Parens Patriae and Public Trust: Litigating Environmental Harm *Per Se*

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In Western legal traditions, environmental harm is generally viewed through a strict anthropocentric lens—an approach that has thus far failed to deliver on the goal of environmental sustainability. The author argues that recognition of environmental harm per se in Canadian law would enhance environmental protection and presents vehicles for addressing such harm through litigation. In particular, the author examines options for litigating environmental harm per se: governmental actions under the parens patriae jurisdiction and their converse—citizen actions against government under the doctrine of public trust. Although both options have their own limitations, both could be used to effectuate the law's potential role in creating a sustainable future.

Dans les traditions juridiques occidentales, les dommages environnementaux sont généralement perçus d’un point de vue strictement anthropocentrique—une approche qui n’a, jusqu’à maintenant, pas donné les résultats escomptés en matière de préservation de l’environnement. L’auteure soutient que la reconnaissance par le droit canadien des dommages environnementaux comme un préjudice en soi améliorerait la protection de l’environnement et offrirait un moyen d’adresser ces dommages par le biais de procédures judiciaires. Notamment, l’auteure étudie les options visant à intenter une action en justice pour des dommages environnementaux en soi : les actions gouvernementales sous la juridiction parens patriae et leurs contraires—les actions citoyennes contre le gouvernement en vertu de la doctrine de la fiducie publique. Bien que chaque option ait ses limites, chacune pourrait être utilisée afin de concrétiser le rôle potentiel du droit dans la création d’un futur durable.

Titre francophone : Parens Patriae et fiducie publique: le dommage environnemental comme préjudice en soi

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1. **INTRODUCTION**

Statutory regulation is the primary system for controlling environmentally hazardous activities and curbing pollution in Canada. However, where regulation leaves gaps or fails to keep pace with industry, toxic tort litigation plays a crucial role in deterring and compensating environmental damage.\(^1\) The traditional aim of tort law is to compensate *individuals* who have suffered some harm or damage due to another person’s actions,\(^2\) such as physical injury to the person, property damage, or consequential loss—financial loss consequent on some injury to the plaintiff or damage to the plaintiff’s property.\(^3\) This understanding of harm in tort law is an anthropocentric one, strictly centered on human interests.\(^4\) In tort, harm is particularly concerned with individuals and private property.

If a goal of toxic tort litigation is environmental protection, then a purely anthropocentric view of harm is inadequate to achieve that purpose. In order to provide greater protection for the environment, the public must be able to deter polluters by litigating “environmental harm *per se*”: environmental harm that is harm for the simple fact that it is damaging to the environment, rather than because it causes direct damage to private land or an individual.\(^5\)

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\(^1\) Lynda Collins & Heather McLeod-Kilmurray, *The Canadian Law of Toxic Torts* (Toronto: Canada Law Book, 2014) at ix (toxic tort litigation is litigation of “torts arising from environmental contamination or a toxic product”).


\(^4\) Monique Evans, *The Definition of Harm in Environmental Tort Litigation* (2014) [Unpublished].

\(^5\) “Environmental harm *per se*” is not an original term, but I cannot trace it to any one individual. The term has been used in a few publications. See e.g. Prue Taylor, *An Ecological Approach to International Law: Responding to Challenges of Climate Change* (London, UK: Routledge, 1998) at 167; Susan F Mandiberg, “Locating the Environmental Harm in Environmental Crimes” (2009) 4 Utah L Rev 1177 at 1178–1179, 1187, 1196.
Whereas anthropocentric harm only captures pollution that has some direct, adverse physical effect on human beings—or in some cases property—environmental harm \textit{per se} encompasses damage to the natural environment that does not directly implicate people or property.

Environmental damage can be conceived of from an anthropocentric perspective. An anthropocentric perspective recognizes the value of the environment as a public resource that humans depend on for “health, recreation, material needs, and ultimately … survival.”6 The environment can be categorized as public property given that most aspects of the environment are public in nature: air, water, plant life, wildlife. But, “‘harm’ is a normative concept that reflects underlying social judgments about the good and the bad.”8 Death, illness, and physical injury to individuals, as well as some property damage, comfortably fall within current conceptions of anthropocentric harm. However, pollution in rivers and streams that has no direct effect on human health does not present itself so clearly as actionable harm from an anthropocentric perspective, where individual, human interests are of prime importance.

In contrast, ecocentrism “accords nature ethical status at least equal to that of humans” because nature has its own intrinsic value.9 Environmental harm \textit{per se} is based in the ethic of ecocentrism (sometimes referred to as “deep ecology” or “ecological egalitarianism”), which in environmental ethics, stands opposite to anthropocentrism.10 A pure ecocentric perspective in law treats natural objects as having their own rights.11 In this way, a wider range of polluting activity is captured as harmful because pure ecocentrism regards all damage to the environment as a violation of the environment’s rights, whereas anthropocentric harm only captures incidents of pollution that have adverse effects from the perspective of human beings.

That being said, these two perspectives present a somewhat false dichotomy. As Westra writes, “[s]cience today clearly indicates that—at the level of basic human rights—the [anthropocentric and ecocentric viewpoints] are one and the same … environmental rights are human rights.”12 Instead of being thought of as opposites, anthropocentrism and ecocentrism are better understood as the two ends of a horseshoe. The environment’s anthropocentric value as a public resource and the environment’s ecocentric value are inextricably linked. The environment’s so-called intrinsic value is a social construct;13 it exists because the public has some abstract interest in the wonder and otherness of nature and projects value and rights

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6 Stewart AG Elgie & Anastasia M Lintner, “The Supreme Court’s Canfor Decision: Losing the Battle but Winning the War for Environmental Damages” (2005) 38 UBC L Rev 223 at 228.
7 Ibid.
10 Ibid.
11 For the key legal work on environmental rights and ecocentrism, see Christopher D Stone, Should Trees Have Standing? Law, Morality, and the Environment, 3rd ed (New York: Oxford University Press, 2010).
12 Laura Westra, Human Rights: The Commons and the Collective (Vancouver: University of British Columbia Press, 2011) at 9 [footnotes omitted].
13 For an overview of the history of nature and wilderness as concepts within euro-American culture and wilderness as a cultural construct, see William Cronon, “The Trouble with Wilderness or, Getting Back to the Wrong Nature” (2006) 1:1 Environmental History 7 at 7 (“Far from being the one place on earth that stands apart from humanity, [wilderness] is quite profoundly a human creation”).
on to the commons as a result. Ultimately, both anthropocentric and ecocentric ethics engage human interests: anthropocentrism from a more individualist perspective, recognizing the traditional harms described above and ecocentrism from a more collective perspective, recognizing harm to a more abstract public interest in the health and maintenance of the natural environment.

In the absence of stricter, more punitive regulation of potential polluters, such that a cost-benefit analysis favours less polluting behaviour, does the Canadian public have any recourse against harm to the commons? In order to better address the gaps in environmental legislation through litigation, I argue that Canadian law should recognize environmental harm per se. This paper examines what options Canadians have in litigating such harm. Although I propose the recognition of environmental harm per se as understood through the ecocentric lens, I would suggest that this harm is not so different from collective, anthropocentric harm. As such, the law does not need to “give primacy to the ecocentric viewpoint at the expense of the anthropocentric perspective.” Where the law currently accommodates “public interest” type claims, the anthropocentric language of the court should not deter litigants from pursuing a broader understanding of public interest towards recognition of ecocentric, environmental harm per se.

Part 2 of this paper examines the tort of public nuisance and examines the barrier created by the special damages requirement for private actions in public nuisance. The special damages requirement bars most individuals and organizations from challenging damage to common resources and by extension, the environment.

Part 3 proposes that the unique position of government in private law actions provides opportunities in litigating environmental harm per se that are otherwise unavailable to the public. In particular, the Supreme Court of Canada’s decision in British Columbia v Canadian Forest Products Ltd, in addition to recognizing the ability to claim for damages for environmental harm generally, opened the door for both (1) government actions in environmental law using its parens patriae standing, and (2) actions against government using the public trust doctrine. Although the two doctrines have been applied in the United States, their use in Canada has been limited. By examining how the two doctrines have been applied in the United States, I intend to illustrate both their potential and limitations as tools for litigating environmental harm per se in Canadian courts.

2. PUBLIC NUISANCE AND THE “SPECIAL DAMAGE” BARRIER TO PRIVATE ACTIONS

Private tort actions—and even class actions—can contribute only marginally to environmental protection. Where pollution does not affect an individual directly, it can still harm the greater environment. When a human activity does not create a nuisance for other

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14 For a summary of 19th century animal rights philosopher, Henry Salt’s ideas on ecocentrism see Nash, supra note 9 at 28–29 (“he was too acute a thinker to really believe that humans and animals could have reciprocal ethical and political relationships. He knew that right and wrong were human concepts. Animals might have rights in the sense of being the beneficiaries of ethical extension, but they could not be expected to act ethically themselves” at 29).

15 Westra, supra note 12 at 9.

16 2004 SCC 38, [2004] 2 SCR 74 [Canfor].
persons, it can still be a nuisance for parts of the ecosystem. However, “no individual can collect damages for harm to these public resources.” Actions involving the currently accepted anthropocentric-type harms serve to remedy and deter only a small fraction of the overall costs of environmentally damaging activities.

Consequently, the best available tort action for claiming collective environmental damages is public nuisance. Public nuisance is the only tort focused on public resources and interests. In addition, the definition of public nuisance is broad enough to encompass environmental harm *per se*: “any activity which unreasonably interferes with the public’s interest in questions of health, safety, morality, comfort, or convenience” may constitute a public nuisance and “the conduct complained of must amount to … an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference.”

However, public nuisance claims for environmental harm *per se* cannot be brought by private citizens because of the “special damage” requirement: “an individual may bring a private action in public nuisance,” but she must plead and prove special damage. A special injury must be a different *kind* of injury from that suffered by the rest of the public.

The “special damages” requirement for individual standing in public nuisance greatly narrows the scope of its protection and limits its utility in litigating environmental harm *per se*. Because an individual would be claiming for damage to the environment as opposed to harm to individuals, it would be impossible for that person to show that she personally suffered some special damage.

As well, the Supreme Court in *Canfor* noted:

> The reality…is that it would be impractical in most of these cases for individual members of the public to show sufficient “special damages” to mount a tort action having enough financial clout to serve the twin policy objectives of deterrence to wrong doers and adequate compensation of their victims: *Bazley v Curry*, [1999] 2 SCR 534 … as Professor Klar notes, “[w]hat has made public nuisance a particularly ineffective private law remedy is the special damages requirement.”

Elgie and Lintner write, “the tragic irony of the special damages rule is that the more widespread the damage, the less likely any individual will have standing to remedy it through public nuisance.” For example, where a widely-used bay is polluted, “it is unlikely that anyone will

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17 Elgie & Lintner, *supra* note 6 at 228.
18 Ibid.
19 Ibid at 231.
22 Ibid at para 52.
23 Collins & McLeod-Kilmurray, *supra* note 1 at 53.
25 *Canfor*, *supra* note 16 at para 68 [footnotes omitted].
26 Elgie & Lintner, *supra* note 6 at 246.
have damages ‘different in kind’ from all others—meaning no one (except the attorney general) is likely to have standing to sue in nuisance.”

Similarly, McLaren writes, “the chances of the aggrieved citizen achieving positive results decrease in inverse proportion to the gravity and geographical scope of the pollution problem.”

3. OPTIONS IN LITIGATING ENVIRONMENTAL HARM PER SE: GOVERNMENT AS PLAINTIFF AND AS DEFENDANT

As Justice Binnie put it, “If justice is to be done to the environment, it will often fall to the attorney general invoking both statutory and common law remedies, to protect the public interest.” In Alfred L Snapp & Son, Inc v Puerto Rico ex rel Barez, Justice Brennan of the US Supreme Court wrote, “a State is no ordinary litigant. As a sovereign entity, a State is entitled to assess its needs, and decide which concerns of its citizens warrant its protection and intervention.” Governments are unique parties in private law actions, in theory, always representing the public interest. The uniqueness of government provides opportunities in litigating environmental harm per se that are otherwise unavailable to the public.

In 2004, in the Canfor decision, the Supreme Court of Canada affirmed the importance of the environment beyond the retail value of certain salable resources. In doing so, the Court recognized the Crown’s ability to sue as parens patriae for compensation as well as for injunctive relief on account of public nuisance or negligence causing environmental damage to public lands. The Court also acknowledged in obiter, the possibility of applying the American public trust doctrine in Canada, whereby interested individuals could bring claims against the Crown for failing to act in the face of threats to the environment.

In 1992, a forest fire damaged 1491 hectares of forest, 225 of which were Environmentally Sensitive Areas (ESAs) protected from logging. The Province of British Columbia sought damages for destruction of those protected ESAs in addition to its fire fighting and forest restoration costs and lost stumpage. Trees in the ESAs did not have a clear monetary value, but the Supreme Court acknowledged that

[o]ne could reasonably anticipate that the environmental impact, apart from “diminution of the value of the timber,” was also significant. Erosion problems have likely been aggravated. Fish habitat likely threatened. Water supply to the local

29 Canfor, supra note 16 at para 8.
30 458 US 592 at 612 (1982) [Snapp].
31 In many jurisdictions, public servants actually swear an oath of public service. See for example: Public Service Oath Regulation, BC Reg 228/2007, s 1; Public Service Act, RSA 2000, c P-42, s 20(1); Public Service Employment Act, SC 2003, c 22, ss 12–13, 54.
32 Canfor, supra note 16 at paras 57, 60.
33 Ibid at para 81.
34 Ibid at paras 79–81.
community to some extent degraded. Forest vistas replaced with the skeletons of blackened trees.\(^{35}\)

Economically, environmental damage is not a cost that is easily captured in the marketplace: “Because most environmental resources are not privately owned (they are ‘public goods’), firms do not have to pay for the full environmental costs they create, such as air pollution, water pollution, or loss of wildlife habitat.”\(^{36}\) In this context, there is little incentive to minimize the environmental costs of an activity and environmentally damaging activities are not adequately deterred. Regulatory offences can work to deter some environmentally damaging activity when the penalties are large enough to deter non-compliance. Where regulatory enforcement leaves gaps by failing to keep up with industry developments, the availability of tort damages for environmental harm potentially “transform[s] the economic equation, making it cheaper to protect, rather than pollute the human environment.”\(^{37}\)

Justice Binnie, writing for the majority in *Canfor*, set out the Crown’s standing to enforce historically “public rights” under the *parens patriae* doctrine. Justice Binnie emphasized the long legal history of public rights in the environment quoting Sanders: “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.”\(^{38}\) Justice Binnie also noted that European legal systems acknowledge common property in navigable rivers and streams, beaches, ports, and harbours.\(^{39}\) De Bracton wrote in *Bracton on the Law and Customs of England*, “by natural law these are common to all: running water, air, the sea, and the shores of the sea.”\(^{40}\)

From the historical recognition of the collective public interest in the commons and the existence of the common law *parens patriae* jurisdiction, Justice Binnie concluded, “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.”\(^{41}\) Justice Binnie also noted that such claims raised important questions, including:

the Crown’s potential liability for inactivity in the face of threats to the environment [as with the American Public Trust Doctrine], the existence or non-existence of enforceable fiduciary duties owned 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.\(^{42}\)

The Province had not pleaded *parens patriae* standing in its original claim and so the Court declined to address these issues. Nonetheless, the issues were raised and the door was opened.
for government to pursue environmental claims using its *parens patriae* standing and for public interest litigants to challenge government management of the environment in light of its status as a public trust resource.

Although since *Canfor*, *parens patriae* standing and the public trust doctrine have yet to be used in Canadian environmental litigation, the two doctrines have been utilized in the United States, providing some insight as to their potential and limitations as tools for litigating environmental harm *per se*.

### 3.1. Parens Patriae: Government as Plaintiff

#### 3.1.1. Parens Patriae Standing in the United States

The *parens patriae* doctrine gives governments standing to bring actions in tort for damages to a quasi-sovereign interest such as the general health and well-being of its residents. The US Supreme Court set out the test for *parens patriae* standing in *Snapp*: (1) “In order to maintain such an action, the State must articulate an interest apart from the interests of particular private parties, *i.e.*, the State must be more than a nominal party”; (2) “the State must express a quasi-sovereign interest”; and (3) “the State [must have] alleged injury to a sufficiently substantial segment of its population.” 43 Although the wording of the third requirement suggests the need for some anthropocentric harm, based on the *Canfor* decision, at least in Canada this standing likely extends to claims for damage to the environment generally. 44

*Parens patriae* standing confers a number of benefits in combatting environmental harm *per se*. First, private interests need not be implicated. In fact, American *parens patriae* jurisprudence “does not permit a state to merely adopt the interests of some subset of its citizens”; 45 the state must have an interest apart from particular private parties. Arguably, that interest could be the health of the environment—air, water, wildlife, etc.—or even simply the preservation of the natural environment. Second, there is no need for a government to show “special damages” different in kind from the rest of the general public. It is enough that the Crown is the “holder of inalienable ‘public rights’ in the environment and certain common resources.” 46 In *Georgia v Tennessee Copper*, the US Supreme Court held that, “the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.”

In the United States, states have successfully used *parens patriae* standing to litigate cross-border pollution and other polluting activities. In 1907, in *Tennessee Copper*, the state of Georgia sought an injunction to stop Tennessee Copper from “discharging noxious gas from their works in Tennessee over [Georgia’s] territory…[the] consequence of [which, was] a wholesale destruction of forests, orchards, and crops…and other injuries.” 48 The Court found

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43 *Snapp*, supra note 30 at 607.
44 *Canfor*, supra note 16 at para 76 (“This is an important jurisdiction that should not be attenuated by a narrow judicial construction”).
46 *Canfor*, supra note 16 at para 76.
47 206 US 230 at 237 (1907) [*Tennessee Copper*].
48 *Ibid* at 236.
that Georgia had an interest independent from its interests as a private property owner. The entire decision is couched in terms of a state giving up a degree of control over its territory by joining the union, but not being stripped entirely of its ability to protect the public resources within its boundaries.

In 1973, the state of Maine brought a claim against a tanker, the MV Tamano, for damage to Casco Bay from a bunker oil spill. In addition to damages claimed by the “state in its proprietary capacity for damage to property, such as state parks” and damages for “all sums expended or to be expended by [the State] in payment of third-party damage claims and clean-up costs,” the State of Maine also sought damages “in its parens patriae capacity as owner and/or trustee for the citizens of the State of Maine of all of the natural resources lying in, on, over, under and adjacent to its coastal waters seeks to recover for damage to such waters and the marine life therein.”

In its decision, the Court in MV Tamano also summarized other successful parens patriae claims to date (to 1973):

[T]he Supreme Court has entertained suits parens patriae to enjoin the discharge of sewage into the Mississippi River; to restrain the diversion of water from an interstate stream; to prevent a copper company from discharging noxious fumes across a state border; to enjoin the discharge of sewage into New York harbor; to preclude restraints on the commercial flow of natural gas; [and] to restrain drainage changes increasing the flow of water in an interstate stream…These cases establish that the right of a State to sue as parens patriae is not limited to suits to protect only its proprietary interests; a State also may maintain an action parens patriae on behalf of its citizens to protect its so-called “quasi-sovereign” interests.

In 1991, the US Government and the State of Alaska exercised their parens patriae powers to sue Exxon Valdez following the 1989 Exxon Valdez oil spill. The parties settled in October of that year. The settlement “required Exxon to pay $900 million over time to natural resources ‘trustees,’ identified in the settlement documents as the United States and the State of Alaska…to restore the damaged environment of Prince William Sound and nearby areas.”

It is apparent that parens patriae standing has proved useful for some state governments as a means of protecting natural resources from cross-boundary pollution and other potentially environmentally harmful activities.

An unfortunate set back in US law is the US Supreme Court’s decision in American Electric Power Co Inc et al v Connecticut et al. The state parties and land trusts were denied claims

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40 Maine v MV Tamano, 357 F Supp 1097 (1973) [MV Tamano].
41 Ibid at 1099.
42 Ibid at 1099 [footnotes omitted]. The court was referring to the following cases Missouri v Illinois, 180 US 208 (1901); Kansas v Colorado, 206 US 46 (1907); Tennessee Copper, supra note 47; New York v New Jersey, 256 US 296 (1921); Pennsylvania v West Virginia, 262 US 553 (1923); North Dakota v Minnesota, 263 US 365 (1923).
45 564 US 410 (2011) [American Electric].
in public nuisance, seeking injunctions against the defendant power companies for excessive green-house gas emissions. The *Clean Air Act* and the regulatory discretion of the Environmental Protection Agency (EPA) authorized by the Act were held to displace the federal common law in this regard. The consequence of this decision is that the EPA is not required to address or act on matters related to environmental harm and protection: “Indeed, were the EPA to decline to regulate carbon-dioxide emissions altogether at the conclusion of its … rulemaking, the federal courts would have no warrant to employ the federal common law of nuisance to upset the agency's expert determination.” The Court went on to say that the EPA's judgment would not escape judicial review. Nonetheless, that the common law is displaced in this context means that the issue of *parens patriae* standing does not arise at all and the role of toxic tort in regulating polluting behaviour is nullified.

### 3.1.2. *Parens Patriae Potential in Canada*

In my view, *American Electric* has little effect on Canadian law respecting public nuisance claims using *parens patriae* standing. As a rule of statutory interpretation, “it is presumed that the legislature does not intend to change the common law.” For this reason, tort in Canada is often still an available remedy for litigants even where statute plays a part in regulation. Were *American Electric* decided in Canada, absent express language in the relevant statute, it is likely that the common law would still apply.

The Supreme Court’s proposition in *Canfor* that governments may claim environmental damage generally, combined with the authority extended to governments by the *parens patriae* doctrine, creates fertile ground for challenging serious environmental harm that would otherwise not be actionable due to the “special damage” rule in private actions for public nuisance. For example, using their *parens patriae* standing, provincial and municipal governments in Canada could claim for environmental damage resulting from oil sands tailings leaking into the Athabasca River. Governments could also claim for ground water contamination due to fracking operations; the Government of Ontario could claim for damage to the Great Lakes due to micro-plastics pollution.

At the moment in Canada, the only express limitation on the Crown in using its *parens patriae* standing to claim for environmental harm *per se* is that it must put forward “a coherent theory of damages, a methodology suitable for their assessment, and supporting evidence.” Although the courts have yet to provide any more detail regarding what a coherent theory of environmental damages will entail, legal scholars have considered some options. Particularly, Olzynski suggests a two-stage assessment that would consider both a form of pecuniary

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55 *Ibid* at 2538–2539.


57 *Canfor*, *supra* note 16 at para 73 (“Canadian courts have suggested that even municipalities have a role to play in defence of public rights” at para 73). Binnie J quotes Lacourcière J in his oral decision in *Scarborough v REF Holmes Ltd*: “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” (*ibid* at para 73).

58 *Ibid* at para 12.
damages and a form of non-pecuniary damages to compensate for environmental damage over and above economic loss in recognition of the environment’s inherent value. 59

On paper, governments’ use of their parens patriae standing presents an excellent option in litigating environmental harm per se. Practically speaking, however, it requires governments to possess the political and economic will to actually bring the claims in the first place. Notably, governments in Canada have not used their parens patriae standing to litigate environmental harm since the Supreme Court’s finding in Canfor.

Relying on governments to bring claims for environmental damages is problematic. Elgie and Lintner write: “The proposition that the Attorney General will represent the public interest [in the environment] is neither tenable nor possible in current Canadian society” which is diverse and pluralistic; “there are many public interests, not just one, and those interests are often in competition.”60 The attorney general must, and does, decide what is a best course of action with respect to environmental matters, a decision that requires balancing many interests. The balancing of interests may not weigh in favour of litigation. Elgie and Lintner offer a number of reasons why an attorney general may not elect to pursue a claim:

- limited legal staff and resources (likely the most common reason);
- political reasons (e.g. the polluter is a major employer or has strong political connections);
- financial interest (the polluter could be a significant source of government revenue);
- or direct self interest (the polluter could be a government agency or Crown corporation).

To date, in Canada, it appears that no attorney general since Canfor has felt that litigation is an appropriate course of action. However, attorneys general are influenced by political and fiscal limitations that a public interest group may not be faced with. An attorney general’s decision not to pursue a certain claim, “cannot be taken as an indication that the claim lacks merit or is not in the public interest.”62

Canadian governments’ records on regulating environmentally hazardous and harmful activities tend to illustrate Elgie and Lintner’s point. Protecting fresh water resources from depletion or pollution can hardly be said to not be in the public interest. Nonetheless, the Albertan government has yet to meaningfully sanction any oil company for tailings pond leakage into the Athabasca river. 63 In 2014, the British Columbia government passed the Water Sustainability Act,64 which allows oil and gas companies to continue the practice of using short-term water permits to draw large amounts of water for fracking operations.65

60 Elgie & Lintner, supra note 6 at 242–243.
61 Ibid at 243.
62 Ibid.
63 Jennifer Grant et al., Beneath the Surface: a View of Key Facts in the Oil Sands Debate, (Drayton Valley, AB: The Pembina Institute, 2013), online: <www.pembina.org/reports/beneath-the-surface-oilsands-facts-201301.pdf> at 37 (“toxic wastewater seeps out of tailing lakes at an estimated rate of more than 11 million litres per day”).
64 SBC 2014, c 15 (not yet in force).
When considering what are otherwise profitable natural resource ventures for the province, governments in Canada appear less concerned with the environmental impacts.

If, as suggested in Canfor, municipal governments may bring claims on behalf of the public for environmental harm, they may be best positioned to challenge environmentally hazardous activities. Municipal governments have less power to determine how certain resources will be extracted and used, and can bring actions without facing accusations of regulation by litigation like their provincial counterparts. Municipalities do not license natural resource companies’ activities or enjoy revenues from leasing crown land. That being said, municipalities may feel community pressure to not interfere where these companies employ many in the community and bring other economic benefits. While municipal governments receive less direct economic benefit than provincial governments from natural resource ventures, entire communities being employed by a particular venture may be enough to deter litigation.

Even if governments do pursue claims, Ratliff raises concern that “attorneys general will not be aggressive enough; they preempt the field, exclude private class action counsel, and then make a sweetheart deal with an egregiously culpable defendant, wiping the slate clean.” By settling claims out of court, attorneys general may thwart efforts to use tort as an ombudsman in the environmental law context and combat environmental harm per se that way.

3.2. The Public Trust Doctrine: Government as Defendant

If the public cannot rely on governments to bring claims using parens patriae jurisdiction, the public may be able to bring claims against a government for breaching the public trust. In Canfor, the Supreme Court suggested that the American public trust doctrine (under which the state holds certain public resources in trust for the people) might be applicable in Canada:

> It seems to me there is no legal barrier to the Crown suing for compensation… 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 [and] the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown in that regard.

Although the Court did not opine on these particular questions, public trust has reared its head in a handful of cases in Canada. The doctrine, as a tool of Canadian environmental law, is still in its infancy, but may present a next-best option for environmental activists in combatting environmental harm per se.

66 Supra note 16 at para 73.
69 Canfor, supra note 16 at para 81.
70 See e.g. Green v Ontario, [1973] 2 OR 396, 34 DLR (3d) 20 (Green cited to OR); R v Mann, (1 June 1990) Vancouver A881092 (BCSC); Canadian Parks and Wilderness Society v Wood Buffalo National Park (Superintendent), [1992] FCJ No 553, 34 ACWS (3d) 618 [Wood Buffalo National Park]; cited in Anna Lund, “Canadian Approaches to America’s Public Trust Doctrine: Classic Trusts, Fiduciary Duties, & Substantive Review” (2012) 23:2 J Envtl L & Prac 135 at 160. For more examples, see Lund at 160 nn 148–149.
3.2.1. The Public Trust Doctrine in the United States

The public trust doctrine provides that certain natural resources are the “common property of all citizens” and “must be preserved and protected by the government.” The Roman law doctrine of res communes recognized that:

some forms of property are legally incapable of exclusive ownership. Instead the commonality—the people collectively—owns them. Such ownership differs from state sovereignty and state ownership in fee, although the state often holds the title in trust for the beneficial interests of the people.

The US Supreme Court’s decision in Illinois Central Railroad v Illinois effectively adopted res communes into the common law in the form of the public trust doctrine. The state holds title to the land “in trust for the people of the State.” In Geer v Connecticut, the Court elaborated, “by implication, it is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use in the future to the people of the state.”

71 Patrick C McGinley, “Climate Change and the Public Trust Doctrine” (2013) 65:8 J Plan & Envtl L 7 at 8.
73 146 US 387 at 452 (1892) [Illinois Central Railroad]; Torres, supra note 72 at 520.
74 161 US 519 at 534 (1896).

Hughes concerned an Oklahoma state regulation prohibiting the transport of minnows in state waters for sale outside the state. The Appellant, a commercial minnow business owner in Texas challenged the law as contrary to the Commerce Clause. Oklahoma argued that its regulation was a conservation measure. The Court applied the rule in Pike v Bruce Church, Inc, 397 US 137, 397 US 142 (1970):

“where statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits…If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”

This rule is narrower than that stated in Geer to the extent that Geer held that a state could hold state resources within its jurisdiction for any purpose; however, the rule does not take away a State’s power to protect its local environment. The Court in Hughes “consider[ed] the States’ interests in conservation and protection of wild animals as legitimate local purposes similar to the States’ interests in protecting the health and safety of their citizens.” But, Oklahoma’s “conservation measure” was rather dubious and discriminatory in its effect on interstate commerce. The regulation did not limit the numbers of minnows that could be taken by licensed minnow dealers, nor did it limit how minnows could be “disposed of” within the State. The Court concluded that the regulation was “certainly not a “last ditch” attempt at conservation after nondiscriminatory alternatives have proved unfeasible. It is rather a choice of the most discriminatory means even though nondiscriminatory alternatives would seem likely to fulfill the State’s purported legitimate local purpose more effectively.”
Doctrine, people and organizations may challenge government action with respect to public trust resources as being in breach of trust.

_Illinois Central Railroad_ set out the traditional scope of the doctrine, which attaches to “(1) navigable water, the land submerged thereunder, and the resources located therein; and (2) tidal waters, the lands submerged thereunder, and the resources located therein.” The doctrine is typically associated with protecting navigation, commerce and fishing. But, because each state shapes its own law, the public trust doctrine has expanded in some states and been limited in others:

In some jurisdictions, public trust protection now extends to wilderness preserves, state parks, marshlands, “all waters usable for recreation purposes,” usufructuary water rights, beaches and wildlife. States have also been able to expand the scope of the public trust doctrine by adopting a less demanding test for determining what makes a body of water navigable. Likewise, some states have broadened the scope of the doctrine to recognize and protect new uses including scientific study, conservation, tourism, aesthetics and scenic views, “bathing, swimming ... hunting, boating and general recreation.”

By contrast, other states have apparently ceded their trust claims to non-navigable tidal waters; Ohio has passed legislation that defines the public trust doctrine more narrowly than its original _Illinois Central Railroad_ conception.

Lund suggests that California and Hawaii have “comparatively mature public trust doctrines” and hence California and Hawaii’s public trust duties are arguably demonstrative of the outermost limits of the public trust doctrine in the United States.

In _National Audubon Society v Superior Court of Alpine County_, the Supreme Court of California set out the state’s duties when state action impairs or disposes of a public trust resource. The case concerned a water diversion by the city of Los Angeles from four of five streams flowing into Mono Lake. The Court found that “the state ha[d] an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.” As well, “the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water” and a duty to reconsider past decisions in light of changing knowledge and needs.
Similarly, in *Re Water Use Permit Applications*, the Supreme Court of Hawaii held that the public trust doctrine imposed duties on the state to monitor and protect water resources. The state has a duty to: (1) “consider the impact of allocation decisions on public trust uses”; (2) “consider less harmful alternatives”; and (3) “revisit decisions as needed.” This case concerned water permits for major irrigation infrastructure on O‘ahu, which supplied the island’s leeward side with water diverted from the windward side. Water diversions reduced the flows in several windward streams, affecting the natural environment and human communities dependent upon them. The water diversions impaired native stream life and allegedly contributed to the decline in the greater Kāne‘ohe Bay ecosystem.

Public trust jurisprudence is written in grand language that provides a strong rhetorical base for public interest groups to bring claims against governments. By recognizing the state or Crown as a trustee, the public trust doctrine imposes duties in the care and management of resources. McGinley writes:

> The essence of the trust responsibility is the sovereign fiduciary duty to protect the public’s crucial assets from irrevocable damage… [A] trustee may not ignore threats of harm to trust property… [t]he trustee has a duty to protect the trust property against damage or destruction… By failing to act decisively in the face of an unprecedented ecological crisis, governments can be seen as abdicating their sovereign trust responsibility to act to safeguard the climate for current and future generations.

3.2.2. **Possibilities for Public Trust in Canada**

When compared with using *parens patriae* standing to litigate environmental harm *per se*, the public trust doctrine has a few key benefits. First, unlike *parens patriae* standing, which leaves discretion to litigate with the Crown, the public trust doctrine provides grounds for individuals and public interest organizations to challenge the Crown and the choices it makes in the management of public resources. A group would likely have to establish public interest standing as in a *Charter* application, but the same balancing of disparate interests would not interfere with litigation that is unquestionably in the public’s interest respecting the environment. Second, a party alleging a breach of trust does not necessarily have to show any direct harm to human individuals, but rather could establish ecocentric harm—harm to the more abstract, socially-constructed public interest in the health and maintenance of the natural environment. Third, an action may react to a one-time environmentally damaging event, but

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84 9 P (3d) 409 at 450 (2002) [*Re Water Use Permit*].
86 The windward side of an island is upwind from the mountain. Trade winds hit this side and it tends to be wetter. The leeward side is downwind from the mountain (on the other side) and is drier.
87 *Re Water Use Permit, supra* note 84 at 423.
88 McGinley, *supra* note 71 at 8 [footnotes omitted].
89 See *Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para 2, [2012] 2 SCR 524 (“The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court”).
may also address imminent damage, damage that has not fully materialized yet as the doctrine serves to protect public trust resources.

The language of public trust is heavily concerned with collective, anthropocentric interests, viewing the environment as valuable in as much as it exists for human benefit. However, as suggested at the outset, anthropocentric language of the court should not deter litigants from pursuing a broader understanding of public interest towards recognition of ecocentric, environmental harm _per se_. Law that seeks to protect the integrity of natural resources is one small step away from law that seeks to protect the environment at large. As the public trust doctrine stands today, it may still be a useful tool for combating environmental harm even if it is based in anthropocentric language. Whereas private torts struggle to tackle harm that is not deeply connected to individual human interests, the public trust doctrine is particularly adept at addressing sweeping harms to a collective interest. As well, since the doctrine is concerned with resource management, the long-term is as relevant as the short-term. Consequently, it may be possible to claim for harm to the collective interest where some action has a minor immediate effect on some aspect of the ecosystem, but will have a measurable long-term impact.

Lum writes: “The use of the public trust doctrine as a sword—by bringing breach of trust claims against the public trustee for failure to protect public natural resources—may hold the most potential to evolve into a trend.” ^90^ I argue that increased use of the public trust doctrine by private litigants could pressure governments to bring more _parens patriae_ claims for environmental harm _per se_ in order to avoid litigation against it by the public and to enhance regulatory schemes to avoid more litigation altogether.

However, Lund cautions against overstating the power of the doctrine in combating environmental harms. The public trust duties applied in even the more mature jurisdictions—California and Hawaii—relate more to the decision-making procedure than the substantive outcomes of decisions. The courts tend to be deferential to legislative decisions respecting the public interest:

> Courts are considered to be ill-suited to weighing the competing interests that are frequently involved in public trust claims. Moreover, in those situations where both competing interests come within the definition of a public trust use, the doctrine provides little direction regarding how these uses should be ranked... courts will only way into the substantive merits of a public trust determination in cases of flagrant misfeasance.^91^

A court will scrutinize a decision to ensure that a “sufficiently representative, accountable and open body” made the decision and that consideration was given to public trust interests in accordance with the doctrine. But, substantive decisions will only be reviewed in cases of flagrant abuse.^92^

As well, Lum notes:

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^91^ Lund, _supra_ note 70 at 152 [footnotes omitted].

^92^ _Ibid_ at 153.
Notwithstanding the fact that there is well-grounded precedent in case law and a protocol for resolving such claims, there does not appear to be a groundswell, let alone a ripple, of breach of trust claims to prevent wasting of natural resources.93 Although the public trust doctrine has the potential to influence environmental law and policy and combat the challenges associated with litigating environmental harm *per se*, it is not without limitations.

In Canada, it may be beneficial that the public trust doctrine is so new to the country’s courts. In bringing public trust claims, Canadian advocates may strategically pull from American jurisprudence in order to shape the doctrine’s application here. Where American courts have imposed stricter fiduciary duties or taken stronger positions on the importance of certain natural resources, Canadian advocates may tactically pick and choose which jurisdictions offer the best model for Canadian courts in hopes that the Canadian judiciary agrees.

To date, Canadian courts have been reluctant to employ the public trust doctrine; it has yet to be substantively determinative in a case in Canada. In her paper “Canadian Approaches to America’s Public Trust Doctrine,” Lund identifies three key differences in how Canadian litigants have used the public trust doctrine as compared to their American counterparts, which may explain the doctrine’s sparse record in Canada. First, Canadian public trust case law has incorporated classical trust law concepts. Second, Canadian public trust law draws heavily on Canadian fiduciary law. Third, Canadian litigation tends to use the public trust doctrine to challenge the substantive merits of a decision as opposed to the decision making procedure.94

Whereas the American public trust doctrine tends to be more flexible, combining principles of easements with trusts, Canadian litigation has imported some elements of classical trust law into public trust litigation.95 It can be challenging to establish the existence of a trust in public trust litigation, as a classical trust law requires that, the language establishing the trust, the property included in the trust, and the beneficiaries of the trust all be certain.96 As can be gleaned from the above summary of classical trust doctrine, what property is included in a public trust will change from place to place and is far from “certain.” While the beneficiaries of the trust are known—the residents of a certain territory—the competing interests of those beneficiaries create uncertainty as to what is in the beneficiaries’ best interests. This issue has implications for the Crown’s potential role as a fiduciary.

In *Green*, Larry Green, an environmental researcher, sought an injunction to stop further excavation of a sand dune leased to Lake Ontario Cement Ltd that bordered a provincial park.97 Green argued that the excavation damaged the aesthetics of the park and that the excavated land was now holding in swamps and stagnant pools of water in which insects, including mosquitoes, were breeding. The excavation also attracted dune buggies and boats that created noise and pollution.

93 Lum, *supra* note 90 at 74.
94 Lund, *supra* note 70 at 156.
95 *Ibid*.
97 *Supra* note 70 at 405.
In granting the Government of Ontario’s motion to strike, Justice Lerner applied classical trust law to determine whether the Provincial Parks Act established a public trust. Justice Lerner dismissed the claim because the statutory language was too uncertain to create a public trust:

A reading of s. 2 together with s. 3(2) makes it clear that the subject-matter of the trust is not certain. Section 3(2) empowers the Province to increase, decrease or even put an end to or “close down” any park. There cannot be a trust as is alleged by the plaintiff herein unless the subject-matter of the trust is of certainty.

Notably, Justice Lerner did not comment on the existence of a common law public trust in spite of the statutory language. As noted above, as a rule of statutory interpretation, it is presumed that the legislature does not intend to conflict with the common law. Post-Canfor, a court may be more open to the possibility of a common law public trust in spite of uncertain statutory language. Green still stands for the proposition that a public trust in Canada—for now—must accord with classical trust principles.

The incorporation of classical trust law “may help to explain why public trust litigation has not been more successful in Canada,” writes Lund, “As evidenced by the outcome in Green, it can be exceedingly difficult to establish that the necessary elements are present when alleging a public trust duty.”

Public trust duties vary greatly across the US, but Canadian litigants have drawn heavily on fiduciary law. The three criteria for fiduciary relationships in Canada are:

(1) the fiduciary has scope for the exercise of some discretion or power; (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests; and, (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

The fiduciary must act in the best interest of the beneficiary, avoid conflicts of interest, preserve property, and act prudently, impartially and with candour.

Lund asserts that the fiduciary approach is attractive to litigants because “it is an area where Canadian courts have proved willing to impose duties on governments outside of classical trust law and therefore offers litigants a method of circumnavigating the holding in Green.” The duties imposed on a fiduciary also invite substantive as opposed to only procedural review of fiduciaries’ decisions.

98 RSO 1970, c 371, s 2.
99 Green, supra note 70 at 407.
100 Sullivan, supra note 56 at 314.
101 Canfor, supra note 16 at para 81.
102 Lund, supra note 70 at 158.
104 Lund, supra note 70 at 163.
105 Ibid at 165.
Although fiduciary duties are in line with how many would like to see the public trust doctrine applied, a tendency toward substantive review in Canadian public trust litigation poses justiciability issues for the courts. Canadian courts are reluctant to decide policy matters that involve a balancing of competing concerns. This is evidenced by both the legislative deference paid on judicial review as well as the proportionality stage of the Oakes test in Charter jurisprudence for which the courts “accord the legislature a measure of deference.” The courts’ reluctance is grounded in two concerns: (1) courts and the adversarial system lack the institutional competence to decide multi-faceted policy matters and (2) the unelected judiciary lacks the institutional legitimacy to second-guess the policy decisions of the democratically elected legislature.

In a number of public trust cases, the Canadian plaintiffs have sought substantive review of government policy decisions. In the applicant asked the Court to review the government’s decision to allow excavation of sand dunes adjoining a provincial park. In the plaintiff challenged the decision to lease timber within a national park to a logging company. In the plaintiffs accused the Canadian government of not doing enough to protect the province’s fisheries. That the government holds natural resources in trust for the public does not automatically grant the courts authority to review the decisions of a democratically elected legislature. Particularly, where a balancing of interests is required, the court is arguably no better equipped than the legislature to decide which public’s “interest” represents the best public policy. The California courts are no better positioned than the state government to determine how dwindling water resources should be allocated. The British Columbia courts have no more authority than the legislature to determine what is an appropriate licensing scheme for fracking operations.

Given the lackluster success rate of the public trust doctrine in Canada until now, it seems to be time that Canadian litigants seriously consider what is the best approach to the doctrine. Any litigation strategy must consider the institutional limitations of the courts and the need for a legal mechanism to combat environmental harm per se beyond regulatory schemes and government actions using parens patriae standing. Key to this strategy will be distancing the Canadian public trust doctrine from classical trusts and creating a thoughtful test for any substantive review. Creating a clear and narrow test will better allow courts to responsibly intervene in what are policy decisions, which balance competing interests of the public in various commercial enterprises and in the rights of the environment.

107 Lund, supra note 70 at 168–169.
108 Ibid at 169.
109 Wood Buffalo National Park, supra note 70.
4. CONCLUSION

Environmental harm *per se* presents a pressing challenge in toxic tort litigation. Where regulations are lacking, tort law may fill in the gaps. However, where environmental harm is not clear, the avenues available to litigants are limited. *Parens patriae* standing provides the best theoretical option with a simple standing rule and a Supreme Court of Canada precedent providing grounds for seeking environmental damages generally. Unfortunately, *parens patriae* litigation leaves the public interest at the mercy of the very body that has failed to adequately regulate environmentally risky activities in the first place. Even where a government is motivated to intervene, political, fiscal and other interests may bar a government from bringing a claim. The public trust doctrine offers great potential to public interest litigants in challenging government decisions in the management of public resources. However, even in its infancy, the way in which the doctrine has been applied in Canada puts it on shaky ground. If public interest litigants seek to utilize the public trust doctrine successfully, careful crafting will be necessary to establish an approach that conservative Canadian courts will be willing to whole heartedly adopt.