THE TIME HAS ARRIVED FOR A CANADIAN PUBLIC TRUST DOCTRINE BASED UPON THE UNWRITTEN CONSTITUTION

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“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 and 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, or 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

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² Marcus Tullius Cicero's *De Legibus* (Book III, part III, sub. VIII)
unruly child into a mature adult and allow an action based on the public trust doctrine as an unwritten principle of the constitution.

This article sets out two approaches for developing a public trust argument in the context of a climate change case: a) the public trust is grounded in the common law; and b) 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 of establishing the existence of a common law public trust over essential natural resources, including the atmosphere, and that it has been breached 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 theory, leads to the conclusion that the public trust is an underlying constitutional principle embedded in the unwritten constitution.

“A Note on Jurisdiction over GHG 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 *Old Man River Society v. Canada (Minister of Transport)* [1992] 1 SCR 3, jurisdiction over the environment is not the exclusive preserve of one level of government over the other. Having said that, it remains clear that the federal government has primary jurisdiction over greenhouse gas (“GHG”) emissions.

The federal government has taken a number of actions and decisions as well as enacted laws under its jurisdiction that has facilitated GHG emissions. This includes 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*, 217 F. Supp.3d 1224 (D. Or. 2016) litigation where the plaintiffs targeted the United States federal government for a broad suite of actions creating and exacerbating climate change.
Given that climate change is the most serious challenge facing the planet, it is time that such a climate change action be brought in Canada. This is underscored by the fact that Canada is responsible for a disproportionate share of global GHG emissions. Furthermore the Canadian government has accepted the global scientific consensus that the earth is warming because of anthropomorphic GHG emissions that is causing climate change. Canada is the 9th largest GHG polluter in the world in terms of absolute annual production based GHG emissions. In terms of per capita of global emission Canada is ranked 2nd in the world. 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%.

PART 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 government 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 defines the doctrine as requiring “...government to hold vital natural resources in trust for public beneficiaries, both present and future generations”. 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”.

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”. 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 the 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.”

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4 Wood, “Atmospheric Trust Litigation” at page 648
6 2004 SCC 28, [2004] 2 SCR 74 at para 74
The most commonly referred to historical source is *The Institutes of Justinian*. In *Canfor, supra*, 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 – the air, running water, the sea…”

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...”

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”.  

The *Magna Carta* is also frequently cited as an historical source. The *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 *Magna Carta*’s provisions were repealed from English statutes shortly before Confederation, many of its influences on the English common law were imported into Canadian common law. The *Magna Carta* has

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7 T.C. Sandars, *The Institutes of Justinian* (1876), Book 11, Title 1, at p. 158, as cited in *Canfor, supra* note 6 at para 75
8 *Bracton on the Laws and Customs of England* (1968), vol. 2, at pp. 39-40, as cited in *Canfor, supra*, note 6, at para 75
9 *Canfor, supra*, note 6 at para 76
been described as “...an inspirational document of considerable historical significance to the development of our system of government...” And in *R. v. Gladstone*, the Supreme Court of Canada referenced the *Magna Carta* in the context of the public right to fish: “...since the time of the *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.”

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* was issued, incorporating those provisions with additional provisions. 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, pastures for pigs and cutting of turf. The *Charter of the Forest* played a key role in the protection and development of environmental rights and natural resources. As Sir William Blackstone pointed out, “there is no transaction in the antient part of our English history more interesting and important than the Great Charter and the *Charter of the Forest*.”

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, in the form of an inalienable public right vested in the Crown to have navigable rivers and ports free of nuisance.

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12 Daniel MaGraw and Natalie Thomure, *Carta de Foresta: The Charter of the Forest Turns 800*, 47 ELR 10934
13 Geraldine van Buren, "Take Back Control: A New Charter for the 21st century is Overdue, 800 years after the first": Times literary supplement, 10 and March 2017, pages 23 – 25.
14 Bradley Freedman and Emily Shirley, “*England and the Public Trust Doctrine*”, (2014) JELP 1 at 2
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 has not yet been formally recognized in Canada, Canadian courts recognized 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 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 courts 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. The end result is identical.

(i) 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 as a source of food
was crucial to human health and the functioning of economic and social structures.

The first case to note is the 1852 decision in *R v. Meyers* ("Meyers"). In *Meyers*, the Upper Canada Court of Common Pleas held that a Crown grant of the soil to a navigable river could not authorize the construction of a dam that would interfere with the public’s navigation rights. Justice McLean identified that navigable lakes and streams are 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...” [Emphasis added] 16

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 1913, in *British Columbia (Atty. Gen.) v. Canada (Atty. Gen.)*, the Judicial Committee of the Privy council, in considering the issue of the public right to fish, held that the “…the subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters

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15 *R v. Meyers*, 1852 Carswell Ont 86,; 3 UCCP 305
16 *Meyers*, supra, note 15, at para 123
alike”\(^\text{17}\). The Privy Council went on to find that this was a right enjoyed from time immemorial, and that the Crown, as \textit{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.

One of the earliest decisions of the Supreme Court of Canada on this issue arose in \textit{Esson v. Wood}.\(^\text{18}\) 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.

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.\(^\text{19}\) This approach is summarized and confirmed by the Supreme Court of Canada in \textit{Ward v. Canada} \(^\text{20}\), where the Court, citing \textit{Comeau’s Sea Foods}, found that under the \textit{Fisheries Act}, the Minister has a “...duty to manage, conserve and develop the fishery for the benefit of Canadians in the public interest.”\(^\text{21}\)

Also of note is the decision of the Superior Court of Prince Edward Island in \textit{PEI v. Canada}\(^\text{22}\) where the Court dismissed a motion to strike the plaintiff’s claim challenging government policy in relation to mismanagement of the fishery. 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. The Court, in dismissing that part of

\(^{17}\) (1913) 15 D.L.R. 308 at 315
\(^{18}\) \textit{Esson v. Wood}, (1884), 9 SCR 239
\(^{19}\) See, for example, \textit{Comeau’s Sea Foods Ltd. V. Canada (Minister of Fisheries and Oceans)} [1997] 1 SCR 12
\(^{20}\) [2002] 1 SCR 569 ("\textit{Ward}"")
\(^{21}\) \textit{Ward}, supra, note 20, at para 38
\(^{22}\) 2005 PESCTD 57 overturned on other grounds in 2006 PESCAD 27
the motion to strike, concluded that if the government can exert its right, as
guardian of the public interest, and claim against a party causing damage to that
current interest, then it would seem, in another case, that a beneficiary of the
current resource ought to be able to claim against the government for a failure to
properly protect the public interest. A right gives rise to a corresponding duty.
This decision was overturned by the Court of Appeal but not on that issue – it was
overturned on the ground that the Federal Court had exclusive jurisdiction to
entertain the claim.

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 nature of the resource.

The above cases, taken together, exhibit 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, and the Crown has a
right, and a duty, to protect those rights and resources.

(ii) The Public Trust Concept in the Context of Municipalities

There have also been a number of decisions of 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\textsuperscript{23}. The Supreme Court of Canada came to an identical conclusion in \textit{Vancouver (City) v. Burchill}\textsuperscript{24}.

More recently, the Alberta Court of Appeal, in \textit{SW Properties Inc. v. Calgary (City of)}\textsuperscript{25}, 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\textsuperscript{26}.”

The Manitoba Court of Appeal in \textit{McDonald v. North Norfolk}\textsuperscript{27} held that municipalities hold highways in trust for the public.

In addition, the Ontario Court of Appeal in \textit{Scarborough v. REF Homes Ltd.}\textsuperscript{28}, 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\textsuperscript{29}.”

One final case to add here, although it is not a case involving a municipality, is an important one. In \textit{Committee for the Commonwealth of Canada v. Canada}\textsuperscript{30} 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 \textit{Charter’s} guarantee of freedom of expression, the Court held that:

\begin{itemize}
\item \textsuperscript{23} (1859), 21 UC QB 59 at 62
\item \textsuperscript{24} [1932] SCR 620 at 625
\item \textsuperscript{25} 2003 ABCA 10
\item \textsuperscript{26} S.W. Properties, supra, note 25, at para 19
\item \textsuperscript{27} (1992), 98 DLR (4th) 436
\item \textsuperscript{28} (1979) 9 MPLR 255
\item \textsuperscript{29} Scarborough v. REF Homes, supra, note 28, at para 5
\item \textsuperscript{30} [1991] 1 SCR 139
\end{itemize}
“...the 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’.

(iii) 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.”31 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 because they 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 which the public trust protects certainly are incapable of acting in their own best interests since they do not exist yet. As discussed below in the section dealing with how the public trust arises from the social contract, environmental issues are a limited case where it is possible to 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

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closed.”32 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 uncomtemplated situations where it appears necessary to do so for the protection of those who fall within its ambit ...”33

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.”34 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*.35 In *Canfor*, the Court, for the first time, examined the

32 *Eve, supra*, note 31, at para 74
33 *Eve, supra*, note 31 at para. 42
34 *Canfor, supra* note 6, at para 76
35 *Canfor, supra*, note 6
roots of the public trust doctrine and considered whether it might 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.”36.

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, that 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.

36 Canfor, supra, note 6, at para 81
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 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 Ltee v. Hudson (Town), the Court reiterated, at para 1:

...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’…”

The Court is strongly affirming that “stewardship of the natural environment’ is a fundamental Canadian value and is underscoring the need for all levels of government to protect the environment. This attitude of the Court is also apparent in the R v. Quebec-Hydro decision, cited in the foregoing quote, 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.”

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37 Canfor, supra, note 6, at para 7
And the Supreme Court in \textit{Canfor}, referencing \textit{Scarborough v. REI Homes}, \textit{supra}, notes that “…even municipalities have a role to play in defence of public rights\textsuperscript{39}.

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 eventual possible adoption of the public trust in Canada reliance could be placed upon the Supreme Court decision in \textit{Guerin v. The Queen}\textsuperscript{40}. In \textit{Guerin}, the Court made it clear that the categories of fiduciary obligations are not closed but 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 fiduciary.”\textsuperscript{41} 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 \textit{Canfor}, and the open-ended ability to expand fiduciary relationships recognized in \textit{Guerin}, it can be argued that the Court has the necessary tools to develop and establish a public trust and that the time has come to do so.

\textsuperscript{39} \textit{Canfor}, supra, note 6, at para. 73
\textsuperscript{40} \textit{Guerin v. The Queen}, [1984] 2 SCR 335
\textsuperscript{41} \textit{Guerin}, supra, note 40, at page 384
The argument against that line of reasoning is found in *Burns Bog Society v. Canada (Attorney General)*\(^42\) 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 an environmentally sensitive area called Burns Bog 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*\(^43\), at para 48, 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 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

\(^{42}\) 2012 FC 1024, affirmed by the Federal Court of Appeal, 2014 FCA 170 (“Burns Bog”)

\(^{43}\) 2011 SCC 24 (“Elder Advocates”)
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.\(^{44}\) So, 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* itself in that 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…”.\(^{45}\)

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. The decision of the Supreme Court of Canada in *Friends of the Oldman River v. Canada (Minister of Transport)*,\(^ {46}\) also supports this notion because, as the Court held, the environment “…is comprised of all that is around us…”\(^ {47}\) and is not “… confined to the biophysical environment alone”\(^ {48}\). It encompasses the

\(^{44}\) *Canfor*, supra, note 6, at para. 81
\(^{45}\) *Elder Advocates*, supra, note 43, at para. 44
\(^{46}\) [1992] 1 SCR 3 (“*Friends of the Old Man River*”)
\(^{47}\) *Friends of the Old Man River*, supra, note 46, at page 70
\(^{48}\) *Friends of the Old Man River*, supra, note 46 at page 37
physical, economic and social environment” 49. “The environment is a diffuse subject matter” 50 and includes “...the potential consequences for a community’s livelihood, health and other social matters from environmental change...” 51. It follows, therefore, 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) v. R., (1897) 27 SCR 271 at 286 Justice Sedgewick of the Supreme Court, 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. [Emphasis added]

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

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, sea level rises may impact the navigability of harbours if large ships are unable to clear bridges, a

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49 Friends of the Old Man River, supra, note 46, at page 63
50 Friends of the Old Man River, supra, note 46, at page 37
51 Friends of the Old Man River, supra, note 46, at page 37
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, and 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 somewhat more useful than the others because it was referred to by the Supreme Court in Canfor. The Court quoted the following passage from Georgia v. Tennessee Copper Company: “…the state has an interest independent of and behind the titles of its citizens in all the earth and air within its domain”\(^5\).

More recently, American courts have recognized the atmosphere as a public trust resource. The Arizona Court of Appeals in Butler/Peshlakai v. Brewer et al\(^5\) held without deciding, that the atmosphere is a part of the public trust. The New Mexico Court of Appeals, in Sanders -Reed\(^5\), held that a public trust exists for the protection of New Mexico’s natural resources, including the atmosphere, for the benefit of the people of the state. In Kanuk Kanuk v. State

\(^5\) 206 US 230 (1907) at p. 237: see Canfor, supra, note 6, at para 78
\(^5\) 2013 WL 1091209
\(^5\) 350 p. at 1225 (2015)
Department of Natural Resources, the Alaska Supreme Court, although dismissing the plaintiffs’ claims, found that the plaintiffs made a good case “...that the atmosphere is an asset of the public trust, with the State as the trustee and the public as beneficiaries...”.

Finally, in Robinson Twp. V. Commonwealth, the Pennsylvania Supreme Court went even further by declaring that a constitutional right to a healthy environment was embedded in the social contract between the citizens and their government. 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, 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 because they go back to first principles, namely, that the sovereignty of the people creates a restraint on legislative power. The Courts make it clear that

55 355 P. 3d 1088, at 1101 - 02
56 83 A. 3d 901 at 947 – 49 (2013)
quite apart from the constitution, the public trust doctrine has been drawn from the English common law, Roman law and American jurisprudence and, most importantly, that there are basic rights that are inherent in all of humankind. Accordingly, these decisions could be helpful in demonstrating that the public trust doctrine is a vehicle that could well be adopted by Canadian courts.

In *Oposa v. Factoran*\(^\text{57}\), the Court, in certifying a class action, relied upon the natural law force of the public trust doctrine and 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 be written in the Constitution, for they are assumed to exist from the inception of humankind.”

In *Metha v. Kamal Nath*\(^\text{58}\), the Indian Supreme Court held that a 99 year lease of government lands to a resort in a protected forest violated the public trust doctrine. The Court held that the doctrine was part of Indian law because Indian jurisprudence was inherited from the 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*\(^\text{59}\), the Supreme Court of India held that Indian society has, since time immemorial, been conscious of the necessity of

\(^{57}\) GR No. 101083, 224 S.C.R.A. 792, 804-05 (Supreme Court of the Philippines, 1993)

\(^{58}\) (1997) 1 SCC 388

\(^{59}\) (2009) INS., C 100 at paras 32 and 36
protecting the environment and ecology. The Court drew on American jurisprudence and academic writings to hold that the public trust doctrine constitutes the best practical and philosophical legal tool for protecting public rights, natural resources and ecological values which are held in trust by government for the 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 re 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 public rights and resources, the trust and fiduciary language in Canfor, the raising of “important and novel” questions in regard to threats to the environment in Canfor, the open-ended ability to expand fiduciary relationships recognized in Guerin, and the very serious, current and future threats to the environment, it can be argued that the court has the necessary tools to develop and establish the public trust and that the time has come to do so.

It is noted here, however, that while a finding of a common law public trust would be a significant step forward, such a trust would not be immune from interference by government because it could be overridden by statute. This is a point which permeates many of the cases examined above. For example, in Esson v. Wood, supra, note 18, the Court held that government could not grant
the right to place an obstruction in the harbour “unless the necessary legislation was enacted”. 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*. There, the Court, after quoting from *Esson v. Wood*, held that while the public right of navigation is paramount to the rights of the owner of the bed of a navigable river, even when the owner is the Crown, it can be “…modified or extinguished by an authorizing statute…”.

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 because government may be hesitant to be seen to be passing legislation specifically aimed at overriding or modifying court ordered protections of such resources. It is just that 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”.

**PART 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 considered is how Canadian courts have, over the years, dealt with the issue of the “unwritten constitution” and “underlying constitutional principles” and 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”\(^ {60}\), the texts enumerated in subsection 52(2) of the Constitution Act, 1982 “are not exhaustive”\(^ {61}\). Instead, the Constitution “embraces unwritten, as well as written rules”.\(^ {62}\) 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”.\(^ {63}\) These unstated assumptions may not always be obvious, and yet “it would be impossible to conceive of our constitutional structure without them”.\(^ {64}\)

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”,\(^ {65}\) or that it is “…inconsistent with human society”\(^ {66}\) or that it involves the “…indispensable elements of civilized life…”,\(^ {67}\) 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

\(^{60}\) Reference re Secession of Quebec, [1998] 2 SCR 217 at para 49 (“Secession Reference”)
\(^{61}\) Secession Reference, supra, note 60, at para 32
\(^{62}\) Provincial Court Judges Assn. (Manitoba) v. Manitoba (Minister of Justice), [1997] 3 SCR 3, at para 92
\(^{63}\) Secession Reference, supra, note 60, at para 49
\(^{64}\) Secession Reference, supra, note 60, at para 51
\(^{65}\) Saumur v. Quebec (City), [1953] 2 SCR 299, at page 329
\(^{66}\) Reference re Manitoba Language Rights, [1985] 1 SCR 721 at para. 60
\(^{67}\) Manitoba Language Rights, supra, note 66, at para. 60
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 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”)68, 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 the province, but three of the six justices identified, albeit in obiter, an unwritten constitutional principle in their analysis.

Chief Justice Duff, with Justice Davis concurring, identified that a right of “free public discussion of affairs”69 underlies the constitutional texts. The analysis is helpful. Duff C.J. 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

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68 Reference re Alberta Legislation [1938] SCR 100
69 Alberta Press, supra, note 68, at page 133
in principle to that of the United Kingdom.”70 This meant “...a parliament working under the influence of public opinion and public discussion.”71 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.”72 He found that “…this right of free public discussion of public affairs...is the breath of life for parliamentary institutions”73 and is a right that underlies the text of the Constitution.

Justice Canon also found that freedom of discussion is an underlying constitutional principle. He found that: “Democracy cannot be maintained without its foundation: free public opinion and free public discussion...” He referred to the “fundamental right” of Canadian citizens “…to express freely his untrammeled opinion about government and discuss matters of public concern.”74

Parenthetically, it should be noted that immediately after making the foregoing statement, Canon J went on to say: “The federal government 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.”75 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

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70 Alberta Press, supra, note 68, at page 133
71 Alberta Press, supra, note 68, at page 133
72 Alberta Press, supra, note 68, at page 133
73 Alberta Press, supra, note 68, at page 133
74 Alberta Press, supra, note 68, at page 146
75 Alberta Press, supra, note 68, at page 146
to shut it down. This statement belies his entire analysis on this point. Justice Abbott, in *Switzman v. Ebbling*, infra, was obviously troubled by this comment of Canon J and makes it clear that, in his view, Parliament does not have such authority.

In any event, while both Chief Justice Duff and Justice Canon ultimately found on division of powers grounds, they were none the less prepared, in the face of this draconian legislation, to recognize freedom of discussion as an underlying constitutional principle.

The Supreme Court dealt with underlying constitutional principles again in *Saumur v. Quebec (City)* ("*Saumur*")76. 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, Rand J 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 licence, its basic condition is destroyed.”77 Importantly, Rand J notes that Duff CJ “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.”78

76 *Saumur*, supra, note 65
77 *Saumur*, supra, note 65, at page 330
78 *Saumur*, supra, note 65, at page 331
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.”79 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. Ebling* 80. *Switzman* dealt with the constitutionality of what was known as the “padlock law”. 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”. 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.

*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

79 Saumur, supra, note 65 at page 329 
80 [1957] SCR 285 ("Switzman")
stated:”...although it is not necessary, of course, to determine this question for the purposes of this appeal...I am also of the opinion that as our Constitution Act now stands, Parliament itself could not abrogate this right of discussion and debate”.

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. 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 of 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”. At the time, Dupond 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 purporting to restrain provincial civil servants and Crown employees from engaging in certain federal political activity. 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. The appellants relied upon

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81 Switzman , supra, note 80, at page 328
82 [1978] 2 SCR 770 (“Dupond”)
83 Dupond , supra, note 82, at page 796
84 [1987] 2 SCR 2
Alberta Press and Switzman. Beetz J, 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 move back toward the role for underlying principles which Dupond had denied.

In Reference re: Manitoba Language Rights85 (“Manitoba Language Rights”), 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”.86

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 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 to two sources: the Preamble’s explicit recognition of the rule of law87 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

85 Manitoba Language Rights, supra, note 66
86 Manitoba Language Rights, supra, note 66, at para. 66
87 Manitoba Language Rights, supra, note 66, at para. 63
“the Constitution” \textsuperscript{88} The choice to write that it is implicit in \textit{a} constitution instead of \textit{the} Constitution, suggests the Court is making a statement about what is required by the very concept of a constitution generally, rather than just our particular Constitution.

The Court went on to state: “The 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 the rule of law.” \textsuperscript{89}

Leading up 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.” \textsuperscript{90} 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: “Law and order are indispensable elements of civilized life. ... A government without laws is ... inconceivable to human capacity and inconsistent with human society.” \textsuperscript{91} This passage could 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 ongoing deterioration of the atmosphere is “inconceivable to human capacity and inconsistent with human society”.

\begin{footnotes}
\item[88]\textit{Manitoba Language Rights, supra}, note 66, at para. 64
\item[89]\textit{Manitoba Language Rights, supra}, note 66, at para. 64
\item[90]\textit{Manitoba Language Rights, supra}, note 66, at para. 60
\item[91]\textit{Manitoba Language Rights, supra}, note 66, at para. 60
\end{footnotes}
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 our Constitution.

The Supreme Court again dealt with underlying constitutional principles in *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*[^92]. In this case, the Court established parliamentary privilege as an underlying constitutional principle. Justice McLachlin[^93], 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”.[^94]

The Supreme Court established that judicial independence for judges is an underlying constitutional principle in *Provincial Court Judges Assn. (Manitoba) v. Manitoba (Minister of Justice)* ("Provincial Judges’ Reference")[^95]. 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”.[^96]

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

[^92]: [1993] 1 SCR 319 ("New Brunswick Broadcasting")
[^93]: Justices L’Heureux, Gonthier and Iacobucci concurring
[^94]: *New Brunswick Broadcasting*, *supra*, note 92, at para 115
[^95]: *Provincial Judges Reference*, *supra*, note 62
[^96]: *Provincial Judges’ Reference*, *supra*, note 62, 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.”

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.” Thus, the Preamble has “important legal effects” due to its affirmation of already existing underlying principles. 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.”

In *Reference re Secession of Quebec*, the Court identified four underlying constitutional principles: federalism, democracy, constitutionalism and

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97 *Provincial Judges’ Reference, supra*, note 62, at para. 92
98 *Provincial Judges’ Reference, supra*, note 62, at para. 95
99 *Provincial Judges’ Reference, supra*, note 62, at para. 95
100 *Provincial Judges’ Reference, supra*, note 62, at para. 95
101 *Secession Reference, supra*, note 54
respect for minority rights. These principles were chosen for their relevance to considering whether unilateral secession by a province would be constitutional, but the Court noted that “...this enumeration is by no means exhaustive”. Instead, those four principles are just some of the underlying principles that “...infuse our Constitution and breathe life into it.”

The Court also clarified the relationship between the various underlying principles by explaining: “These defining principles operate in symbiosis. No single principle can be defined in isolation from the others, nor does anyone principle trump or exclude the operation of any other”.

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 invested with a powerful normative force, and are binding on both courts and government.”

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.

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102 Secession Reference, supra, note 60, at para. 32
103 Secession Reference, supra, note 60, at para. 87
104 Secession Reference, supra, note 60, at para. 50
105 Secession Reference, supra, note 60, at para. 49
106 Secession Reference, supra, note 60, at para.54
C. CONCLUSION re 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.

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. In essence, underlying constitutional principles are not formally recognized until a situation or particular set of facts calls for recognition. 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 and the 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”¹⁰⁷ 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: “The 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”. Because underlying principles are the “… very source of the substantive provisions of the Constitution Act, 1867”¹⁰⁸ 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”.

In sum, where the Court perceives a serious threat to the fundamental values and norms of democracy, human capacity, and human society¹⁰⁹, 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.

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 human kind. 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

¹⁰⁷ New Brunswick Broadcasting, supra, note 92, at para. 113
¹⁰⁸ Provincial Judges Reference, supra, note 62, at para. 95
¹⁰⁹ Manitoba Language Rights, supra, note 66 at para. 60
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 which are the “…indispensable elements of civilized life”\(^{110}\) and are the foundation of “…the primary conditions of community life in a legal order.” 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 to this point 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 and/or exacerbating the situation, threatens “…the primary conditions of the community of life in

\(^{110}\) *Manitoba Language Rights, supra*, note 66, at para. 60
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”.

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…”111 every bit as important as freedom of speech, religion and the inviolability of the person.

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 to account 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, gone some way in protecting public rights and interests in limited

111 Saumur, supranote 65, at page 329
natural resources. As Binnie J noted, writing for the majority in Canfor: “The notion that there are public rights in the environment that reside in the Crown has deep roots in the common law....”112 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. They have a right to a healthy environment. That right has been, and continues to be, abused by government. There needs to be a constitutional mechanism to protect it. That constitutional mechanism is the 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 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.

112 Canfor, supra, note 6 at para.74
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 which 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 to it. The concept provides a theoretical justification for the legitimacy of the coercive power of the state that is compatible with democracy. As Chief Justice McLachlin, as she then was, notes, writing extra-judicially: “... if 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”.

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 Hobbs, Locke, Rouseau, Rawls and other theorists. Given that “Western tradition” informs the Court’s understanding of what principles are implicit in the nature of constitutions, it is not surprising that the Supreme Court would look to social contract theory in its constitutional analysis.

The importance of the social contract was recognized by the Court in Sauve v. Canada (Chief Electoral Officer) (“Sauve”). In Sauve, the Court held that legislation prohibiting prisoners from voting is unconstitutional. In doing so,

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113 The RT Hon. Beverly McLachlin, “Unwritten Constitutional Principles: What is going on?”
114 Manitoba Language Rights, supra, note 66, at para. 60
115 Sauve, [2002], 3 SCR 519
the majority found that the social contract “... stands at the heart of our system of constitutional democracy”\textsuperscript{116} and the minority held that: “The social contract is the theoretical basis upon which the exercise of rights and participation in the democratic process rests”\textsuperscript{117}

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: “The legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote”\textsuperscript{118} 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”.\textsuperscript{119} 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”.\textsuperscript{120} 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 \textit{Secession Reference} that: “[t]he Constitution is the expression of the sovereignty of the people of Canada”.\textsuperscript{121} 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.

\textsuperscript{116} Sauve, \textit{supra}, note 115, at para. 31
\textsuperscript{117} Sauve, \textit{supra}, note 115, at para. 115
\textsuperscript{118} Sauve, \textit{supra}, note 115, at para. 31
\textsuperscript{119} Sauve, \textit{supra}, note 115, at para. 31
\textsuperscript{120} Sauve, \textit{supra}, note 115, at para. 31
\textsuperscript{121} Secession Reference, \textit{supra}, note 60, at para. 85
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? And 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 Woods notes, citizens would “… never confer to their government the power to substantially impair the resources crucial to their survival and welfare...”\textsuperscript{122} A healthy environment is just such a resource.

The passage from \textit{Canfor}, quoted \textit{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 \textit{R v. Hydro-Quebec}..., legal measures to protect the environment ‘relate to a public purpose of superordinate importance’... In \textit{Ontario v. Canadian Pacific Ltd}...‘stewardship of the natural environment’ was described as a fundamental value... Still more recently, in \textit{114957 Canada Ltee v. Hudson}... the Court reiterated at para 1:

...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”\textsuperscript{123}.

And in \textit{Ontario v. Canadian Pacific Ltd}., the majority of the Court adopted a passage from the Law Reform Commission of Canada that described “... a

\textsuperscript{122} Wood, “Atmospheric Trust Litigation”, \textit{supra}, note 3 at page 648
\textsuperscript{123} \textit{Canfor}, \textit{supra}, note 6 , at para. 7
fundamental and widely shared value ... which we will refer to as the right to a safe environment".124

A democratic state not prepared to protect its citizens from threats to the environment upon which they depends for their well-being and survival, would be in breach of the social 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, and given the actions and inactions of the federal government exacerbating that threat, and given 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-

124 [1995] 2 SCR 1031 at para. 55
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 can 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”.$^{125}$

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 to know 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.

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$^{125}$ *Suave, supra*, note 115, at para. 31
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.” It is also helpful to look to American jurisprudence to illuminate the connection between the social contract and the public trust. In *Illinois Central Railway Co. v. State of Illinois*, the foundational authority on the public trust doctrine in the United States, 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, held the navigable waters and the lands under them in trust for the public because the ownership of such property is a subject of public concern to the whole people of the state. While *Illinois Central* was dealing with navigable waters and the lands beneath them, the reasoning – the public character of the property requires the protection of the public trust – could be drawn upon in support of the argument for a public trust that arises from the social contract.

In sum, 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

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127 *Illinois Central Rail Co. v. State of Illinois* (1892), 146 US 387
128 *Illinois Central*, supra, note 127, at 455-456
democracy…”129 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 even their 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. A constitutional mechanism is required to force the government to comply with the social contract. There is no such mechanism in the written constitution so we must turn to an underlying constitutional principle to fill that gap. That underlying principle is the public trust. Through the public trust, government can be required to uphold its end of 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.

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, of necessity be implicit in “...the very nature of a constitution”.130 They are the “...vital, unstated

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129 Sauve, supra, note 115, at para 31
130 Manitoba Language Rights, supra, note 66, at para 64
assumptions...”131 upon which the Constitution is based. In Saumur, supra, Rand J 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”.132

In a similar vein, in Switzman, supra, Rand J 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”133. As such, he found, that the right is “... an inherence in the individual...” and embodied in his status of citizenship.134 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 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”. Here, Justice Rand takes for granted, that the primary conditions of physical existence, such as air to breathe, are inherent rights.

And, of course, this must be so. The primary conditions of physical existence are such fundamental rights that they must precede everything. A healthy

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131 Secession Reference, supra, note 60, at para 49
132 Saumur, supra, note 65, at page 329
133 Switzman, supra, note 80, at page 306
134 Switzman, supra note 80, at pages 306-307
environment, it can be argued, is, in essence, 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”\textsuperscript{135}. What could be more fundamental to the democratic state than the existence and well-being of the sovereign people?

The inherent nature of the right to a healthy environment, which the public trust protects through preventing the substantial impairment of the resources necessary to maintain the right, has been recognized by the Supreme Court of the Philippines in \textit{Minors Oposa v. Secretary of the Department of the Environment and Natural Resources} \textsuperscript{136} (“\textit{Minors Oposa}”), where the Court compellingly reasoned:

“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.” [emphasis added]

The embedding of this right in the constitution is important because constitutions are meant to endure through time. As Lynda Collins writes in \textit{Safeguarding the Longue Duree, supra, note 135} at 539: “A constitution not grounded in a healthy, sustainable environment is a paper temple – a mere recitation of rights with no real guarantee of their survival over time”. As the Supreme Court stated in \textit{Hunter v. Southam}\textsuperscript{137} : “[a] statute defines present

\begin{footnotes}
\item[135] Lynda Collins, “\textit{Safeguarding the Longue Duree: Environmental Rights in the Canadian Constitution}” (2015) 71 SCLR (2d) 519 at 522
\item[136] 33 ILM 75 (1994) at 187
\item[137] [1984] 2 SCR 145 at para 16
\end{footnotes}
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”.

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 our Constitution because it ensures that government will protect, or be required to protect, the resources necessary for a viable environment and the well-being, and indeed the survival, of the population. Through the public trust, government authority in relation to those resources must be guided by its fiduciary obligations to the public.

McLachlin, at page 150 of her essay, Unwritten Constitutional Principles, supra, note 114 confirms this point when she states that government should not be allowed to kill their citizens indirectly through “degradation of the environment”. 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 democratic constitution. 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 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 re THE PUBLIC TRUST AS AN UNDERLYING CONSTITUTIONAL PRINCIPLE

It is now 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 to the fundamental norms of democracy or to human capacity and human society, or to the proper functioning of the state, that cannot be resolved by recourse to the written texts. A number of such principles have already been recognized by the Supreme Court 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, such as 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 citizens, 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 the 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 to account for its participation in the degradation of those resources. There is a gap in the written constitutional texts. That gap should be filled by the recognition of the public trust as an underlying principle.