Federal Court  Cour fédérale

Date: 20201027

Docket: T-1750-19

Citation: 2020 FC 1008

Ottawa, Ontario, October 27, 2020

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

CECILIA LA ROSE, BY HER GUARDIAN AD LITEM ANDREA LUCIUK, SIERRA RAINE ROBINSON, BY HER GUARDIAN AD LITEM KIM ROBINSON, SOPHIA SIDAROUS, IRA JAMES REINHART-SMITH, BY HIS GUARDIAN AD LITEM LINDSEY ANN REINHART, MONTAY JESSE BEAUBIEN-DAY, BY HIS GUARDIAN AD LITEM SARAH DAWN BEAUBIEN, SADIE AVA VIPOND, BY HER GUARDIAN AD LITEM JOSEPH CONRAD VIPOND, HAANA EDENSHAW, BY HER GUARDIAN AD LITEM JAALEN EDENSHAW, LUCAS BLAKE PRUD'HOMME, BY HIS GUARDIAN AD LITEM HUGO PRUD'HOMME, ZOE GRAMES-WEBB, BY HER GUARDIAN AD LITEM ANNABEL WEBB, LAUREN WRIGHT, BY HER GUARDIAN AD LITEM HEATHER WRIGHT, SÁJ MILAN GRAY STARCEVICH, BY HER GUARDIAN AD LITEM SHAWNA LYNN GRAY, MIKAEEL MAHMOOD, BY HIS GUARDIAN AD LITEM ASIYA ATCHA, ALBERT JERÔME LALONDE, BY HIS GUARDIAN AD LITEM PHILIPPE LALONDE, MADELINE LAURENDEAU, BY HER GUARDIAN AD LITEM HEATHER DAWN PLETT AND DANIEL MASUZUMI

Plaintiffs

and

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

Defendants

ORDER AND REASONS

I. Introduction

[1] This is a motion to strike the Plaintiffs' Statement of Claim without leave to amend. This motion is brought by the Defendants, Her Majesty the Queen in Right of Canada and the Attorney General of Canada, on the basis that the Statement of Claim discloses no reasonable cause of action, pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106.

II. Background

A. *The Plaintiffs*

[2] The Plaintiffs are fifteen children and youth from across Canada. The Statement of Claim describes each of the Plaintiffs' specific experiences with climate change. While their locations and particular circumstances vary, the Plaintiffs collectively describe that climate change has negatively impacted their physical, mental and social health and well-being. They allege it has further threatened their homes, cultural heritage and their hopes and aspirations for the future. As children and youth, they claim a particular vulnerability to climate change, owed to their stage of development, increased exposure risk and overall susceptibility.

B. *Climate Change*

[3] The Plaintiffs' Statement of Claim is particularly focused on the contribution of greenhouse gases (GHGs) to climate change, discussing the link between the cumulative impacts

of GHGs and changes occurring in the environment. It challenges the entirety of the Defendants' alleged conduct that the Plaintiffs associate with GHG emissions.

[4] The Plaintiffs and Defendants agree that climate change is serious, real and measurable. Each party has described the wide ranging impacts of climate change, including extreme weather events, ocean acidification and warming, the degradation of natural resources, air pollution and the expansion of vector-borne illnesses. The parties also agree that climate change particularly threatens Indigenous cultures and communities. The negative impact of climate change to the Plaintiffs and all Canadians is significant, both now and looking forward into the future.

[5] However, at issue is the justifiability of the claim and whether the Plaintiffs raise valid causes of action under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* [*Charter*]. As well, the parties also disagree on whether a "public trust doctrine" can be relied upon and argued at trial, based on the common law or as an unwritten constitutional principle. This forms the basis of both the Defendants' Statement of Defence (filed on February 7, 2020) and the current motion to strike the Plaintiffs' Statement of Claim.

C. *Plaintiffs' Statement of Claim*

(1) Causes of Actions

[6] The Plaintiffs filed their Statement of Claim on October 25, 2019. They allege that various conduct on the part of the Defendants [the "Impugned Conduct"] continues to cause, contribute to and allow GHG emissions that are incompatible with a "Stable Climate System".

This is described as a stable climate capable of sustaining human life and liberties (Plaintiffs' Statement of Claim at para 3).

[7] The Plaintiffs allege that the Impugned Conduct has unjustifiably infringed their rights (and the rights of all children and youth in Canada, present and future, due to an asserted public interest standing) under sections 7 and 15 of the *Charter*. The Plaintiffs further allege that the Defendants have failed to discharge their public trust obligations with respect to identified public resources, arguing a breach of obligations they claim fall under the "public trust doctrine".

(2) The Impugned Conduct of the Defendants

[8] The Impugned Conduct involves the following actions and inactions on the part of the Defendants (Plaintiffs' Statement of Claim at para 5):

a. Continuing to cause, contribute to and allow a level of GHG emissions incompatible with a Stable Climate System;
b. Adopting GHG emission targets that are inconsistent with the best available science about what is necessary to avoid dangerous climate change and restore a Stable Climate System;
c. Failing to meet the Defendants' own GHG emission targets; and
d. Actively participating in and supporting the development, expansion and operation of industries and activities involving fossil fuels that emit a level of GHGs incompatible with a Stable Climate System.

[9] The Defendants' causation of, contribution to and allowance of GHG emissions is further pleaded in paragraphs 45 to 51 of the Statement of Claim, including broad activities under

various statutory authorities (Plaintiffs' Statement of Claim at para 47). The Defendants are further alleged to support fossil fuel exploration, extraction, production and consumption through subsidies to the fossil fuel industry and through the acquisition of the Trans Mountain Pipeline System, the Trans Mountain Expansion Project and the Puget Sound Pipeline System.

[10] In paragraphs 52 to 63 of the Statement of Claim, the Plaintiffs set out facts alleging the failure of the Defendants to fulfill their own commitments to limit GHG emissions under a variety of international agreements and conventions, spanning the period of 1988 to 2015.

(3) Harms Associated with Climate Change

[11] The impact of climate change on the individual Plaintiffs is set out in paragraphs 94 to 221 of the Statement of Claim. The Statement of Claim lists approximately thirteen different alleged harms to the Plaintiffs in paragraph 4. As indicated above, the impacts of climate change that are described by the Plaintiffs are wide ranging, significant and felt across Canada.

(4) Relief Sought

[12] The Plaintiffs claim various forms of relief at paragraph 222 of the Plaintiffs' Statement of Claim, including the following:

a. an order declaring that the Defendants have a common law and constitutional obligation to act in a manner compatible with maintaining a Stable Climate System, i.e. one that is capable of sustaining human life and liberties, and to refrain from acting in a manner that disrupts a Stable Climate System;

b. an order declaring that, as a result of their Impugned Conduct, the Defendants have and continue to unjustifiably infringe the Plaintiffs' rights under section 7 of the *Charter* and put at risk the section 7 rights of all children and youth now and in the future;

c. an order declaring that, as a result of their Impugned Conduct, the Defendants have and continue to unjustifiably infringe the Plaintiffs' rights under section 15 of the *Charter* and put at risk the section 15 rights of all children and youth now and in the future;

d. an order declaring that, as a result of their Impugned Conduct, the Defendants have breached and continue to be in breach of their obligation to protect and preserve the integrity of public trust resources and have violated the right of the Plaintiffs and put at risk the rights of all children and youth now and in the future to access, use and enjoy public trust resources including navigable waters, the foreshores and the territorial sea, the air including the atmosphere, and the permafrost ("Public Trust Resources");

e. an order requiring the Defendants to prepare an accurate and complete accounting of Canada's GHG emissions, including the GHG emissions released in Canada, the emissions caused by the consumption of fossil fuels extracted in Canada and consumed out of the country, and emissions embedded in the consumption of goods and services within Canada;

f. an order requiring the Defendants to develop and implement an enforceable climate recovery plan that is consistent with Canada's fair share of the global carbon budget plan to achieve GHG emissions reductions compatible with the maintenance of a Stable Climate System, the protection of Public Trust Resources subject to federal jurisdiction and the Plaintiffs' constitutional rights;

g. an order retaining jurisdiction over this action until the Defendants have fully complied with the orders of this Court and there is reasonable assurance that the Defendants will continue to comply in the future absent continuing jurisdiction; and

h. costs, including special costs and applicable taxes on those costs; and

i. such further and other relief as this Honourable Court deems just.

III. Issue

[13] The issue is whether it is plain and obvious that the pleadings disclose no reasonable cause of action, or that the claim has no reasonable prospect of success?

[14] This inquiry involves four sub-issues:

a. Are the claims justiciable?

b. Does the section 7 *Charter* claim disclose a reasonable cause of action?

c. Does the section 15 *Charter* claim disclose a reasonable cause of action?

d. Does the claim pursuant to a "public trust doctrine" disclose a reasonable cause of action?

IV. Relevant Provisions

[15] *Federal Courts Rules*, Rule 221:

> **Motion to strike**
>
> **221(1)** On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
>
> > **(a)** discloses no reasonable cause of action or defence, as the case may be,
> >
> > **(b)** is immaterial or redundant,

> **(c)** is scandalous, frivolous or vexatious,
>
> **(d)** may prejudice or delay the fair trial of the action,
>
> **(e)** constitutes a departure from a previous pleading, or
>
> **(f)** is otherwise an abuse of the process of the Court,
>
> and may order the action be dismissed or judgment entered accordingly.
>
> **Evidence**
>
> **(2)** No evidence shall be heard on a motion for an order under paragraph (1)(a).

V. Test on a Motion to Strike

[16] The test on a motion to strike is whether it is plain and obvious that the pleadings disclose no reasonable cause of action, or that the claim has no reasonable prospect of success (*Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at 980; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [*Imperial Tobacco*]). The threshold to strike a claim is high and the matter must proceed to trial where a reasonable prospect of success exists.

[17] The material facts pleaded in the Statement of Claim must be taken as true, unless the allegations are based on assumption and speculation (*Operation Dismantle v The Queen*, [1985] 1 SCR 441 at para 27 [*Operation Dismantle*]). It is incumbent on the Plaintiffs to clearly plead the facts in sufficient detail to support the claims and the relief sought. The material facts form the basis upon which to evaluate the possibility of the success of the claim (*Imperial Tobacco*, above at para 22; *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227 at paras 16-17, leave to appeal to SCC refused, 36889 (23 June 2016)).

[18] Further, the pleadings must be read as generously as possible, erring on the side of permitting a novel but arguable claim to proceed to trial (*Imperial Tobacco* at para 21; *Atlantic Lottery v Corp Inc v Babstock*, 2020 SCC 19 at para 19 [*Atlantic Lottery*]).

[19] The test on a motion to strike considers the context of the law and the litigation process. It "operates on the assumption that the claim will proceed through the court system in the usual way – in an adversarial system where judges are under a duty to apply the law as set out in (and as it may develop from) statutes and precedents" (*Imperial Tobacco* at para 25).

VI. Analysis

A. *Parties' Position*

[20] It is the Plaintiffs' position that what is really being asked of the Court, through the relief being claimed, is to require the Defendants, through the disclosure and application of scientific data, on a justifiably manageable standard, to comply with their common law and constitutional obligations and act in a manner compatible with maintaining a Stable Climate System.

[21] The Plaintiffs argue that the relief claimed in paragraph 222 of the Statement of Claim are all "conventional" legal remedies to correct breaches of section 7 and section 15 of the *Charter*. Further, the Plaintiffs ask this Court to recognize a new or novel cause of action, the breach of the public trust doctrine. They claim the Defendants have failed to meet the duty to safeguard Public Trust Resources in a manner that does not "substantially" impair the integrity of those resources or impair the right of the public to access, use and enjoy those resources.

[22] The Defendants argue that the broad and sweeping claim of the Plaintiffs is not justiciable, in that the breadth of the claim is incompatible with the basic rules of *Charter* analysis. Further, the Plaintiffs are effectively seeking that this Court intervene in Canada's overall approach to climate policy, for which there is no judicially manageable legal standard. Additionally, the remedies sought by the Plaintiffs are not legal remedies. The Defendants also allege that the claim does not disclose a reasonable cause of action. This is because the *Charter* claims are positive rights claims and because they would also fail to meet the tests under sections 7 and 15 of the *Charter*. Lastly, the public trust doctrine holds no reasonable prospect of success, as this cause of action does not exist in Canadian law.

B. *Moving to Strike Charter Claims*

[23] As a preliminary matter, the parties have raised the appropriateness of this Court to consider a motion to strike on the basis that the Statement of Claim raises *Charter* claims, novel questions of law and novel *Charter* claims. The Plaintiffs state that novel claims, particularly novel *Charter* claims, ought not to be decided on a motion to strike. The Defendants' position is that the *Charter* claims in this case are not novel because they engage traditional *Charter* frameworks. Further, the Defendants assert that a Court may strike a novel claim, where it is not in line with the principles of proper judicial restraint and where it extends beyond an incremental change in the law.

[24] First, I note that the parties have raised several cases throughout their pleadings in which a motion to strike of a *Charter* claim was considered. I do not find that the presence of a *Charter* claim alone prevents me from considering this motion to strike (see *Operation Dismantle*, above; *Tanudjaja v Canada (Attorney General)*, 2014 ONCA 852 [*Tanudjaja*]).

[25] Second, it is clear that a Court can hear and decide novel questions of law on a motion to strike. In fact, a claim should not survive a motion to strike based on novelty alone. Disposing of novel claims that are doomed to fail is "critical to the viability of civil justice and public access" (*Atlantic Lottery*, above at para 19). Nor am I convinced that I am required to allow the *Charter* claims to survive the motion to strike simply because they are new *Charter* claims. The Plaintiffs rely on the dissenting decision in *Nevsun Resources Ltd v Araya*, 2020 SCC 5 at paragraph 145, for this proposition. While I agree with the Plaintiffs that the framing of their *Charter* claim is novel, I do not find that this overrides the "housekeeping" role of the Court on a motion to strike, without more (*Imperial Tobacco* at para 19).

C. *Justiciability*

(1) Conclusions on Justiciability

[26] For the reasons below, I find both *Charter* claims, under sections 7 and 15 of the *Charter*, are not justiciable. However, the question in relation to the public trust doctrine is a justiciable issue.

(2) Law of Justiciability

(a) **Test for Justiciability**

[27] Justiciability is concerned with the Court's proper role within Canada's constitutional framework and the "time-honoured" demarcation of powers between the Courts and the other branches of government. It relates to the subject matter of a dispute and whether the issue is appropriate for a Court to decide (*Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 32 [*Highwood*]; *Hupacasath First Nation v Canada*

(Foreign Affairs and International Trade Canada), 2015 FCA 4 at para 62 [*Hupacasath*]). The inquiry into justiciability was described in *Canada (Auditor General) v Canada (Minister of Energy, Mines & Resources)*, [1989] 2 SCR 49 at 90-91, as:

> 50 …first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead, deferring to other decision making institutions of the polity.

[28] In *Boundaries of Judicial Review: The Law of Justiciability in Canada*, Lorne M. Sossin defines justiciability as:

> …a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life. In short, if a subject-matter is held to be suitable for judicial determination, it is said to be justiciable; if a subject-matter is held not to be suitable for judicial determination, it is said to be non-justiciable.
>
> [Lorne M Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed (Toronto: Carswell, 2012) at 7 [Sossin], cited in *Highwood*, above at para 33]

[29] The question to be decided is whether the Court has the institutional capacity and legitimacy to adjudicate the matter. Or, more generally, is the issue one that is appropriate for a Court to decide (*Highwood* at paras 32, 34). The terms "legitimacy" and "capacity" can also be understood as the "appropriateness" and "ability" of the Court to deal with a matter (*Hupacasath*, above at para 62).

[30] There is no single set of rules delineating the scope of justiciability, the approach to which is flexible and to some degree contextual. Courts have often inquired whether there is a sufficient legal component to warrant judicial intervention, "[s]ince only a court can

authoritatively resolve a legal question, its decision will serve to resolve a controversy or it will have some other practical significance" (*Highwood* at para 34; *Reference Re Canada Assistance Plan (BC)*, [1991] 2 SCR 525 at 546).

[31] In determining whether it has the institutional capacity and legitimacy to adjudicate the matter, the Supreme Court in *Highwood* provides that a Court should consider that the matter before it "would be an economical and efficient investment of judicial resources to resolve, that there is a sufficient factual and evidentiary basis for the claim, that there would be an adequate adversarial presentation of the parties' positions and that no other administrative or political body has been given prior jurisdiction of the matter by statute" (Sossin, above at 294, cited in *Highwood* at para 34).

(b) **Novelty or Complexity of the Claim**

[32] The parties agree that simply because a cause of action is novel or complex *per se* does not make it non-justiciable or without merit. While this Court is not dissuaded by the complexity of the matter or the novelty of the claim, neither can these factors permit judicial involvement in subject matters where the Court does not have institutional legitimacy or capacity. The importance of a societal issue cannot extend the boundaries of a Court's role within Canada's constitutional framework (*Tanudjaja*, above at para 35):

> 35 I add that complexity alone, sensitivity of political issues, the potential for significant ramifications flowing from a court decision and a preference that legislatures alone deal with a matter are not sufficient on their own to permit a court to decline to hear a matter on the ground of justiciability: see, for example, Chaoulli, at para. 107. *Again, the issue is one of institutional competence. The question is whether there is a sufficient legal component to anchor the analysis*.

[Emphasis added]

(c) **Policy and Political Questions**

[33] Policy and political questions are not a bar to judicial involvement, however, "[s]ome questions are so political that courts are incapable or unsuited to deal with them, or should not deal with them in light of the time-honoured demarcation of powers between the courts and other branches of government" (*Hupacasath* at para 62). Questions in the realm of policy and political issues must be demonstrably unsuitable for adjudication (Sossin at 162):

> Political questions, therefore, must demonstrably be unsuitable for adjudication. These will typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution through adversarial presentation of evidence or the judicial process. Justiciable questions and political questions lie at opposing ends of a jurisdiction spectrum.

[34] To engage the Court's adjudicative functions, the question must be one that can be resolved by the application of law.

[35] It is within the Court's role to consider the constitutionality of government action and the accountability of the executive in light of the supremacy of the Constitution, including the *Charter*. *Charter* cases have been considered justiciable, regardless of the nature of government action, be it an exercise of Crown prerogative or otherwise (*Hupacasath* at paras 61, 70).

[36] Several cases discuss the crystallization of a policy or political issue into a justiciable one, as it relates to a Court's role in upholding constitutional supremacy. The Supreme Court in

Canada (Attorney General) v PHS Community Services Society, 2011 SCC 44 at paragraph 105 [*PHS*], states:

> 105 The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people concerning how addiction should be treated. *It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the Charter*… The issue before the Court at this point is not whether harm or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*.
>
> [Emphasis added]

[37] The Supreme Court in *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at paragraph 107 [*Chaoulli*], in a different context found:

> 107 *While the decision about the type of health care system Quebec should adopt falls to the Legislature of that province, the resulting legislation, like all laws, is subject to constitutional limits, including those imposed by s. 7 of the Charter*. The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for Charter compliance when citizens challenge it…
>
> [Emphasis added]

[38] Policy choices must be translated into law or state action in order to be amenable to *Charter* review and otherwise justiciable.

(3) Justiciability of the *Charter* claims

[39] The Plaintiffs argue that their claim is systemic and complex in nature. However, this should not render their claim non-justiciable. Asking this Court to declare the Defendants' conduct to be unconstitutional, it is argued, is justiciable and well within the institutional legitimacy and capacity of the Courts. There is no issue as to institutional capacity because the Courts are well equipped to handle complexity, which in this case is based on scientific data and the assessment of that data. Furthermore, an underlying social or policy context is not an impediment to a Court's legitimacy. The Plaintiffs further argue that their case is narrow in formulation, in that they are not asking this Court to review each independent action and inaction on the part of the Defendants, but rather to assess the cumulative effects of GHG emissions occurring from that conduct. Without considering the totality of the Defendants' conduct, Canada's contribution to global warming would be evasive of review.

[40] The Plaintiffs' position fails on the basis that there are some questions that are so political that the Courts are incapable or unsuited to deal with them. These include questions of public policy approaches – or approaches to issues of significant societal concern. As found in *PHS*, above at paragraph 105, and *Chaoulli*, above at paragraph 107, to be reviewable under the *Charter*, policy responses must be translated into law or state action. While this is not to say a government policy or network of government programs cannot be subject to *Charter* review, in my view, the Plaintiffs' approach of alleging an overly broad and unquantifiable number of actions and inactions on the part of the Defendants does not meet this threshold requirement and effectively attempts to subject a holistic policy response to climate change to *Charter* review.

[41] My finding on justiciability is supported both by the undue breadth and diffuse nature of the Impugned Conduct and the inappropriate remedies sought by the Plaintiffs.

(a) **Breadth of the Impugned Conduct**

[42] As described above, the Impugned Conduct refers broadly to categories of the Defendants' actions and inactions, including Canada's participation in various industries and its causation of, contribution to and allowance of GHG emissions incompatible with a Stable Climate System. These categories are somewhat sub-categorized throughout the Statement of Claim, through descriptions of a broad range of activities, as identified above.

[43] The diffuse nature of the Impugned Conduct, as described by the Plaintiffs, has effectively put the entirety of Canada's policy response to climate change in issue. The Plaintiffs adamantly disagree with this characterization. In their Written Representations, they attempt to clarify their claim, suggesting that they are asking this Court to review the cumulative effects of GHG emissions, not each and every law or state action that underpins these emissions. I find this position to be problematic, as the purpose of *Charter* review is to ensure the constitutionality of laws and state action. The Plaintiffs' position undermines this function of *Charter* review, if assessments of *Charter* infringement cannot be connected to specific laws or state action.

[44] Moreover, the diffuse nature of the claim that targets all conduct leading to GHG emissions cannot be characterized in a way other than to suggest the Plaintiffs' are seeking judicial involvement in Canada's overall policy response to climate change. There is little difference between the choices the Defendants make in relation to addressing climate change and other policy choices the Courts have consistently recognized as falling more appropriately within

the sphere of the other branches of government. These include choices in relation to the type of healthcare system (*Chaoulli* at para 107), approaches to illegal drug use and addiction (*PHS* at para 105), limits on how and where prostitution may be conducted (*Canada (Attorney Genera) v Bedford*, 2013 SCC 72 at para 5), addressing physician-assisted death (*Carter v Canada (Attorney General)*, 2015 SCC 5 at para 98) and the prioritization of homeless and inadequate housing (*Tanudjaja* at para 33). These are all important societal issues, the decisions in relation to which fall more appropriately on the legislative and executive branches of government. They attract a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people about how these issues should be addressed (*PHS* at para 105).

[45] However, when policy choices are translated into law or state action, that resulting law or state action must not infringe the constitutional rights of the Plaintiffs. As such, it is the specific law or state action – or possibly a network thereof – that is subject to *Charter* review and that forms the basis upon which the rest of the *Charter* analysis can occur. "A challenge to a particular law or particular application of such law is an archetypal feature of *Charter* challenges under s. 7 and s. 15" (*Tanudjaja* at para 22).

[46] The Plaintiffs do not plead definable law or state action in issue, or for that matter a network in respect thereof. I agree with the statement made by the Ontario Court of Appeal in *Tanudjaja*, that it is not the case that a Court could never consider the constitutionality of a network of programs. In fact, Courts have already considered the constitutionality of a network of laws in some cases. For example, in *Bedford*, the Supreme Court considered three impugned provisions that prevented prostitutes from implementing certain safety measures (*Bedford*, above

at para 6). My concern is not that the Plaintiffs are asking this Court to consider a network of Canada's actions and inactions related to climate change, but with the undue breadth and diffuse nature of that network, which puts Canada's overall policy choices at issue.

[47] The Plaintiffs rely on *Youth Environment v Attorney General of Canada*, 2019 QCCS 2885 [*Youth Environment*] as a case which demonstrates that "constitutional claims about climate action are justiciable". The claimants in *Youth Environment* argued that Canada's failure to set appropriate GHG emission reduction targets, and to meet the targets that had been set, amounted to a violation of rights, including those under the *Charter*. The Quebec Superior Court in *Youth Environment* was clear it was not prepared to find the claim "unjusticiable" at the certification stage of the action (*Youth Environment*, above at para 71). This case is not binding on this Court and I remain unpersuaded of its assistance, considering the differences in the breadth of conduct alleged in *Youth Environment* and in the current case.

[48] As it relates to the evasiveness of review, my comments above are not to be taken as suggesting that the Defendants should not be responsible or unaccountable in addressing climate change. The Defendants acknowledge that climate change posses a serious societal issue of our times, requiring responsiveness from all stakeholders. However, justiciability is an important underpinning of Canada's constitutional framework and this Court cannot circumvent its constitutional boundaries of the subject matter pleaded on the sole basis that the issue in question is one of societal importance, no matter how critical climate change is and will be to Canadians' health and well-being, which is acknowledged.

(b) **Remedies**

[49] The Plaintiffs ask for various forms of relief at paragraph 222 of their Statement of Claim. They provide that the relief sought is within the bounds of justiciable orders, as they are all "conventional" legal remedies to correct breaches of sections 7 and 15 of the *Charter*, or are otherwise appropriate in relation to the "public trust doctrine", if this cause of action is found to exist at common law or an unwritten constitutional principle.

[50] While the *Charter* remedies have the air of *prima facie* legal remedies, the Plaintiffs fail to consider that the overall context of the relief sought, in relation to the undue breadth of the claim, pushes this Court into a role outside the confines imposed by justiciability. In this respect, I agree with the Defendants that while the availability of *Charter* remedies are broad, the proposed remedies in this case are not legitimate within the framework of Canada's constitutional democracy.

[51] The first order proposed by the Plaintiffs, asking this Court to declare that the Defendants have a common law and constitutional obligation to act in a manner compatible with maintaining a Stable Climate System, is unrelated to the constitutionality of the Impugned Conduct. Even if this was the case, the breadth of the Impugned Conduct effectively means that the Plaintiffs are seeking a legal opinion on the interpretation of the *Charter*, in the absence of clearly defined law or state action that brings the *Charter* into play (*Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at 365).

[52] The declaratory relief related to a finding that the Plaintiffs' section 7 and section 15 *Charter* rights have been unjustifiably infringed, as well as that the Defendants are in breach of the public trust doctrine, does not address the underlying harms created by law or state action. The breadth of the Impugned Conduct subject to review effectively asks this Court to take on a public inquiry role, whereby it determines whether or not the Defendants' overall approach to climate change is effective.

[53] The proposed remedies include that this Court require action on the part of the Defendants to prepare an accounting of GHG emissions and to develop and implement an enforceable climate recovery plan, as well as retain supervision of the Defendants' compliance in relation to these orders. These remedies are similar to the wide-ranging remedies sought at paragraph 15 of *Tanudjaja*, including declarations, mandatory orders and supervision. The Ontario Court of Appeal in *Tanudjaja* was of the view that (at para 34):

> 34 Were the court to confine its remedy to a bare declaration that a government was required to develop a housing policy, that would be so devoid of content as to be effectively meaningless. To embark, as asked, on judicial supervision of the adequacy of housing policy developed by Canada and Ontario takes the court well beyond the limits of its institutional capacity…

[54] These considerations are also applicable in the current case. This Court, in *Friends of the Earth*, found the evaluation of the content of a climate change plan to be non-justiciable (*Friends of the Earth v Canada (Governor in Council)*, 2008 FC 1183 at paras 34-36, aff'd 2009 FCA 297, leave to appeal to SCC refused, 33469 (25 March 2010)). Although this finding was based on this Court's interpretation of the *Kyoto Protocol Implementation Act*, it suggests that the remedies in the context of climate change must be carefully circumscribed to the appropriate separation of powers.

[55] The Plaintiffs are seeking an order requiring the Defendants to develop and implement an enforceable climate recovery plan, without specifying the specific content of that plan. Instead, they specify the method for devising such a plan, which involves a comprehensive accounting of Canada's GHG emissions and the alignment of the "enforceable" climate recovery plan with Canada's fair share of the global carbon budget plan. This remedy is devoid of content and meaning in addressing the Plaintiffs' alleged rights, if violated. Further, it poses an incursion into the policy-making functions of the executive and legislative branches by requiring specific standards that the climate recovery plan must meet, including that it be compatible with maintaining a Stable Climate System and the protection of Public Trust Resources.

[56] An appropriate and just remedy in the context of a *Charter* claim "must employ means that are legitimate within the framework of our constitutional democracy" (*Doucet-Boudreau v Nova Scotia (Minister of Education)*, 2003 SCC 62 at para 56 [*Doucet-Boudreau*]). While I agree with the Plaintiffs that novel and creative remedies may be warranted in order to be responsive to the needs of a given case, this is not such a case. In *Doucet-Boudreau*, the Supreme Court considered the decision of a trial judge who ordered a provincial government to do its best to build French-language schools within a set timeframe. The trial judge declared himself competent to hear reports on the efforts. The orders were made in light of section 23 of the *Charter*, which provides for language rights, and the supervisory jurisdiction was limited. I find the context in *Doucet-Boudreau* to be distinguishable from the current case.

(4) Justiciability of the Public Trust Doctrine

[57] I do not find that the justiciability arguments relied upon by the Defendants apply in the same manner to the public trust doctrine. In relation to this particular claim, the Plaintiffs are

seeking that this Court recognize the existence of a *sui generis* doctrine, in which the Defendants have obligations to protect and preserve various identified inherently public resources, within the jurisdiction of the federal government.

[58] The existence of the public trust doctrine at common law or as an unwritten constitutional principle is clearly a legal question, which the Courts can resolve. This question does not engage the same considerations in relation to the constitutional demarcation of powers and there is no policy or political context or component to the claim. The novelty of the doctrine is not a bar to its justiciability. The real question in relation to this particular claim is whether such a doctrine discloses a reasonable cause of action or has a reasonable prospect of success.

D. *Reasonable Cause of Action*

(1) Conclusion on whether the Statement of Claim Discloses a Reasonable Cause of Action

[59] Even if I am wrong on the question of justiciability, I find that the Statement of Claim does not disclose a reasonable cause of action. For the reasons that follow, on the basis of the pleadings, the facts of which are taken to be true, both the section 7 and section 15 *Charter* claims, as well as the claim in relation to the public trust doctrine, have no reasonable prospect of success. Specifically, the undue breadth and diffuse nature of the Impugned Conduct cannot sustain a section 7 *Charter* analysis. The Plaintiffs have failed to disclose a distinction on the basis of state action or law, required for the purposes of a section 15 *Charter* analysis. Moreover, the existence of the public trust doctrine, as pleaded by the Plaintiffs, is not supported in Canadian law.

(2) Section 7 of the *Charter*

[60] To establish a section 7 *Charter* infringement, the Plaintiffs are required to demonstrate that: (1) the legislation or state action interferes with, or deprives them of, their life, liberty or security of the person; and (2) once they have established that section 7 of the *Charter* is engaged, they must show that the deprivation in question is not in accordance with the principles of fundamental justice (*Carter*, above at para 55).

[61] The test on a motion to strike operates on the assumption that the claim will proceed through the Court system in the usual way (*Imperial Tobacco* at para 25). The Defendants argue that: (1) there is no reasonable cause of action because section 7 of the *Charter* does not confer positive rights, requiring Canada to enact, fund and enforce climate change policies consistent with the Plaintiffs' standards; (2) the claim is speculative and incapable of proof; and (3) the Defendants have also brought into issue the breadth of the Impugned Conduct, which does not disclose a discrete law, state action or network thereof as the foundation for a section 7 *Charter* analysis. I find that the claim discloses no reasonable prospect of success on the basis of this third reason. However, I will nonetheless address each argument the Defendants have raised.

(a) **Impugned Law or State Action**

[62] In my view, the section 7 *Charter* claim fails to disclose a reasonable cause of action because the undue breadth and diffuse nature of the Impugned Conduct cannot sustain a section 7 *Charter* analysis. As identified in *Tanudjaja*, a challenge to a *particular* law or application thereof is an archetypal feature of section 7 *Charter* challenges.

[63] As discussed above, while I would be prepared to find that a network of laws or state action could be reviewable under section 7 of the *Charter*, it is the diffuse and unconstrained nature of the proposed Impugned Conduct that fails to provide an anchor for the analysis in this case. As such, the claim has no reasonable prospect of success under section 7 of the *Charter*.

[64] While this finding forms the basis for striking the section 7 *Charter* claim, I will address the additional arguments of the Defendants below.

(b) **Positive Rights**

[65] While no longer determinative, I will offer some comments in regards to the Defendants' argument in relation to the positive rights framing of the section 7 *Charter* claim. I do not find this argument sufficient to find that the claim discloses no reasonable cause of action for the reasons below.

[66] The Defendants assert that the Plaintiffs' section 7 *Charter* claim discloses no reasonable cause of action because the claim is seeking recognition of positive rights to the climate change policies preferred by the Plaintiffs. Section 7 of the *Charter* does not instill positive obligations, rather it is premised on the finding of a deprivation resulting from law or state action. The Defendants further indicate that the Plaintiffs' claim is not consistent with an incremental step in the evolution of section 7 *Charter* interpretation and that there is allegedly a lack of special circumstances in this case that would allow for a positive rights framing.

[67] I am not prepared to find that the Plaintiffs would be unable to argue a negative rights claim or that they are otherwise barred from arguing a positive rights claim at this stage in the

proceedings. Therefore, this argument has not been accepted as an additional basis for striking the section 7 *Charter* claim.

[68] I am cognizant of the Plaintiffs' objection to this "positive rights" characterization of their claim. They are seeking to argue that the Impugned Conduct deprives them of a healthy climate and that both the actions and inactions of the Defendants have deprived them of a Stable Climate System. Considering the high threshold that must be met on a motion to strike, I am not prepared to characterize the Plaintiffs' claim as one that only engages positive rights.

[69] Additionally, the Plaintiffs have raised authorities to suggest that section 7 may be interpreted as engaging positive rights in appropriate cases. Notably, in *Gosselin v Quebec*

(Attorney General), 2002 SCC 84 at paragraphs 81-82 [*Gosselin*], Chief Justice McLachlin, writing for the majority provided:

> 81 …Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.
>
> 82 …The question therefore is not whether s. 7 has ever been - or will ever be - recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

[70] Furthermore, Justice Rennie, speaking for an unanimous Federal Court of Appeal in *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at paragraph 139, stated:

> 139 I am cognizant of the fact that section 7 is not frozen in time, nor is its content exhaustively defined, and that it may, some day, evolve to encompass positive obligations — possibly in the domain of social, economic, health or *climate rights*…
>
> [Emphasis added]

[71] The Plaintiffs further rely on a British Columbia Supreme Court decision, *Single Mothers' Alliance of BC Society v British Columbia*, 2019 BCSC 1427 at paragraph 112, as an example of when a section 7 *Charter* claim was not struck on the basis that section 7 of the *Charter* has not yet been interpreted to impose positive obligations. The British Columbia Supreme Court found that it should err on the side of permitting a novel, but arguable, case to proceed to trial.

[72] As found by the Supreme Court in *Gosselin*, "[i]t would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases" (*Gosselin*, above at

para 82). In is within this context of *Charter* interpretation that the door has been opened for growth and expansion, within its natural limits, to potentially consider positive rights under section 7. The Plaintiffs have pleaded facts that may support the existence of "special circumstances". Within this context, I do not accept the Defendants' argument that the Plaintiffs' claim discloses no reasonable cause of action on this basis alone.

(c) **Speculation**

[73] I will also address the Defendants' arguments in relation to the speculative nature of the section 7 *Charter* claim, although I have already determined that the section 7 *Charter* claim discloses no reasonable cause of action on the basis of the undue breadth and diffuse nature of the Impugned Conduct. For the reasons below, I do not agree with the Defendants' arguments on this narrow issue.

[74] The Defendants further allege that the *Charter* claims are speculative because they are incapable of proof, owed to the cumulative and global nature of climate change. Climate change is driven from historical and global human activities and requires a comprehensive, international approach to address. In this way, the Defendants liken the current case to *Operation Dismantle*, where a "sufficient causal link" could not be established. In *Operation Dismantle*, the Federal Cabinet's decision to approve cruise missile testing could not be linked to the result the appellants were alleging – the increased threat of nuclear war. This amounted to speculation, which could never be proven (*Operation Dismantle* at para 18).

[75] I cannot find that there is no reasonable prospect of success on the basis of the speculation arguments alone. Unlike the speculation inherent in the assumption in *Operation*

Dismantle - that the reaction of foreign powers to cruise missile testing will increase the risk of nuclear war, the Plaintiffs in this case are alleging that Canada's role in climate change has led to the alleged harms. Canada has a role in GHG emissions that is more than speculative in this current case.

(3) Section 15 of the *Charter*

[76] To establish a limitation of their section 15 *Charter* rights, the Plaintiffs must demonstrate that an impugned law, on its face or in its impact, creates (1) a distinction based on an enumerated or analogous ground, and (2) that the distinction perpetuates a disadvantage (*Quebec (Attorney General*) *v Alliance of professional and technical personnel in health and social services*, 2018 SCC 17 at para 25 [*Alliance professional*]).

[77] Section 15 of the *Charter* is not limited to evaluating the constitutionality of legislation, but will apply to government action in a variety of forms, for example the implementation of statute in a discriminatory way by government officials (*Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, 2000 SCC 69). However, the law in question must be the source of the distinction, whether on its face or in its impact.

[78] The Plaintiffs claim that a "law" under section 15 of the *Charter* includes what the Plaintiffs have characterized as "Impugned Conduct". I note that the Plaintiffs have described the particular vulnerability of children and youth to climate change at paragraphs 78 to 89 of the Plaintiffs' Statement of Claim. Further, the Plaintiffs allege discrimination on the basis of age and "indigeneity" at paragraph 232 of the Plaintiffs' Statement of Claim.

[79] The Defendants argue that section 15 of the *Charter* cannot offer protection in the abstract and there is no allegation of a particular law bearing benefits or burdens, distributed unequally on the basis of a prohibited ground. I agree with the Defendants. It is unclear what impugned law creates the claimed distinction, whether on its face or in its impact. I understand that the Plaintiffs are claiming that climate change has a disproportionate impact on children and youth. However, by using this as a starting point, they have circumvented the step of defining a law that creates a distinction on the basis of an enumerated ground.

[80] On the basis of the above, I do not find it helpful to address the argument at paragraphs 59 to 60 of the Defendants' Written Representations, that section 15 of the *Charter* does not impose positive obligations on the part of Canada. The Defendants' arguments were primarily focused on positive rights concerns as it relates to section 7 of the *Charter*, and the above is otherwise determinative of the issue on section 15 of the *Charter*. There is no reasonable cause of action under section 15 of the *Charter* for the reasons above.

(4) The Public Trust Doctrine

[81] The Plaintiffs describe the public trust doctrine as a trust-like, *parens patriae*, or fiduciary obligation on the part of the Defendants to preserve and protect the integrity of inherently public resources so that the public is not deprived of the benefits they provide to all. In their Written Representations on this motion to strike, the Plaintiffs clarified that the public trust doctrine is a *sui generis* doctrine. They allege it is both a common law and an unwritten constitutional principle. The Defendants have allegedly both general and specific obligations under the public trust doctrine with respect to the identified Public Trust Resources.

[82] As beneficiaries of the public trust, and on account of having public interest standing, the Plaintiffs claim they may enforce the public trust in circumstances in which the Defendants have failed to discharge their obligations as trustee (Plaintiffs' Statement of Claim at para 242).

[83] The following resources are suggested by the Plaintiffs as falling under the public trust doctrine, which by their nature, are public resources that Canada has an obligation to preserve and protect. The Public Trust Resources include:

a. Navigable waters, the foreshores and the territorial sea, including the lands submerged thereunder and the resources located therein;
b. The air, including the atmosphere; and
c. The permafrost.

[84] The Plaintiffs also assert that the general obligations owed by the Defendants under the public trust doctrine include:

a. A duty to exercise continuous supervision and control over the Public Trust Resources;
b. A duty to protect the right of the public to access, use and enjoy such resources whenever feasible, including those rights that are fundamental to the ability of the public to enjoy the benefit of the resource as one held in common; and
c. A duty to safeguard the Public Trust Resources in a manner that does not substantially impair the integrity of these resources or substantially impair the right of the public to access, use and enjoy such resources.

(a) **Public Trust Doctrine at Common Law**

[85] The Plaintiffs assert that the public trust doctrine is an open, long standing question that remains unanswered and deserves adjudication. In this respect, they distinguish an "unrecognized" legal right from a "non-existent" legal right. They seek to distinguish prior case law that has failed to recognize the public trust doctrine, arguing their case ought to be heard at trial to assess the existence of and the boundaries of the proposed public trust obligations. The Plaintiffs further provide that a motion to strike is a gate-keeping tool meant to eliminate clearly meritless claims. It is not a means of thwarting the potential of the law to adapt to changing circumstances. The Plaintiffs therefore assert that they are entitled to make their case about how this *sui generis* doctrine may apply in the specific and unprecedented context of climate change.

[86] The Plaintiffs attempt to distinguish the Supreme Court decision in *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 [*Elder Advocates*] from the type of public trust obligations they are seeking that the Court find in this case (*Elder Advocates*, above at paras 36-37). In *Elder Advocates*, the Supreme Court found that the Crown does not owe fiduciary obligations to the public at large (*Elder Advocates* at para 50). In the current case, the Plaintiffs are claiming a formulation of the public trust doctrine, whereby the duty is owed to all Canadians. The public trust doctrine described by the Plaintiffs therefore does not fall under the concept of an *ad hoc* fiduciary duty in their view.

[87] I find that there is no legal foundation to suggest that the public trust doctrine, as described by the Plaintiffs, discloses a reasonable cause of action. For the reasons that follow, this claim has no reasonable prospect of success.

[88] The breadth of the claim under the alleged public trust doctrine and the lack of material facts to support any legal basis suggests this claim is reflective of an “outcome” in search of a “cause of action”. The scope of the obligations proposed by the Plaintiffs are both extensive and without definable limits. The Plaintiffs rely on *obiter* in *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 [*Canfor*] for the proposition that the door has been opened for the public trust doctrine to be considered in Canada, whereby public rights are vested in the Crown (*Canfor*, above at paras 72-83):

> 74 The notion that there are public rights in the environment that reside in the Crown has deep roots in the common law: see, e.g., J.C. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized" (1997), 7 J.E.L.P. 1. Indeed, the notion of "public rights" existed in Roman law:
>
> > By the law of nature these things are common to mankind - the air, running water, the sea ...
> >
> > (T.C. Sandars, The Institutes of Justinian (5th ed. 1876), at 2.1.1)
>
> …
>
> 81 It seems to me there is no legal barrier to the Crown suing for compensation as well as injunctive relief in a proper case on account of public nuisance, or negligence causing environmental damage to public lands, and perhaps other torts such as trespass, but there are clearly important and novel policy questions raised by such actions. These include the Crown’s potential liability for inactivity in the face of threats to the environment, the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown in that regard, the limits to the role and function and remedies available to governments taking action on account of activity harmful to public enjoyment of public resources, and the spectre of imposing on private interests an indeterminate liability for an indeterminate amount of money for ecological or environmental damage.

[89] *Canfor* concerned the Attorney General’s ability to recover damages for environmental loss (*Canfor* at para 8). In this case, the Crown in right of British Columbia claimed it sued not

only in its capacity as a property owner, but as the representative of the people of British Columbia. In this context, *obiter* comments in relation to the public trust doctrine cannot be taken to suggest a basis for the extensive scope of rights as suggested by the Plaintiffs, where the Plaintiffs have an actionable right against the Crown (Plaintiffs' Statement of Claim at para 242). The Supreme Court's *obiter* comments in *Canfor* were made in the context of whether the Crown was limited to suing in its capacity as an ordinary landowner. As such, if any door was opened, it is in relation to the entitlement of the Crown in the context of a tort action.

[90] The American public trust doctrine and secondary sources relied on by the Plaintiffs to this effect are also not applicable in my view. Specifically, the Plaintiffs rely on *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Carswell, 2012) [*Waters*], which surveys the doctrine under American law. This text discusses the American public trust doctrine, before clarifying that "[t]he public trust doctrine has not been adopted in Canada" (*Waters*, above at 603; see also: Maguire, John C, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized" (1997) 7 J Env L & Prac 1).

[91] In *Burns Bog Conservation Society v Canada*, 2014 FCA 170 [*Burns Bog* (FCA)], the Federal Court of Appeal agreed with a decision of the Federal Court, recognizing that the public trust doctrine has not been recognized in Canadian law (*Burns Bog* (FCA) at paras 43-47; *Burns Bog* (FC) at para 107). The Federal Court of Appeal specified at paragraph 44:

> 44 It is clear that in reaching his conclusion, the Judge carefully considered *Canfor*. He found that at best *Canfor* opens the door to the application of the public trust doctrine developed in the United States in respect of land owned by the Crown (see *Canfor* at paragraphs 74-81). Here, as mentioned, the respondent does not own Burns Bog.

[92] While it is clear the determining issue in *Burns Bog* was that of ownership, I do not find these cited cases have "opened the door" to an expansive public trust doctrine, as described by the Plaintiffs, that could be crystalized in a different factual context. I have reviewed the reasons in *Canfor* and *Burns Bog* (*Canfor* at paras 72-83; *Burns Bog* (FC) at paras 74-81) and while there is a "notion" that public rights in the environment reside in the Crown, these authorities do not approach the breadth of the rights and actionable interests that the Plaintiffs claim could exist at common law.

[93] I remain unconvinced that a claim for the public trust doctrine should proceed to trial on the basis that it is a novel claim and that I must err on the side of caution. Rather, the public trust doctrine is a concept that Canadian Courts have consistently failed to recognize. It does not exist in Canadian law. In this respect, I do not agree with the Plaintiffs' attempt at distinguishing an unrecognized from non-existent cause of action.

[94] This is a claim that may be appropriately struck. As provided by the Supreme Court in *Atlantic Lottery*, "[i]f a court does not recognize an unprecedented claim where the alleged facts are taken to be true, the claim is clearly doomed and must be struck out" (*Atlantic Lottery* at para 19).

[95] Moreover, the recognition of this principle is not consistent with the Courts' approach to the development of the common law, namely that these evolutions are incremental, unlike the developments in the law that may be taken by the legislature. The Courts are constrained in this regard, unlike the legislature, and the breadth of the proposed public trust doctrine is not reflective of such an incremental step.

(b) **Public Trust Doctrine as an Unwritten Constitutional Principle**

[96] The Plaintiffs also claim that the public trust doctrine is an unwritten constitutional principle. They rely on secondary sources, pointing to remarks by Chief Justice McLachlin in *Unwritten Constitutional Principles: What is going on?* [Given at the 2005 Lord Cooke Lecture in Wellington, New Zealand]. The remarks discussed how constitutional principles are rooted in natural law. In the Plaintiffs' view, this is not unlike the alleged public trust doctrine they describe. The remarks by the Chief Justice include the following statement:

> The contemporary concept of unwritten constitutional principles can be seen as a modern reincarnation of the ancient doctrines of natural law.

[97] The Plaintiffs claim it would therefore be premature to reject this claim on a motion to strike.

[98] This said, the Plaintiffs' Statement of Claim has not pleaded material facts to support the public trust doctrine as an unwritten constitutional principle, outside its allegation that this is in fact the case. The failure to offer any material facts which, taken to be true, would support this finding in their Statement of Claim, is fatal to the proposed cause of action.

[99] The Supreme Court in *Reference re Succession of Quebec*, [1998] 2 SCR 217 at paras 50, 51, describe that "it would be impossible to conceive of our constitutional structure without them [underlying constitutional principles]. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood". There are no material facts, which taken to be true, could demonstrate this threshold has been met.

[100] On the basis of the above, it is plain and obvious that the claims related to the public trust doctrine fail to disclose a reasonable cause of action.

VII. Conclusion

[101] On the basis of the above findings, I would grant the Defendants' motion to strike the Plaintiffs' Statement of Claim without leave to amend.

[102] The *Charter* claims, under section 7 and section 15, are not justiciable and otherwise disclose no reasonable cause of action. The public trust doctrine, while justiciable, does not disclose a reasonable cause of action.

[103] The Defendants did not seek costs in their motion. Given the novel and challenging nature of the statement of claim, I exercise my discretion in ordering no costs.

ORDER IN T-1750-19

THIS COURT ORDERS that:

1. The Defendants' motion to strike the Plaintiffs' Statement of Claim is granted without leave to amend;

2. No costs are awarded.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1750-19
STYLE OF CAUSE:	CECILIA LA ROSE BY GUARDIAN AT LITEM ANDREA LUCIUK ET AL v THE QUEEN ET AL

HEARING HELD BY VIDEOCONFERENCE AND IN-PERSON ON SEPTEMBER 30, 2020 AND OCTOBER 1, 2020, FROM VANCOUVER, BRITISH COLUMBIA (COURT AND PARTIES) AND VICTORIA, BRITISH COLUMBIA (PARTIES)

ORDER AND REASONS:	MANSON J.
DATED:	OCTOBER 27, 2020

WRITTEN REPRESENTATIONS BY:

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