The Time Has Arrived for a Canadian Public Trust Doctrine Based upon the Unwritten Constitution

By Harry J. Wruck, QC[1]

"The welfare of the people is the supreme law of the land."[2]

The specter of climate change and its catastrophic impacts upon the environment is a *cri de coeur* in Canada for recognition of a public trust doctrine and the securing of that doctrine by the unwritten constitutional principles entrenching it. Accordingly, the unwritten constitution is critical in protecting the public trust doctrine, which, in Canada, arises from the social contract between government and its people under the inherent rights theory.

INTRODUCTION

The public trust is a well-developed doctrine in various jurisdictions, including the United States, India, the Philippines, and Pakistan. In Canada, however, its development has been slow and unwieldy, and even today it is unclear whether and to what extent the public trust exists. Having said that, there is no doubt that Canadian jurisprudence has been moving in the direction of recognizing the existence of the public trust. It may well be that litigation based upon climate change will be the impetus for the courts to raise this unruly child into a mature adult and allow an action based on the public trust doctrine as an unwritten principle of the Constitution.

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[1] Counsel with Ecojustice and formerly Senior General Counsel with the Canadian Federal Department of Justice. I would like to acknowledge the able research and editorial assistance provided to me by Alex Semple and Kate Gotziaman in the preparation of this paper, without which I could not have completed this work.

[2] MARCUS TULLIUS CICERO, DE LEGIBUS bk. III, pt. III, subsec. VIII (1852).

This Article sets out two approaches for developing a public trust argument in the context of a climate change case: (1) the public trust is grounded in the common law; and (2) the public trust is an underlying, unwritten constitutional principle. While recognition of a common law public trust would be a significant step in climate change litigation, recognition of a public trust as an underlying constitutional principle would be much more significant. This is because a common law public trust could be overridden by statute, while a public trust that is recognized as part of the unwritten constitution would be extremely difficult, if not impossible, for the government to override.

In Part I, below, the nature of the public trust, its historical origins and common law development, and its current status in Canada is examined. In addition, American and international public trust jurisprudence is reviewed. Based upon this analysis, it is concluded that the public trust would be a viable cause of action in climate change litigation. As a consequence, there is a reasonable chance of success in establishing the existence of a common law public trust over essential natural resources, including the atmosphere, and the breach of the public trust by the actions and inactions of the Canadian federal government.

In Part II, the jurisprudence establishing the existence in Canada of underlying, unwritten constitutional principles is examined. This analysis, in conjunction with social contract and inherent rights theories, leads to the conclusion that the public trust is an underlying constitutional principle embedded in the unwritten constitution.

A Note on Jurisdiction over Greenhouse Gas Emissions in Canada

In Canada, jurisdiction over the environment is divided between the federal and provincial governments under the Canadian Constitution. As the Supreme Court of Canada held

in *Friends of Oldman River Society v. Canada (Minister of Transport)*,[3] jurisdiction over the environment is not the exclusive preserve of one level of government over the other.[4] Having said that, it remains clear that the federal government has primary jurisdiction over greenhouse gas ("GHG") emissions.[5]

The federal government has taken a number of actions that have facilitated GHG emissions. This includes creating fossil fuel subsidies, fossil fuel extraction in the provinces with federal approvals, GHG emissions from electricity generation, fossil fuel exports, extractions of fossil fuels on federal, offshore or territorial lands, regulation of GHGs from fossil fuels in the transportation sector, import and export of electricity, the federal government's consumption of fossil fuels, and the transportation of fossil fuels. As a consequence, the basis of any action against the federal government in Canada would need to be framed in a manner similar to the *Juliana v. United States*[6] litigation where the plaintiffs targeted the United States federal government for a broad suite of actions causing and exacerbating climate change.

Given that climate change is the most serious challenge facing the planet, it is time for climate change action to be brought in Canada. This is underscored by the fact that Canada is responsible for a disproportionate share of global GHG emissions. The Canadian government has accepted the global scientific consensus that the earth is warming because of anthropomorphic GHG emissions, and the need for taking strong action to address climate change is critical and

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[3] Friends of Oldman River Soc'y v. Canada (Minister of Transp.), [1992] 1 S.C.R. 3 (Can.).
[4] *See e.g.*, *id.* at 63–64.
[5] For a discussion of the federal government's powers to legislate on environmental matters, see Nathalie J. Chalifour*, Canadian Climate Federalism: Parliament's Ample Constitutional Authority to Legislate GHG Emissions Through Regulations, a National Cap and Trade Program, or a National Carbon Tax*, 36 NAT'L J. CONST. L. 331, 368–69 (2016).
[6] Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016).

urgent.[7] Canada is the ninth largest GHG polluter in the world in terms of absolute annual production based GHG emissions.[8] In terms of per capita of global emissions, Canada is ranked third in the world.[9] Furthermore, between 1990 and 2018 Canada has established seven plans to reduce emissions. All of those plans have failed miserably and Canada's GHG emissions have increased by 18% during that time period.[10]

I. THE COMMON LAW PUBLIC TRUST

A. The Nature of the Public Trust

The public trust doctrine is, in essence, a legal mechanism that can be used to require governments to hold and protect vital natural resources for the benefit of present and future generations. It is a procedural safeguard for public rights to natural resources: it requires that government take these public rights into account in decision-making and prohibits government from substantially impairing them. The doctrine asserts that governments have an inherent fiduciary obligation to ensure the continuous availability of resources that are essential to the well-being and survival of current and future citizens.

Professor Mary Wood of the University of Oregon School of Law defines the doctrine as requiring "government[s] to hold vital natural resources in trust for public beneficiaries, both

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[7] PAN-CANADIAN FRAMEWORK ON CLEAN GROWTH AND CLIMATE CHANGE, GOV'T OF CAN., 1–2 (2016), http://publications.gc.ca/collections/collection_2017/eccc/En4-294-2016-eng.pdf [https://perma.cc/TQ8P-6ZX9].

[8] CANADIAN ENVIRONMENTAL SUSTAINABILITY INDICATORS: GLOBAL GREENHOUSE GAS EMISSIONS, ENV'T AND CLIMATE CHANGE CAN. 5 (2016), http://publications.gc.ca/collections/collection_2016/eccc/En4-144-63-2016-eng.pdf [https://perma.cc/6Z94-TVEK].

[9] Nathalie Chalifour & Jessica Earle, *Feeling the Heat: Climate Litigation Under the Charter's Right to Life, Liberty and Security of the Person* 50 (Univ. of Ottawa, Working Paper No. 2017-48, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3080379##.

[10] *Id.* at 13.

present and future generations . . . ."[11] In this way, as Wood notes, the "doctrine gives force to the plain expectation, central to the purpose of organized government, that natural resources essential for survival and welfare remain abundant, justly distributed, and bequeathed to future generations . . . ."[12]

It is worth noting that the concept of the public trust is different from the conventional trust. In *Waters' Law of Trusts in Canada*, Professor Donovan Waters explains that "the public trust doctrine is a *sui generis* concept that does not invoke existing trust law such as the establishment of the three certainties."[13] The public trust doctrine articulates the trust-like obligations a government has to its citizens to preserve essential resources, but it is not a conventional trust.

B. Historical Origins of the Public Trust

The concept of public trust is a long-standing one. The Supreme Court of Canada reviewed its origins in *British Columbia v. Canadian Forest Products Ltd*. (*Canfor*) finding that "[t]he notion that there are public rights in the environment that reside in the Crown has deep roots in the common law."[14]

The most commonly referred to historical source is *The Institutes of Justinian*. In *Canfor*, the Court, noting that the notion of "public rights" existed as far back as Roman civil law, quoted from *The Institutes of Justinian*: "[b]y the law of nature these things are common to mankind—

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[11] Mary C. Wood & Charles W. Woodward, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last*, 6 WASH. J. ENVTL. L. & POL'Y 633, 647 (2016).
[12] *Id.* at 648.
[13] DONOVAN WATERS ET AL., WATERS' LAW OF TRUSTS IN CANADA 602–03 (4th ed. 2012).
[14] British Columbia v. Can. Forest Prods., Ltd. (*Canfor*), [2004] 2 S.C.R. 74, para. 74 (Can.).

the air, running water, the sea . . . ."[15] The Court in *Canfor* also recognized the work of de Bracton, quoting from his mid-13th-century treatise, *The Laws and Customs of England*:

> By natural law these things are common to all: running water, air, the sea and the shores of the sea . . . No one therefore is forbidden to the seashore . . . All rivers and ports are public so that the right to fish therein is common to all persons. The use of river banks, as of the river itself, is also public by the *jus gentium* . . . .[16]

The Court, again citing de Bracton, found "[s]ince the time of de Bracton, it has been the case that public rights and jurisdiction over these cannot be separated from the Crown."[17]

Magna Carta is also frequently cited as an historical source.[18] *Magna Carta* established the King's duty, based on his capacity as sovereign, to protect public lands. It, in effect, placed a restriction on the powers of the Crown in relation to tidal waters and the shoreline.

Although several of the provisions in *Magna Carta* were repealed from English statutes shortly before Confederation, many of its influences on the English common law were imported into Canadian common law. It has been described as "an inspirational document of considerable historical significance to the development of our system of government . . . ,"[19] and in *R. v. Gladstone*, the Supreme Court of Canada referenced *Magna Carta* in the context of the public right to fish: "since the time of . . . *Magna Carta*, there has been a common law right to fish in tidal waters that can only be abrogated by the enactment of competent legislation."[20]

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[15] *Id.* at para. 75 (quoting JUSTINIAN I, THE INSTITUTES OF JUSTINIAN 158 n.1 (Thomas Sandars ed. & trans., 5th ed. 1876)).
[16] *Id.* (quoting 2 HENRY DE BRACTON, BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 39–40 (George E. Woodbine ed., Samuel E. Thorne trans., 1968) (alteration in original)).
[17] *Id.* at para. 76.
[18] *See e.g.*, WILLIAM BLACKSTONE, THE GREAT CHARTER AND CHARTER OF THE FOREST, WITH OTHER AUTHENTIC INSTRUMENTS: TO WHICH IS PREFIXED AN INTRODUCTORY DISCOURSE, CONTAINING THE HISTORY OF THE CHARTERS (Oxford: Clarendon Press 1759).
[19] R. v. Ahmad, 2008 CanLII 54311, para. 31 (Can. Ont. Super. Ct.).
[20] R. v. Gladstone, [1996] 2 S.C.R. 723, para. 67 (Can.).

In 1217, a third version of *Magna Carta* was issued with two of the forest provisions removed and in its place the *Charter of the Forest*[21] was issued, incorporating those provisions with additional ones. The *Charter of the Forest* restored public access to the Royal Forests and allowed for common stewardship of shared resources, including gathering of firewood, grazing of cattle, pasturing pigs, and cutting of turf. The *Charter of the Forest* arose because of the abuse of power by the King of the Royal Forest. Forests were of significant importance to both the King and his subjects. The King earned a major part of his income from the sale of forest privileges to raise money for wars and other royal matters. The Royal Forest also provided food and fuel for his military and his court. As a consequence, the King kept expanding the Royal Forest while allowing little or no access to his subjects. The barons, knights, entrepreneurs, clergy, and users of the forest engaged in negotiations with the King to avoid a Civil War that led to *Magna Carta* and the *Charter of the Forest*. The *Charter of the Forest* applied to everyone and played a key role in the protection and development of environmental rights and natural resources.[22]

The Forest Charter guaranteed broad public rights, both substantive and procedural.[23] It guaranteed the land rights of free men and unfettered uses of an individual's holdings in the Royal Forest. This included access to water to operate a fishpond or a mill, to claim honey from wild beehives, and to reclaim arable land subject only to the common law rule that an individual not create a nuisance.[24] It also guaranteed procedural rights by requiring rules providing for due

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[21] *Charter of the Forest*, *in* 1 GEORGE EYRE & ANDREW STRAHAN, LONDON RECORD COMM'N, STATUTES OF THE REALM, cl. 10, 12 (1810) [hereinafter *Forest Charter*].
[22] Daniel Magraw & Natalie Thomure, *Carta de Foresta: The Charter of the Forest Turns 800*, 47 ENVTL. L. REP. NEWS & ANALYSIS 10934, 10937 (2017).
[23] *See generally* Nicholas A. Robinson, *The Charter of the Forest: Evolving Human Rights in Nature*, LINCOLN CHARTER OF THE FOREST CONF. (Sept. 22–24, 2017).
[24] *Forest Charter*, *supra* note 21, cl. 1, 9, 12, 13.

process of law for handling offences of forest law. Chapter 17 of the Forest Charter acknowledges that humans have rights in nature that the Crown is obliged to respect and sustain.[25] In effect, the King entered into a social contract guaranteeing and preserving the rights of his subjects. As Sir William Blackstone pointed out, "[t]here is no transaction in the antient part of our English history more interesting and important than The Great Charter and *Charter of the Forest*."[26]

Lord Justice Hale, in his 1667 treatise concerning *The Law of the Sea and Its Arms*, introduced the Roman concept of *jus publicum* into the common law. The concept of *jus publicum* took the form of an inalienable public right, vested in the Crown, to have navigable rivers and ports free of nuisance.[27] It is from these deep historical roots in the common law that the concepts of public rights and the public trust, insofar as they are currently recognized in Canadian law, have arisen.

C. The Common Law Development of the Public Trust

While the public trust is not formally recognized in Canada, Canadian courts accepted early on the need to protect public rights and interests in limited and vulnerable natural resources. A number of authorities, reviewed below, have identified some form of public trust or public right, some of which have been used to protect the environment. These cases provide a

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[25] *Id.* at 11 (citing a reproduction of the Forest Charter in DANIEL BARSTOW MAGRAW ET AL., MAGNA CARTA AND THE RULE OF LAW 423 app. H (Am. Bar Ass'n ed. 2014) ("These liberties of the forest and free customs traditionally had, both within and without the royal forests, are granted to ecclesiastics, nobles, freeholders, and all in our realm, in short to everyone. Everyone is also obliged to observe the liberties and customs granted in the Forest Charter.")).

[26] Geraldine Van Bueren, *More Magna than Magna Carta*, TIMES LITERARY SUPPLEMENT (Mar. 8, 2017), https://www.the-tls.co.uk/articles/private/carta-de-foresta [https://perma.cc/WP3R-R97Q].

[27] Bradley Freedman & Emily Shirley, *England and the Public Trust Doctrine*, 8 J. PLANNING & ENVTL. L. 839, 840 (2014).

basis from which to argue the existence of the public trust writ large because they show that the courts have recognized the existence of public environmental rights and have held the Crown responsible for holding in trust the resources necessary for those rights. In effect, the Court's recognition in these cases of the Crown's responsibility to protect vulnerable resources as public rights is a finding that government must hold these vulnerable resources in a public trust for present and future generations of Canadians. In practice, the end result is identical regardless of whether or not the Canadian government formally recognizes public trust doctrine.

1. The Public Right to Navigation and Fishing

The earliest Canadian decisions protecting public rights arose in the 19th and early 20th centuries in relation to navigation and fishing. During that time, access to water for transportation, commercial activity, and food was crucial to human health and functioning economic and social structures.

The first case to note is the 1853 decision in *R v. Meyers* (*Meyers*). In *Meyers*, the Upper Canada Court of Common Pleas held that a Crown grant from the soil to a navigable river could not authorize the construction of a dam that would interfere with the public's navigation rights.[28] Justice McLean identified navigable lakes and streams as public trust assets, although he did not use that specific term:

> I have no hesitation in stating it as my opinion that the great lakes and the streams which are in fact navigable . . . must be regarded as *vested in the Crown in trust for the public uses* for which nature intended them – that the Crown, as guardian of public rights, is entitled to prosecute and to cause the removal of any obstacles which obstruct the exercise of the public right, *and cannot by force of its prerogative curtail or grant that which it is bound to protect and preserve for public use*.[29]

[28] R. v. Meyers, 1852 CarswellOnt 86, [1883] 3 U.C.C.P. 305, 322 (Can.).
[29] *Id.* at 357 (emphasis added).

In this passage, Justice McLean identifies that certain natural resources are vested in the Crown as the guardian of public rights, and that the Crown has the power, *and is in fact bound*, to protect those resources. In that same case, Justice MacAuley, also found that the Crown cannot grant away such public rights.

Over the years since *Meyers*, several decisions have recognized public rights and the concept of the public trust with respect to navigation and the common property fishery resource. In the 1913 case of *British Columbia (Atty. Gen.) v. Canada (Atty. Gen.)*, the Judicial Committee of the Privy Council when considering the issue of the public right to fish, held that "the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike."[30] The Privy Council went on to find that this was a right enjoyed from time immemorial, and that the Crown, as *parens patriae*, was bound to protect the subjects in the exercise of that right, and therefore it was a legal right enforceable in the Courts.[31] One of the earliest decisions of the Supreme Court of Canada on this issue arose in *Wood v. Esson*.[32] The Court held that there was a public right of navigation and that the Crown could not grant a right to obstruct navigable waters in contravention of the public right unless the necessary legislation was enacted.[33]

Since that time, the courts have developed an extensive body of jurisprudence on the management of Canadian fisheries as a common property resource to be managed for the public good.[34] This approach is summarized and confirmed by the Supreme Court of Canada in *Ward v.*

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30 Att'y Gen. for British Columbia v. Att'y Gen. for Canada, (1913), 15 D.L.R. 308, 315 (Can.).
31 *Id.*
32 *See* Wood v. Esson, (1884) 9 S.C.R. 239, 1884 CanLII 44 (Can.).
33 *Id.*
34 *See e.g.*, Comeau's Sea Foods, Ltd. v. Canada (Minister of Fisheries & Oceans), [1997] 1 S.C.R. 12 (Can.).

Canada,[35] where the Court, citing *Comeau's Sea Foods*, found that under the *Fisheries Act*, the Minister has a "duty to manage, conserve and develop the fishery for the benefit of Canadians in the public interest."[36]

Also of note is the decision of the Superior Court of Prince Edward Island in *PEI v. Canada*,[37] where the Court dismissed a motion to strike the plaintiff's claim challenging government policy in relation to mismanagement of the fishery.[38] One of the claims was that the Minister of Fisheries and Oceans had breached his public trust obligations to manage the common property resource, the fishery, in a prudent manner for all of its beneficiaries.[39] The Court, in dismissing that part of the motion to strike, held that if the government can exert its right as guardian of the public interest and claim against a party causing damage to that public resource, it follows that a beneficiary of the public resource ought to be able to claim against the government for a failure to properly protect the public interest.[40] A right gives rise to a corresponding duty. The Prince Edward Island Court of Appeal overturned this decision, but not on that issue—it was overturned on the ground that the Federal Court had exclusive jurisdiction to entertain the claim.[41]

In each of these latter cases, the courts, in finding that the Minister has a duty to protect and preserve the fishery for present and future generations, harken back to the common property

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[35] *See* Ward v. Canada (Att'y Gen.), [2002] 1 S.C.R. 569 (Can.).
[36] *Id.* at para. 38.
[37] Prince Edward Island v. Canada (Minister of Fisheries & Oceans), 2005 PESCTD 57 (Can. P.E.I.), *rev'd on other grounds*, 2006 PESCAD 27 (Can. P.E.I. C.A.).
[38] *Id.* at para. 43.
[39] *Id.* at para. 5.
[40] *Id.* at para. 30.
[41] *See* Prince Edward Island v. Canada (Minister of Fisheries & Oceans), 2006 PESCAD 27 (Can. P.E.I. C.A.).

nature of the resource.[42] Taken together, the above cases demonstrate the essence of the public trust—certain public rights and resources are so important to the well-being of the population that they are vested in the Crown, in trust for the public. The Crown therefore has a right, *and a duty*, to protect those rights and resources.

2. The Public Trust Concept in the Context of Municipalities

There have also been a number of decisions from Canadian courts applying the public trust concept to municipalities. As early as 1859, in *Sarnia (Township) v. Great Western Railway*, a municipality was found to be a trustee for the public in relation to highway property, which was to be held and used for the benefit of the public within that municipality.[43] The Supreme Court of Canada came to an identical conclusion in *Vancouver (City) v. Burchill*.[44]

More recently, the Alberta Court of Appeal in *SW Properties Inc. v. Calgary (City of*)[45] noted that "it is well established that municipalities hold title to streets in trust for the public . . . [and] the lands being encroached upon are impressed with a public trust."[46] The Manitoba Court of Appeal in *McDonald v. North Norfolk*[47] held that municipalities hold highways in trust for the public. In addition, the Ontario Court of Appeal in *Scarborough v. REF Homes, Ltd*.,[48] noted the environmental trust responsibilities of municipalities holding that "the municipality is, in a broad sense, a trustee of the environment for the benefit of the residents in the area and for the citizens of the community at large."

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[42] *See id.*; *see also* Ward v. Canada (Att'y Gen.), [2002] 1 S.C.R. 569 (Can.); Comeau's Sea Foods, Ltd. v. Canada (Minister of Fisheries & Oceans), [1997] 1 S.C.R. 12 (Can.).
[43] *See* Sarnia v. Great W. Ry. Co., 1859 CarswellOnt 159, [1878] 17 U.C.Q.B. 65, 67 (Can.).
[44] Vancouver v. Burchill, [1932] S.C.R. 620, 625 (Can.).
[45] S.W. Properties Inc. v. Calgary, 2003 ABCA 10 (Can. Alta. C.A.).
[46] *Id.* at para. 19.
[47] McDonald v. North Norfolk, 1992 CanLII 8570 (Can. Man. C.A.).
[48] Scarborough v. R.E.F. Homes, Ltd., 1979 CarswellOnt 1588, para 5 (Can. Ont. CA.).

One final case to consider is *Committee for the Commonwealth of Canada v. Canada*,[49] which, though not a case involving a municipality, is nevertheless important. Here, the Supreme Court of Canada considered whether the government could prohibit the dissemination of political materials in airports. In finding that the prohibition violated the *Charter of the Forest*'s guarantee of freedom of expression, the Court held that:

> [T]he very nature of the relationship existing between citizens and the elected government provides that the latter will own places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns. The 'quasi-fiduciary' nature of the government's right of ownership was indeed clearly set out by the U.S. Supreme Court in *Hague v. Committee for Industrial Organization* . . . 'Where ever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public.'[50]

3. The Public Trust and the Crown's *Parens Patriae* Jurisdiction

As found by the courts in various decisions in the mid-19th and early 20th centuries, the Crown has a duty to hold certain public assets in trust for the public and is bound to protect those assets in the exercise of its *parens patriae* jurisdiction. The *parens patriae* jurisdiction is "founded on necessity, namely, the need to act for the protection of those who cannot care for themselves."[51] This is relevant to the public trust doctrine because individual members of the public often do not have sufficient power to care for their environment. Members of the public cannot control the actions of others—no individual is capable of maintaining the atmosphere or the cleanliness of water by themselves—and the future generations that the public trust protects certainly are incapable of acting in their own best interests since they do not exist yet. As discussed below in Section II.F, environmental issues are a limited case where it is possible to

[49] Comm. for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139 (Can.).
[50] *Id.* at 154.
[51] E. (Mrs.) v. Eve, [1986] 2 S.C.R. 388, para. 73 (Can.).

determine what is in the best interests of future generations; every person needs a liveable environment.

The *parens patriae* jurisdiction is also capable of supporting the public trust because "the categories under which the jurisdiction can be exercised are never closed."[52] Because the *parens patriae* jurisdiction is founded on necessity, it must be capable of expansion, when necessary, even if a particular category has not been recognized before. As stated by La Forest J in *Eve*: "and even where there is legislation in the area, the courts will continue to use the *parens patriae* jurisdiction to deal with uncontemplated situations where it appears necessary to do so for the protection of those who fall within its ambit . . . ."[53]

The Court in *Canfor* emphasised this nature of the *parens patriae* jurisdiction by noting that it "is an important jurisdiction that should not be attenuated by a narrow judicial construction."[54] Given that the necessity of protecting essential natural resources for the welfare of the public is becoming increasingly apparent, the *parens patriae* jurisdiction is well-suited to support the public trust. The above cases and concepts can lay the groundwork for a common law public trust argument.

D. Where Is Canada Now?

While the foregoing decisions will be important in laying the groundwork for advancing an argument that the public trust does exist in Canadian law, the leading Canadian decision on the public trust is the Supreme Court of Canada decision in *Canfor*.[55] In *Canfor*, the Court, for the first time, examined the roots of the public trust doctrine and considered whether it might

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[52] *Id.* at para. 74.
[53] *Id.* at para. 42.
[54] *Canfor*, [2004] 2 S.C.R. 74, para. 76 (Can.).
[55] *Id*. at para. 74.

apply in Canada. While the Court, due to the lack of evidence and poor pleadings, was unable to reach any clear conclusions regarding the nature and scope of the public trust, the decision remains of importance precisely because of the issues it raised and considered but left unanswered. The Court left no doubt that it is prepared to entertain these issues in a properly constituted case:

> there are clearly important and novel policy questions raised by such actions. These include the Crown's potential liability for *inactivity* in the face of threats to the environment, the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown in that regard, the limits to the role and function and remedies available to governments taking action on account of activity harmful to public enjoyment of public resources, and the spectre of imposing on private interests an indeterminate liability for an indeterminate amount of money for ecological or environmental damage.[56]

After setting out the above statement, the Court noted that this was not a proper appeal to embark on a consideration of these difficult issues. That is a clear indication that the Court is of the view that these are issues it is prepared to consider given proper pleadings and evidence.

It can be argued, therefore, that the Court in *Canfor* has accepted, or at least acknowledged, the Crown is not simply a guardian of the public interest, but is a trustee holding public resources on behalf of the public as beneficiaries. The Court, in reaching its decision, made several references to statements in previous cases that governments are, in a broad sense, trustees for the environment.

In particular, reliance can be placed on the following passage where the Court, while not formally recognizing the public trust doctrine, reviews and affirms a number of decisions where the Supreme Court has recognized the interests underlying the doctrine:

> As the Court observed *in R v. Hydro-Quebec* . . . legal measures to protect the environment 'relate to a public purpose of superordinate importance.' In *Friends of the Oldman River Society v. Canada (Minister of Transport*) . . . the Court declared, at p. 16, that '[t]he protection of the environment has become one of the major

[56] *Id.* at para. 81.

> challenges of our time.' In *Ontario v. Canadian Pacific Ltd.* . . . 'stewardship of the natural environment' was described as a fundamental value . . . Still more recently, in *114957 Canada Ltée v. Hudson (Town),* the Court reiterated, at para 1:
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> > our common future, that of every Canadian community, depends on a healthy environment . . . This Court has recognized that '(e)very one is aware that individually and collectively, we are responsible for preserving the natural environment . . . environmental protection [has] emerged as a fundamental value in Canadian society . . .'[57]

Here, the Court strongly affirms that "stewardship of the natural environment" is a fundamental Canadian value, underscoring the need for all levels of government to protect the environment.[58] This attitude is also apparent in *R. v. Quebec-Hydro*, where the Court, after referencing the "superordinate" importance of protecting the environment, stated: "The all-important duty of Parliament and the provincial legislatures to make full use of the legislative powers respectively assigned to them in protecting the environment has inevitably placed upon the courts the burden of progressively defining the extent to which these powers may be used to that end." And the Court in *Canfor*, referencing *Scarborough v. REI Homes, supra*, notes that "even municipalities have a role to play in defence of public rights."[59]

Given this attitude of the Court, it may well be open to a public trust argument when presented with evidence of the drastic impacts of climate change facing the planet, along with evidence of the actions and inactions of government that are exacerbating it. To help facilitate the Court's consideration and adoption of the public trust in Canada, reliance could be placed upon the Supreme Court decision in *Guerin v. The Queen* (*Guerin*).[60] In *Guerin*, the Court made it clear that whenever "one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a

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[57] *Id.* at para. 7 (quoting Canada Ltée v. Hudson, [2001] 2 S.C.R. 241, para. 1 (Can.)).
[58] *Id.* (quoting Ontario v. Canadian Pacific, Ltd., [1995] 2 S.C.R. 1031, para. 55 (Can.)).
[59] *Id.* at para. 73.
[60] Guerin v. The Queen, [1984] 2 S.C.R. 335 (Can.).

fiduciary."[61] It is not the specific category of actor that is important, but rather the nature of the relationship that gives rise to the fiduciary duty.

Drawing these threads together—namely, the current and future threats to the environment, the many findings of Parliament's solemn duty to protect public rights and resources, the trust and fiduciary duty language found in *Canfor*, and the open-ended ability to expand fiduciary relationships recognized in *Guerin*—it can be argued that the Court has the necessary tools to develop and establish a public trust and that the time to do so is now.

The argument against that line of reasoning is found in *Burns Bog Society v. Canada (Attorney General)*,[62] which suggests that the public trust is not alive and well in Canada. In that case, the Federal Court summarily dismissed an action brought to compel the federal government to protect Burns Bog, an environmentally sensitive area located in and owned by the City of Delta and the Province of British Columbia. The plaintiff argued, among other things, that the federal government "owed the Canadian public a trust" to protect Burns Bog but was unsuccessful because, as the Court found, Canada did not own the Bog. In this regard, the Court applied conventional trust principles to the plaintiff's public trust claims. As noted above, it can be argued that conventional trust principles do not apply to the concept of the public trust.

More problematic is the Court's finding with respect to fiduciary duty. The plaintiff argued that Canada owed a fiduciary duty to the Bog, to the Canadian public, and to the plaintiff. The Court cited *Alberta v. Elder Advocates of Alberta Society*[63] for the principle that the Crown does not owe a fiduciary duty to the public-at-large. The Court also found that Canada could not

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61 *Id.* at 384.
62 Burns Bog Conservation Soc'y v. Canada (Att'y Gen.), 2012 F.C. 1024 (Can. F.C.).
63 Alberta v. Elder Advocates of Alberta Soc'y (*Elder Advocates*), [2011] 2 S.C.R. 261, para. 48 (Can.).

owe a fiduciary duty to the Bog itself because a fiduciary duty can only be owed to persons or classes of persons. And finally, the Court found that the plaintiff had not established that its relationship fell into any of the recognized categories of fiduciary relationships.

Burns Bog is clearly distinguishable from a comprehensive climate change case, and it can be argued that *Elder Advocates* is not conclusive with respect to the issue of owing a fiduciary duty to the public-at-large. In fact, the Supreme Court in *Canfor*, in the passage previously cited, raised the "important and novel policy question" regarding "the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown" in the face of threats to the environment.[64] Therefore, on the basis of *Canfor*, the issue of whether the Crown can owe a fiduciary duty to the public-at-large is still open. There is also helpful wording in *Elder Advocates*; in that decision, the Court talks of the Crown's "duty to act in the best interests of society as a whole" and "[t]he Crown's broad responsibility to act in the public interest."[65]

E. The Public Trust Includes the Atmosphere

Once it is established that the public trust exists in Canada, the next step would be to have the court recognize that the public trust includes the right to a healthy atmosphere. This next step should not be a particularly challenging one. After all, the public trust doctrine traces back to Roman law, which recognized *the air*, running water, the sea and seashores as common to humankind.[66]

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[64] *Canfor*, [2004] 2 S.C.R. 74, para. 81 (Can.).
[65] *Elder Advocates*, [2011] 2 S.C.R. 261, para. 44 (Can.).
[66] *Public Trust Doctrine*, WATER EDUC. FOUND., https://www.watereducation.org/aquapedia/public-trust-doctrine [https://perma.cc/KQH2-69G4] (last visited _____).

The decision of the Supreme Court of Canada in *Friends of the Oldman River v. Canada (Minister of Transport)*,[67] also supports this notion, because as the Court held, the environment "is comprised of all that is around us"[68] and is not "confined to the biophysical environment alone."[69] It encompasses the physical, economic and social environment."[70] "[T]he environment is a diffuse subject matter"[71] and includes "the potential consequences for a community's livelihood, health and other social matters from environmental change."[72] It follows that the broad definition given to the environment must include the atmosphere.

One can also look to the purpose of the public trust to understand that it must include the atmosphere. In *Frederick Gerring Jr. (The Ship) v. R.*,[73] Justice Sedgewick of the Supreme Court of Canada, in dissent, but not on this point, illuminated part of the purpose of the public trust doctrine:

> We Canadians are in a sense the world's trustees. The North American fisheries have been committed to our guardianship, not for Canada alone, but for humanity. They are the most prolific in the world. One can only imagine, he cannot measure, their potentiality of blessing to mankind, and the Canadian Parliament *has recognized its obligation* to conserve them for the benefit of future generations.[74]

Justice Sedgewick notes that Parliament recognized its obligation to conserve fisheries because of their importance to humanity.[75] Similarly, the atmosphere is so essential to humankind that the government must have an obligation to protect it.

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[67] Friends of Oldman River Soc'y v. Canada (Minister of Transp.), [1992] 1 S.C.R. 3 (Can.).
[68] *Id.* at 70.
[69] *Id.* at 37.
[70] *Id.* at 63.
[71] *Id.* at 37.
[72] *Id.*
[73] Gering Jr. v. The Queen (1897), 27 S.C.R. 271, 286 (Can.).
[74] *Id.* (emphasis added).
[75] *Id.*

Even if the atmosphere is not an independent public trust asset like navigable waters or the fisheries, it still must be protected in order to preserve more well-established public rights and resources. For example, rises in sea level may impact the navigability of harbours if large ships are unable to clear bridges, a doubling of the area consumed by wildfires by the end of the century in Canada would likely impact National and Provincial Parks, and ocean acidification threatens fisheries. Given that current scientific knowledge shows the interconnected nature of natural resources, it is impossible to preserve public rights to particular resources in isolation. The climate is an essential foundation that is interconnected with other public trust resources; therefore, the atmosphere must be held in trust in order to protect other public environmental trust resources.

Some American jurisprudence may be of assistance in this regard, but care must be taken with these cases because in each instance the public trust duty was embodied in the various state constitutions and their relevance to Canada is somewhat debatable. One of these decisions, however, may be more useful than the others after the Supreme Court's reference in *Canfor*. The Court quoted the following passage from *Georgia v. Tennessee Copper Co.*: "the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."[76]

More recently, American courts have recognized the atmosphere as a public trust resource. The Arizona Court of Appeals in *Butler ex rel. Peshlakai v. Brewer* held without deciding that the atmosphere is a part of the public trust.[77] The New Mexico Court of Appeals, in *Sanders-Reed v. Martinez* held that a public trust, including the atmosphere, exists for the

[76] *Canfor*, [2004] 2 S.C.R. 74, para. 78 (Can.).
[77] Butler ex rel. Peshlakai v. Brewer, No. 1 CA-CV 12-0347, 2013 WL 1091209, at *6 (Ariz. Ct. App. Mar. 14, 2013).

protection of New Mexico's natural resources and for the benefit of the people of the state.[78] In *Kanuk ex rel. Kanuk v. State Department of Natural Resources,* the Alaska Supreme Court, although ultimately dismissing the plaintiffs' claims, found that the plaintiffs made a good argument "that the atmosphere is an asset of the public trust, with the State as the trustee and the public as beneficiaries . . . ."[79] Finally, in *Robinson Township v. Commonwealth,* the Pennsylvania Supreme Court declared that a constitutional right to a healthy environment was embedded in the social contract between the citizens and their government.[80] It is important to note, however, that Pennsylvania's constitution expressly provides that all power is inherent in the people and founded on their authority and instituted for their peace, safety and happiness. In addition, the people have a right to clean air, pure water, and the preservation of the environment.

F. International Jurisprudence Outside of the United States

A number of countries, including India, Pakistan, the Philippines, Uganda, Kenya, Nigeria, and South Africa, have incorporated the public trust doctrine into their respective constitutions.[81] While this makes the following cases, like the American jurisprudence, for the most part distinguishable, it is useful to examine the decisions from the Supreme Court of the Philippines and India. These courts go back to first principles, namely, that the sovereignty of the people creates a restraint on legislative power. The Courts make it clear that quite apart from the constitution, the public trust doctrine has been drawn from the English common law, Roman law

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[78] Sanders-Reed v. Martinez, 350 P.3d 1221, 1225 (N.M. Ct. App. 2015).
[79] Kanuk v. State, 335 P.3d 1088, 1101–02 (Alaska 2014).
[80] Robinson Twp. Washington Cty. v. Commonwealth, 83 A.3d 901, 947–49 (Pa. 2013).
[81] Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741 (2012).

and American jurisprudence and, most importantly, that there are basic rights that are inherent in all of humankind.[82] Accordingly, these decisions could be helpful in demonstrating that the public trust doctrine is a vehicle that could be adopted by Canadian courts.

In *Oposa v. Factoran*,[83] the Court, in certifying a class action, relied upon the natural law force of the public trust doctrine.[84] It held that the right to a healthy environment is the most basic of all rights because it concerns the self-preservation and self-perpetuation of the human species, which "need not even be written in the Constitution for they are assumed to exist from the inception of humankind."[85]

In *Metha v. Kamal Nath*, the Indian Supreme Court held that a ninety-nine year lease of government lands to a resort in a protected forest violated the public trust doctrine.[86] The Court held that the doctrine was part of Indian law because Indian jurisprudence was inherited from English common law, which prevented the public's natural resources, the environment, and the ecosystems of the country from being eroded by private interests for commercial purposes. The Court also adopted the entirety of the American public trust jurisprudence, including the *Illinois Central Railway* decision.

In *Fomento Resorts v. Minguel*, the Court held that Indian society has, since time immemorial, been conscious of the need to protect the environment and ecology.[87] The Court drew on American jurisprudence and academic writings to hold that the public trust doctrine

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[82] Melissa K. Scanlan, *The Role of the Courts in Guarding Against Privatization of Important Public Environmental Resources*, 7 MICH. J. ENVTL. & ADMIN. L. 237, 246 (2018).
[83] Minors Oposa v. Sec'y of the Dep't of Env't & Nat. Res., G.R. No. 101083 (S.C., July 30, 1993) (Phil.).
[84] *Id.*
[85] *Id.*
[86] M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388 (India).
[87] Fomento Resorts and Hotels, Ltd. v. Mingue Martinsl, (2009) 3 SCC 571, paras. 32, 36 (India).

constitutes the best practical and philosophical legal tool for protecting the public rights, natural resources, and ecological values held in trust by a government for its people. Every person exercising their right to use the air, water, or land and associated natural ecosystems has the obligation to secure for the rest of the public the right to live or otherwise use that same resource or property for the long-term enjoyment of future generations.

G. Conclusion Regarding the Common Law Public Trust

The common law public trust could form the basis of a viable cause of action in Canada. By drawing on the many findings of Parliament's duty to protect the public's rights and resources, the trust and fiduciary language in *Canfor*, the raising of "important and novel" questions regarding threats to the environment in *Canfo*r, and the ability to expand fiduciary relationships recognized in *Guerin*, it becomes clear that the court has the necessary resources to establish the public trust.

It is noted here, however, that while a finding of a common law public trust would be a significant step forward, it would be susceptible to government interference because it could be overridden by statute. This is a point that permeates many of the cases examined above. For example, in *Wood v. Esson* the Court held that the government could not grant the right to place an obstruction in the harbour unless the necessary legislation was enacted.[88] In other words, if the government chose to grant a right to obstruct the harbour by way of competent legislation, it could do so.

This is precisely the conclusion reached by the Supreme Court of Canada in *Old Man River*.[89] There, the Court, after quoting *Wood v. Esson*, held that while the public right of

[88] Wood v. Esson, (1884) 9 S.C.R. 239, 1884 CanLII 44 (Can.).
[89] Friends of Old Man River Soc'y v. Canada, [1992] 1 S.C.R. 3, 55 (Can.); *see also* Wood v. Esson, (1884) 9 S.C.R. 239, 1884 CanLII 44 (Can.).

navigation is paramount to the rights of the owner of a bed of a navigable river, these rights can be "modified or extinguished by an authorizing statute . . . ."[90]

This does not necessarily render a common law public trust useless of course. Recognition of a common law public trust over vital natural resources could still be very effective. Government may be hesitant to be seen passing legislation specifically aimed at overriding or modifying court ordered protections of such resources. Recognition of a public trust as an underlying constitutional principle, as argued below, would be more effective because it could not be overridden by "legislative sanction."

II. THE PUBLIC TRUST IS AN UNDERLYING UNWRITTEN CONSTITUTIONAL PRINCIPLE

In this part, the question of whether the public trust is an underlying constitutional principle, and thus part of the unwritten constitution, is addressed. The first issue to be considered is how Canadian courts have, over the years, dealt with the issue of the "unwritten constitution" and "underlying constitutional principles." Then, the issue of whether the public trust is an underlying constitutional principle on the basis of social contract theory and inherent rights theory is examined.

A. The Constitution of Canada Includes Underlying Unwritten Constitutional Principles

The general concept and existence of unwritten, underlying constitutional principles is now well-established in Canada. Courts have recognized these principles as an important part of the Constitution of Canada. While the Constitution is "primarily a written one,"[91] the texts enumerated in subsection 52(2) of the *Constitution Act, 1982* "are not exhaustive."[92] Instead, the

[90] Friends of Old Man River Soc'y v. Canada, [1992] 1 S.C.R. 3, 55 (Can.).
[91] Reference re Secession of Quebec (*Secession Reference*), [1998] 2 S.C.R. 217, para. 49 (Can.).
[92] *Id.* at para 32.

Constitution "embraces unwritten, as well as written rules."[93] These unwritten rules are underlying principles that "inform and sustain the constitutional text: they are the vital, unstated assumptions upon which the text is based."[94] These unstated assumptions may not always be obvious, and yet "it would be impossible to conceive of our constitutional structure without them."[95]

It is important to note that the Supreme Court has only recognized underlying constitutional principles in very limited circumstances. It appears from the case law that the issue before the Court must be so serious that it threatens "the primary conditions of . . . community life within a legal order,"[96] or that it is "inconsistent with human society,"[97] or that it involves the "indispensable elements of civilized life,"[98] or that it otherwise goes to the root of the proper functioning of the state, and that it cannot be resolved through recourse to the written constitutional texts. With that in mind, it must be reiterated that a plaintiff must be able to establish, on the evidence, that the spectre of climate change is so real and so drastic that it fits within, or is similar to, one of the above categories and that it must be addressed immediately.

B. Summary of Cases Establishing Underlying Principles

Underlying constitutional principles have a long history in Canada. The following review of some key decisions demonstrates that the importance and existence of unwritten constitutional

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93 Manitoba Provincial Court Judges Ass'n v. Manitoba (Minister of Justice), [1997] 3 S.C.R. 3, para. 92 (Can.).
94 *Secession Reference*, [1998] 2 S.C.R. 217, para. 49 (Can.).
95 *Id.* at para. 51.
96 Saumur v. Quebec, [1953] 2 S.C.R. 299, 329 (Can.).
97 Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, para. 60 (Can.) (quoting Carl-Zeiss-Stiftung v. Rayner and Keeler, Ltd., [1967] 1 AC 853 (HL)).
98 Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, para. 60 (Can.).

principles is well-established, and, very importantly, that the recognition of particular principles is still developing.

As early as 1938, in *Reference re Alberta Legislation* ("*Alberta Press*"),[99] Justices of the Supreme Court identified unwritten principles underlying the Constitution. In that case, the Court protected the core democratic value of free speech. The Court was asked to determine the constitutional validity of the *Accurate News and Information Act* and two other *Acts* of the Alberta legislature. The Court unanimously held that all three statutes were *ultra vires* of the province, but three of the six justices identified, albeit in dicta, an unwritten constitutional principle in their analysis.[100]

Chief Justice Duff, with Justice Davis concurring, identified that a right of "free public discussion of affairs" underlies the constitutional texts.[101] Chief Justice Duff first considered what kind of parliamentary institutions are created by the *Constitution Act, 1867*. He looked to the Preamble which "shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom."[102] This meant "a parliament working under the influence of public opinion and public discussion."[103] The Chief Justice then considered the conditions necessary for a parliament of that kind to exist and found that "there can be no controversy that such institutions derive their efficacy from the free public discussion of affairs."[104] He therefore found that "this right of free public discussion of public affairs . . . is the

99 Reference re Alberta Legislation, [1938] S.C.R. 100 (Can.).
100 *Id.* at 100–01.
101 *Id.* at 133.
102 *Id.*
103 *Id.*
104 *Id.*

breath of life for parliamentary institutions" and is a right that underlies the text of the Constitution.[105]

Justice Canon also found that freedom of discussion is an underlying constitutional principle, stating: "Democracy cannot be maintained without its foundation: free public opinion and free public discussion . . . ," he then referred to the "fundamental right" of Canadian citizens "to express freely his untrammelled opinion about government and discuss matters of public concern."[106]

Parenthetically, it should be noted that immediately after making the foregoing statement, Justice Canon went on to say: "[t]he federal parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press in discussing public affairs and the equal rights in that respect of all citizens throughout the Dominion."[107] Justice Canon appears to be of the view that despite the fact that democracy is unsustainable without free public opinion and free discussion, the federal government has the authority to shut it down. This statement belies his entire analysis on this point. Justice Abbott, in *Switzman v. Ebbling*, was obviously troubled by this comment of Justice Canon and makes it clear that, in his view, Parliament does not have such authority.[108] In any event, while both Chief Justice Duff and Justice Canon ultimately found on division of powers grounds, they were nonetheless prepared, in the face of this draconian legislation, to recognize freedom of discussion as an underlying constitutional principle.

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[105] Reference re Alberta Legislation, [1938] S.C.R. 100, 133 (Can.).
[106] *Id.* at 146.
[107] *Id.*
[108] Saumur v. Quebec, [1953] 2 S.C.R. 299, 331 (Can.).

The Supreme Court dealt with underlying constitutional principles again in *Saumur v. Quebec (City)* ("*Saumur*").[109] Although the majority of the Court did not rely on underlying principles, four justices drew on the Preamble to establish that the provincial legislature did not have power to legislate for the purpose of restricting religious freedom.

Drawing on the *Alberta Press* case, Justice Rand maintained that the Preamble suggests the Constitution requires parliamentary institutions with "government resting ultimately on public opinion reached by discussion and the interplay of ideas. If that discussion is placed under license, its basic condition is destroyed."[110] Importantly, Justice Rand notes that Chief Justice Duff "deduces authority" to protect the right of free public discussion "from the principle that the powers requisite for the preservation of the *Constitution* arise by a necessary implication of the *Confederation Act* as a whole."[111]

Justice Rand described his understanding of underlying principles stating: "Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order."[112] In essence, Justice Rand is describing rights and freedoms—"original freedoms"—that are so fundamental that they are the very basis of a functioning democracy and must underlie any democratic constitution, whether explicitly stated or not.

Another early example of the developing recognition of underlying constitutional principles is *Switzman v. Elbling* (*Switzman*).[113] *Switzman* dealt with the constitutionality of the

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[109] *Id.* at 329.
[110] *Id.* at 330.
[111] *Id.* at 331.
[112] *Id.* at 329.
[113] *See generally* Switzman v. Elbling, [1957] S.C.R. 285 (Can.).

Padlock Act.[114] The Act in question declared it to be illegal to use or occupy a dwelling to "propagate communism or bolshevism by any means whatsoever" and also made it unlawful to print, publish, or distribute in the Province any newspaper, periodical, pamphlet, circular, document, or writing "propagating . . . communism or bolshevism."[115] Once again, a situation arose where the Court found it necessary to identify an unwritten principle in order to protect the fundamental democratic right of freedom of speech.[116]

Switzman is noteworthy because it is the first decision in which a Supreme Court justice suggests that underlying constitutional principles might limit the legislative jurisdiction of Parliament. Justice Abbot raised the issue when he stated, "[a]lthough it is not necessary, of course, to determine this question for the purposes of the present appeal . . . I am also of the opinion that as our *Constitutional Act* now stands, Parliament itself could not abrogate this right of discussion and debate."[117]

Two decades later, in *Canada (Attorney General) v. Montreal (City)* (*Dupond*), the Supreme Court, for a time, moved away from accepting underlying constitutional principles as constraints on legislative actions.[118] In response to an argument, based on the *Alberta Press* case, that a Montreal by-law was in conflict with the fundamental freedoms of speech, the press, and religion, Justice Beetz, for the majority, wrote: "None of the freedoms referred to is so enshrined in the Constitution as to be above the reach of competent legislation."[119] At the time, *Dupond*

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[114] *Id.* at 325.
[115] *Id.* at 310.
[116] *Id.* at 326–28.
[117] *Id.* at 328.
[118] Canada (Att'y Gen.) v. Montreal, [1978] 2 S.C.R. 770 (Can.).
[119] *Id.* at 796.

indicated an end to the potential for underlying constitutional principles to constrain legislative action.

However, Justice Beetz, some years later, had a change of heart in *OPSEU v. Ontario (Attorney General*), a constitutional challenge to a number of sections of the *Public Service Act* that purported to restrain provincial civil servants and Crown employees from engaging in certain federal political activity.[120] The appellants argued, in part, that Canadian constitutional jurisprudence recognizes the existence of certain fundamental political rights and freedoms in the citizens of the country.[121] The appellants relied upon *Alberta Press* and *Switzman*.[122] Justice Beetz, citing those cases, identified that the basic structure of the *Constitution Act, 1867* contemplates certain political institutions and held: "neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure". This was a reversal toward the role for underlying principles, which *Dupond* had denied.

In *Reference re Manitoba Language Rights* (*Manitoba Language Rights*),[123] the Supreme Court took a big step forward when the Court explicitly stated "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada."[124]

In *Manitoba Language Rights* the Court, faced with declaring that all unilingual enactments of the Manitoba Legislature were invalid and of no force or effect, identified an underlying constitutional principle, the rule of law, to grant temporary validity to those

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120 Ontario Pub. Serv. Emps. Union v. Ontario (Att'y Gen.), [1987] 2 S.C.R. 2 (Can.).
121 *Id.* at 6.
122 *Id.* at 2.
123 Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, para. 60 (Can.).
124 *Id.* at para. 66.

enactments. In doing so, the Court used an underlying principle in a substantive, rather than a merely interpretative way.

To identify the rule of law as an underlying principle, the Court looked at two sources: the Preamble's explicit recognition of the rule of law[125] and also to what is implicit in a constitution. Regarding the latter, the Court found that "the principle [of the rule of law] is clearly implicit in the very nature of a constitution."[126] The Court's choice to write that it is implicit in *a* constitution instead of *the* Constitution, suggests that the Court is making a statement about what is required by the very concept of a constitution generally, rather than just Canada's particular Constitution.

The Court went on to state: "[t]he founders of this nation must have intended, as one of the basic principles of nation building, that Canada be a society of legal order and normative structure: one governed by rule of law."[127] Leading to this conclusion, the Court noted the principle's connection with basic democratic notions. According to Wade and Philips, "the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions."[128] This demonstrates that the Western tradition informs the Court's understanding of what principles are implicit in the nature of constitutions and nation building.

The Court also held: "[l]aw and order are indispensable elements of civilized life . . . . 'A government without laws is . . . inconceivable to human capacity and inconsistent with human society.'"[129] This passage would be particularly helpful in a climate change case where it could be argued that a healthy environment is an "indispensable element of civilized life" and that the

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125 *Id.* at paras. 63, 66.
126 *Id.* at para. 64.
127 *Id.* at para. 64.
128 *Id.* at para. 60.
129 *Id.*

ongoing deterioration of the atmosphere is "inconceivable to human capacity and inconsistent with human society."[130] This case also shows that when a principle is clearly implicit in the nature of a constitution, the Court will conclude that the founders must have intended for it to be part of the Canadian Constitution.

The Supreme Court again dealt with underlying constitutional principles in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*.[131] In this case, the Court established parliamentary privilege as an underlying constitutional principle. Justice McLachlin,[132] as she then was, highlighted the principle's roots in both history and necessity by asserting that "our legislative bodies possess those historically recognized inherent constitutional powers as are necessary to their proper functioning."[133]

The Supreme Court established that judicial independence for judges is an underlying constitutional principle in *Manitoba Provincial Court Judges Assn. v. Manitoba (Minister of Justice)* (*Provincial Judges' Reference*).[134] Chief Justice Lamer, writing for the majority, found that "judicial independence is at root an unwritten constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*."[135] The majority also agreed with the general principle that the Constitution "embraces written as well as unwritten rules . . ." and noted that since "it has emerged from a constitutional order whose fundamental rules are not

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130 *Id.*
131 New Brunswick Broad. Co. v. Nova Scotia, [1993] 1 SCR 319 (Can.).
132 *Id.* at 378 (McLachlin, J., concurring).
133 *Id.*
134 Manitoba Provincial Court Judges Ass'n v. Man. (Minister of Justice), [1997] 3 S.C.R. 3 (Can.).
135 *Id.* at para. 83.

authoritatively set down in a single document, it is of no surprise that our Constitution should retain some aspect of this legacy."[136]

The *Provincial Judges Reference* also provides clarification of the legal status of the Preamble. After noting that, strictly speaking, the Preamble is not a source of positive law, the Court explained that the Preamble articulates "the political theory which the *Act* embodies . . . . It recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act*, 1867."[137] Thus, the Preamble has "important legal effects" due to its affirmation of already existing underlying principles. [138] This is an important conceptual distinction that reveals the Preamble is not the source of underlying principles, but rather recognizes the *already existing* underlying principles that are a source of the Constitution.

Another important point arising from this case is in the Court's articulation of "the gap theory." As the Chief Justice states: "As such, the Preamble is not only key to construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law."[139]

In *Reference re Secession of Quebec,*[140] the Court identified four underlying constitutional principles: federalism, democracy, constitutionalism, and respect for minority rights.[141] These principles were chosen for their relevance to consider whether unilateral secession by a province would be constitutional, but the Court noted "this enumeration is by no

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136 *Id.* at para. 92.
137 *Id.* at para. 95.
138 *Id.*
139 *Id.*
140 *Secession Reference,* [1998] 2 S.C.R. 217 (Can.).
141 *Id.* at para. 32.

means exhaustive."[142] Instead, those four principles are just some of the underlying principles that "infuse our Constitution and breathe life into it."[143]

The Court also clarified the relationship between the various underlying principles by explaining: "[t]hese defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."[144]

Very importantly, the Court held that underlying principles can give rise to substantive legal obligations, which:

> constitute substantive limitations upon government action . . . . These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and government.[145]

The Supreme Court of Canada has unanimously confirmed that underlying constitutional principles may be the source of substantive legal obligations which place limits on governmental actions.

C. Conclusion Regarding Underlying Principles

The foregoing summary of cases makes clear that the existence of underlying constitutional principles is well-established, and the recognition of those principles is a process which is still unfolding. The list is not closed and new principles may be recognized. In essence, underlying constitutional principles are not formally recognized until a situation or particular set of facts calls for recognition.

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[142] *Id.* at para. 87.
[143] *Id.* at para. 50.
[144] *Id.* at para. 49.
[145] *Id.* at para. 54.

The well-established nature and binding force of underlying principles is perhaps most apparent in the *Secession Reference*. The earlier decisions canvased above, in addition to providing support for the concept of underlying principles, provide examples of how the Supreme Court, when faced with particular circumstances, is prepared to expand the list of such principles. For example: although the rule of law has always been a fundamental underlying principle, it was not recognized as such until the possibility of a lawless Manitoba led the Court to illuminate and confirm it in *Manitoba Language Rights*.

It is important to note that since many of the above cases were decided after the *Canadian Bill of Rights*[146] and the *Charter of Rights and Freedoms*[147] (*Charter*) came into effect, it is clear that those instruments have not ousted the courts' authority to identify and affirm previously unrecognized underlying constitutional principles. The alternative would "negate the manifest intention expressed in the preamble of our Constitution that Canada retain the fundamental constitutional tenets upon which British parliamentary democracy rested,"[148] because it would mean that these tenets are not retained unless they are expressed in the written texts.

The existence of unwritten constitutional principles is also consistent with section 26 of the *Charter*: "[t]he guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada."[149] Because underlying principles are the "very source of the substantive provisions of the *Constitution Act,*

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146 Canadian Bill of Rights, S.C. 1960, c 44 (Can.).
147 Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).
148 New Brunswick Broad. Co. v. Nova Scotia, [1993] 1 S.C.R. 319, para. 377 (Can.).
149 Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

1867,"[150] they have existed since at least 1867 even if some have not been recognized. Accordingly, there is room to recognize previously unrecognized underlying constitutional principles even if they are rights or freedoms, because they are rights and freedoms that already "exist in Canada."[151]

In sum, where the Court perceives a serious threat to the fundamental values and norms of democracy, human capacity, and human society,[152] or to the proper functioning of the state that cannot be resolved by recourse to the written Constitution, it will protect against those threats by identifying underlying constitutional principles to fill the constitutional gap.[153]

D. Climate Change Reveals a Textual Gap

The unprecedented reality of climate change exposes the lack of environmental protection in the constitutional texts. Anthropogenic climate change poses an extreme threat to humankind. The climate system is being seriously degraded by human activity and that degradation is already having a drastic impact on the planet. The degradation is only going to increase unless we change our ways, but governments around the world are resistant to such change. In the Canadian context, the federal government's actions and inactions are contributing to this environmental degradation and thus directly harming segments of the population. If something is not done to force the government to act, that harm will only intensify and irreparable damage done to the environment and the population.

But how can the government be forced to act? There are no express environmental protections in the written constitutional texts. There are no protections for the natural resources,

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150 Manitoba Provincial Court Judges Ass'n. v. Man. (Minister of Justice), [1997] 3 S.C.R. 3, para. 95 (Can.).
151 *Supra* note 146.
152 Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, para. 60 (Can.).
153 *Id.* at para. 65.

which are the "indispensable elements of civilized life" and are the foundation of "the primary conditions of community life in a legal order."[154] There are no mechanisms in the Constitution to protect these very fundamentals of life. There is a clear and serious gap in the written texts.

As the cases we have reviewed demonstrate, where there is a gap in the constitutional texts on an issue fundamental to the proper functioning of the nation, or where there is a threat to the fundamental values of human society, the Court is prepared to recognize the underlying constitutional principles necessary to support that proper functioning or to protect those fundamental values. In this context, it can be argued that the ongoing environmental degradation, and the serious risk of future harm, coupled with governmental actions and inactions causing or exacerbating the situation, threaten "the primary conditions of the community of life in a legal order," go to the core of the proper functioning of the nation, and are "inconceivable to human capacity and inconsistent with human society."[155]

There is a lack of recognition and protection of the core environmental resources necessary for a healthy environment in the written constitutional texts and hence no mechanism to force the government to protect those resources. This is a conspicuous gap in the written texts. It is a gap that must be filled with an underlying constitutional principle, because a healthy environment is critical to support our basic quality of life and, ultimately, to a healthy, functioning democracy. The right to a healthy environment is a right so fundamental to a functioning society that it must underlie any democratic constitution. It is an "original freedom"[156] every bit as important as freedom of speech, religion, and the inviolability of the person.

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154 *Id.* at para. 60.
155 *Id.*
156 Saumur v. Quebec, [1953] 2 S.C.R. 299, 329 (Can.).

It is here that we turn to the concept of the public trust as an underlying constitutional principle. The public trust is a necessary constitutional mechanism that can be used by citizens to hold government accountable for its participation in the degradation of the environment and to prevent further degradation.

E. The Public Trust Is an Underlying Constitutional Principle that Can Fill the Gap

As noted above in the discussion of the public trust generally, the public trust doctrine is well-developed in the United States and other jurisdictions, but its development in Canada has been slow and uncertain. Canadian courts have, however, made some progress to protect public rights and interests in limited natural resources. As Justice Binnie noted in *Canfor*: "[t]he notion that there are public rights in the environment that reside in the Crown has deep roots in the common law . . . ."[157] In *Canfor*, the Supreme Court reviewed the roots of the public trust doctrine and left the door open to the possibility. It is time to walk through that door.

Canadians have an underlying constitutional right to the natural resources essential to a healthy environment. This right to a healthy environment has been, and continues to be, abused by government, and therefore, a constitutional mechanism of protection is required. That constitutional mechanism is a public trust. The Court must recognize that government holds the natural resources essential for a healthy environment in trust for the citizens. The recognition of such a trust will acknowledge that democratic governments have an inherent obligation to ensure the continuous availability of resources that are essential to current and future citizens. In the Canadian context, a public trust would require the Crown to take public rights and interests in natural resources into account in decision-making and would prohibit the Crown from seriously interfering with or degrading these rights. In the specific context of a climate change case, the

[157] *Canfor*, [2004] 2 S.C.R. 74, para. 74 (Can.).

public trust could be used to require government to, for example, bring GHG emissions into a target range in order to protect the atmosphere.

Below are set out two possible bases for a court to recognize a public trust over essential natural resources: the social contract and the inherent right principle.

F. The Public Trust Arises from the Social Contract

The first argument is that the public trust arises from the social contract. The concept of the social contract is a long-standing theory that claims the source and legitimacy of democratic state power is an implicit contract between the state and its citizens. The concept seeks to legitimize state power by claiming it is grounded in the implicit consent of citizens to be governed. On that basis, the state's legitimate powers must be limited to those that the citizens would conceivably grant it. The concept provides a theoretical justification for the legitimacy of the coercive power of the state that is compatible with democracy. As former Chief Justice McLachlin, writing extra-judicially, notes: "[i]f the state, as we believe, exists as an expression of its citizens, then it follows that its legitimacy and power must be based on the citizens' consent."[158]

The social contract is well-established in western political thought. Its roots trace back to Plato's depiction of Socrates, and it was expounded upon by Hobbes, Locke, Rousseau, Rawls and other theorists. Given that "Western tradition" informs the Court's understanding of what principles are implicit in the nature of constitutions,[159] it is not surprising that the Supreme Court would look to social contract theory in its constitutional analysis.

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158 Beverly McLachlin, *Unwritten Constitutional Principles: What is Going On?*, 4 N.Z. J. OF PUB. & INT'L L. 147, 151 (2006).
159 Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, para. 60 (Can.).

The importance of the social contract was recognized by the Court in *Sauvé v. Canada (Chief Electoral Officer)*, (*Sauve*).[160] In *Sauve*, the Court held that legislation prohibiting prisoners from voting is unconstitutional. In doing so, the majority found that the social contract "stands at the heart of our system of constitutional democracy,"[161] and the minority held that: "[t]he social contract is the theoretical basis upon which the exercise of rights and participation in the democratic process rests."[162]

The majority identified that the source of the legitimacy of the law in a democratic state comes from its citizens; the lawmakers act as the citizens' proxies. The Court recognized that: "[t]he legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote"[163] and that there is a "vital, symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it."[164] The Court found that this connection between the legitimacy of the law and the participation of citizens through voting is "inherited from social contract theory."[165] The argument here is that the fundamental legitimacy of the state rests on the consent of its citizens expressed through the social contract.

The Supreme Court's endorsement of social contract theory can also be seen in the Court's finding in the *Secession Reference* that: "[t]he Constitution is the expression of the sovereignty of the people of Canada."[166] In other words, the people are sovereign and, through the Constitution, have expressed their consent to be governed, and how they choose to be governed.

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160 Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519 (Can.).
161 *Id.* at para. 31.
162 *Id.* at para. 115.
163 *Id.* at para. 31.
164 *Id.*
165 *Id.*
166 *Secession Reference*, [1998] 2 S.C.R. 217, para. 85 (Can.).

So what does the social contract entail? What terms have the people imposed upon the state in exchange for their consent to be governed? The most fundamental term is the protection of the "primary conditions" for the well-being of the citizens. What could be more fundamental to citizens than their well-being? Among the primary conditions for the well-being of the populace is the environment upon which they depend. Clearly, a sovereign people would not grant to government the power or authority to degrade their environment to the point of serious harm to the people's well-being. As Professor Wood notes, citizens would "never confer to their government the power to substantially impair the resources crucial to their survival and welfare . . . ."[167] A healthy environment is just such a resource.

The passage from *Canfor*, quoted *supra*, lends support to the proposition that protection of the environment is a fundamental aspect of the social contract in Canada:

> As the Court observed in *R v. Hydro-Quebec* . . . , legal measures to protect the environment 'relate to a public purpose of superordinate importance'. . . . In *Ontario v. Canadian Pacific Ltd*. . . .'stewardship of the natural environment' was described as a fundamental value . . . . Still more recently, in *114957 Canada Ltee v. Hudson* . . . the Court reiterated at para 1:
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> > Our common future, that of every Canadian community, depends on a healthy environment . . . . This Court has recognized that '(e)veryone is aware that individually and collectively, we are responsible for preserving the natural environment . . . environmental protection has emerged as a fundamental value in Canadian society.'[168]

And in *Ontario v. Canadian Pacific Ltd.*, the majority of the Court adopted a passage from the Law Reform Commission of Canada that described "a fundamental and widely shared value . . . which we will refer to as the right to a safe environment."[169]

A democratic state not prepared to protect its citizens from threats to the environment upon which they depend for their well-being and survival, would be in breach of the social

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[167] Wood & Woodward, *supra* note 11, at 648.
[168] *Canfor*, [2004] 2 S.C.R. 74, para. 7 (Can.).
[169] Ontario v. Canadian Pac., Ltd., [1995] 2 S.C.R. 1031, para. 55 (Can.).

contract. In those circumstances, in order to maintain the legitimacy of the state, there must be some way for citizens to enforce the social contract. Some mechanism is required to force the state to protect the fundamental resources necessary to the welfare and survival of its citizens.

As noted above, in the Canadian context, where the threat of serious environmental damage is upon us, there are no mechanisms in the written constitutional texts that can be used to require the government to comply with its fundamental responsibility under the social contract. There is, then, a constitutional gap that potentially undermines the legitimacy of government. This opens the door to recognition of an underlying principle. Given the threat of catastrophic damage to the environment, the actions and inactions of the federal government exacerbating that threat, and the requirements of the social contract, the legitimacy of the Canadian state rests upon recognition of a mechanism whereby the social contract can be enforced and vital environmental resources protected. That mechanism must be an underlying, unwritten constitutional principle because there is no such mechanism in the written Constitution. That mechanism is the public trust. A public trust requires government to hold the resources necessary for the well-being and survival of its citizens in trust for those citizens. It is as beneficiaries under the public trust that citizens could require government to protect those vital resources. It is through the public trust that citizens are able to hold government to its obligations under the social contract.

The importance of the public trust to the social contract becomes particularly clear when considering harms, like climate change, where the full negative impact of actions today will not be fully experienced by Canadian citizens for decades to come. To subject future citizens to a world without vital natural resources and a healthy environment would mean making them suffer as a result of laws (or the lack of laws) and decisions they had no voice in making. Once again, this would undermine the legitimacy of the state. As the Supreme Court found in *Suave, supra*,

there is a "vital, symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it."[170]

One could argue that this is just the nature of being a citizen—citizenship in a political community requires taking responsibility for the past actions of that community. And it could be further argued that it is impossible to determine what actions future generations would voice approval of since they, by definition, only exist in the future. However, in this narrow area it is safe to presume what future generations would say if they had a voice in the matter. No one would agree to have the resources they depend on for survival substantially impaired, especially when that impairment is likely irreversible.

In the environmental context, the principle of "intergenerational equity" imposes on "each generation . . . an obligation to future generations to pass on the natural and cultural resources of the planet in no worse condition than received and to provide reasonable access to the legacy for the present generation."[171] It is also helpful to look to American jurisprudence to illuminate the connection between the social contract and the public trust. *Illinois Central Railway Co. v. Illinois* (*Illinois Central*),[172] recognized as the foundational authority on the public trust doctrine, the United States Supreme Court upheld legislation revoking a legislative grant of land and water to the Illinois Central Railway on the basis of the public trust doctrine. The Court found that the state, through its sovereignty (sovereignty that arises, it is argued, through the social contract), held the navigable waters and the lands under them in trust for the

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[170] Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, para. 31 (Can.).
[171] Jerry V. DeMarco, *Law for Future Generations: The Theory of Intergenerational Equity in Canadian Environmental Law* 15 J. ENVTL. L. & PRAC. 1, 3–4 (2004); *see also* Labrador Inuit Ass'n v. Newfoundland (Minister of Env't and Labour), 1997 CanLII 14512, paras. 11–12 (Can. N.L. C.A.).
[172] Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

public because the ownership of such property is a subject of public concern to the whole people of the state.[173] While *Illinois Central* dealt with navigable waters and the lands beneath them, the Court reasoned that the public character of the property requires the protection of the public trust. *Illinois Central* could therefore be used to support the argument for a public trust that arises from the social contract.

The Supreme Court of Canada has recognized and affirmed the importance of the social contract to the legitimacy of our democracy: the social contract "stands at the heart of our system of constitutional democracy . . . ."[174] The social contract legitimizes state power by claiming it is grounded in the implicit consent of citizens to be governed, and therefore, the legitimate powers of the state must be limited to those powers that citizens would conceivably grant to it. In the Canadian context, it is clear that Canadians would not grant to government the power or authority to substantially impair the resources necessary to their essential well-being and survival. Accordingly, given that the federal government's actions and inactions are bringing about that impairment, the government is in breach of the social contract. Because a constitutional mechanism is required to force the government to comply with the social contract and there is no such mechanism in the written constitution, we must turn to an underlying constitutional principle to fill that gap. That underlying principle is the public trust. Through the public trust, government is required to uphold the social contract by protecting the fundamental resources necessary to the well-being and survival of the citizens. A finding that there is a public trust over vital resources is necessary to avoid contradicting the logic of the social contract that is at the heart of our democracy.

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[173] *Id.* at 455–456.
[174] Sauvé v. Canada (Chief Electoral Officer), [2002] 3 S.C.R. 519, para. 31 (Can.).

G. The Public Trust Is an Inherent Right Implicit in the Nature of a Constitution

In addition to arising from the social contract, the public trust is also an expression of a pre-political, inherent right of humans. Inherent rights are rights that are so fundamental that they must, out of necessity, be implicit in "the very nature of a constitution."[175] They are the "vital, unstated assumptions . . . " upon which the Constitution is based.[176] In *Saumur*, *supra*, Justice Rand described these rights as "original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order."[177]

In a similar vein, in *Switzman*, *supra*, Justice Rand recognized the right of freedom of discussion as an underlying constitutional principle because it is "the primary condition of social life, thought and its communication by language . . . " and is "little less vital to man's mind and spirit than breathing is to his physical existence."[178] As such, he found, that the right is "an inherence in the individual . . . " and embodied in his status of citizenship.[179] In other words, it is an inherent right embedded in the Constitution.

If freedom of discussion is a primary condition of social life and thought—and therefore an inherent right—then the primary conditions for physical existence, including a healthy environment, must also be inherent rights since their existence is obviously necessary for social life and thought. Justice Rand implies as much when he states that liberty of discussion "is little less vital to man's mind and spirit than breathing is to his physical existence."[180] Here, Justice

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175 Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, para 64 (Can.).
176 *Secession Reference*, [1998] 2 S.C.R. 217, para. 49 (Can.).
177 Saumur v. Quebec, [1953] 2 S.C.R. 299, 329 (Can.).
178 Switzman v. Elbling, [1957] S.C.R. 285, 306 (Can.).
179 *Id.* at 306–307.
180 *Id.* at 306.

Rand takes for granted that the primary conditions of physical existence, such as air to breathe, are inherent rights.

The primary conditions of physical existence are such essential rights that they must precede everything. Thus, a healthy environment, it can be argued, is a primary human right. This right is implicit in the very nature of the constitution of a democratic state because the "biophysical reality is that all other rights, including the right to life itself, depend upon a viable environment."[181] What could be more fundamental to the democratic state than the existence and well-being of its sovereign people?

The Supreme Court of the Philippines, in *Minors Oposa v. Secretary of the Department of the Environment and Natural Resources* (*Minors Oposa*), recognized the innate nature of the right to a healthy environment.[182] The Court addressed the idea that the public trust protects these rights by preventing the substantial impairment of these resources by making the compelling argument that:

> The right to a balanced and healthful ecology . . . belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation[,] the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the constitution for they are assumed to exist from the inception of humankind.[183]

Embedding this right in the Constitution is important because constitutions are meant to endure through time. As Lynda Collins writes in *Safeguarding the Longue Duree*: "[a] constitution not grounded in a healthy, sustainable environment is a paper temple—a mere

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[181] Lynda M. Collins, *Safeguarding the Longue Durée: Environmental Rights in the Canadian Constitution*, 71 SUP. CT. L. REV.: OSGOODE'S ANN. CONST. CASES CONF. 519, 522 (2015).
[182] Minors Oposa v. Sec'y of the Dep't of Env't and Nat. Res., G.R. No. 101083, 187 (S.C., July 30, 1993) (Phil.).
[183] *Id.*

recitation of rights with no real guarantee of their survival over time."[184] As the Supreme Court stated in *Hunter v. Southam*: "[a] statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework."[185]

If these rights are implicit in the very nature of a constitution, a mechanism for protection of these rights must also be implicit in the Constitution. That protective mechanism cannot be, like a statute, "easily enacted and as easily repealed." It is here that we once again turn to the public trust. A public trust embedded in the Constitution can be used to safeguard the essential resources that are the primary conditions of the well-being of the population. A public trust over essential natural resources is implicit in the Canadian Constitution because it ensures that government will, or will be required to, protect the resources necessary for a viable environment and the well-being and survival of the population. Through the public trust, the fiduciary obligations to the public must guide government authority in relation to those resources.

McLachlin in her essay, *Unwritten Constitutional Principles*, confirms this point when she states that government should not be allowed to kill their citizens indirectly through "degradation of the environment."[186] It is clear from her essay that she thinks that a sufficiently catastrophic environmental degradation would violate a fundamental democratic right.

In sum, there are rights—"original freedoms"—that are so fundamental that they are "implicit in the very nature of a constitution."[187] These are inherent rights that are embedded in an individual's very status as a citizen. If the essence of the democratic state is to promote the

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[184] Collins, *supra* note 181, at 539.
[185] Hunter v. Southam, Inc., [1984] 2 S.C.R. 145, para 16 (Can.).
[186] *Id.* at 150.
[187] Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721, para. 64 (Can.).

interests and well-being of its citizens, then the primary conditions of physical existence must be among those inherent rights implicit in the Constitution. If those rights are implicit in the Constitution, the mechanism to protect those rights must also be implicit in the Constitution. That mechanism is the public trust. Hence, the public trust is an underlying constitutional principle.

H. Conclusion Regarding the Public Trust as an Underlying Constitutional Principle

Based on the foregoing, it is well established that there are unwritten constitutional principles underlying the written Constitution. These principles may be recognized by the Court where the Court perceives a serious threat—either to the fundamental norms of democracy, to human capacity and society, or to the proper functioning of the state—that recourse to the written texts cannot resolve. The Supreme Court has already recognized a number of such principles, but it is clear that the list is not closed and new principles may be recognized.

Climate change is an existential threat to human capacity and human society. It is a threat to the natural resources (e.g., the atmosphere) that are essential to the survival of humankind. On the basis of social contract theory and inherent rights theory, government must hold those essential resources in trust for current and future generations. Protection of both present and future citizens from existential threats is the most fundamental responsibility of any democratic government.

In Canada, rather than protecting essential natural resources, the actions and inactions of the federal government are contributing to the degradation of those natural resources and, thus, the government is in breach of the public trust. There is no recognized constitutional mechanism available to citizens to require government to protect those essential resources or to hold government accountable for its participation in the degradation of those resources. There is a gap

in the written constitutional texts, and the Canadian Constitution should recognize the public trust as an underlying principle, thereby filling the gap.