

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

**ONTARIO PLACE PROTECTORS**

**APPELLANT**

AND:

**HIS MAJESTY THE KING IN RIGHT OF ONTARIO AND  
ATTORNEY GENERAL OF ONTARIO**

**RESPONDENTS**

AND:

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**INTERVENERS**

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**FACTUM**

**(ONTARIO PLACE PROTECTORS, APPELLANT)**

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### A. Overview

1. The appellant, Ontario Place Protectors (“OPP” or the “appellant”) has challenged the constitutionality of the *Rebuilding Ontario Place Act, 2023* (the “ROPA”).<sup>1</sup>

#### (i) Section 96 Core Jurisdiction

2. The *ROPA* is virtually unprecedented legislation. It immunizes almost all government conduct within its scope and takes away almost all rights to challenge the government in court. The only two limited exceptions are applications for judicial review, and proceedings to enforce aboriginal or treaty rights under the *Constitution Act, 1982*.<sup>2</sup> All other court proceedings are barred, and all remedies are precluded, outside of those limited exceptions.

3. Section 96 of the *Constitution Act, 1867*<sup>3</sup> guarantees the role of the provincial superior courts in maintaining the rule of law as courts of inherent and general jurisdiction descended from the Royal Courts of Justice. Legislation cannot detract from the “core jurisdiction” of the superior courts. “Core jurisdiction” has not been exhaustively defined, but includes “that which enables” the superior court “to fulfil itself as a court of law”,<sup>4</sup> including “review of the constitutional validity of laws, enforcing court orders, controlling the court’s process, and its residual jurisdiction as a court of original general jurisdiction.”<sup>5</sup>

4. The rule of law is inextricably bound up with the role of s. 96 courts, who act as its guardians. The superior courts play a critical role, in particular, in ensuring government accountability and in maintaining public confidence that those who are entrusted with governing are subject to laws enforceable by an independent judiciary. This role predates Confederation.

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<sup>1</sup> [Rebuilding Ontario Place Act, 2023, S.O. 2023, c. 25, Sched. 2 \[ROPA\]](#).

<sup>2</sup> *Constitution Act, 1982*, [being Schedule B to the Canada Act 1982 \(U.K.\), 1982, c. 11](#).

<sup>3</sup> *Constitution Act, 1867*, [30 & 31 Victoria, c. 3](#), reprinted in R.S.C. 1985, Appendix II, No. 5.

<sup>4</sup> *MacMillan Bloedel Ltd. v. Simpson*, [\[1995\] 4 S.C.R. 725](#), at [para. 30](#) [*MacMillan Bloedel*], citing I. H. Jacob, “The Inherent Jurisdiction of the Court” (1970) 23:1 Current Legal Problems”, at p. 27, [**Jacob**] Appellant’s Book of Authorities [**ABOA**], Vol. I, Tab 21, p. 420.

<sup>5</sup> *Reference re Code of Civil Procedure (Que.)*, art. 35, [2021 SCC 27](#), at [para. 68](#) [*Quebec Civil Code Ref.*].

5. In *Trial Lawyers*, this Court held that “[i]f people cannot challenge government actions in court... the government will be, or be seen to be, above the law.”<sup>6</sup> The appellant submits that if s. 96 is infringed by court fees that dissuade some litigants, but do not prevent others from coming to the courts to have their “questions of private and public law” decided, and if “holding the state to account” is arguably the most important of these questions, then s. 96 must also be infringed by a statute that provides almost absolute immunity to the government for conduct both past and future, bars almost all proceedings against them, and precludes the court from granting remedies.

6. This Court further held in the *Quebec Civil Code Reference* that a contextual, multi-factored analysis is required to determine whether a law “crosses the line” in failing to maintain the rule of law through the protection of the judicial role.<sup>7</sup> On this analysis, the *ROPA* goes too far. Section 17 of the *ROPA* bars declaratory actions, and rules out damages even for bad faith or abuse of power. It places restrictions on judicial review applications that will make them ineffectual in many cases. It falls below the floor of the jurisdiction exercised by superior courts at Confederation. It even (on its face) precludes claims for *Charter* damages. As such, it infringes the core jurisdiction of s. 96 courts, and must be struck down.

(ii) *The Doctrine of Public Trust*

7. The doctrine of public trust includes the principle that certain natural and cultural assets are essential to the well-being of the public, and that the state must safeguard them for the benefit of all. The doctrine is firmly rooted in English common law and forms part of Canada’s inherited constitutional structure. It is reflected in the text and structure of the *Constitution Act, 1867* and is firmly established in other common law jurisdictions. It has been considered in Canada, and has never been rejected. Accordingly, this Honourable Court is asked to recognize and expressly affirm the doctrine as an Unwritten Constitutional Principle (“UCP”).

8. In this case, the doctrine of public trust reinforces other recognized UCPs, including the rule of law and judicial independence. It is of sufficient normative weight to constrain governmental action. When properly recognized as an UCP, the doctrine operates on two levels in

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<sup>6</sup> *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, [2014 SCC 59](#), at [para. 40](#) [*Trial Lawyers*].

<sup>7</sup> [Quebec Civil Code Ref.](#), at [para. 86](#).

this appeal: it supplies an independent foundation for a declaration that the Crown has breached its obligations as trustee of Ontario Place’s irreplaceable environmental and heritage assets; and it gives concrete constitutional content to the s. 96 violation, identifying precisely what s. 17 of the *ROPA* has removed. Section 17’s elimination of all causes of action, including for bad faith and breach of trust, is the antithesis of the Crown’s trustee obligations and cannot be accomplished by ordinary legislation. Properly understood and applied, the doctrine supports a declaration that s. 17 of the *ROPA* is constitutionally invalid.

## **B. Statement of Facts**

### *(i) The ROPA*

9. Late in 2023, Ontario passed the *ROPA*. The *ROPA* was passed quickly, without legislative debate: First Reading November 27, 2023, Second Reading and Third Reading December 5, 2023, and Royal Assent December 6, 2023.<sup>8</sup>

10. Sections 9, 10 and 11 of the *ROPA* exempt Ontario Place lands from the *Environmental Assessment Act*, the *Ontario Heritage Act*, and noise control by the City of Toronto subject to further provincial regulation, which has not been enacted.<sup>9</sup>

11. Section 17 of the *ROPA* purports to negate all legal remedies that could ordinarily be sought, as well as numerous other legislative protections developed over many decades.

12. Subsection 17(1) of the *ROPA* has broad application to, among others, “the Crown, the Corporation, any current or former member of the Executive Council or any current or former employee, officer or agent of or advisor to the Crown or the Corporation”.<sup>10</sup>

13. The balance of s. 17 of the *ROPA* generally extinguishes causes of action, bars proceedings, and denies any remedy under any statute “available to any person in connection with anything referred to in ss. (1) against any person referred to in that subsection” with the purported exception

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<sup>8</sup> [Bill 154, An Act to enact the Recovery Through Growth Act \(City of Toronto\), 2023 and the Rebuilding Ontario Place Act, 2023.](#)

<sup>9</sup> [ROPA, ss. 9, 10 and 11.](#)

<sup>10</sup> [ROPA, ss. 17\(1\) and 17\(2\).](#)

of judicial review applications and proceedings in respect of s. 35 of rights under the *Constitution Act, 1982*.<sup>11</sup>

(ii) *Affidavit Evidence*

14. The Appellant filed the following affidavits in support of its application:
- a) Diane Chin – Architectural Conservancy of Ontario<sup>12</sup>
  - b) Mathieu Dormaels – President – ICOMOS Canada<sup>13</sup>
  - c) Javier Ors Ausín – Program Manager – World Monuments Fund<sup>14</sup>
  - d) Elsa Lam – Editor – Canadian Architect Magazine<sup>15</sup>
  - e) Elizabeth Pagliacolo – Editor in Chief – Azure Magazine<sup>16</sup>
  - f) Ian Chodikoff – Architect, MArch, MAUD, OAA, FRAIC<sup>17</sup>
  - g) Joël León – Executive Director – Toronto Society of Architects<sup>18</sup>
  - h) John Lorinc – Journalist<sup>19</sup>
  - i) John Sewell – Former Mayor – City of Toronto<sup>20</sup>
  - j) Lynn Morrow – The Friends of the Golden Horseshoe<sup>21</sup>
  - k) Norman Di Pasquale – Co-Chair – Ontario Place for All<sup>22</sup>
  - l) Sandford Borins – Professor of Public Management Emeritus – U of T<sup>23</sup>
  - m) Tony Morris – Conservation Policy and Campaigns Director – Ontario Nature<sup>24</sup>
  - n) Charles A. Birnbaum – President – The Cultural Landscape Foundation<sup>25</sup>
  - o) Cynthia Wilkey – former Co-Chair for Ontario Place for All<sup>26</sup>

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<sup>11</sup> [ROPA, s. 17](#).

<sup>12</sup> Affidavit of Diane Chin, at para. 1, Record of the Appellant [AR] Tab 30, p. 293.

<sup>13</sup> Affidavit of Mathieu Dormaels, at para. 1, AR Tab 34, p. 318.

<sup>14</sup> Affidavit of Javier Ors Ausín, at para. 1, AR Tab 26, p. 255.

<sup>15</sup> Affidavit of Elsa Lam, at para. 1, AR Tab 22, p. 165.

<sup>16</sup> Affidavit of Elizabeth Pagliacolo, at para. 1, AR Tab 31, p. 299.

<sup>17</sup> Affidavit of Ian Chodikoff, at para. 1, AR Tab 23, p. 178.

<sup>18</sup> Affidavit of Joël León, at para. 1, AR Tab 24, p. 185.

<sup>19</sup> Affidavit of John Lorinc, at para. 1, AR Tab 25, p. 248.

<sup>20</sup> Affidavit of John Sewell, at para. 1, AR Tab 27, p. 267.

<sup>21</sup> Affidavit of Lynn Morrow, at para. 1, AR Tab 32, p. 305.

<sup>22</sup> Affidavit of Norman Di Pasquale, at para. 1, AR Tab 28, p. 273.

<sup>23</sup> Affidavit of Sandford Borins, at para. 1, AR Tab 29, p. 282.

<sup>24</sup> Affidavit of Tony Morris, at para. 1, AR Tab 33, p. 313.

<sup>25</sup> Affidavit of Charles A. Birnbaum, at para. 1, AR Tab 21, p. 159.

<sup>26</sup> Affidavit of Cynthia Wilkey, at para. 1, AR Tab 35, p. 322.

p) Catherine Nasmith – Heritage Architect - Director of Ontario Place Protectors<sup>27</sup>

15. The following evidence highlights the issues giving rise to the appellant’s claim that the doctrine of public trust is engaged:

*Heritage/Culture/Architecture*

i. “Every two years World Monuments Fund identifies 25 heritage places from around the world which are at risk of loss or serious damage. We publish these 25 sites in a periodical called Watch and our website: [www.wmf.org](http://www.wmf.org). In 2020, WMF identified Ontario Place as a highly significant monument of the 20th century and included it in the 2020 Watch to put the international spotlight on its important social and heritage values and its risk of disappearance. It is the sole Canadian site included in that list, which also included the Cathedral of Notre Dame in Paris, the Sacred Valley of the Incas in Peru, and Easter Island in Chile. We have only placed three Canadian sites on our Watch list over the more than 20 years of the Watch existence .... I believe the loss of Ontario Place would be a devastating loss not only to the Canadian people, but also to the international community.” Javier Ors Ausín – Program Manager – World Monuments Fund<sup>28</sup>

*Environmental*

ii. “The significance of preserving parklands as an element of Ontario Place was voiced through various applications: the preservation of parks for family friendly public use; a nature haven within the city; habitat preservation for animals; ecology research and education; conservation activities; and an evergreen forest that echoes the landscape of Ontario.” Joël León – Executive Director – Toronto Society of Architects<sup>29</sup>

*Public Consultation*

iii. “Bill 154 also states that no legal action may be taken against the government or any of its members for anything done regarding Ontario Place. The Bill was approved in a single day without public hearings and without debate in the Legislative Assembly. The province can proceed in spite of any laws, exempting itself from any court oversight. Extraordinary.” John Sewell – Former Mayor – City of Toronto<sup>30</sup>

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<sup>27</sup> Affidavit of Catherine Nasmith, at para. 1, AR Tab 36, p. 334.

<sup>28</sup> Affidavit of Javier Ors Ausin, Exhibit A, AR Tab 26, p. 258.

<sup>29</sup> Affidavit of Joël León, Exhibit A, at p. 68, AR Tab 24, p. 209.

<sup>30</sup> Affidavit of John Sewell, Exhibit A, AR Tab 27, p. 270.

*Public Trust*

- iv. “If a government can break its own laws and then avoid any challenge to such actions by passing a new law saying the old one never applied, it makes those laws meaningless. It is our view that the manner in which the Ontario Government has proceeded with its Ontario Place scheme both before and specifically in the enactment of Bill 154 is unprecedented and has broken the public trust.” Lynn Morrow – The Friends of the Golden Horseshoe<sup>31</sup>

16. Upon reviewing this evidence, the Application Judge and the Court of Appeal acknowledged that “Ontario Place enjoys some renown, has received awards and designations, and that there are people and groups who care deeply about its fate.”<sup>32</sup>

**C. Procedural History**

*(i) Application Judge’s Decision*

17. The Application Judge found the appellant did not have standing to bring the application, and in the event this conclusion was incorrect, further considered the merits of the application.<sup>33</sup>

18. The Application Judge rejected the appellant’s argument that s. 17 of the *ROPA* impermissibly infringes s. 96, finding that the provision merely extinguishes specific causes of action in a single context rather than removing general access to the courts. The Application Judge declined to make a declaration of invalidity in the absence of any concrete legal claim by the appellant.<sup>34</sup>

19. The Application Judge also declined to grant declaratory relief on the basis of the doctrine of public trust, finding that: the doctrine has never been recognized by a Canadian court, and even if it existed and applied to Ontario Place, a declaration of breach without the ability to strike down

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<sup>31</sup> Affidavit of Lynn Morrow, Exhibit A, AR Tab 32, p. 307.

<sup>32</sup> *Ontario Place Protectors v. HMK in Right of Ontario*, 2024 ONSC 4194, AR Tab 3, p. 4 [Application Decision], at [paras. 10-11](#) and *Ontario Place Protectors v. Ontario*, 2025 ONCA 183, AR Tab 5, p. 20 [Court of Appeal Decision], at [para. 10](#).

<sup>33</sup> Application Decision, at [para. 2](#).

<sup>34</sup> Application Decision, at [paras. 33-42](#).

the legislation would serve no practical purpose.<sup>35</sup> The application was dismissed,<sup>36</sup> without costs.<sup>37</sup>

(ii) *Court of Appeal's Decision*

20. The Court of Appeal reversed the Application Judge and granted the appellant standing.<sup>38</sup> The balance of the appeal was dismissed with costs.<sup>39</sup>

21. The Court of Appeal concluded that the right of judicial review had been preserved and, otherwise, that the *ROPA* constitutionally immunizes the Crown from liability related to the Ontario Place redevelopment by extinguishing certain statutory and common law causes of action, which falls within the Legislature's authority to establish, amend, or repeal causes of action. For the Court of Appeal, this did not violate s. 96 of the *Constitution Act, 1867* because the *ROPA* neither usurps the superior courts' core jurisdiction nor prevents them from functioning as courts of inherent general jurisdiction.<sup>40</sup>

22. The Court of Appeal rejected the appellant's argument that the *ROPA* breaches the doctrine of public trust, finding that no such doctrine has ever been recognized in Canadian law and that post-*Canfor* developments, including two Federal Court of Appeal decisions striking similar claims, actively undermine its existence. For the Court of Appeal, even if such a doctrine were to eventually be adopted, the appellant failed to define its nature or scope, and could not explain how democratically enacted legislation could be subject to it or what purpose a declaration would serve given its lack of constitutional force.<sup>41</sup>

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<sup>35</sup> Application Decision, at [paras. 48-56](#).

<sup>36</sup> [Application Decision](#).

<sup>37</sup> Costs decision of the Superior Court of Justice, dated July 26, 2024 (unreported), AR Tab 4, p. 17.

<sup>38</sup> Court of Appeal Decision, at [paras. 17-28](#).

<sup>39</sup> Court of Appeal Decision, at [paras. 58](#) and [60](#).

<sup>40</sup> Court of Appeal Decision, at [paras. 33-37, 40-45](#).

<sup>41</sup> Court of Appeal Decision, at [paras. 46-57](#).

**PART II – ISSUES**

23. The appellant seeks a declaration that s. 17 of the *ROPA* is of no force and effect. The following questions arise:

**Question #1** – Whether s. 17 of the *ROPA* is constitutionally invalid because it trenches on the core jurisdiction of Superior Courts under s. 96 of the *Constitution Act, 1867*; and

**Question #2** – Whether the doctrine of public trust exists and applies so as to invalidate s. 17 of the *ROPA*.

24. The appellant's position on these issues is:

**Question #1** – Provinces cannot legislate to remove the core jurisdiction of the superior courts. Whether a law crosses the line and trenches on this core jurisdiction requires a contextual and multi-factor approach. Core jurisdiction must include the judicial power to ensure government accountability, consistent with the governing principles of s. 96 and its interrelationship with the rule of law, and historical practice at Confederation. The *ROPA* goes too far in immunizing government conduct, while failing to preserve meaningful access to the superior courts to challenge such conduct.

**Question #2** – The doctrine of public trust has long been recognized in English common law. It has been inherited by Canada as part of its constitutional framework. It holds that key natural and cultural resources are fundamental to the public welfare and government holds them as a trustee for the benefit of all. The doctrine is well developed in other common law jurisdictions. It has been discussed and never rejected in Canada. It can and ought to be formally recognized as an UCP in Canadian law. When properly interpreted and applied, the doctrine should also result in a declaration that s. 17 of the *ROPA* is constitutionally invalid.

## PART III – STATEMENT OF ARGUMENT

### The Standard of Review – Correctness

25. Both issues raised in this appeal are questions of constitutional law, reviewable on the standard of correctness. As this Court held in *Housen*: “[o]n a pure question of law, the basic rule with respect to the review of a trial judge’s findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: *Kerans*, *supra*, at p. 90.”<sup>42</sup> While this case does not arise from an administrative decision, *Vavilov* confirmed the basic principle that correctness applies where a case raises a “constitutional question,” reasoning that such questions “must be answered the same way in every case, regardless of who is asking, and incorrect answers are not acceptable.”<sup>43</sup> The Court further held that correctness is required for “questions of law of central importance to the legal system as a whole.”<sup>44</sup> The present appeal engages both categories.

26. The first question, whether the *ROPA* infringes s. 96 of the *Constitution Act, 1867* by stripping superior courts of core jurisdiction, is squarely a constitutional question. Whether a legislative provision trenches upon the protected core of superior court powers is not a question on which reasonable disagreement is permissible: it either does or it does not.

27. The second question, whether the doctrine of public trust exists as an UCP and applies here, is equally a question of law. The identification and application of UCPs are matters affecting the architecture of Canada’s constitutional framework. No standard lower than correctness is appropriate. This Court is, therefore, able to answer both questions afresh.

### Question #1 – Does the *ROPA* Remove s. 96 Superior Court Core Jurisdiction?

#### A. The Scope of the *ROPA*

28. Section 17 of the *ROPA* is drafted in the widest possible terms. As a basic rule, it provides *absolute immunity* to the Crown, Ontario Infrastructure and Lands Corporation, any current or former member of the Executive Council, or any current or former employee, officer, or agent of

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<sup>42</sup> *Housen v. Nikolaisen*, [2002 SCC 33](#), at [para. 8](#).

<sup>43</sup> *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019 SCC 65](#), at [para. 55](#) [*Vavilov*].

<sup>44</sup> *Vavilov*, at [para. 59](#).

or advisor to the Crown or the Corporation (collectively, “the Crown and Related Entities”) for anything connected to the enactment of the *ROPA* or any subordinate instrument under the *ROPA*, anything done or not done in accordance with *ROPA* or any such subordinate instrument, any impact on rights in real property, contract, or other rights resulting from the above, or any representation or other conduct relating to the transfer of vested real property under s. 2 of the *ROPA*, whether past or future (“Immunized Crown Conduct”).<sup>45</sup>

29. Section 17 of the *ROPA* precludes *any remedy* for Immunized Crown Conduct, subject only to some highly specific provisions on compensation for the vesting of real property in the Crown.<sup>46</sup> The section also generally bars court proceedings against the Crown and Related Entities.

30. There are only two limited express exceptions: applications for judicial review,<sup>47</sup> and causes of action arising from s. 35 aboriginal or treaty rights.<sup>48</sup>

31. This wholesale immunization of Crown conduct, for the benefit of the Crown and Related Entities, is inimical to the rule of law – a fundamental aspect of the core jurisdiction of s. 96 courts, along with the principle of judicial independence.<sup>49</sup> The effect of the *ROPA* is to remove almost all power of the superior courts to hold the Crown and Related Entities accountable for unlawful acts. As such, s. 17 impermissibly seeks to strip the superior courts of a power that is essential to our constitutional framework.

## **B. Prior Recognition of s. 96 Courts’ Core Jurisdiction to Hold Governments Accountable**

32. In *A.G. Canada v. Law Society of British Columbia* (“*Jabour*”),<sup>50</sup> this Court held that Parliament lacked the power to take away from the provincial superior courts the jurisdiction to rule on the constitutionality of federal legislation. In part this was based upon the special position of s. 96 courts in the federal system, with the courts being organized by the provinces, but presided over by federally-appointed judges, so that the provincial superior courts “straddled the divide” between federal and provincial powers. However, this Court also drew on an equally fundamental

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<sup>45</sup> [ROPA, s. 17\(1\)](#).

<sup>46</sup> [ROPA, s. 17\(2\)](#).

<sup>47</sup> [ROPA, s. 17\(4\)](#).

<sup>48</sup> [ROPA, s. 17\(7\)](#).

<sup>49</sup> [Trial Lawyers](#), at [para. 40](#); [MacMillan Bloedel](#), at [paras. 37-38](#).

<sup>50</sup> *A.G. Can. v. Law Society of B.C.*, [\[1982\] 2 S.C.R. 307](#) [*Jabour*].

reason – that as courts of general jurisdiction, descended from the Royal Courts of Justice, provincial superior courts were competent to answer any question of law that came before them, including the validity of statutes they were tasked with administering. Parliament therefore lacked the power to strip s. 96 courts of “a judicial power fundamental to a federal system as described in the *Constitution Act*”.<sup>51</sup>

33. In a similar vein, this Court held in *Crevier* that s. 96 provided a guarantee that a provincial legislature could not remove the supervisory jurisdiction of the provincial superior courts over inferior tribunals on questions of tribunal jurisdiction – a clear “hallmark of a superior court.”<sup>52</sup> This Court affirmed in *Vavilov* that s. 96 means that “legislatures cannot shield administrative decision making from curial scrutiny entirely.”<sup>53</sup> The supervisory jurisdiction that was found to be part of the core jurisdiction of s. 96 courts in *Crevier* and *Vavilov* is the historical successor to the prerogative writs described below.

34. Cases subsequent to *Jabour* and *Crevier* have repeatedly stressed the connection between s. 96 and the UCP of the rule of law, including as it applies to government. As noted by Chief Justice McLachlin in *Trial Lawyers Association*, “[i]f people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law.”<sup>54</sup>

35. The appellant submits that these authorities are not isolated examples of s. 96’s ambit. Rather, they point to a broader principle – that the core jurisdiction of s. 96 courts must include the effective ability to ensure that governments are bound by the rule of law, and that they are accountable for breaches of the law. As this Court held in *Trial Lawyers’ Association*:

The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To

<sup>51</sup> *Jabour*, at p. 328 [Emphasis added].

<sup>52</sup> *Crevier v. A.G. (Québec) et al.*, [1981] 2 S.C.R. 220, at pp. 234-237. [*Crevier*]

<sup>53</sup> *Vavilov*, at para. 24.

<sup>54</sup> *Trial Lawyers*, at para. 40.

prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*.<sup>55</sup>

36. If s. 96 is infringed by court fees that dissuade some litigants, but do not prevent others from coming to the courts to have their “questions of private and public law” decided, and if “holding the state to account” is regarded as arguably the most important of these questions, then it follows that s. 96 is likewise infringed by a statute that provides almost absolute immunity to the Crown and Related Entities for conduct both past and future, bars almost all proceedings against them, and precludes the court from granting remedies.

37. Framing the core jurisdiction of s. 96 courts in terms of a broader principle that governments are bound by the rule of law and are accountable for breaches of the law, and that legislatures cannot remove the jurisdiction of the superior courts to ensure government accountability, is supported by principle. At a minimum, legislatures cannot remove this jurisdiction to such an extent that it falls below the floor that existed at Confederation. The rule of law is a central consideration in many key s. 96 precedents.<sup>56</sup> It is also a key UCP that this Court has described as one of the “fundamental and organizing principles of the Constitution.”<sup>57</sup> It finds written expression in the preamble to the *Constitution Act, 1982*,<sup>58</sup> and is a feature of the unwritten “Constitution similar in principle to that of the United Kingdom” referred to in the preamble to the *Constitution Act, 1867*.<sup>59</sup> Using the rule of law as an interpretive aid to find that the scope of “core

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<sup>55</sup> [Trial Lawyers](#), at [para. 32](#).

<sup>56</sup> *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, [2020 SCC 4](#), at [para. 47](#) [*Uashaunnuat*]; [Trial Lawyers](#), at [para. 39](#): “The s. 96 judicial function and the rule of law are inextricably intertwined”; *Reference re Amendments to the Residential Tenancies Act (N.S.)*, [\[1996\] 1 S.C.R. 186](#), at [para. 72](#): “Indeed, the constitutionally guaranteed existence of [s. 96 courts] may be seen as one of the ultimate safeguards of the rule of law in this country”; *Ontario v. Criminal Lawyers’ Association of Ontario*, [2013 SCC 43](#), at [paras. 17-19](#); *MacMillan Bloedel*, at [para. 38](#): “The core jurisdiction of the provincial superior courts comprises those powers which are essential to the administration of justice and the maintenance of the rule of law”; *Highwood Congregation of Jehovah’s Witnesses (Judicial Committee) v. Wall*, [2018 SCC 26](#), at [para. 13](#); *Quebec Civil Code Ref.*, at [paras. 46-52](#).

<sup>57</sup> *Reference re Secession of Quebec*, [\[1998\] 2 S.C.R. 217](#), at [para. 32](#) [*Quebec Secession Ref.*].

<sup>58</sup> *Constitution Act, 1982*, [Part 1](#): “Canada is founded upon principles that recognize . . . the rule of law”.

<sup>59</sup> *Ontario (Attorney General) v. G*, [2020 SCC 38](#), at [para. 96](#); *The Queen v. Beauregard*, [\[1986\] 2 S.C.R. 56](#), at [p. 72](#).

jurisdiction” under s. 96 includes ensuring government accountability, accords with the constitutional architecture of our legal system.<sup>60</sup>

38. As this Court noted in *Quebec Civil Code Reference*:

In short, a province which takes away an aspect of the court’s core jurisdiction contravenes s. 96 — a provision whose purpose lies in the “maintenance of the rule of law through the protection of the judicial role” (*Reference re Remuneration of Judges (1997)*, at para. 88 (emphasis added); *Trial Lawyers*, at para. 39). In every case, the line that must not be crossed will be dependent upon a contextual and multi-factored analysis.<sup>61</sup>

39. On a contextual and multi-factored analysis, as set out below, the *ROPA* fails to maintain the rule of law through the protection of the judicial role, and thereby crosses the line.

**C. The *ROPA* Crosses the Line by Failing to Protect the Core Jurisdiction of s. 96 Courts**

40. The *ROPA* goes too far in immunizing the Crown and Related Entities from accountability, prohibiting proceedings, and stripping the superior courts of the power to grant remedies. It treats the “core jurisdiction” of the superior courts as no more than the sum of unconnected precedents. This interpretation of s. 96 should be rejected.

41. Subsection 17(4) preserves the supervisory jurisdiction of the superior court considered in *Crevier* and *Vavilov*. Otherwise, apart from causes of action based on aboriginal and treaty rights, the Crown and Related Entities are granted absolute immunity from court proceedings.

42. The Court of Appeal held that s. 17(4) preserves the traditional remedies on judicial review, as set out in the *Judicial Review Procedure Act* (“*JRPA*”) – the prerogative writs of *mandamus*, prohibition, and *certiorari*, as well as declarations and injunctions where a “statutory power of decision” is at issue.<sup>62</sup> While this conclusion may well be supportable as a necessary implication of s. 17(4) – following the maxim *ubi jus, ibi remedium* (there is no right without a remedy) – with respect, the Court of Appeal’s reliance upon s. 17(2) to reach this result appears faulty. On its face, s. 17(2) precludes all remedies, with no exemption for judicial review applications.

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<sup>60</sup> *Toronto (City) v. Ontario (Attorney General)*, [2021 SCC 34](#), at [para. 55](#) [*City of Toronto*].

<sup>61</sup> [Quebec Civil Code Ref.](#), at [para. 86](#) [Emphasis added].

<sup>62</sup> Court of Appeal Decision, at [para. 34](#).

43. The Court of Appeal appears to have misinterpreted the words “[e]xcept as otherwise provided under section 4” in s. 17(2), as a reference to subsection 17(4).<sup>63</sup> Not only does this go against drafting conventions, but it is contrary to the statutory context. Section 4 sets out a procedure for an entity whose property rights are vested in the Crown under the *ROPA* to claim compensation, and to arbitrate if agreement is not reached.<sup>64</sup> Under the Court of Appeal’s apparent misreading, no remedy could be granted in such an arbitration. Moreover, s. 17(2) goes on to refer to “a regulation under clause 19 (c)”, which sets out a power to make regulations “governing compensation under section 4” in terms that plainly refer to compensation under that section.<sup>65</sup>

44. On its face, s. 17(2) bars all remedies including those available under the *JRPA*. An exception must therefore be read into this subsection to preserve an effective right of judicial review guaranteed under s. 96 of the *Constitution Act, 1867*.

45. Even accepting that s. 17(4) preserves by necessary implication the remedies available under the *JRPA*,<sup>66</sup> this does not provide the full range of relief that has historically proven to be necessary to ensure the accountability of the Crown and its servants and agents. Damages are unavailable on judicial review. Damages for bad faith actions or misfeasance of public officers are also precluded by s. 17(2) of the *ROPA*. The effect is that bad faith actions of Crown agents or employees, such as those in *Roncarelli v. Duplessis*,<sup>67</sup> will be immunized from effective redress.

46. The Court of Appeal also relied upon its prior decision in *Poorkid Investments Inc. v. Ontario (Solicitor General)*,<sup>68</sup> in which the Court found no violation of s. 96 in a statutory requirement set out in s. 17 of the *Crown Liability and Proceedings Act, 2019* to seek leave of the

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<sup>63</sup> Court of Appeal Decision, at [para. 35](#).

<sup>64</sup> *ROPA*, at [s. 4\(10\)](#).

<sup>65</sup> The *ROPA* uses the term “subsection” 69 separate times, including 9 times in s. 17, and in each case clearly refers to a subsection within a section. Conversely, the *ROPA* uses the term “section” 49 times, including 6 times in s. 17, and in every other case clearly refers to a section, not a subsection. There is no possibility that the legislative drafters confused these words.

<sup>66</sup> *Judicial Review Procedure Act*, [R.S.O. 1990, c. J.1](#) [*JRPA*].

<sup>67</sup> *Roncarelli v. Duplessis*, [\[1959\] S.C.R. 121](#) [*Roncarelli*].

<sup>68</sup> Court of Appeal Decision, at [para. 41](#), citing *Poorkid Investments Inc. v. Ontario (Solicitor General)*, [2023 ONCA 172](#) [*Poorkid*]. The above assumes that *Poorkid* is correctly decided.

court before proceeding with a claim for misfeasance in public office or bad faith in the performance of public duties. With respect, there is a substantial difference between a procedural leave requirement that preserves the “judicial role” in ensuring Crown accountability, and a prohibition on bringing any proceedings or granting any remedy for all Crown conduct, whether past or future, that comes within the scope of s. 17(1) of the *ROPA*. Whether or not the former “crosses the line” on a multi-factor, contextual analysis, the latter certainly does.

47. The above reasoning, that the limited nature of judicial review as preserved in the *ROPA* makes it ineffective to preserve the core jurisdiction of the superior courts to ensure Crown accountability, applies with even more force in the context of *Charter* rights. As this Court said in *Nelles*, “access to a Court of competent jurisdiction to seek a remedy is essential for the vindication of a constitutional wrong.”<sup>69</sup> The role of the superior courts is crucial to ensuring “that the subject always has access to a remedy for a violation of his or her *Charter* rights and freedoms.”<sup>70</sup>

48. On its face, the *ROPA* precludes a proceeding under the *Charter*, except insofar as the *Charter* may be raised in an application for judicial review.<sup>71</sup> This would not only exclude damages under s. 24 of the *Charter*, but could also put the claimant in the procedural straightjacket of an application with short timelines, restrictions on the evidence that may be obtained or adduced, and limitations on the court’s ability to find facts if material facts are in dispute. The *JRPA* requires that judicial review applications be commenced within 30 days of the impugned “decision”, subject to the court’s discretion to extend the time.<sup>72</sup> The Ontario Superior Court has held that judicial review applications under the *JRPA* are inappropriate to resolve factual disputes.<sup>73</sup> Further, Borins J. of the Divisional Court has held that a pure *Charter* challenge to a regulation cannot be brought under the *JRPA* because there is no “statutory power of decision” at issue.<sup>74</sup>

49. The Court of Appeal in the present case held that “[s]ection 17(2) of *ROPA* does not purport to immunize the Ontario government from liability for acts in breach of the constitution and could

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<sup>69</sup> *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196.

<sup>70</sup> *Kourtessis v. Minister of National Revenue*, [1993] 2 S.C.R. 53, at p. 114 [*Kourtessis*].

<sup>71</sup> Or potentially a proceeding based upon s. 35 treaty or aboriginal rights.

<sup>72</sup> *JRPA*, s. 5.

<sup>73</sup> *Di Cienzo v. Attorney General of Ontario*, 2017 ONSC 1351, at para. 16.

<sup>74</sup> *Falkiner v. Ontario (Ministry of Community and Social Services)*(1996), 140 D.L.R. (4th) 115 (Div. Ct.), at p. 132, ABOA, Vol. I, Tab 6, p. 84.

not do so in any event.”<sup>75</sup> With respect, the terms of s. 17 are drafted so broadly that on their plain and ordinary meaning, they would preclude an action for *Charter* damages, especially given that s. 17 expressly exempts proceedings based on s. 35 aboriginal or treaty rights while remaining silent on the *Charter*. Section 17 would also on its face preclude any action for injunctive relief under the *Charter*, contrary to this Court’s holding in *Doucet-Boudreau*.<sup>76</sup> It is accurate that s. 17 cannot constitutionally immunize the government from *Charter* liability, but this demonstrates a defect in the statute, not a feature of it.

50. Further, the terms of ss. 17(1) and (2) are directly contrary to this Court’s recent decision in *Power*, to the extent that a case may be brought alleging that the *ROPA* contravenes the *Charter* and is clearly unconstitutional, or that its enactment was in bad faith or an abuse of power.<sup>77</sup> In *Power*, this Court confirmed that there is no absolute immunity from *Charter* damages for the enactment of unconstitutional legislation. Yet absolute immunity for the enactment of *ROPA* is exactly what ss. 17(1) and (2) provide. Whether or not they would be effective to prevent an award of *Charter* damages in a case that met the “high threshold” set in *Power*, this illustrates the potential need for yet another exception to be read into s. 17.

51. If more than one exception must be read into the plain words of s. 17 to support its validity, that raises the question of whether the whole section should be struck.

52. The *ROPA* also precludes access to the declaratory action, which is an established procedure for determining the legality of Crown conduct and may be used (in appropriate cases, and at the court’s discretion) even in aid of extrajudicial relief.<sup>78</sup> This Court has previously issued declarations despite the fact that any individual remedy was statute-barred.<sup>79</sup> Unlike a judicial review application, a declaratory action allows for discovery and provides greater scope for adducing evidence, and allows the court to make factual findings where the facts are in dispute.

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<sup>75</sup> Court of Appeal Decision, at [para. 44](#).

<sup>76</sup> *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003 SCC 62](#), at [para. 70](#).

<sup>77</sup> *Canada (Attorney General) v. Power*, [2024 SCC 26 \[Power\]](#), at para. 4.

<sup>78</sup> *Dumont v. Canada (Attorney General)*, [\[1990\] 1 S.C.R. 279](#).

<sup>79</sup> See for example *Manitoba Metis Federation Inc. v. Canada (Attorney General)*, [2013 SCC 14](#); *Shot Both Sides v. Canada*, [2024 SCC 12](#).

53. What distinguishes s. 17 from prior cases is its sheer scope. Subsection 17(3) eliminates the possibility of bringing proceedings at all, other than those discussed above, and s. 17(2) eliminates remedies “in contract, restitution, tort, misfeasance, bad faith, trust or fiduciary obligation, any equitable remedy or any remedy under any statute.” Ontario has over 1,200 statutes, and many more associated regulations. If this provision is allowed to stand, there will be few if any limits to the ability of legislatures to take away the superior courts’ ability to ensure government accountability under the rule of law. As this Court has recently held, the greater the removal of jurisdiction, the more likely the removal violates s. 96.<sup>80</sup>

54. While the appellant acknowledges that the legislature can create or abolish causes of action for policy reasons,<sup>81</sup> and can expand or limit substantive immunity subject to constitutional limitations, there surely comes a point at which absolute immunity “crosses the line” and becomes incompatible with the rule of law.<sup>82</sup> The scope of immunity set out in s. 17, together with the bar on proceedings and the removal of remedies, makes this legislation virtually unprecedented.

55. These features of s. 17 have also been adopted in other recent legislation in Ontario, including the *Greenbelt Act*<sup>83</sup> and the *Special Economic Zones Act, 2025* (“Bill 5”).<sup>84</sup> Immunity provisions of Bill 5 apply to “special economic zones” designated by the Lieutenant Governor in Council, in which designated projects may be exempted from any statutory requirement. The decision in this case will likely be a precedent for challenges to that legislation.

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<sup>80</sup> [Quebec Civil Code Ref.](#), at paras. 98-99.

<sup>81</sup> *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005 SCC 49](#) [*Imperial Tobacco*].

<sup>82</sup> *Ontario (Attorney General) v. Clark*, [2021 SCC 18](#), at [para. 63](#), per Côté J. (dissenting). The majority did not agree that the immunity at issue had reached that point but did not indicate disagreement with the concept.

<sup>83</sup> *Greenbelt Act, 2005*, [S.O. 2005, c. 1, s. 19](#), as amended by the *Greenbelt Statute Law Amendment Act, 2023*, [S.O. 2023, c. 22](#). This provision was upheld against a challenge based on s. 96 of the *Constitution Act, 1867* in *Minotar Holdings Inc. v. Ontario*, [2025 ONSC 1791](#) (appeal to the Court of Appeal for Ontario heard January 2026; decision under reserve).

<sup>84</sup> *Special Economic Zones Act, 2025*, [S.O. 2025, c. 4, Schedule 9, s. 7](#). See also [s. 5](#), setting out the power to exempt special projects from statutory requirements.

56. This Court has emphasized that the Constitution is a living document and is not “frozen” at the time of 1867.<sup>85</sup> In *Just*, this Court noted that in modern times “complete governmental immunity” has become “intolerable”. In *Imperial Tobacco*, this Court emphasized again that “exempting all government actions from liability would result in intolerable outcomes.”<sup>86</sup> The appellant submits that the *ROPA* crosses this line, to the extent that it can no longer be truly said that the rule of law is preserved. Indeed, it provides far less scope for challenging the conduct of the Crown and Related Entities than was available in the superior courts at the time of Confederation, as set out below. As such, it is inconsistent with s. 96 of the *Constitution Act, 1867*.

57. If the determination of “issues of private and public law” are the superior courts’ “very book of business”, and preventing this business from being done “strikes at the core of the jurisdiction of the superior courts”,<sup>87</sup> then the *ROPA* must infringe that core jurisdiction. Subject to the limited exceptions of judicial review applications and s. 35 causes of action, the *ROPA* leaves the superior court with no business to do. Moreover, the *ROPA* removes the ability to grant “any remedy” under statutes that allow superior courts to perform their functions, even to the extent that rights are preserved. These may include remedies that make litigation possible and effective, such as access to information and discovery under the *Rules of Civil Procedure*,<sup>88</sup> the *Courts of Justice Act*,<sup>89</sup> the *Ontario Evidence Act*,<sup>90</sup> the *Public Inquiries Act, 2009*,<sup>91</sup> the *Freedom of Information and Protection of Privacy Act*,<sup>92</sup> and various other statutes. If core jurisdiction includes “enforcing court orders, controlling the court’s process, and its residual jurisdiction as a court of original general jurisdiction”,<sup>93</sup> as this Court has held, then that core jurisdiction has been eviscerated. For these reasons, s. 17 must be found to be invalid.

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<sup>85</sup> See for example [Quebec Civil Code Ref.](#), at [paras. 53, 89](#).

<sup>86</sup> *Just v. British Columbia*, [\[1989\] 2 S.C.R. 1228](#), at [para. 16](#); *Imperial Tobacco*, at [para. 76](#). See also *Leroux v. Ontario*, [2020 ONSC 1994](#), at [para. 23](#), reversed on other grounds [2021 ONSC 2269 \(Div. Ct.\)](#), [2023 ONCA 314](#), application for leave dismissed, [\[2023\] S.C.C.A. No. 284](#).

<sup>87</sup> [Trial Lawyers](#), at [para. 32](#).

<sup>88</sup> *Rules of Civil Procedure*, [R.R.O. 1990, Reg. 194](#).

<sup>89</sup> *Courts of Justice Act*, [R.S.O. 1990, c. C.43](#).

<sup>90</sup> *Evidence Act*, [R.S.O. 1990, c. E.23](#).

<sup>91</sup> *Public Inquiries Act, 2009*, [S.O. 2009, c. 33, Sched. 6](#).

<sup>92</sup> *Freedom of Information and Protection of Privacy Act*, [R.S.O. 1990, c. F.31](#).

<sup>93</sup> [Quebec Civil Code Ref.](#), at [para. 68](#).

**D. The Governing Principles of s. 96 Support the Conclusion that “Core Jurisdiction” includes Ensuring Government Accountability**

58. Section 96 plays a key role in Canada’s constitutional architecture. This provision guarantees the role of the provincial superior courts as courts of general and inherent jurisdiction, inheriting the role of the Royal Courts of Justice from the United Kingdom.<sup>94</sup> They have jurisdiction over “all matters federal and provincial.”<sup>95</sup>

59. The fundamental principles underlying s. 96 and the organization of the judiciary are national unity and the rule of law.<sup>96</sup> Section 96 courts play a vital role; accordingly, s. 96 protects their special status to ensure that their jurisdiction is not “usurped by [...] a provincial legislature, whether by transferring their core powers to inferior courts and administrative tribunals or removing them altogether.”<sup>97</sup> As this Court has said, on no account can the inherent or core jurisdiction of the superior courts be [...] removed.<sup>98</sup>

60. Section 96 guarantees the core jurisdiction of provincial superior courts.<sup>99</sup> The elements of this core jurisdiction have not been exhaustively catalogued, but they include “that which enables” the superior court “to fulfil itself as a court of law.”<sup>100</sup> They include “review of the constitutional validity of laws, enforcing court orders, controlling the court’s process, and its residual jurisdiction as a court of original general jurisdiction.”<sup>101</sup> Powers that are “hallmarks of superior courts” cannot be removed.<sup>102</sup> This core jurisdiction must be “guarded jealously” to prevent the removal of any part of the core jurisdiction which would emasculate the court, making it something other than a superior court.<sup>103</sup>

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<sup>94</sup> [Jabour](#), at pp. 326-327.

<sup>95</sup> *R. v. Thomas Fuller Construction Co. (1958) Ltd. et al.*, [1980] 1 S.C.R. 695, at p. 713.

<sup>96</sup> [Quebec Civil Code Ref.](#), at paras. 1-2, 4.

<sup>97</sup> [Poorkid](#), at para. 24.

<sup>98</sup> [MacMillan Bloedel](#), at paras. 13, 15, 18, 35.

<sup>99</sup> [MacMillan Bloedel](#), at para. 29.

<sup>100</sup> [MacMillan Bloedel](#), at para. 30, citing Jacob, at p. 27, ABOA, Vol. I, Tab 21, p. 420.

<sup>101</sup> [Quebec Civil Code Ref.](#), at para. 68.

<sup>102</sup> [MacMillan Bloedel](#), at para. 35.

<sup>103</sup> [MacMillan Bloedel](#), at para. 30; [Poorkid](#), at para. 28.

61. Section 96 protects the “special status of the superior courts of general jurisdiction as the cornerstone of our unitary justice system.”<sup>104</sup> The rule of law is central to the purpose of s. 96, as it is maintained through the separation of the judicial, legislative, and executive branches.<sup>105</sup>

62. The judiciary plays a crucial role in safeguarding the fundamental aspects of the rule of law, which include equality of all before the law, the creation and maintenance of an actual order of positive laws, and oversight of the exercise of public powers.<sup>106</sup> While legislatures could “abolish courts with provincially appointed judges or seriously fetter their powers without falling afoul of the Constitution”, they cannot do so for the superior courts given the protection in s. 96.<sup>107</sup>

### **E. The Superior Courts, the Rule of Law, and the Crown**

63. The superior courts have the primary responsibility of ensuring that Crown conduct is always bound by the rule of law. The judiciary must remain institutionally independent from the Crown, precisely because the courts act a bulwark against intrusions from the government, including from the legislative branch.<sup>108</sup> The courts serve a vital role in protecting against the authority of the Crown, interposed between the government and its citizens, to safeguard the rule of law. While a provincial legislature can exercise authority under s. 92(14) regarding the administration of justice, or s. 92(13) regarding property and civil rights within the province, it cannot do so in a manner that infringes s. 96 and the core jurisdiction of superior courts.<sup>109</sup>

64. Access to the courts is central to the rule of law. There “cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice.”<sup>110</sup>

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<sup>104</sup> [Quebec Civil Code Ref.](#), at [para. 4](#).

<sup>105</sup> [Quebec Civil Code Ref.](#), at [para. 46](#).

<sup>106</sup> [Quebec Civil Code Ref.](#), at [para. 47](#) [Emphasis Added].

<sup>107</sup> [Quebec Civil Code Ref.](#), at [para. 50](#).

<sup>108</sup> *Ref re Remuneration of Judges of the Prov. Court of P.E.I.; Ref re Independence and Impartiality of Judges of the Prov. Court of P.E.I.*, [1997] 3 S.C.R. 3, at [paras. 88, 125](#) [*P.E.I. Ref.*].

<sup>109</sup> [Poorkid](#), at [para. 22](#).

<sup>110</sup> *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at [p. 230](#) [*B.C.G.E.U.*].

65. These principles underpin the constitutional architecture of our system. Section 96 courts and their predecessors, the Royal Courts of Justice, played a crucial role historically in ensuring that the Crown and its servants or agents adhered to the rule of law. They did so, for example, through the vehicles of the declaratory action, the petition of right procedure, and equitable relief against Crown servants or agents. The prerogative writs were also available to ensure that Crown servants or agents fulfilled their public duties. As developed by the courts, these vehicles ensured that long before modern Crown liability legislation, individuals affected by Crown conduct would have access to the courts, and would have recourse to remedies that could ensure a core of government accountability.

**F. Historical Practice at Confederation supports a finding that the *ROPA* infringes s. 96**

66. As set out in *Residential Tenancies*,<sup>111</sup> s. 96 invites a historical inquiry into the jurisdiction exercised by the provincial superior courts at the time of Confederation. While “the core jurisdiction analysis is not primarily historical in nature”, as “it is the very essence of the superior courts that is protected”, and the “content of the core jurisdiction is therefore not limited to what the superior courts exercised exclusively at the time of Confederation”, but “extends to whatever is needed in order to preserve the vigour and strength of those courts”,<sup>112</sup> the role of the superior courts at Confederation may shed light on the minimum content of their core jurisdiction.<sup>113</sup>

67. Superior courts, like the Royal Courts of Justice, are courts of general and inherent jurisdiction. At the time of Confederation, their general jurisdiction included adjudicating claims against the Crown and its servants and agents, and ensuring that the rule of law applied to governments as well as to individuals. They did so through a number of specialized rules and procedures. Notwithstanding the “garland of prerogatives”<sup>114</sup> that applied to the Crown itself,

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<sup>111</sup> *Re Residential Tenancies Act*, [1981] 1 S.C.R. 714, at p. 734: the first step is to determine “whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation”.

<sup>112</sup> *Quebec Civil Code Ref.*, at para. 67 [Emphasis added].

<sup>113</sup> See e.g. *MacMillan Bloedel*, at paras. 20-24, 28-30.

<sup>114</sup> Peter W. Hogg, Patrick J. Monahan & Wade K. Wright, *Liability of the Crown*, 4th ed. (Toronto: Thomson Reuters, 2011), at p. 5 [Hogg et. al.], ABOA, Vol. II, Tab 24, p. 73, citing W.S. Holdsworth, *A History of English Law*, 3rd ed. (London: 1944), Vol. 9, at p. 22, ABOA, Vol. II, Tab 27, p. 428.

superior courts had jurisdiction to rule on the legal position of the Crown and its servants and agents by various means.

68. Most significantly in the public law context, an action could be brought for a declaration to clarify the legal rights of a party vis-à-vis the Crown. The declaratory action had its roots in 14<sup>th</sup> century France and had been adopted by the British courts of equity by the first half of the 19<sup>th</sup> century, forming part of the common law before Confederation.<sup>115</sup> Because a declaration is not a coercive order, it was available against the Crown and avoided the issues that were perceived to arise in commanding the Crown or enforcing orders against the Crown.

69. One kind of declaration came to be known as a *Dyson* declaration, after the case of *Dyson v. Attorney General*.<sup>116</sup> The advantage of the *Dyson* declaration was that no royal fiat was needed to start an action,<sup>117</sup> as was required under the petition of right procedure. As this Court noted in *Jabour*, this form of action took on particular significance in a federal system where it was “found to be efficient as a means of challenging the constitutionality of legislation.”<sup>118</sup> However, its use was not confined to constitutional cases.

70. *Dyson* recognized that the courts play a crucial role in ensuring that the legality of Crown conduct must be subject to judicial oversight. The Court noted that the declaratory action provides “a speedy and easy access to the Courts for any of His Majesty’s subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials...”.<sup>119</sup> The Court further noted that the Attorney General also had a responsibility to ensure that legal questions of substance could be determined by the courts:

It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of proceedings for the purpose of

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<sup>115</sup> 2747-3174 *Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at paras. 136-138; *Taylor v. Attorney-General* (1837), 59 E.R. 164 (Ct. of Chancery), ABOA, Vol. I, Tab 14, p. 260.

<sup>116</sup> *Dyson v. Attorney-General*, [1911] 1 K.B. 410 (C.A.), ABOA, Vol. I, Tab 5, p. 52 [*Dyson*].

<sup>117</sup> Hogg et. al., at p. 38, ABOA, Vol. II, Tab 24, p. 79.

<sup>118</sup> *Jabour*, at p. 323.

<sup>119</sup> *Dyson*, at p. 423, ABOA, Vol. I, Tab 5, p. 52.

bringing matters before a Court of justice when any real point of difficulty that requires judicial decision has occurred.<sup>120</sup>

71. With the enactment of modern Crown liability legislation, there was no longer any advantage to the *Dyson* declaration, but this Court recognized in *Jabour* that the *Dyson* declaration has always been a part of our common law,<sup>121</sup> and that the jurisdiction of the superior courts to issue declaratory judgments remains vital to the Canada’s federal system.<sup>122</sup> A court that issued a declaration could also grant injunctive relief in aid of the declaration, as an exercise of its ancillary jurisdiction “as a matter of inherent jurisdiction of a superior court of general jurisdiction to ensure the effectiveness of its dispositions.”<sup>123</sup> This Court noted however that the issue was “no doubt academic” because “any officer of the Crown” would respect the judicial determination.<sup>124</sup>

72. The petition of right procedure has ancient roots, tracing back to the reign of Edward I.<sup>125</sup> In its common law form it was received into Canadian law prior to Confederation.<sup>126</sup> The petition of right lay to recover from the Crown damages for breach of contract,<sup>127</sup> and to obtain an order in relation to an interest in land.<sup>128</sup> The petition of right could also be used to seek equitable relief in support of common law claims.<sup>129</sup> This procedure was subject to limitations – including notably, the need to obtain a fiat from the Crown before proceeding, although this requirement must be viewed in the context of the established practice that the Crown would exercise its discretion to

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<sup>120</sup> *Dyson*, at p. 424, ABOA, Vol. I, Tab 5, p. 66, quoting *Deare v. Attorney-General* (1835), 160 E.R. 80 (K.B.), at p. 85, ABOA, Vol. I, Tab 4, p. 50.

<sup>121</sup> *Jabour*, at p. 323.

<sup>122</sup> *Kourtessis*, at p. 113, per Sopinka J., citing *Jabour*, at p. 328.

<sup>123</sup> *Jabour*, at p. 331. The context was an injunction sought against the Director of Investigation and Research under the *Combines Investigation Act*, not the Crown itself.

<sup>124</sup> *Jabour*, at p. 330.

<sup>125</sup> *C. v. Nova Scotia (Attorney General)*, [2015 NSSC 199](#), at para. 50, aff’d [2016 NSCA 21](#) [*C. v. N.S.*].

<sup>126</sup> *C. v. N.S.*, at para. 51.

<sup>127</sup> Hogg et. al., at p. 32, ABOA, Vol. II, Tab 24, p. 76.

<sup>128</sup> *Calder v. Attorney General of British Columbia*, [\[1973\] S.C.R. 313](#), at p. 424, per Pigeon J [*Calder*].

<sup>129</sup> *Restoule v. Canada (Attorney General)*, [2020 ONSC 3932](#), at paras. 31-37, 46, aff’d [2021 ONCA 779](#) (the issue of Crown immunity was not appealed to the Supreme Court: [2024 SCC 27](#), at para. 56); *Dolmage v. Ontario*, [2010 ONSC 1726](#), at paras. 109-112 [*Dolmage*].

allow meritorious cases to proceed.<sup>130</sup> From early times, the King was regarded not as being above the law, but rather as being subject to a duty (albeit unenforceable) to give the same redress to a subject whom he had wronged as his subjects were bound to give each other.<sup>131</sup> If the fiat was granted, the court could award damages against the Crown.<sup>132</sup>

73. The petition of right did not apply to tort claims against the Crown itself, which was immune from liability based on the idea that the King could do no tortious wrong.<sup>133</sup> However, tort claims could be made against Crown servants and agents. Eventually this state of affairs proved untenable,<sup>134</sup> because the Crown could not be held vicariously liable for the negligence of Crown servants.<sup>135</sup> Following reforms in other countries, the petition of right was abolished in Canada with the enactment of Crown liability legislation.<sup>136</sup>

74. Despite the limitations of the petition of right procedure, the superior courts had mechanisms to ensure that the Crown and its servants and agents were accountable for their

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<sup>130</sup> See e.g. *Norton v. Fulton* (1907), [29 S.C.R. 202](#), at [p. 210](#), where this court held that it was a “derelection of duty” for a responsible minister to refuse to submit a fiat to the Lieutenant Governor for consideration in a petition of right case, applying the maxim *ubi jus, ibi remedium*. See also *Dolmage*, at [para. 98](#), noting “the error of thinking... the petition of right... could properly be granted or denied at the whim of the Crown”, citing legal historian L. Ehrlich “Petitions of Right”, (1929), 77 L.Q.R. 60: “It may, of course, be admitted that there was a physical possibility of a king not endorsing a petition of right and thus preventing proceedings upon it. This, however, would at all times since Edward I have been contrary to law. It should be remembered that *Magna Carta* promised that to no one would the king deny or delay justice and right.” [Emphasis Added.] In *Air Canada v. B.C. (A.G.)*, [\[1986\] 2 S.C.R. 539](#), at pp. [545-546](#), this Court left open the question of whether the Crown had a duty to grant a fiat in non-constitutional cases that were not frivolous, but held that there was such a duty where recovery was sought of taxes paid under an unconstitutional statute.

<sup>131</sup> Hogg et. al., at p. 5, ABOA, Vol. II, Tab 24, p. 72.

<sup>132</sup> *Thomas v. The Queen* (1874), L.R. 10 Q.B. 31, ABOA, Vol. I, Tab 16, p. 331, where the court held that the petition of right lay to recover damages against the Crown for breach of contract.

<sup>133</sup> Hogg et. al., at p. 32, ABOA, Vol. II, Tab 24, p. 76.

<sup>134</sup> *Nelson (City) v. Marchi*, [2021 SCC 41](#), at [para. 38](#) [*Marchi*].

<sup>135</sup> *Marchi*, at [para. 38](#); Hogg et. al., at p. 7, ABOA, Vol. II, Tab 24, p. 74.

<sup>136</sup> Hogg et. al., at p. 32, ABOA, Vol. II, Tab 24, p. 76.

conduct. As noted above, the fiat requirement did not apply to actions brought against the Attorney General for a *Dyson* declaration, nor did it apply to proceedings seeking equitable relief against Crown servants, as the petition of right proceeding was confined to the common law courts.<sup>137</sup> Even in respect of tort, this Court held that the petition of right procedure was available where a statutory provision supported a claim for damages, applying the maxim *ubi jus, ibi remedium* – there is no right without a remedy.<sup>138</sup>

75. Injunctive relief was available against a Crown servant to restrain an unlawful act at common law, though not directly against the Crown itself.<sup>139</sup> The prerogative writs of *mandamus*, prohibition and *certiorari* are of ancient lineage,<sup>140</sup> and were available against Crown servants (though not against the Crown directly) to compel the performance of a public duty (*mandamus*), prohibit a tribunal from exceeding its jurisdiction (prohibition), or to quash a decision made without jurisdiction (*certiorari*).<sup>141</sup>

76. The celebrated case of *Roncarelli v. Duplessis*<sup>142</sup> also demonstrates that the core jurisdiction of the courts included holding Crown servants or agents – even those holding the highest office – accountable for the legality of their actions. In *Roncarelli*, the Premier and Attorney General of Quebec was found liable and ordered to pay damages under the public law of Quebec and Art. 1053 of the Civil Code for his conduct in causing harm to the plaintiff by directing that the plaintiff’s liquor license be denied, solely because he had advanced funds for bail of Jehovah’s Witnesses who had been arrested for distributing leaflets contrary to local by-laws.<sup>143</sup>

77. For liability under the “public law of Quebec”, Rand J. cited *Mostyn v. Fabrigas*,<sup>144</sup> where the Court of King’s Bench upheld an award of damages for false imprisonment against the Governor of Minorca, who had imprisoned the plaintiff without trial. As Lord Mansfield held:

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<sup>137</sup> *Calder*, at pp. 416-421, per Hall, Spence, and Laskin JJ. (dissenting).

<sup>138</sup> *The King v. Zornes*, [1923] S.C.R. 257, at p. 259.

<sup>139</sup> Hogg et. al., at pp. 46-48, ABOA, Vol. I, Tab 24, p. 83.

<sup>140</sup> *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, at para. 185 per Lebel J. (dissenting in part), tracing the history of *mandamus*.

<sup>141</sup> Hogg et. al., at pp. 57-61, ABOA, Vol. II, Tab 24, p. 88.

<sup>142</sup> *Roncarelli*.

<sup>143</sup> *Roncarelli*, at pp. 141-142, per Rand J.

<sup>144</sup> *Mostyn v. Fabrigas* (1774), 98 E.R. 1021 (K.B.), ABOA, Vol. I, Tab 11, p. 206.

To lay down in an English Court such a monstrous proposition as that a Governor, acting by virtue of Letters Patent under the Great Seal can do what he pleases; that he is accountable only to God and his own conscience; and that he is absolutely despotic and that he may spoil, plunder, and affect their bodies and their liberty, and is accountable to nobody – is a doctrine not to be maintained; for if he is not accountable to this court, he is not accountable anywhere.

78. The common thread to these cases is that the superior courts have always been the guardians of the rule of law – indeed, the superior courts are the “foundation of the rule of law itself.”<sup>145</sup> Further, the rule of law counts for little unless it also applies to the Crown and its servants and agents, so that we have “a government of laws, and not of men [and women].”<sup>146</sup> Despite the complexities of litigation against the Crown, the superior courts have always had the jurisdiction to ensure that the Crown and its servants and agents are bounded by law. The appellant submits that this jurisdiction has always been a core part of their responsibilities and is a “hallmark of the superior courts.” The jurisdiction that the superior courts had at Confederation, though qualified by special rules and procedures as described above, acts as a floor to the jurisdiction held by superior courts today, by virtue of s. 96. That floor is not limited to the modern successors to the prerogative writs, which were found to form part of the core jurisdiction of s. 96 courts in *Crevier* and *Vavilov*, and which are the only court proceedings preserved by s. 17(4) of the *ROPA*.

### **G. Conclusion on s. 96 and Core Jurisdiction**

79. The almost absolute immunity for the Crown and Related Entities created by the *ROPA*, combined with its prohibition on proceedings and its bar on providing remedies, infringes the core jurisdiction of the superior courts to ensure government accountability. As in the *Quebec Civil Code Reference*, the *ROPA* fails to protect the judicial role, on a contextual and multi-factor analysis, and thereby crosses the line of infringing core jurisdiction. In particular, the *ROPA*:

- eliminates causes of action, prohibits proceedings, and bars remedies;
- does not just eliminate a single cause of action or reverse a single decision, but eliminates *all* causes of action except for those arising from s. 35 aboriginal and treaty rights (even including those based on bad faith or abuse of power)
- not only immunizes the Crown, but also its Related Entities;

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<sup>145</sup> [MacMillan Bloedel](#), at [para. 37](#).

<sup>146</sup> *Marbury v. Madison* (1803), 5 U.S. (1 Cranch) 137, at p. 163, ABOA, Vol. I, Tab 10, p. 198; [B.C.G.E.U.](#), at [p. 230](#).

- applies to all conduct of the Crown and Related Entities, whether past or future;
- bars remedies comprehensively, to the point that an exception must be read in for those judicial review applications that are permitted under the *ROPA*;
- requires an exception to be read in for *Charter* damages that may be claimed, either for the conduct of the Crown and Related Entities, or arising from the enactment of the *ROPA*;
- bars remedies under other statutes that make litigation possible and effective, such as the *Courts of Justice Act* and *Rules of Civil Procedure*, the *Evidence Act*, and the *Freedom of Information Act*;
- precludes access to the declaratory action, which has particular significance for ensuring government accountability; and
- falls below the floor of judicial powers to ensure government accountability at the time of Confederation.

80. As such, s. 17 of the *ROPA* infringes s. 96 and must be struck down.

## **Question #2 – Does the Doctrine of Public Trust Apply?**

### **H. What Is the Doctrine of Public Trust?**

81. The doctrine of public trust is an ancient legal principle with roots in Roman law and the Justinian Code, incorporated into English common law and subsequently inherited by Canada through its constitutional foundation. At its core, the doctrine declares certain natural and cultural resources are so fundamental to the public welfare that government holds them not as an ordinary proprietor, but as trustee for the benefit of all — present and future.<sup>147</sup> The Court of Appeal identified two related concerns about how the doctrine was presented before that Court. First, it noted that the Appellant “did not offer a definition of the public trust doctrine in its factum or in oral argument.”<sup>148</sup> Second, the Court observed that the submissions had not answered basic questions about the doctrine: “Is a public trust similar to a traditional trust? Does the doctrine depend on Crown ownership or does Crown ownership displace it? How and when does a public

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<sup>147</sup> Erin Ryan, “[The Public Trust Doctrine, Property, and Society](#)”, in the Routledge Handbook of Property, Law, and Society (2002) at pp. 3-4, ABOA, Vol. I, Tab 19, p. 399 [Ryan]; *British Columbia v. Canadian Forest Products Ltd.*, [2004 SCC 38](#), at [para. 74](#) [Canfor].

<sup>148</sup> Court of Appeal Decision, at [para. 47](#).

trust arise? Can it apply to ‘cultural heritage’ or buildings, as opposed to natural resources or the environment?”<sup>149</sup> This factum addresses these questions directly.

82. The doctrine rests on three related propositions: that certain resources are too important to the public welfare to be left to private ownership or disposition; that such resources must remain freely available to the public and cannot be alienated without compelling justification; and that government exists to promote the public interest and must manage these resources accordingly.<sup>150</sup> In practice, the doctrine imposes on the Crown a continuing obligation to protect trust resources, to refrain from impairing public access and enjoyment, and to act in good faith as fiduciary rather than as an unconstrained owner. Ontario Place, a designated provincial heritage property of provincial significance on the shores of a Great Lake, internationally recognized as a landmark of twentieth-century architecture and landscape design, and a critical urban green space for migratory birds and species at risk, is exactly the kind of resource for which the doctrine was designed.<sup>151</sup>

83. The public trust doctrine differs from a private or traditional trust in several material respects. First, it arises not from a settlor’s deed or instrument but by operation of law, reflecting the inherent nature of certain resources and their indispensability to public welfare.<sup>152</sup> Second, the beneficiary is not a discrete or identifiable class of persons but the public at large, including future generations — a feature that distinguishes the doctrine from ordinary private-law trusts.<sup>153</sup> Third, the trust obligation is inalienable: it is not dissolved by the Crown’s election, nor extinguished by the passage of time or by ordinary legislation without constitutional consequence.<sup>154</sup> Fourth, the doctrine extends beyond navigable waters and natural resources: wherever a resource is of the

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<sup>149</sup> Court of Appeal Decision, at [para. 55](#).

<sup>150</sup> Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1970) 68:3 Mich. L. Rev. 471 at 489, ABOA, Vol. I, Tab 22, p. 465 [Sax].

<sup>151</sup> Affidavit of Tony Morris, Exhibit A, AR Tab 33, p. 315; Affidavit of Diane Chin, Exhibit A, AR Tab 30, p. 295; Affidavit of Javier Ors Ausín, Exhibit A, AR Tab 26, p. 258.

<sup>152</sup> [Ryan](#), at pp. 3-4, ABOA, Vol. I, Tab 19, p. 399; Sax, at p. 489, ABOA, Vol. I, Tab 22, p. 465.

<sup>153</sup> Sax, at p. 489, ABOA, Vol. I, Tab 22, p. 465; Michael Blumm and Rachel Guthrie, "[Internationalizing the Public Trust Doctrine](#)", UC Davis Law Review, Vol. 44 (2012), ABOA, Vol. II, Tab 23, p. 1 [Blumm and Guthrie].

<sup>154</sup> *Illinois Central Railroad Co. v. Illinois*, [146 U.S. 387 \(1892\)](#) at p. 452, ABOA, Vol. I, Tab 7, p. 133 [*Illinois Central*].

requisite public significance — whether environmental, cultural, or architectural — the Crown’s trustee obligations attach.<sup>155</sup>

84. Once the doctrine applies, the Crown is required to: preserve the resource and maintain its availability for public use and enjoyment; refrain from alienating or substantially impairing it absent compelling public justification; and account for its stewardship decisions through judicial oversight.<sup>156</sup> These obligations are enforceable, and it is those enforcement mechanisms that s. 17 of the *ROPA* purports to remove.

85. In Canada, this Court has recognized the notion of public rights in the environment residing in the Crown has “deep roots in the common law,” and has affirmed that elected governments “own places [like parks] for the citizens’ benefit and use, unlike a private owner.”<sup>157</sup> Not every Crown-owned resource attracts a public trust obligation. The doctrine is engaged where a resource satisfies one or more of the following criteria: it has been held for common public use from time immemorial;<sup>158</sup> it is of exceptional and irreplaceable significance to public welfare, whether environmental, ecological, cultural, or architectural;<sup>159</sup> it is integral to the shared identity or collective memory of the community across generations;<sup>160</sup> or its impairment or alienation would deprive the public of benefits that cannot be recovered or compensated in any meaningful sense.<sup>161</sup> These criteria are not exhaustive; they are drawn from the historical and comparative jurisprudence and reflect the principle that public trust protection is reserved for resources whose loss would constitute an irreversible wrong to present and future generations alike.<sup>162</sup>

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<sup>155</sup> *National Audubon Society v. Superior Court* (1983), [189 Cal.Rptr. 346; 658 P.2d 709](#), ABOA, Vol. I, Tab 12, p. 218 [*National Audubon*]; *Borough of Neptune City v. Borough of Avon-by-the-Sea*, [61 N.J. 296 \(1972\)](#), ABOA, Vol. I, Tab 2, p. 25 [*Neptune City*]; *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388 (India), ABOA, Vol. I, Tab 8, p. 143 [*Mehta*]; *M.I. Builders Private Ltd. v. Radhey Shayam Sahu*, [\(1999\) 6 SCC 464](#) (India), ABOA, Vol. I, Tab 9, p. 157 [*M.I. Builders*].

<sup>156</sup> *Illinois Central*, at p. 452, ABOA, Vol. I, Tab 7, p. 133; Sax, at p. 489, ABOA, Vol. I, Tab 22, p. 465.

<sup>157</sup> *Canfor*, at [para. 74](#).

<sup>158</sup> *Illinois Central*, at p. 452, ABOA, Vol. I, Tab 7, p. 133.

<sup>159</sup> *National Audubon*, ABOA, Vol. I, Tab 12, p. 218; *Neptune City*, ABOA, Vol. I, Tab 2, p. 33; *Ryan*, at pp. 1, 2, 9, ABOA, Vol. I, Tab 19, pp. 397-398, 405.

<sup>160</sup> *Ryan*, ABOA, Vol. I, Tab 19, p. 399.

<sup>161</sup> Sax, at p. 490, ABOA, Vol. II, Tab 22, p. 466.

<sup>162</sup> *Blumm and Guthrie*, ABOA, Vol. II, Tab 23, p. 1; Sax, at p. 532, ABOA, Vol. I, Tab 22, p. 508.

## I. The Doctrine Is Well Developed in Other Jurisdictions

86. Although not binding on this Court, foreign jurisprudence is “relevant and persuasive” in the development of Canadian common law.<sup>163</sup> The doctrine of public trust has been applied with increasing sophistication across a broad range of common law and civil law jurisdictions, all drawing from the same historical antecedents as Canadian law.

87. The foundational American authority is *Illinois Central Railroad Co. v. Illinois*, in which the United States Supreme Court held the State of Illinois could not alienate in fee simple the submerged lands of Lake Michigan’s Chicago harbour, as those lands were impressed with a public trust for navigation and commerce.<sup>164</sup> The doctrine has since expanded significantly in American state law. States including Hawaii, Pennsylvania, California, and New Jersey have broadened the doctrine to encompass natural resources, natural beauty, ecological values, and historically or culturally significant places.<sup>165</sup>

88. In India, the doctrine applies to all natural resources, including shorelands, ecologically fragile lands, and parklands. The Supreme Court of India confirmed in *M.C. Mehta v. Kamal Nath*, that the State is trustee of all natural resources meant for public use and enjoyment and is under a legal duty to protect them.<sup>166</sup> Indian courts trace the doctrine’s origins to English common law and ground it in both natural law and constitutional guarantees of life and liberty. Courts in Pakistan and Kenya have similarly grounded the public trust in constitutional guarantees of life.<sup>167</sup> The public trust is rooted in the same or similar fundamental values that ground s. 7 of the *Charter*: the right to life, liberty and security of the person.<sup>168</sup> A healthy environment, and access to the cultural resources by which communities define themselves across generations, are prerequisites to the

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<sup>163</sup> *Quebec (Attorney General) v. 9147-0732 Québec Inc.*, [2020 SCC 32](#), at [paras. 98–104](#); *R. v. Kirkpatrick*, [2022 SCC 33](#), at [para. 251](#).

<sup>164</sup> *Illinois Central*, at p. 452, ABOA, Vol. I, Tab 7, p. 133.

<sup>165</sup> Constitution of the State of Hawaii, [Article XI, s. 1](#) and [Article IX, s. 7](#); Constitution of the Commonwealth of Pennsylvania, [Article I, s. 27](#); *National Audubon*, ABOA, Vol. I, Tab 12, p. 218; *Neptune City*, ABOA, Vol. I, Tab 2, p. 25.

<sup>166</sup> *Mehta*, ABOA, Vol. I, Tab 8, p. 143; *M.I. Builders*, ABOA, Vol. I, Tab 9, p. 157.

<sup>167</sup> *Blumm and Guthrie*, at pp. 25-26, ABOA, Vol. II, Tab 23, p. 25; *Zia v. Wapda*, [\(1994\) 46 PLD \(S.C.\) 693](#) (Pakistan) at paras. 12 and 14, ABOA, Vol. I, Tab 17, p. 347.

<sup>168</sup> [The Constitution Act, 1982, Schedule B to the Canada Act 1982 \(UK\), 1982, c 11, s. 7.](#)

enjoyment of those rights. The public trust mechanism allows citizens to require the Crown to honour its fundamental obligation as steward of these irreplaceable public assets.

89. In the Netherlands, the Hague Court of Appeal in *The State of the Netherlands v. Urgenda Foundation*, confirmed on appeal to the Dutch Supreme Court, held the government to account for failing to discharge its public trust obligations in relation to climate change. South Africa's Constitution codifies a public trust obligation, and the High Court of Uganda has applied the doctrine to upland and freshwater resources well beyond navigable waters.<sup>169</sup>

90. The breadth and consistency of this jurisprudence across jurisdictions that share Canada's common law inheritance is instructive. As this Court observed in *Canfor*, the relevance of these decisions lies not in their binding force but in the fact that all of these jurisdictions derive their legal antecedents from and still apply common law principles.<sup>170</sup> The Court of Appeal stated that there was "no way for this court to assess the state of the law in the various jurisdictions based simply on these decisions," and questioned why decisions from those jurisdictions were "relevant to the development of Canadian law."<sup>171</sup> The Court of Appeal's dismissal of this jurisprudence as irrelevant was with respect in error. The recognition of a public trust doctrine is consistent with Canada's international obligations and the *Charter*, including the right to a clean, healthy and sustainable environment and principles of sustainable development and intergenerational equity.<sup>172</sup> Canadian courts are to prefer interpretations of law that accord with these obligations.<sup>173</sup>

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<sup>169</sup> *The State of the Netherlands v. Urgenda Foundation*, [ECLI:NL:GHDHA:2018:2610](#), at para. 62, ABOA, Vol. I, Tab 15, p. 287, aff'd [ECLI:NL:HR:2019:2007](#), ABOA, Vol. I, Tab 15, p. 291; *Advocates Coalition for Development and Environment v. AG*, [2004] Misc Cause No. 0100 (High Court of Uganda), ABOA, Vol. I, Tab 1, p. 1.

<sup>170</sup> *Canfor*, at [paras. 73–81](#).

<sup>171</sup> Court of Appeal Decision, at [para. 48](#).

<sup>172</sup> GA Resolution (A/RES/76/300); [UNFCC, No. 30822](#), art. 3, ABOA, Vol. I, Tab 20, p. 415; [Convention on Biological Diversity](#), art. 2, ABOA, Vol. I, Tab 18, p. 368; [UNESCO World Heritage Convention](#), art. 4, ABOA, Vol. II, Tab 26, p. 394; UN Brundtland Commission, [Report of the World Commission on Environment and Development \(1987\)](#), ABOA, Vol. II, Tab 25, p. 91.

<sup>173</sup> *Baker v. Canada (Minister of Citizenship and Immigration)*, [\[1999\] 2 S.C.R. 817](#), at [para. 70](#); *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson*, [2001 SCC 40](#), at [paras. 31–32](#) [*Spraytech*].

## J. In Canada the Doctrine Has Been Discussed - Never Rejected

91. The Court of Appeal also observed both the appellant and the intervener asserted “that the public trust concept is immanent in the law – rooted in the common law – but offer little in support of this assertion.”<sup>174</sup> Despite that Court’s characterization, the public trust doctrine has never been rejected by a Canadian court of final resort. A careful review of the Canadian jurisprudence reveals in every instance where the doctrine was before a court, it was either unnecessary to decide, defeated by jurisdictional or factual circumstances peculiar to that case, or expressly left open for future development. The door this Court opened in *Canfor* has never been closed.

92. In *Green v. The Queen et al.*, the Court dismissed a public trust claim on the basis that the plaintiff lacked standing and had not demonstrated a personal interest in the lands at issue. The Court made no finding that a common law public trust doctrine did not exist; it simply found no express trust in the statute and no particularized standing.<sup>175</sup> Standing is not in issue here: the Court of Appeal has already granted it.

93. In *Canadian Parks and Wilderness Society v. Wood Buffalo National Park (Superintendent)*, the parties reached a consent settlement before the public trust issue could be adjudicated. The defendant conceded it lacked statutory authority to grant the impugned logging permit, and the Court never ruled on the doctrine.<sup>176</sup>

94. This Court’s decision in *Canfor* is the most significant Canadian authority. Justice Binnie, writing for the majority, explicitly acknowledged the deep common law roots of public rights in the environment, canvassed the American and comparative experience, and expressly declined to close the door to the doctrine’s recognition. The Court identified one reason why it could not engage the doctrine on that record: the Crown had not introduced the public trust argument at trial with the necessary evidentiary foundation, making it unfair to the defendant to consider it on appeal.<sup>177</sup> Those procedural obstacles are entirely absent here.

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<sup>174</sup> Court of Appeal Decision, at [para. 49](#).

<sup>175</sup> *Green v. The Queen in Right of the Province of Ontario et al.*, [\[1973\] 2 O.R. 396 \(H.C.\)](#), at [pp. 15-16](#).

<sup>176</sup> *Canadian Parks and Wilderness Society v. Wood Buffalo National Park (Superintendent)*, [1992] F.C.J. No. 553 (T.D.), ABOA, Vol. I, Tab 3, p. 33.

<sup>177</sup> *Canfor*, at [paras. 74–81](#).

95. In *Burns Bog Conservation Society v. Canada*, the Federal Court of Appeal confirmed that *Canfor* “opens the door” to the public trust doctrine in respect of Crown-owned land. The claim failed solely because the federal Crown did not own Burns Bog; without ownership, no public trust duty over those lands could be conceived.<sup>178</sup> Here, Ontario Place is now wholly Crown-owned. The principal factual obstacle that defeated the claim in *Burns Bog* does not arise in this case.

96. In *La Rose v. Canada*, the Federal Court of Appeal struck the public trust claim because it was not targeted to Crown-owned land and was directed at general climate policy rather than a discrete Crown-held asset.<sup>179</sup> Even so, the Court expressly accepted that the doctrine “may some day be recognized by Canadian courts.” The Nova Scotia Court of Appeal dismissed a similar claim on grounds of mootness, which is also not in issue here.<sup>180</sup> Notwithstanding this, the Court of Appeal below stated that “[d]evelopments since *Canfor* offer no support for a Canadian public trust doctrine”, citing *Burns Bog* and *La Rose* as authority.<sup>181</sup> However, as demonstrated above, both decisions are distinguishable on their facts, and neither Court in these cases closed the door to the doctrine’s recognition.

97. In *Nestle Canada Inc. v. Ontario (Ministry of the Environment)*, the Environmental Review Tribunal discussed the doctrine but declined to resolve it because the case could be disposed of on a statutory basis.<sup>182</sup> This pattern of decision is not rejection of the doctrine; it reflects judicial economy, not a finding that the doctrine is unavailable as a matter of law.

98. The Canadian jurisprudence thus reveals a doctrine that has been consistently deferred, not denied. In every case, failure resulted from obstacles entirely specific to the facts: absence of Crown ownership, overreach in asking courts to supervise broad climate policy, mootness, standing deficiencies, or procedural defects. This case presents none of these obstacles. Ontario Place is a discrete, wholly Crown-owned parcel of iconic heritage and environmental significance.

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<sup>178</sup> *Burns Bog Conservation Society v. Canada*, [2014 FCA 170](#), at [para. 44](#).

<sup>179</sup> *La Rose v. Canada*, [2023 FCA 241](#), at [paras. 53, 56, 61-62](#).

<sup>180</sup> *Bancroft v. Nova Scotia (Lands and Forestry)*, [2022 NSCA 78](#), at [para. 36](#).

<sup>181</sup> Court of Appeal Decision, at [para. 52](#).

<sup>182</sup> *Nestle Canada Inc. v. Ontario (Ministry of the Environment)*, [\[2013\] OERTD No. 54](#), ABOA, Vol. I, Tab 13, p. 242.

The public trust issue is squarely presented and completely appropriate for resolution by this Honourable Court.

## **K. The Public Trust Doctrine Is An Unwritten Constitutional Principle**

### *(i) UCPs – Powerful Constitutional Tools*

99. This Court has described UCPs as the “lifeblood” of the Constitution and stated that “it would be impossible to conceive of our constitutional structure without them.”<sup>183</sup> UCPs are “not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments.”<sup>184</sup> They “emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meanings”<sup>185</sup>, precisely the analysis that supports recognizing the public trust doctrine as an UCP.

100. UCPs such as the rule of law and judicial independence serve multiple functions in the constitutional order. They dictate major elements of the architecture of the Constitution itself. They assist in interpreting constitutional text and delineating the scope of rights and obligations. They may give rise to substantive legal obligations constituting limitations upon government action. Where the constitutional text is not itself sufficiently definitive or comprehensive, they may operate as powerful interpretive aids.<sup>186</sup> As this Court confirmed in *City of Toronto*, unwritten principles can “develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture” and thus “fill gaps and address important questions on which the text of the Constitution is silent.”<sup>187</sup>

101. The history of UCPs in this Court’s jurisprudence demonstrates that courts are fully capable of recognizing principles that the written text does not enumerate. The UCP of judicial independence was first recognized in the *Provincial Judges Reference*, grounded in the preamble to the *Constitution Act, 1867* and in ss. 96–100, and applied to find provincial reductions of judges’ salaries were unconstitutional. The UCP of minority rights was invoked by the Ontario Court of Appeal in *Lalonde* to quash a governmental decision to close the only francophone hospital in

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<sup>183</sup> [Quebec Secession Ref.](#), at [para. 51](#).

<sup>184</sup> [Quebec Secession Ref.](#), at [para. 54](#).

<sup>185</sup> [Quebec Secession Ref.](#), at [para. 32](#).

<sup>186</sup> [Quebec Secession Ref.](#), at [paras. 52–54](#).

<sup>187</sup> [City of Toronto](#), at [paras. 56, 65](#).

Ottawa — relying on the UCP as an independent basis for the decision. The UCPs of federalism, democracy, constitutionalism, the rule of law, and respect for minorities were all recognized in the *Secession Reference* to give content to the Constitution’s silence on unilateral secession.<sup>188</sup>

102. The public trust doctrine satisfies every criterion this Court has articulated for recognizing an UCP. First, it is reflected in and consistent with the text and structure of the Constitution: the preamble to the *Constitution Act, 1867* expressly adopts a Constitution similar in Principle to that of the United Kingdom, which itself inherited the public trust from the common law tradition.<sup>189</sup> Second, the principle has deep historical roots: its antecedents in Roman law, the Justinian Code, and English common law trace a continuous tradition of sovereign stewardship of public resources that predates the written Constitution and was imported into Canadian law at Confederation.<sup>190</sup> Third, the doctrine is consistent with and reinforces other recognized UCPs: it operates alongside the rule of law (by subjecting Crown stewardship to judicial oversight), judicial independence (by preserving superior court jurisdiction over constitutional claims), and the protection of minorities (by securing intergenerational equity against majoritarian expropriation of public resources).<sup>191</sup> Fourth, the principle is of sufficient normative weight to constrain governmental action: it imposes enforceable obligations on the Crown as trustee, not merely aspirational standards.<sup>192</sup> These features together satisfy the test for UCP recognition established in the *Secession Reference* and applied consistently by this Court.

103. The analogy to judicial independence is particularly apt. The public trust doctrine and the principle of judicial independence share an essential character: they protect institutions and resources that serve the entire community and whose integrity cannot be secured by ordinary legislation alone. Just as judicial independence safeguards the institutional conditions necessary for the rule of law to function, the public trust doctrine safeguards the environmental and cultural resources that the Crown holds in trust and whose protection is required as a matter of

<sup>188</sup> *P.E.I. Ref.*, at [paras. 94–109](#); *Lalonde v. Ontario (Commission de restructuration des services de santé)*(2001), [56 O.R. \(3d\) 505](#) (C.A.); *Quebec Secession Ref.*, at [paras. 49–54](#).

<sup>189</sup> *Constitution Act, 1867*, Preamble; *Trial Lawyers*, at [para. 48](#); *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at [pp. 750–752](#) [*Manitoba Ref.*].

<sup>190</sup> *Ryan*, at pp. 3-4, ABOA, Vol. I, Tab 19, p. 399; Sax, at p. 489, ABOA, Vol. I, Tab 22, p. 465.

<sup>191</sup> *P.E.I. Ref.*, at [paras. 94-109](#); *Quebec Secession Ref.*, at [paras. 49-54](#); *City of Toronto*, at [paras. 56, 65](#).

<sup>192</sup> *Quebec Secession Ref.*, at [para. 54](#); *Illinois Central*, at p. 452, ABOA, Vol. I, Tab 7, p. 133.

constitutional obligation, not merely good governance.<sup>193</sup> The analogy rests on constitutional structure, not on a claim about what is necessary for democracy to function generally: the point is that the public trust doctrine, like judicial independence, identifies a constitutional constraint on legislative and executive action that cannot be displaced by ordinary majoritarian processes.<sup>194</sup> These principles cannot be captured in a single constitutional text provision; they require recognition as organizing principles of the constitutional order. The principle that government holds public resources in trust for the people is among the most ancient features of the constitutional order shared by Canada and its constitutional forebears.<sup>195</sup>

104. The doctrine is further grounded in social contract theory: the public has conveyed authority over public resources to government, but only so long as governments maintain their protection for the public's benefit.<sup>196</sup> This Court has recognized trust relationships between public authorities and the communities they serve, and has affirmed municipalities fulfill their role as trustees of the environment in managing public places.<sup>197</sup> The public trust doctrine articulates in constitutional terms a principle that Canadian courts have long applied in specific contexts. Recognition as an UCP gives this principle its proper constitutional status.

(ii) *Interpretive Aid – Confirming s. 96 Violation*

105. While UCPs cannot on their own ground a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982*,<sup>198</sup> they operate with full legal force as interpretive aids. The primary constitutional provision in this appeal is s. 96 of the *Constitution Act, 1867*. The public trust doctrine as an UCP is an essential interpretive tool that reveals why s. 17 of the *ROPA*'s elimination of all remedies is constitutionally intolerable. It identifies what the legislature has removed, why that removal matters, and why it cannot stand. Section 96 protects the superior court's core jurisdiction over matters broadly conformable with its historic function. As noted above, this Court confirmed in *MacMillan Bloedel* and in *Power* that provincial legislatures cannot strip superior

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<sup>193</sup> [Quebec Secession Ref.](#), at [para. 54](#).

<sup>194</sup> [Quebec Secession Ref.](#), at [paras. 52-54](#); [City of Toronto](#), at [paras. 5, 56, 65](#).

<sup>195</sup> *Constitution Act, 1867*, Preamble; [Trial Lawyers](#), at [para. 48](#); [Manitoba Ref.](#), at [pp. 750–752](#).

<sup>196</sup> *Sauvé v. Canada (Chief Electoral Officer)*, [2002 SCC 68](#), at [paras. 31, 115](#).

<sup>197</sup> *Committee for the Commonwealth of Canada v. Canada*, [\[1991\] 1 S.C.R. 139](#), at [p. 154](#); [Spraytech](#), at [para. 27](#).

<sup>198</sup> [City of Toronto](#), at [para. 5](#).

courts of jurisdiction over such matters, and cannot immunize Crown conduct from all judicial scrutiny including for bad faith and misfeasance.<sup>199</sup> The public trust UCP illuminates the constitutional dimension of what the *ROPA* has eliminated: not merely a collection of statutory remedies, but the court’s jurisdiction over a constitutional claim that the Crown has breached its obligations as trustee of Crown-held public resources.

106. The relationship between the public trust doctrine and the Crown’s immunity provisions deserves particular attention, because the two are in constitutional conflict. The public trust doctrine requires that the Crown’s exercise of authority over trust resources be conducted in good faith, with transparency, and in pursuit of the public benefit, obligations that are enforceable through the superior courts.<sup>200</sup> Immunity from bad faith claims is therefore not a mere procedural bar; it is, in this context the antithesis of the trustee’s core obligation. A trustee who is immunized against liability for bad faith is no trustee at all. Section 17 of the *ROPA* achieves exactly this result: by eliminating all causes of action including for bad faith, misfeasance, and breach of trust or fiduciary obligation – it converts the Crown’s role from trustee to unconstrained owner, the very transformation the doctrine prohibits.<sup>201</sup> The constitutional infirmity of s. 17 is thus not confined to the s. 96 dimension: it also represents a legislative attempt to dissolve a trust obligation that has constitutional status and cannot be abrogated by ordinary statute.<sup>202</sup>

107. The public trust doctrine, as an UCP, also has “full legal force” and is invested with a “powerful normative force” binding on governments and courts alike.<sup>203</sup> When the provincial legislature enacts s. 17 of the *ROPA* to eliminate public trust claims regarding iconic Crown-held resources, it fundamentally interferes with the superior court’s adjudicative role over constitutional matters. This Court held in *Imperial Tobacco* that a violation of the judicial independence principle is established where “legislation must interfere, or be reasonably seen to interfere, with the courts’

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<sup>199</sup> [MacMillan Bloedel](#), at [para. 15](#); [Power](#), at [paras. 4, 5](#) and [93](#).

<sup>200</sup> Sax, at p. 489, ABOA, Vol. I, Tab 22, p. 465; [MacMillan Bloedel](#), at [para. 15](#); [Power](#), at [paras. 4, 5](#) and [93](#).

<sup>201</sup> [Illinois Central](#), at p. 452, ABOA, Vol. I, Tab 7, p. 133.

<sup>202</sup> [Quebec Secession Ref.](#), at [para. 54](#)

<sup>203</sup> [Quebec Secession Ref.](#), at [para. 54](#); [City of Toronto](#), at [para. 49](#).

adjudicative role, or with the essential conditions of judicial independence.”<sup>204</sup> Section 17 of the *ROPA* satisfies that test.

108. The public trust doctrine thus performs a dual function in this appeal. First, it establishes an independent basis on which a declaration should issue: the Crown’s actions regarding Ontario Place; removing decades of statutory environmental and heritage protections, proceeding without proper environmental assessment or heritage review, and entrenching all of this through the immunity provisions of the *ROPA*, breach the trust in which these iconic Crown-held lands are held for the public. Second, the doctrine as UCP gives concrete constitutional content to the s. 96 violation: it focuses the specific constitutional claim over which the legislature has impermissibly stripped superior court jurisdiction. Both dimensions of this case warrant these findings.

109. The Court of Appeal also held “[e]ven assuming that a public trust doctrine exists, I do not see how democratically enacted legislation could be said to breach it, nor do I see the point of a declaration given that the doctrine has no constitutional force.”<sup>205</sup> With respect, this holding conflates two distinct functions of the doctrine. As an UCP, the public trust doctrine does not depend on constitutional entrenchment to constrain legislation: it operates as an interpretive tool illuminating the s. 96 violation, and confirms the existence of the superior court’s jurisdiction that s. 17 of the *ROPA* impermissibly removes. The declaration sought is not premised solely on the doctrine having independent constitutional force; it is premised on the s. 96 violation the doctrine reveals.<sup>206</sup> In addition, as a declaration, as outlined in detail above, it has legal force and effect.<sup>207</sup>

110. Lastly, the appellant does not ask this Court to resolve all future cases in which the doctrine of public trust might apply. That request would be inconsistent with how constitutional doctrine develops in Canada. When this Court first recognized that the “principles of fundamental justice” under s. 7 of the *Charter* had substantive as well as procedural dimensions, it expressly confined its analysis to the facts before it, and held that whether any given principle qualified would be

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<sup>204</sup> *Imperial Tobacco*, at [para. 54](#).

<sup>205</sup> Court of Appeal Decision, at [para. 56](#).

<sup>206</sup> *Uashaunnuat*, at [para. 248](#).

<sup>207</sup> See paras. 52, 68, 70 and 71 *infra*.

determined having regard to the particular context of each case.<sup>208</sup> This incremental methodology is the norm. In *Toronto (City) v. Ontario (Attorney General)*, the Court left open whether the honour of the Crown could independently invalidate legislation, declining to decide what the facts did not require it to decide.<sup>209</sup> In *Canada (Attorney General) v. Power*, the Court recognized a new constitutional remedy while expressly leaving its subsidiary implications for future litigation.<sup>210</sup> The same approach was taken in the *Secession Reference* itself, where the Court identified and applied unwritten constitutional principles only to the extent required by the questions placed before it.<sup>211</sup>

111. What the appellant asks of this Court is precisely what the jurisprudence contemplates: a ruling that the doctrine of public trust exists as an unwritten constitutional principle, that it applies on the facts of this case, and that its further contours be developed as future cases arise. This is how Canadian constitutional law has always evolved.

#### **PART IV – SUBMISSIONS ON COSTS**

112. The appellant requests that it be granted its costs throughout.

#### **PART V – ORDER SOUGHT**

113. The appellant respectfully requests:

- (a) A declaration that s. 17 of the *Rebuilding Ontario Place Act, 2023*, S.O. 2023, c. 25, Sched. 21 is of no force and effect as it breaches s. 96 of the *Constitution Act, 1867*;
- (b) A declaration that the doctrine of public trust applies and has been breached; and
- (c) If necessary, a stay and/or injunction prohibiting the respondents from further implementing the *ROPA*.

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<sup>208</sup> *Reference re BC Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 513 (Lamer J.): “Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves.”

<sup>209</sup> *City of Toronto*, at paras. 5, 57, 62-63, 69.

<sup>210</sup> *Power*, at paras. 4-6.

<sup>211</sup> *Quebec Secession Ref.*, at paras. 88-97; *P.E.I. Ref.*.

**PART VI – SUBMISSIONS ON CASE SENSITIVITY**

114. No confidentiality issues arise in this case.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 2<sup>nd</sup> day of April, 2026.

Eric K. Gillespie, as agent for

Eric K. Gillespie  
Counsel for the Appellant

Andrew Lokan and Grace Bryson, as agents for

Andrew Lokan and Grace Bryson  
Counsel for the Appellant

## PART VII – TABLE OF AUTHORITIES

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<i>Loi sur la procédure de révision judiciaire, <a href="#">LRO 1990, c J.1</a></i>	<a href="#">5</a>
<i>Public Inquiries Act, 2009, <a href="#">S.O. 2009, c. 33, Sched. 6</a></i>	
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**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

**ONTARIO PLACE PROTECTORS**

**APPELLANT**  
(Appellant)

- and -

**HIS MAJESTY THE KING IN RIGHT OF ONTARIO AND  
ATTORNEY GENERAL OF ONTARIO**

**RESPONDENTS**  
(Respondents)

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**NOTICE OF CONSTITUTIONAL QUESTIONS**  
**(ONTARIO PLACE PROTECTORS, APPELLANT)**  
(Pursuant to Rule 33(2) of the *Rules of the Supreme Court of Canada*)

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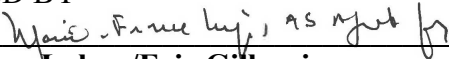
**TAKE NOTICE** that we, Andrew Lokan and Eric Gillespie, counsel for the Appellant Ontario Place Protectors, assert that the appeal raises the following constitutional questions:

1. Does section 17 of the *Rebuilding Ontario Place Act, 2023*, SO 2023, c 25, Sch 2, contravene s.96 of the *Constitution Act, 1867*, insofar as it removes the core jurisdiction of the Superior Court of Justice of Ontario and immunizes the Crown from liability under common law or statute, thereby preventing the Court from exercising its role as primary guardian of the rule of law?
2. Does Canadian law recognize a public trust obligation inherent in Crown sovereignty over certain public resources, operating as an unwritten constitutional principle that informs statutory interpretation and constrains the exercise of discretionary public power?

AND TAKE NOTICE that an attorney general who intends to intervene with respect to this constitutional question may do so by serving a notice of intention in Form 33C on all other parties and filing the notice with the Registrar of the Supreme Court of Canada within four weeks after the day in which this notice is served.

Dated at Toronto, Ontario, this 6<sup>th</sup> day of February, 2026.

SIGNED BY

  
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