

SCC Court File No.:

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

BETWEEN:

ONTARIO PLACE PROTECTORS

APPLICANT
(Appellant)

- and -

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

RESPONDENTS
(Respondents)

APPLICATION FOR LEAVE TO APPEAL
(ONTARIO PLACE PROTECTORS, APPLICANT)
(Pursuant to s. 40(1) of the *Supreme Court Act*, RSC, 1985)

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PART I – OVERVIEW & STATEMENT OF FACTS

Overview & Issues of Public Importance

1. A proper understanding of the relationship between governments and their citizens is integral to Canadian society. The role of Canada’s courts in this relationship is equally fundamental. This case appears to raise two essential questions regarding this relationship.

2. This relationship is directly addressed in s. 96 of the *Constitution Act, 1867*.¹ While expressly referring to the appointment of superior court judges etc., s. 96 has been interpreted to grant courts constitutionally protected “core powers.” This Honourable Court has consistently held that government action cannot remove, assign or derogate from these core functions.²

3. Late in 2023 the Respondent Ontario (“Ontario”), passed the *Rebuilding Ontario Place Act, 2023*, S.O. 2023, c. 25, Sched. 21 (“ROPA”). ROPA was passed quickly without legislative debate and received First Reading November 27, 2023, Second Reading and Third Reading December 5, 2023, and Royal Assent December 6, 2023.

4. Section 17 of ROPA purports to negate almost all legal remedies that could ordinarily be sought, as well as numerous other legislative protections developed over many decades. These provisions raise two central questions: (1) do they infringe on the core jurisdiction granted to superior courts under s. 96 of the *Constitution Act, 1867*, and (2) do they breach the doctrine of public trust?³ These two questions appear to be of both public and national importance.

5. Subsection 17(1) of ROPA applies to “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...”⁴ The balance of s. 17 of ROPA extinguishes causes of action,

¹ *Constitution Act, 1867*, s. 96.

² See as examples *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 SCR 725 (“*MacMillan Bloedel*”) at para. 37; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (“*Trial Lawyers Assn.*”) at para. 32; *Reference re Code of Civil Procedure (Que.)*, art. 35, 2021 SCC 27 at paras. 3-54.

³ *Ontario Place Protectors v. HMK in Right of Ontario*, 2024 ONSC 4194 (S.C.J.) (the “*Application Decision*”) at para. 2.

⁴ ROPA, ss. 17(1) and 17(2).

bars proceedings and denies any remedy under any statute... “available to any person in connection with anything referred to in subsection (1) against any person referred to in that subsection.” The only purported exceptions are judicial review and s. 35 of the *Constitution Act, 1982* rights.⁵

6. Ontario has used s. 17(2) to eliminate every remedy “in contract, restitution, tort, misfeasance, bad faith, trust or fiduciary obligation, any equitable remedy or any remedy under any statute,” thereby excluding all remedies and liabilities under every one of Ontario’s more than 1,200 statutes and associated Regulations.⁶ ROPA applies only to Ontario Place. However, there is nothing precluding Ontario, or any other Provincial, Territorial or the Federal government from utilizing this same approach to exclude any of Canada’s superior courts as they may see fit.

7. Ontario Place is also iconic both for its cultural heritage value and for its environmental attributes.⁷ Does it belong exclusively to the “government of the day”? Are governments permitted to utilize such public resources as they alone decide, or do other legal principles such as the concept of governments holding such resources in public trust apply? While again ROPA applies to Ontario Place, there is nothing precluding the same approach from being taken with other provincial and national treasures such as Algonquin Provincial Park, Banff National Park, Parliament Hill etc. This case appears to be a proper opportunity for this Honourable Court to address these issues.

Background and Procedural History

8. The Applicant filed the following affidavits in support of its application:

- (i) Diane Chin – Architectural Conservancy of Ontario
- (ii) Elsa Lam – Editor – Canadian Architect Magazine
- (iii) Elizabeth Pagliacolo – Editor in Chief – Azure Magazine
- (iv) Ian Chodikoff – Architect, MARCH, MAUD, OAA, FRAIC
- (v) Joël León – Executive Director – Toronto Society of Architects
- (vi) John Lorinc – Journalist
- (vii) Javier Ors Ausín – Program Manager – World Monuments Fund
- (viii) John Sewell – Former Mayor – City of Toronto
- (ix) Lynn Morrow – The Friends of the Golden Horseshoe
- (x) Mathieu Dormaels – President – ICOMOS Canada
- (xi) Norman Di Pasquale – Co-Chair – Ontario Place for All

⁵ ROPA, s. 17.

⁶ ROPA, s. 17(2).

⁷ [Application Decision](#) at paras. 7 and 9.

- (xii) Patricia Kell – Executive Director – National Trust for Canada
- (xiii) Sandford Borins – Professor of Public Management Emeritus – U of T
- (xiv) Tony Morris – Conservation Policy and Campaigns Director – Ontario Nature
- (xv) Charles A. Birnbaum – President – The Cultural Landscape Foundation
- (xvi) Catherine Nasmith – Heritage Architect - Director of Ontario Place Protectors
- (xvii) Cynthia Wilkey – former Co-Chair for Ontario Place for All⁸

9. After reviewing this evidence, the Application Judge and the Court of Appeal acknowledged that despite evidentiary frailties, “Ontario Place enjoys some renown, has received awards and designations, and that there are people and groups who care deeply about its fate.”⁹

Application Judge’s Decision

10. The Application Judge found the Applicant did not have standing to bring the application, and in the event this conclusion was incorrect, further considered the merits of the application.¹⁰ The application was dismissed¹¹ without costs.¹²

Court of Appeal’s Decision

11. The Court of Appeal reversed the Application Judge and granted the Applicant standing.¹³ The Court of Appeal concluded the right of judicial review had been preserved.¹⁴ The Applicant does not seek leave to appeal this finding. The balance of the appeal was dismissed with costs.¹⁵

⁸ Applicant’s Factum for the Ontario Court of Appeal, at para. 9 [Tab 3A].

⁹ [Application Decision](#) at paras. 10 to 11 and *Ontario Place Protectors v. Ontario*, [2025] O.J. No. 1073 (the “Court of Appeal Decision”) at para. 10.

¹⁰ [Application Decision](#) at para. 2.

¹¹ [Application Decision](#).

¹² *Ontario Place Protectors v. His Majesty the Queen in Right of Ontario* Costs Decision (the “Costs Decision”) (unreported) [Tab 3B].

¹³ [Court of Appeal Decision](#) at paras. 17 to 28.

¹⁴ [Court of Appeal Decision](#) at paras. 33 to 37.

¹⁵ [Court of Appeal Decision](#) at paras. 58 and 60.

PART II – QUESTIONS IN ISSUE

12. This Application for Leave to Appeal raises the following issues of public and national importance:

Issue One: Does ROPA remove s. 96 superior court core jurisdiction?

Issue Two: Does ROPA breach the doctrine of public trust?

PART III – STATEMENT OF ARGUMENT

Issue One: Does ROPA Remove s. 96 Superior Court Core Jurisdiction?

Section 96 Core Jurisdiction

13. It is open to governments to exclude legislative provisions, statutory remedies and damages etc.¹⁶ The clear difference here is that ss. 17(2) of ROPA eliminates all remedies “in contract, restitution, tort, misfeasance, bad faith, trust or fiduciary obligation, any equitable remedy or any remedy under any statute.”¹⁷ ROPA appears to be unprecedented. The Courts below have not cited any examples similar to the scope and breadth of ss. 17(2) of ROPA. Furthermore, the full extent of the limits placed on superior court powers to grant remedies under ROPA does not appear to have been considered. Neither the Application Judge nor the Court of Appeal considered the implications of the removal of more than 1,200 statutes and related Regulations on the operation of the Courts or citizens. The removal of the superior court’s powers under the *Rules of Civil Procedure*,¹⁸ the *Courts of Justice Act*¹⁹, the *Public Inquiries Act, 2009*²⁰ and the *Freedom of Information and Protection of Privacy Act*²¹ are only some examples of the myriad of tools of the superior court and the rights of citizens that have all been eliminated.

14. The fact that ROPA only applies to Ontario Place is also not determinative. In *MacMillan Bloedel*, the removal of the superior court’s jurisdiction was limited to the Provincial Youth Court

¹⁶ [Application Decision](#) at para. 41; [Court of Appeal Decision](#) at para. 38.

¹⁷ ROPA, s. 17(2).

¹⁸ *Rules of Civil Procedure*, [RRO 1990, Reg 194](#).

¹⁹ *Courts of Justice Act*, [R.S.O. 1990, c. C.43](#).

²⁰ *Public Inquiries Act, 2009*, [S.O. 2009, c. 33, Sched. 6](#).

²¹ *Freedom of Information and Protection of Privacy Act*, [R.S.O. 1990, c. F.31](#).

in British Columbia. However, as has been noted many times, a loss of jurisdiction may begin in one particular instance, but this can then set the precedent for the removal of core jurisdiction in other ways that are constitutionally unacceptable.²²

15. In its decision below, the Court of Appeal references *Poorkid* as a leading recent case regarding s. 96. While “narrow”, it acknowledges its purpose is “to protect the special status of the superior courts by ensuring that their decision-making authority is not usurped, whether by transferring their core powers to inferior courts and administrative tribunals or removing them altogether.”²³ It acknowledges “the need to ensure that the exercise of public authority is not shielded from judicial scrutiny.”²⁴ *Poorkid* was also a case where s. 96 jurisdiction was altered, but not removed.²⁵ While relying on *Poorkid*, the Court does not reference its central finding:

[28] Thus, core jurisdiction is defining of the superior courts and must be guarded jealously. In *MacMillan Bloedel*, Lamer C.J. put the matter this highly: removal of any part of the core jurisdiction, he said, “emasculates the court, making it something other than a superior court”: at para. 30.²⁶

16. If ss. 17(2) of ROPA is constitutional, it will also set a clear precedent for future government action by Ontario, other Provinces and Federally. One of the other primary purposes of s. 96 is to provide a unified court system across Canada. Consequently, whenever a government wishes to construct or expand a major highway, a hydroelectric project, a landfill or quarry, an airport or nuclear facility etc., the Court of Appeal has now confirmed a government can eliminate any remedy under any statute, virtually overnight. This directly impacts, at minimum, every corporation and individual who does business with any government in Canada.

17. ROPA’s wholesale elimination of the superior court’s jurisdiction under s. 96 to grant *any* remedies under all of Ontario’s law also appears to be highly inconsistent with the core of what superior courts have always done. As stated by this Honourable Court in *Trial Lawyers Assn.*:

²² *MacMillan Bloedel* at para. 37.

²³ [Court of Appeal Decision](#) at paras. 29 to 31.

²⁴ [Court of Appeal Decision](#) at para. 21.

²⁵ [Court of Appeal Decision](#) at para. 41.

²⁶ *Poorkid Investments Inc. v. Ontario (Solicitor General)*, [2023 ONCA 172](#) at para. 28 [emphasis added].

[32] 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 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*.²⁷

18. ROPA's elimination of the court's powers to grant remedies could not have been broader. The more vast the removal of jurisdiction, the more likely the infringement violates s. 96.²⁸ All jurisdiction to grant remedies under every Ontario statute and regulation has been totally removed. How this will allow courts to carry out their remaining core functions, even in relation to Ontario Place, has not been considered or addressed. There is also now nothing precluding the Crown in Ontario, or in any other Province, or the Federal Crown, from eliminating the superior court's jurisdiction from, at minimum, any further developments they wish to undertake. Development projects may also only be the commencement of the use of these powers.

19. Can the Courts' approach below be viewed as "jealously guarding" the core jurisdiction of superior courts under s. 96? Or, as found in *MacMillan Bloedel*, does ROPA constitute a removal of a part of the superior court's core jurisdiction, thereby "emasculating" superior courts to the greatest extent Ontario could possibly have done? These appear to be key questions regarding the scope of s. 96 and the superior courts' core powers. They also raise clear questions regarding reconciling this Honourable Court's approach to this issue in cases such as *MacMillan Bloedel* and *Trial Lawyers Assn.*, as contrasted with the lower Courts' approach here.

Crown Immunity from Liability

20. This Honourable Court has also expressly stated that while provinces have the right to control the civil courts, "the province's powers under s. 92(14) must be exercised in a manner that is consistent with the right of individuals to bring their cases to the superior courts and have them

²⁷ [Application Decision](#) at para. 39, citing from *Trial Lawyers Assn.* at para. 32.

²⁸ *Reference re Code of Civil Procedure (Que.)*, art. 35, [2021 SCC 27](#) at paras. 98 to 99.

resolved there.”²⁹ In interpreting the impact of ROPA on s. 96, regard must also be had to underlying principles, including the rule of law:

Judicial orders are one manifestation of the law with which the state and the individual must comply. The rule of law, however, does more than demand compliance with the law. To validate this demand, the law must provide individuals with meaningful access to independent courts with the power to enforce the law by granting appropriate and effective remedies to those individuals whose rights have been violated: *B.C.G.E.U. v. British Columbia (Attorney General)*, *supra*, at pp. 228-29 S.C.R., pp. 298-99 C.C.C.; *Nelles v. Ontario*, [1989] 2 S.C.R. 170 at pp. 195-96, 60 D.L.R. (4th) 609; *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236 at p. 250, 88 D.L.R. (4th) 193; *Kourtessis v. Minister of National Revenue*, [1993] 2 S.C.R. 53 at pp. 90-91, 81 C.C.C. (3d) 286 at pp. 309-10, *per* La Forest J.; P. W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at p. 1263. This court must give effect to both the compliance and the remedial components of the rule of law in determining whether the appellant is entitled to challenge the order of Kovacs J. at his trial.³⁰

21. As observed in *Poorkid*, a screening mechanism of remedies for claims against the Crown is permissible, if conducted by superior court judges, because core functions remain intact:

[37] ... Section 17 (of the *Crown Liability and Proceedings Act*) establishes a screening process - a procedure that allows the superior courts to screen out unmeritorious claims. The operation of the screening process is determined by the superior courts themselves: they determine whether or not a claim may proceed based on their interpretation and application of the criteria set out in s. 17. In other words, the superior courts continue to exercise their core jurisdiction - hearing and resolving disputes.³¹

22. However, completely removing the superior courts’ ability to grant any remedy under any Ontario statute is different and plainly removes the superior courts’ ability to resolve disputes. Under ROPA, again, every possible remedy under all possible statutes and regulations is removed.

23. The basic rule of law encompasses three fundamental facets, “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 (*Reference re Manitoba Language Rights*, at pp. 748-51; *Imperial Tobacco*, at

²⁹ *Trial Lawyers Assn.* at para. 36, and more generally see paras. 19 to 39 [emphasis added].

³⁰ *R. v. Domm*, 31 O.R. (3d) 540 (C.A.) [emphasis added].

³¹ *Poorkid Investments Inc. v. Ontario (Solicitor General)*, 2023 ONCA 172 at para. 37.

para. 58; *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854, at para. 16)³². Historically, the superior courts had primary responsibility for this task.”³³

24. The concept of rule of law is used as an interpretive aid when considering s. 96 and cannot be used standing alone to invalidate a law.³⁴ It speaks to principles rather than the terms of legislation.³⁵ Similarly, s. 96 does not grant specific rights such as the right to a fair trial or a court process.³⁶ If citizens believe they are being treated unfairly or unjustly the remedy is through the electoral process.³⁷ However, one of the core functions of any court is to adjudicate claims for compensation, damages and costs. When the *Constitution Act, 1867*, was first enacted, there was absolute Crown immunity from liability. As noted above, there is also no doubt governments can use their powers under s. 92(14) the *Constitution Act, 1982*, to restrict such claims for both private and public entities in many ways.³⁸ This rationale has been used to preclude s. 96 findings related to certain types of claims being part of the core jurisdiction of superior courts.³⁹

25. At the same time, as this Honourable Court has held many times, the Constitution is a living document and is not “frozen” at the time of Confederation.⁴⁰ As also recently observed “(i)n

³² *Reference re Manitoba Language Rights*, [1992] 1 S.C.R. 212; *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49 (“*Imperial Tobacco*”); *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 at para. 16.

³³ *Reference re Code of Civil Procedure (Que.)*, art. 35, 2021 SCC 27 at para. 47.

³⁴ *Poorkid Investments Inc. v. Ontario (Solicitor General)*, 2023 ONCA 172 at para. 57; *Poorkid Investments Inc., et al. v. Solicitor General of Ontario Sylvia Jones, et al.*, 2023 CanLII 115642 (S.C.C.).

³⁵ *Imperial Tobacco* at para. 59.

³⁶ *Imperial Tobacco* at paras. 63 to 77.

³⁷ *Imperial Tobacco* at para. 66.

³⁸ *Joseph v. Paramount Canada’s Wonderland*, 2008 ONCA 469 at para. 13; *Frame v. Smith*, [1987] 2 SCR 99 at paras. 6 and 31; *Hernandez v. Palmer*, [1992] O.J. No. 2648 (Gen. Div.); *Weber v. Ontario Hydro*, [1995] 2 SCR 929 at paras. 36 and 76; *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Sch A, ss. 26 to 31; *Libel and Slander Act*, RSO 1990, c L.12; *Occupiers’ Liability Act*, RSO 1990, c O.2, s. 2.

³⁹ *Canada (Attorney General) v. Thouin*, 2017 SCC 46 at para. 23; *Babcock v. Canada (Attorney General)*, 2002 SCC 57, see also *R. v. Ahmad*, 2011 SCC 6; *Rudolph Wolff v. Canada*, 1990 1 SCR 695; *Proceedings Against the Crown Act*, R.S.O. 1990, c. P.27; *Ontario v. Criminal Lawyers’ Association of Ontario*, 2013 SCC 43 at para. 19, citing *MacMillan Bloedel* at paras. 30 and 38; *MacMillan Bloedel* at para. 37; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 SCR 214; *Trial Lawyers Assn.*

⁴⁰ See for example *Reference re Code of Civil Procedure (Que.)*, art. 35, 2021 SCC 27 at paras. 53 and 89.

the *Just* decision, the Court noted that in modern times ‘complete governmental immunity’ has become ‘intolerable’. In *Imperial Tobacco*, the Court emphasized again that ‘exempting all government actions from liability would result in intolerable outcomes’.”⁴¹ These decisions of this Honourable Court reflect the current understanding that governments can and ought to be held accountable to some extent for their actions.

26. This Honourable Court also recently released its decision in *Canada (Attorney General) v. Power*, holding that:

[4] ... The state is not entitled to an absolute immunity from liability for damages when it enacts unconstitutional legislation that infringes *Charter* rights. Rather, as this Court held in *Mackin v. New Brunswick (Minister of Finance)*, 2002 SCC 13, [2002] 1 S.C.R. 405, the state enjoys a limited immunity in the exercise of its law-making power. Accordingly, damages may be awarded under s. 24(1) for the enactment of legislation that breaches a *Charter* right. However, the defence of immunity will be available to the state unless it is established that the law was clearly unconstitutional, or that its enactment was in bad faith or an abuse of power. This is a high threshold. But it is not insurmountable.⁴²

27. As the Applicant has submitted here, *Power* affirms that Crown immunity is not absolute. Given that ss. 17(2) of ROPA eliminates all claims for compensation, damages, costs and all other remedies, this directly offends this Honourable Court’s findings regarding total immunity. Regarding the *Power* decision, the Application Judge held:

[44] The day this matter was argued, the Supreme Court of Canada released its decision in *Canada (Attorney General) v. Power*, 2024 SCC 26. The parties provided submissions in writing on the effect of *Power*. The applicant takes the position that *Power* resolves the matter in its favour. I do not agree. *Power* stands for the proposition that if legislation is found to be unconstitutional, the legislature does not enjoy absolute immunity and may be sued for *Charter* damages. It is not clear to me that, on its face, the wording of s. 17(2) would prohibit such litigation.

⁴¹ *Leroux (Litigation guardian of) v. Ontario*, [2020] O.J. No. 1450 (S.C.J.) at para. 23, reversed on other grounds *Leroux (Litigation guardian of) v. Ontario*, [2021] O.J. No. 3545 (Div. Ct.), *Leroux (Litigation guardian of) v. Ontario*, [2023] O.J. No. 2027 (C.A.), *Ontario v. Leroux (Litigation guardian of)*, [2023] S.C.C.A. No. 284; citing from *Just v. British Columbia*, [1989] 2 S.C.R. 1228 (“*Just*”) at para. 16 and *Imperial Tobacco*, 2005 SCC 49 at para. 76.

⁴² *Canada (Attorney General) v. Power*, 2024 SCC 26 (“*Power*”) at paras. 4, 5 and 93 [emphasis added].

That will be for a court to determine should such litigation arise. It does not assist the applicant here, where there is no underlying *Charter* claim.⁴³

28. The Court of Appeal also distinguished *Power*.⁴⁴ While *Power* is a *Charter* case, as noted, this Honourable Court expressly recognizes in *Power* the availability of other types of claims – such as for acts of bad faith, which were also expressly eliminated by ss. 17(2). Subsection 17(2) of ROPA seeks to completely immunize the Ontario government from all liability to the greatest possible extent. This appears to again contravene core functions of superior courts, as well as the basic principles of law in today’s Canadian society.

29. The Court of Appeal concludes “(t)he fundamental error underlying the appellants’ position arises out of a confusion between amending or abolishing a cause of action, which the Legislature is free to do, and interfering in the adjudication of an action or the exercise of the court’s inherent powers, which the constitution prohibits.”⁴⁵ This does not address this Honourable Court’s ratios in *Just, Imperial Tobacco, Power* or as also acknowledged by the Court of Appeal recently in *Marchi*, where this Honourable Court again described “complete Crown immunity as ‘untenable’.”⁴⁶

30. The Court of Appeal states “(t)hese comments cannot be read out of context. Neither *Just* nor *Marchi* limits the Legislature’s authority to establish immunities.”⁴⁷ However, the Court of Appeal expressly acknowledges ROPA “immunizes the Crown against liability” in respect of the Ontario Place redevelopment.⁴⁸ As noted, this immunity is as complete as a government could possibly seek to create. There is also no consideration or indication of any limits regarding why this immunization cannot be extended *ad hoc* elsewhere in Ontario, across Canada and at the Federal level. The question is whether this immunity comports with, or offends, the principles regarding Crown immunity set out by this Honourable Court in *Just, Imperial Tobacco, Marchi* and *Power*? Only this Honourable Court can properly resolve this question.

⁴³ [Application Decision](#) at para. 44.

⁴⁴ [Court of Appeal Decision](#) at para. 55.

⁴⁵ [Court of Appeal Decision](#) at para. 40.

⁴⁶ [Court of Appeal Decision](#) at para. 43, citing from *Nelson (City) v. Marchi*, [2021] S.C.J. No. 41 (“*Marchi*”) at para. 38.

⁴⁷ [Court of Appeal Decision](#) at para. 43.

⁴⁸ [Court of Appeal Decision](#) at para. 42.

31. As a result, it is open to this Honourable Court to consider i) whether core powers of Canada's superior courts under s. 96 of the *Constitution Act, 1867* have been eliminated by ROPA and/or ii) whether the Crown has been unconstitutionally immunized by ROPA.

Issue Two: Does ROPA Breach the Doctrine of Public Trust?

32. The Court of Appeal titles its analysis of this issue: “**The appellants have not established that a public trust doctrine exists in Canadian law or that it would apply in any event.**”⁴⁹ This squarely raises important questions of public interest in the development of the law in Canada.

33. This Honourable Court has held that the doctrine of public trust may be recognized in an appropriate case. In *Canfor*, writing for the majority Justice Binnie observed:

[73] ... In *Scarborough v. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255 (Ont. C.A.), Lacourcière J.A., in an oral decision, said at p. 257 that:

In our judgment, the municipality is, in a broad general sense, a trustee of the environment for the benefit of the residents in the area of the road allowance and, indeed, for the citizens of the community at large. [Emphasis added.]

This expression was referred to, without elaboration, by L'Heureux-Dubé J. in *114957 Canada, supra*, at para. 27.

[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...

...

[79] The American law has also developed the notion that the states hold a "public trust". Thus, in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), the Supreme Court of the United States upheld Illinois' claim to have a land grant declared invalid. The State had granted to the railroad in fee simple all land extending out one mile from Lake Michigan's shoreline, including one mile of shoreline through Chicago's central business district. It was held that this land was impressed with a public trust. The State's title to this land was different in character from that which the State holds in lands intended for sale... . It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over

⁴⁹ [Court of Appeal Decision](#) at para. 46.

them, and have liberty of fishing therein freed from the obstruction or interference of private parties. [p. 452] ...⁵⁰

34. Such matters were not determined in *Canfor*. However, these principles still form part of Canadian law. The principle of lands as public space has been found in relation to public places such as airports and parks.⁵¹ As was being requested in this case, this Honourable Court has also recognized trust relationships between government and the public, finding public authorities “own places [like parks] for the citizens’ benefit and use, unlike a private owner,”⁵² and as similarly affirmed by this Honourable Court:

... Kennedy J. correctly found (at pp. 230-31) that the Town Council, “faced with a situation involving health and the environment”, “was addressing a need of their community.” In this manner, the municipality is attempting to fulfill its role as what the Ontario Court of Appeal has called a “trustee of the environment” (*Scarborough v. R.E.F. Homes Ltd.* (1979), 9 M.P.L.R. 255, at p. 257).⁵³

35. Public trust principles have been further considered by academics.⁵⁴ Similar legal principles have also been directly applied in other common law jurisdictions such as the United States and India.⁵⁵ These decisions arise from the same common law principles:

Our legal system – based on English Common Law [*sic*] – includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large [*sic*] is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources.⁵⁶

⁵⁰ *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 SCR 74 (“*Canfor*”) at paras. 73, 74 and 79.

⁵¹ *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 at paras. 154 and 155.

⁵² *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 at para. 14.

⁵³ *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at para. 27.

⁵⁴ See for example Andrew B. Gage, *Public Environmental Rights: A New Paradigm for Environmental Law* (2007) [Tab 4A]; Erin Ryan, *The Public Trust Doctrine, Property, and Society*, *Handbook of Property, Law, and Society* (2002) at pp. 3 to 4 [Tab 4B].

⁵⁵ See for example, *Gould v. Greylock Reservation Commission* (1966), 350 Mass 410 (S.J.C.); *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388 (1996) (India).

⁵⁶ *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388 (1996) (India).

36. At the Court of Appeal, submissions were made by a coalition of Interveners which included Democracy Watch, Ontario Place for All, Toronto Field Naturalists, and National Trust for Canada.⁵⁷ They noted many international jurisdictions have specifically recognized the public trust doctrine, which limits government actions and gives the public access to lands and resources for their common use and enjoyment.⁵⁸

37. In the leading U.S. Supreme Court case, the Court confirmed the state holds title to the lands under navigable waters in trust for the public.⁵⁹ The public trust concept has since further evolved. Some states have broadened the doctrine to include the protection of the state's natural resources, natural beauty and esthetic values, and historically or culturally significant places.⁶⁰

38. In India, the doctrine is broadly applied to all natural resources, including shorelands, ecologically fragile lands, and parklands.⁶¹ Indian courts confirm the public trust doctrine was inherited from English law, with its source in both natural and constitutional law, including in a constitutional guarantee of life and liberty.⁶² Courts in Pakistan and Kenya have similarly grounded the public trust in this guarantee.⁶³

39. Canadian courts have used international law as a tool to assist in interpreting domestic law.⁶⁴ Interpretations of Canadian law that are consistent with international law are to be

⁵⁷ Respecting leave is not granted by this Honourable Court at the Leave to Appeal stage no applications to intervene have been made at this time.

⁵⁸ See Michael Blumm and Rachel Guthrie, [Internationalizing the Public Trust Doctrine](#), UC Davis Law Review, Vol. 44 (2012).

⁵⁹ *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892) (United States).

⁶⁰ [Constitution of the State of Hawaii, Article IX, s. 7](#) and [Article XI, s. 1](#); [Constitution of the Commonwealth of Pennsylvania, Article I, s. 27](#); *Pennsylvania Environmental Defense Foundation v. Commonwealth*, No. 609 M.D. 2019 (2021) at p. 3; *National Audubon Society v. Superior Court* (1983), 189 Cal.Rptr. 346; 658 P.2d 709.

⁶¹ *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388 (1996) (India); *M.I. Builders Private Ltd. v. Radhey Shayam Sahu*, (1999) 6 SCC 464 (India); Michael Blumm and Rachel Guthrie, [Internationalizing the Public Trust Doctrine](#), UC Davis Law Review, Vol. 44 (2012) at pp. 2 to 23.

⁶² *M.C. Mehta v. Kamal Nath*, (1997) 1 SCC 388 (1996) (India); *M.I. Builders Private Ltd. v. Radhey Shayam Sahu*, (1999) 6 SCC 464 (India).

⁶³ *Waweru v. Republic* (1994) 46 PLD (SC) 102 (1992) (Pakistan) in Michael Blumm and Rachel Guthrie, [Internationalizing the Public Trust Doctrine](#), UC Davis Law Review, Vol. 44 (2012) at pp. 25 to 26; *Zia v. Wapda*, (1994) 46 PLD (S.C.) 693 (Pakistan) at paras. 12 and 14.

⁶⁴ *Baker v. Canada*, 1999 CanLII 699 (S.C.C.) at paras. 69 to 71.

preferred.⁶⁵ The recognition of public trust is also consistent with Canada's international obligations. International law recognizes the right to a clean, healthy and sustainable environment⁶⁶ and principles of sustainable development and intergenerational equity.⁶⁷ Canada's international commitments support the development of the common law to recognize an enforceable public trust doctrine.⁶⁸

40. The Court of Appeal declined to give weight to this jurisprudence, finding “(t)here is no way for this court to assess the state of the law in the various jurisdictions based on simply these decisions, nor is it clear why decisions from these jurisdictions are relevant to the development of Canadian law in any event.”⁶⁹ With respect, although not binding, foreign jurisprudence is “relevant and persuasive.”⁷⁰ As in *Canfor*, these decisions are being cited as all of these jurisdictions, including Canada, still derive their legal antecedents from and still apply common law principles irrespective of the mechanisms under which such principles are applied.

41. There are instances of public trusts not being applied by Canada's courts. For example, where a party has sought to find a trust under a statute rather than pursuant to the common law.⁷¹ However, in the case of *Burns Bog* cited by the Courts below,⁷² even where the doctrine has not been applied, Canadian courts have recognized it may still be applied in the future: “(i)t is clear that in reaching his conclusion, the Judge carefully considered *Canfor*. He found that at best *Canfor*

⁶⁵ *Baker v. Canada*, [1999 CanLII 699 \(S.C.C.\)](#) at para. 70; *R. v. Keegstra*, [1990 CanLII 24 \(S.C.C.\)](#); *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001 SCC 40](#) at paras. 31 to 32.

⁶⁶ [GA Resolution 217 A](#), art. 25; [UN Sustainable Development Goals](#); [UNHRC Resolution \(A/HRC/RES/48/13\)](#); [GA Resolution \(A/RES/76/300\)](#).

⁶⁷ [UNFCCC, No. 30822](#), art. 3; [Convention on Biological Diversity](#), art. 2; [UNESCO World Heritage Convention](#), art. 4; UN Brundtland Commission, [Report of the World Commission on Environment and Development](#) (1987) at para. 27; [UN Agenda for Sustainable Development](#), SDG 15.

⁶⁸ As do Ontario's own standards. See, for example: Ministry of Heritage, Sport, Tourism and Culture Industries' [Standards & Guidelines for Conservation of Provincial Heritage Properties](#) (2010).

⁶⁹ [Court of Appeal Decision](#) at para. 48.

⁷⁰ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, [2020 SCC 32](#) at paras. 98 to 104. See also: *R. v. Kirkpatrick*, [2022 SCC 33](#) at para. 251.

⁷¹ *Green v. The Queen in right of the Province of Ontario et al*, [\[1973\] 2 OR 396 \(H.C.J.\)](#) at paras. 26 to 28.

⁷² [Application Decision](#) at para. 50; [Court of Appeal Decision](#) at para. 52.

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”.⁷³ In this case, the fact the Ontario Place lands are now held by the Crown supports the Applicant’s case.

42. In 2023, in the *La Rose* decision⁷⁴ (also referenced by the Courts below)⁷⁵, the Federal Court of Appeal dismissed a claim related to “bodies of water, the air, and the permafrost” in Canada as “(t)he youth appellants' claim is not targeted to land owned by Canada.”⁷⁶ In this case, the parcel of lands is discreet (Ontario Place) and again as observed below is now owned by Ontario. The Nova Scotia Court of Appeal also recently considered a public trust claim, ultimately dismissing it on the basis of mootness, which is also not an issue here.⁷⁷

43. Applying the doctrine to the Crown owned lands of Ontario Place is an incremental extension of both the common law in Canada and other jurisdictions, and specifically of the law regarding the protection of the environment as already established by this Honourable Court.

44. The Court of Appeal expressed misgivings regarding the doctrine applying solely to Crown rights, and further stated:

[55] These submissions fail to address a number of fundamental problems with the public trust concept. 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 trust arise? Can it apply to “cultural heritage” or buildings, as opposed to natural resources or the environment? If Ontario Place is subject to a public trust, did the trust arise when it was built, or at some later date when it developed cultural value or significance? Neither the appellant nor the intervener could answer any of these basic questions.⁷⁸

45. Again with respect, the Applicant and Interveners made submissions on these issues. For example, as noted above, Crown ownership resolves one of the key concerns expressed in *La Rose*.

⁷³ *Burns Bog Conservation Society v. Canada*, [2014 FCA 170](#) at para. 44.

⁷⁴ *La Rose v. Canada*, [2020 FC 1008](#), 477 C.R.R. (2d) 239, aff’d [2023 FCA 241](#) (“*La Rose*”).

⁷⁵ [Application Decision](#) at para. 50; [Court of Appeal Decision](#) at para. 52.

⁷⁶ *Luciuk (Guardian ad litem of) v. Canada*, [2023] FCJ No 2260 (C.A.) at paras. 53, 56, 61 and 62.

⁷⁷ *Bancroft v. Nova Scotia (Lands and Forestry)*, [2022 NSCA 78](#) at para. 36.

⁷⁸ [Court of Appeal Decision](#) at paras. 49 and 55.

It was also respectfully submitted the doctrine naturally should and does include public resources such as cultural heritage assets, such as Ontario Place. And irrespective of when it arose (which may need to be determined on the facts of another case), a trust clearly existed at the time material to this application, i.e. when ROPA was enacted. At the same time, these are the very kinds of questions that would benefit from the direction of this Honorable Court. The facts surrounding Ontario Place, given its iconic nature and now complete Crown ownership, appear to lend themselves ideally to this Honourable Court's consideration.

46. By removing the primary statutory protections developed over many decades for both the natural and built-form environments, and by enacting s. 17 of ROPA so as to eliminate all remedies under Ontario statute and all types of claims, including for acts of bad faith and misfeasance by the government or its agents, it appears clear the public trust in which these lands are being held has been breached. The Applicant, therefore, respectfully requested a declaration to this effect.

47. Notwithstanding the reservations of the Courts below,⁷⁹ the Applicant's request for a declaration was also proper. As observed by this Honourable Court, declarations are legally binding, based on the reasonable conclusion that governments cannot intentionally contravene the law as declared by the courts: "(t)hus, a public body or public official subject to a declaratory order is bound by that order and has a duty to comply with it."⁸⁰

Conclusion

48. The two issues raised by this Application for Leave to Appeal are not social or political questions. The continued erosion of the powers of superior courts granted under s. 96 of the *Constitution Act, 1867*, directly engages the jurisdiction and acumen of this Honorable Court. The existence and application of the doctrine of public trust also raises questions of law that are of equal public and national importance. It appears these issues can best be addressed only by Canada's highest Court.

⁷⁹ [Application Decision](#) at para. 55; [Court of Appeal Decision](#) at para. 56.

⁸⁰ *Newfoundland and Labrador (Attorney General) v. Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, [2020 SCC 4](#) at para. 248.

PART IV – SUBMISSIONS CONCERNING COSTS

49. The Applicant requests costs in the cause.

PART V – ORDERS SOUGHT

50. The Applicant seeks an order granting Leave to Appeal with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 12th DAY OF MAY 2025.



Eric K. Gillespie
Counsel for the Applicant

PART VI – TABLE OF AUTHORITIES

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