Boom or Bust: The Public Trust Doctrine in Canadian Climate Change Litigation

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Over the past few years, Canadian courts have heard the first climate change cases. These claims have been commenced on behalf of youth and future generations who allege that governments have failed to meet or, otherwise, uphold greenhouse gas reduction targets under the Paris Agreement. *This novel area of litigation has brought forth creative legal arguments to expand or re-envision existing doctrines in order to place blame for what continues to be a warming planet and increasingly unstable ecosystems. This article investigates the public trust doctrine. In Canadian courts, the doctrine's limited and arguably parochial interpretation has diverged from its understanding in other jurisdictions. Now, it appears to be at a crossroads. On the one hand, it can lay the foundation for robust climate litigation for years to come via common law, constitutional law, or even natural law interpretations. On the other hand, it could wither away into irrelevance as, even if it is recognized as part of Canadian law, it would be relegated to its historical origins as a property law doctrine that guarantees that natural resources can be accessed by the public—not a doctrine that obligates governments to protect natural resources for current and future generations.*

Arguably, the public trust doctrine sits alone as a potential tool to hold government and even corporate actors to account for their exceptional contributions to a warming planet. Currently, the tension in Canadian courts lies with how broadly to interpret the doctrine, particularly in light of past opinions that span from obiter comments in Canfor *to the doctrine's recent rejection in* La Rose. *For an expansive public trust doctrine that could be applied in climate litigation, Canadian courts would construe governments as being responsible for the continued enjoyment of inherently public resources, including the air, atmosphere, forests, and all navigable waters. Pursuant to that understanding, the doctrine would serve as a cause of action for claims brought by individuals against governments as well as for claims brought by governments against arms-length corporations.*

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Introduction

The existential urgency of climate change has entered the courtroom. Over the past few years, Canadian courts have heard the first climate change cases,[1] referred to, at times, in their comparatively longer American history as "atmospheric trust litigation".[2] Predominantly, these claims have been commenced on behalf of youth and future generations who allege that governments have failed to meet or, otherwise, uphold greenhouse gas (GHG) reduction targets under nationally determined contributions outlined in the *Paris Agreement*.[3]

Lawyers, activists, and academics have worked together to orchestrate lawsuits to coerce institutional actors to protect the Earth's atmosphere before they can no longer effectively do so. This novel area of litigation has brought

1. *La Rose v Canada*, 2020 FC 1008 [*La Rose*]; *Mathur v Ontario*, 2020 ONSC 6918 [*Mathur* 2020]; *Mathur v Ontario*, 2023 ONSC 2316 [*Mathur* 2023]; *Environnement Jeunesse c Procureur général du Canada*, 2021 QCCA 1871.

2. This article uses "atmospheric trust litigation" and "climate change litigation" interchangeably. For commentary on the former, see Mary Christina Wood, *Nature's Trust: Environmental Law for a New Ecological Age* (Cambridge, UK: Cambridge University Press, 2013); Mary Christina Wood & Charles W Woodward IV, "Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last" (2016) 6:2 Wash J Envtl L & Pol'y 634; Kacie Couch, "After Juliana: A Proposal for the Next Atmospheric Trust Litigation Strategy" (2020) 45:1 Wm & Mary Envtl L & Pol'y Rev 219.

3. *Paris Agreement*, 22 April 2016, Can TS 2016 No 9, art 3 (entered into force 4 November 2016).

forth creative legal arguments to expand or re-envision existing doctrines in order to place blame for what continues to be a warming planet and increasingly unstable ecosystems. This article investigates the public trust doctrine—what previous authors have referred to as the "law's DNA" because it is "evident in the legal systems of nations throughout the world".[4] In Canadian courts, the doctrine appears to be at a crossroads. On the one hand, it can lay the foundation for robust climate litigation for years to come. On the other hand, it could wither away into irrelevance.[5]

A long-standing Justinian-era property law doctrine that prohibits governments from restricting public access to navigable waters and their underlying sea beds, the public trust doctrine, was recently canvassed but ultimately rejected by the Federal Court of Canada in *La Rose v Canada* (*La Rose*).[6] Despite that inauspicious start, there is still potential for the doctrine to flourish in Canadian climate change cases such that plaintiffs can attribute climate effects to the (in)action of Canadian governments and even Canadian-domiciled corporations.

The doctrine's limited and arguably parochial interpretation in Canada has diverged from its recent consideration in the United States.[7] Judicial interpretations there have used constitutional law, common law, and even natural law bases to suggest the doctrine may be sufficiently malleable to apply in climate change litigation that concerns atmospheric degradation, ocean acidification, and the like.[8] Over time, that jurisprudence may integrate itself in the minds of Canadian jurists who may be inclined to expand the doctrine because it is uniquely placed to protect the natural environment for the public at large—a notion that does not fit well with established understandings of, among others, fiduciary duties and public nuisance. In that light, rather than outright rejecting the doctrine, *La Rose* may be better viewed as an intractable set of facts for which the doctrine could not form a reasonable cause of action.

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4. Michael C Blumm & Mary Christina Wood, "'No Ordinary Lawsuit': Climate Change, Due Process, and the Public Trust Doctrine" (2017) 67:1 Am U L Rev 1 at 22.

5. Albeit prior to the rise of Canadian climate litigation, Anna Lund also viewed the public trust doctrine as sitting at a crossroads between, on the one hand, a fiduciary doctrine that could elicit substantive outcomes and, on the other hand, a trust-based doctrine that could require government procedures to consider environmental protection. See Anna Lund, "Canadian Approaches to America's Public Trust Doctrine: Classic Trusts, Fiduciary Duties & Substantive Review" (2012) 23:2 J Envtl L & Prac 105 at 135.

6. *La Rose*, *supra* note 1 at paras 81–100.

7. See *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at paras 72–83 [*Canfor*].

8. See *Foster v Washington State Department of Ecology*, 2015 WL 7721362 (Wash Super Ct) at 3–4 [*Foster*]; *Juliana v United States*, 217 F Supp (3d) 1224 at 1250 (D Or 2016) [*Juliana II*]. For commentary on both cases, see Blumm & Wood, *supra* note 4; Wood & Woodward, *supra* note 2.

Part I outlines the public trust doctrine's historical trajectory. It reviews early American cases as well as more recent atmospheric trust cases. It also assesses climate-related cases in other parts of the world (predominantly South Asia) in which the doctrine has been invoked. In doing so, it identifies constitutional law, common law, and natural sovereignty models that other jurisdictions have employed to expand the doctrine from its historical understanding. Finally, that part presents Canadian cases that have considered the doctrine. Although there may have been hope for the doctrine to gain traction after Justice Binnie's *obiter* in *British Columbia v Canadian Forest Products Ltd* (*Canfor*), more recent lower court decisions in *Burns Bog Conservation Society v Canada (Attorney General)* (*Burns Bog*), *La Rose*, and *Bancroft v Nova Scotia (Minister of Lands and Forestry)* (*Bancroft*) have been unwilling to take a doctrinal step forward such that governments would be required to maintain the air and atmosphere for current and future generations.[9]

Parts II and III canvass the aforementioned paths the Canadian public trust doctrine can take at this pivotal juncture. Part II portends the doctrine's expansive interpretation in climate change litigation. It presents reasons why judges may respond positively to the doctrine and, therefore, decide to expand it rather than radically re-envision existing understandings of, for instance, fiduciary duties and nuisance. For an expansive public trust doctrine that could be applicable in climate-related claims, Canadian courts would construe governments as being responsible for the continued enjoyment of inherently public resources, including the air, atmosphere, forests, and all navigable waters. Pursuant to that understanding, the doctrine would serve as a cause of action for claims brought by individuals against governments as well as for claims brought by governments against arm's length corporations.

Alternatively, even if the doctrine is eventually found to be part of Canadian common law, courts may view it as being a poor fit for climate litigation. Pursuant to that path, discussed in Part III, Canadian courts would freeze the doctrine's interpretation to its Roman and English origins and nineteenth-century interpretations. They would understand it as a governmental fiduciary duty to ensure that inherently public lands and resources are not privatized in a way that makes them inaccessible to the public. In that scenario, institutional actors would not necessarily have to conduct themselves in a manner that protects natural resources for current and future enjoyment. Practically, the death knell of the public trust doctrine in Canada may mean that climate change litigation would revolve around public nuisance and negligence concepts, which are not well-placed to account for the breadth

9. *Canfor*, *supra* note 7 at paras 72–83; *Burns Bog Conservation Society v Canada (Attorney General)*, 2012 FC 1024 at para 39 [*Burns Bog* FC]; *Burns Bog Conservation Society v Canada (Attorney General)*, 2014 FCA 170 at paras 43–47 [*Burns Bog* FCA]; *La Rose*, *supra* note 1 at paras 85–100; *Bancroft v Nova Scotia (Lands and Forestry)*, 2021 NSSC 234 at para 4 [*Bancroft* SC].

of climate impacts and their diffuse nature that affects the entire Canadian public, not only in the present but also for the foreseeable future.

I. A Spectrum of Public Trust Interpretations

Although the concepts should not be conflated, the public trust doctrine comes out of the historical dichotomy at common law between the *jura privata* (private right) and *jura publica* (public right).[10] In essence, under the Crown's authority over the *jura publica*, it was prohibited from privatizing land that was viewed as being for public use. The historical scope of this public right was limited to land and waters associated with fishing, navigation, and highways.[11] It is that historical scope with which domestic courts have recently grappled. In climate change litigation, they have been tasked with determining if and how to expand the public trust doctrine from being a prohibition on privatizing lands into a governmental responsibility to maintain a stable environment.

This part reviews the public trust doctrine's trajectory in different parts of the world. Its story outside of Canada may provide fodder for future Canadian courts to move past the view that the doctrine does not exist here or that it is only a rule of title. To date, Canadian courts have yet to follow the guidance put forth by the Supreme Court of New Jersey in *Matthews v Bay Head Improvement Association* when it stated, "we perceive the public trust doctrine not to be fixed or static, but one to 'be molded and extended to meet changing conditions and needs of the public it was created to benefit'".[12]

A. American Courts

The doctrine's historical application by US courts has largely been as a rule of title.[13] Inherited from English common law, original title of submerged lands beneath navigable waters was presumed to be held by the government, unless there was proof of subsequent legal acquisition by a private party. The

10. Vladislav Mukhomedzyanov, "Canadian Public Trust Doctrine at Common Law: Requirements and Effectiveness" (2019) 32:3 J Envtl L & Prac 317.

11. *Ibid* at 324.

12. 471 A (2d) 355 at 365 (NJ Sup Ct 1984) [*Matthews*], quoting *Borough of Neptune City v Borough of Avon-by-the-Sea*, 294 A (2d) 47 at 309 (NJ Sup Ct 1972) [*Neptune City*]. Alongside *Raleigh Avenue Beach Association v Atlantis Beach Club, Inc*, 879 A (2d) 112 (NJ Sup Ct 2005), these cases form a trilogy of decisions by the Supreme Court of New Jersey that expanded the doctrine with respect to public beach access. For further commentary, see Lund, *supra* note 5 at 112–14.

13. Lund, *supra* note 5 at 122.

common law deemed these lands to be held in trust for the public's right of navigation and fishing. In the 1892 decision of *Illinois Central Railroad Co v Illinois* (*Illinois Central*), the Supreme Court of the United States affirmed this understanding.[14] There, the Court upheld the State of Illinois' claim to invalidate a previous grant to a private railroad company of lands along the Chicago harbour. The State had granted in fee simple all land that extended out one mile from Lake Michigan's shoreline, including one mile of shoreline through Chicago's central business district.

In *Illinois Central*, the Court explained that the disputed lands, irrespective of whether they were owned by the state or the railroad company, were distinct from other lands.[15] According to the Court, they were held in trust for the public to "enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties".[16] Joseph Sax summed up the holding in *Illinois Central* in the following statement: "What a state may not do . . . is to divest itself of authority to govern the whole of an area in which it has responsibility to exercise its police power; to grant almost the entire waterfront of a major city to a private company is, in effect, to abdicate legislative authority over navigation".[17] Although not explicitly stated in that excerpt, the Court in *Illinois Central* was concerned with government abdicating its responsibility to ensure public access to navigable waters.

Since *Illinois Central*, the Supreme Court of the United States has confirmed that, absent inter-state or international concerns, each state is endowed with the authority to determine the public trust doctrine's scope.[18] Accordingly, there are now a number of state statutes and constitutions that delineate the government's duty to maintain lands and resources in the public trust. As we will see in the Canadian context, the absence of constitutional or statutory provisions has been used as an implicit basis for courts to conclude

14. 146 US 387 (1892) [*Illinois Central*].

15. James L Huffman, "The Public Trust Doctrine: A Brief (and True) History" (2019) 10:1 George Washington J Energy & Envtl L 15 at 22. But see Robin Kundis Craig, "A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust" (2010) 37:1 Ecology LQ 53 at 69.

16. *Illinois Central*, *supra* note 14 at 452.

17. Joseph L Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1970) 68:3 Mich L Rev 471 at 489.

18. *Martin v Waddell*, 41 US (16 Pet) 367 (1842); *Pollard's Lessee v Hagan*, 44 US (3 How) 212 (1845) [*Martin*]; *United States v Alaska*, 521 US 1 (1997); *Idaho v United States*, 533 US 262 at 272–73 (2001).

that the doctrine is not part of Canadian law.[19] Despite that difference between the two countries, the concept of an ecological public trust outlined in a few US state constitutions may (to the extent the doctrine is accepted as part of Canada's common law) inform the common law's development of a more expansive public trust doctrine in Canadian climate change litigation.

According to Kundis Craig, California and Hawaii have enshrined the most expansive notions of an ecological public trust doctrine, meaning one which allows for the types of protections being argued in climate change litigation today.[20] The Supreme Court of California has affirmed that the public trust doctrine applies to environmental purposes beyond navigable waters.[21] California may be unique—and for conservative advocates of the public trust doctrine, an outlier—because it allows for two distinct types of public trust doctrines: the traditional one that applies to navigable waters, and a doctrine that requires the government to protect wildlife. Individuals can sue in California courts to enforce either of those two conceptions of the doctrine on the basis that it requires the state's government to protect those resources.[22] With that said, Craig surmises the California doctrine may not be as progressive as it first appears since the broader ecological public trust doctrine that allows for wildlife protection requires state ownership of the beds and banks of navigable waters where wildlife are located.[23]

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19. See e.g. *Burns Bog* FC, *supra* note 9 at para 47. With that said, the three Canadian territories have statutory provisions that reference the public trust. See *Environmental Rights Act*, SNWT 2019, c 19, s 13(1) ("every adult resident in the Northwest Territories has the right to protect the environment and the public trust, by commencing an action in the Supreme Court against any person for any act or omission that the resident believes on reasonable grounds has caused or is likely to cause significant harm to the environment"); *Environmental Rights Act*, RSNWT (Nu) 1988, c 83 (Supp), s 6(1) ("[e]very person resident in Nunavut has the right to protect the environment and the public trust from the release of contaminants by commencing an action in the Nunavut Court of Justice against any person releasing any contaminant into the environment"); *Environment Act*, RSY 2002, c 76, s 38(2) ("[t]he Government of the Yukon shall . . . conserve the natural environment in accordance with the public trust"). These provisions have yet to be tested in Canadian climate litigation. They were not referenced in the decisions in *La Rose* and *Mathur*. However, in *McLean Lake Residents' Assn v Whitehorse (City)*, 2007 YKSC 44, Yukon's *Environment Act* was invoked to challenge the territory's approval of a quarry.

20. Craig, *supra* note 15 at 71.

21. *City of Los Angeles v Venice Peninsula Properties*, 644 P (2d) 792 at 794 (Cal Sup Ct 1982).

22. *Center for Biological Diversity, Inc v FPL Group*, *Inc*, 83 Cal Rptr (3d) 588 at 600–01 (Cal Ct App 2008).

23. Craig, *supra* note 15 at 86. This interpretation of California's case law aligns with other conservative commentators. See e.g. Huffman, *supra* note 15.

Hawaii has expanded the traditional navigable waters public trust doctrine to a broader natural resources public trust. For one, the Supreme Court of Hawaii has held that ownership of the water—not just navigating on it—remains at all times with the people.[24] The Court has written that the requirement to maintain waters in their natural state "constitutes a distinct 'use' under the water resources trust".[25] Going beyond California's expansive notion of the public trust doctrine, Hawaii's Constitution enshrines the government's trust over natural resources. Article 11 of the state's Constitution reads:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, include land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.[26]

Despite progressive notions of the public trust doctrine in California and Hawaii, there are a number of state legislatures, such as those of Arizona and Colorado, that have continued to promulgate the doctrine's historical understanding as a rule of title over navigable waters, first expounded in *Illinois Central*.[27] Within this tension, there is a push in atmospheric trust litigation for American courts to adopt the doctrine's more expansive iteration, which has garnered some success in ongoing litigation.

In the Superior Court of the State of Washington's November 2015 decision in *Foster v Washington Department of Ecology* (*Foster*), Hill J utilized what we can refer to as a "constitutional law model" to expand the public trust doctrine to respond to climate-related harms brought about by rising sea levels, ocean acidification, glacier loss, droughts, floods, landslides, wildfires, and other natural disasters.[28] That model grounds the doctrine as a basis for environmental protection within established constitutional provisions or interpretations.[29] *Foster* concerned article XVII of Washington's Constitution, which provides for the state's ownership over the beds and shores of navigable

24. *In re Water Use Permit Applications*, 9 P (3d) 409 at 441 (Hawaii Sup Ct 2000).

25. *Ibid* at 448.

26. Hawaii Const art XI, § 1.

27. Craig, *supra* note 15 at 69.

28. *Foster*, *supra* note 8. According to Wood and Woodward, Hill J's decision was the first to link GHG emissions with ocean acidification. See Wood & Woodward, *supra* note 2 at 676.

29. See also *McCleary v Washington*, 269 P (3d) 227 (Wash Sup Ct 2012) (a similar type of order in the context of phase-in funding for the state's public education system).

waters.[30] Judge Hill's opinion characterized the atmosphere as inextricably linked to submerged lands, which therefore required the state government to safeguard it just as much as the lands it owns within its constitutional mandate.[31]

When Washington's government eventually abandoned its rulemaking processes around its emissions reduction, youth plaintiffs and their lawyers returned before Hill J for an order that Washington follow through and finalize its reduction rules by year-end 2016. In that subsequent decision, Hill J affirmed her prior opinion grounded in what I have termed here a constitutional law model. She included the atmosphere as being a part of the public trust as outlined in article XVII of Washington's Constitution.[32] She wrote the "public trust doctrine mandates that the State act through its designated agency to protect what it holds in trust".[33] For the purposes of the doctrine's potential development in Canada, Hill J rejected the government's arguments to restrict it to its traditional ambit in US law as a rule of title applicable only to navigable waters and their streambeds. But she was only able to extend the doctrine's applicability under article XVII of the Constitution by tying together protection of the atmosphere with protection of navigable waters.[34]

In September 2015, around the time that *Foster* was being litigated in Washington state courts, twenty-one youths from across the US launched a lawsuit in the United States District Court for the District of Oregon against multiple federal agencies with control over fossil fuel policies. In *Juliana v United States of America* (*Juliana*), the plaintiffs have argued that, by failing to protect essential natural resources (including the atmosphere) as a result of fossil fuel promotion, the federal government has violated the public trust doctrine as well as constitutional due process and equal protection principles.[35] Although the case has meandered procedurally for the past half-decade or so, in 2016 the District Court, like the Washington state court in *Foster*, employed the constitutional law model and twice held that the public trust doctrine is implicit in the US Constitution's due process clause, which protects the right to a sustainable climate system.[36]

30. *Foster*, *supra* note 8 at 7–8.

31. *Ibid* at 8.

32. *Ibid* at 7. Judge Hill's interpretation of article XVII was enmeshed with the understanding that article I of the Constitution guarantees the right to a healthy atmosphere.

33. *Ibid* at 8.

34. *Ibid*.

35. *Juliana II*, *supra* note 8. See also *Alec L v McCarthy*, 561 Fed Appx 7 (DC Cir 2014) (like *Juliana II*, an allegation that the federal government is subject to public trust duty to protect the atmosphere).

36. *Juliana v United States of America*, 2016 WL 183903 (D Or) [*Juliana I*]; *Juliana II*, *supra* note 8.

In her November 2016 decision in *Juliana*, Aiken J also employed what can be referred to as a "natural sovereignty model" of the public trust doctrine. That decision characterized the doctrine as an inherent attribute of sovereignty because it "imposes on the government an obligation to protect the *res* of the trust [and] . . . cannot be legislated away".[37] As discussed later, that statement is seminal to future climate litigation in Canada because it recognizes that the responsibility to maintain a sustainable climate system for current and future generations falls squarely upon government actors. Although Aiken J's decision held the doctrine falls within constitutional due process, she concluded that it is neither created by it nor limited to it.[38]

Following *Illinois Central*, Aiken J saw no reason to limit the doctrine to the conduct of state governments. With that said, in perhaps a clever interpretative move that would limit the possibility of a successful appeal, she did not expand the doctrine from its traditional geographical scope of territory underneath navigable waters to include the air and atmosphere in order to apply to climate litigation. Rather, in *Juliana*, she anchored the use of the doctrine to its traditional scope of submerged lands in the territorial seas because GHG emissions result in ocean acidification and rising ocean temperatures.[39] Of course, that approach is not necessarily one to which Canadian courts will have to adhere. But, as in *Juliana*, it may strike an appropriate balance between respecting the doctrine's historical scope as one centered around navigable waters and the permissibility of logically extending it to the protection of other natural resources.

B. Other Jurisdictions

Aside from Canada, Blumm and Guthrie identify nine other countries on four continents (India, Pakistan, the Philippines, Uganda, Kenya, Nigeria, South Africa, Brazil, and Ecuador) where the doctrine has been equated with environmental protection.[40] I briefly discuss a few jurisdictions here. South Asian states appear to be where the doctrine has received the most expansive judicial consideration. The Supreme Court of India has construed the federal

37. *Juliana II*, *supra* note 8 at 1260. Judge Aiken used Kennedy J's decision in *Idaho v Coeur d'Alene Tribe of Idaho*, 521 US 261 at 286 (1997) [*Idaho*], which declared that the public trust doctrine developed as "a natural outgrowth of the perceived public character of submerged lands, a perception which underlies and informs the principle that these lands are tied in a unique way to sovereignty".

38. *Juliana II*, *supra* note 8 at 1260–61.

39. *Ibid* at 1256. For a similar approach, see *Foster*, *supra* note 8.

40. Michael C Blumm & Rachel D Guthrie, "Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision" (2012) 45:3 UC Davis L Rev 741.

government as the trustee of all the country's natural resources, with the public being the beneficiary of "sea-shore, running waters, airs, forests, and ecologically fragile lands".[41] What can be characterized as a third model through which domestic courts apply the public trust doctrine—the "common law model"—the Court ruled in its 1997 decision *MC Mehta v Kamal Nath* that a ninety-nine-year lease held by a resort planning to build a motel that would level protected forest areas violated the doctrine, which was integrated into Indian jurisprudence through English common law.[42]

Two years later, in *MI Builders Private Ltd v Radhey Shyam Sahu* (*MI Builders*), the Supreme Court of India used the doctrine to stop the construction of an underground shopping mall that would encroach on the grounds of a public park.[43] An instance of the constitutional law model, introduced above, the Court declared the doctrine to be part of article 21 of the Indian Constitution, a provision, similar to section 7 of the *Canadian Charter of Rights and Freedoms* (*Charter*), that says, "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law".[44] The Court in *MI Builders* held that the public trust doctrine, as part of article 21, was a sufficient basis to save the park as it was an "environmental necessity" to do so.[45]

In *Oposa v Factoran*, the Supreme Court of the Philippines halted logging in that country's last remaining ancient forest pursuant to the natural sovereignty model.[46] Like other jurisdictions, the Court construed the public trust doctrine as a facet of sovereignty that pre-dated constitutional rights.[47] Specifically, the Court wrote that "every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology . . . [This] belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation . . . the advancement of which may even be said to predate all governments and constitutions".[48] As discussed below, there has yet to be an equivalent pronouncement by Canadian courts which, to date, have not recognized any of the constitutional law, common law, or natural sovereignty models in a way that prioritizes the need for societal preservation for the benefit of current and future generations.[49]

41. *MC Mehta v Kamal Nath*, AIRONLINE 1996 SC 711, (1997) 1 SCC 388 (SC India) [*MC Mehta*].

42. *Ibid*.

43. AIR 1999 SC 2468, 6 SCC 464 at 466 (SC India) [*MI Builders*].

44. *Ibid*.

45. *Ibid*.

46. 224 SCRA 792, GR No 101083 (SC Philippines) [*Oposa*].

47. *Ibid* at 29.

48. *Ibid* at 28–29.

49. *Mathur* 2023, *supra* note 1.

Finally, at least two important decisions have come out of Pakistan. First, in *Leghari v Federation of Pakistan* (*Leghari*), a case about a farmer alleging the government's failure to reduce and mitigate carbon emissions, the Lahore High Court fell in line with decisions from the US and other countries by adopting all three of the constitutional law, common law, and natural sovereignty models to recognize the public trust doctrine's place in its domestic legal system. The Court held that the doctrine is at once part of constitutional protections around life and dignity and also a stand-alone common law right that predated the Pakistani Constitution.[50] The Lahore High Court ordered the creation of a judicial oversight body as well as an executive-level Climate Change Commission comprised of cabinet officials.[51]

In *Ali v Federation of Pakistan*,[52] the Supreme Court of Pakistan heard a claim by a seven-year-old girl who alleged the government's promotion of fossil fuels violated the public trust doctrine. The Court adopted all three of the above-noted models in the same manner as the Court in *Leghari* did in the previous year. Specifically, it wrote the following as a basis to conclude that the plaintiff's claim could proceed to trial:

> [T]he Constitutional Right to Life includes the right to a healthy and clean Environment. The Fundamental Rights to Life, Liberty, Property, Human Dignity, Information and Equal Protection of the Law, guaranteed by the Constitution, read with the Constitutional principles of democracy, equality, and social, economic and political justice found in the Preamble of the Constitution, *include within their ambit and commitment the Doctrine of Public Trust* and international Environmental principles of sustainable development, precautionary principle, Environmental impact assessment and inter and intra-generational equity . . .
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> *[O]ur legal system—based on English common law—includes the Doctine of Public Trust* as part of its jurisprudence. The State is the trustee of all natural resources, which are by nature meant for public use and enjoyment. The public at large, including future generations, is the beneficiary of the sea-shore, running

50. *Asghar Leghari v Federation of Pakistan*, (2015) WP No 25501/2015 (Lahore HC Pakistan) [*Leghari*].

51. *Ibid*.

52. (2016), Constitutional Petition No I of 2016 (SC Pakistan), online (pdf): <climatecasechart.com> [perma.cc/AH8P-WYVM].

> future generations, is the beneficiary of the sea-shore, running waters, airs and atmosphere, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect and conserve the natural resources. These resources meant for public use cannot be converted into private ownership . . .
>
> [T]he Earth's Climate system and atmosphere are critical to human life and the functioning of the Earth's ecosystems and *fall under protection of the Doctrine of Public Trust, which holds that the people of Pakistan have an inalienable right to safe levels of CO_2 in the atmosphere.*[53]

In sum, jurisdictions outside of North America have adopted one or more of the three distinct models of public trust doctrine recognition. Moreover, they have viewed the doctrine as a basis for environmental protection, whether it is pleaded pursuant to a particular emissions-producing project or, more broadly, to confront a general policy of unabated GHG emissions that harms the environment.

C. The Canadian Public Trust Pre-Climate Litigation

Is it true, as Vladislav Mukhomedzyanov writes, that "Canadian jurists are consistent in their opinion that there is no juristic basis for either expanding the traditional public rights into the environmental protection realm, or creating the [public trust] doctrine 'from scratch'"?[54] Case law prior to and now in a potential era of climate litigation has periodically suggested otherwise. Certainly, Binnie J's *obiter* in *Canfor* cannot be read as outright rejecting the potential to expand or re-envision the historical common law public trust doctrine.[55] *Canfor* arose out of a forest fire in British Columbia's interior where it was undisputed that the fire was caused by the defendant logging company, Canadian Forest Products Ltd (Canfor).[56] The Crown sought compensation for the costs of suppressing the fire and restoring the damaged forest areas, the loss of "stumpage revenue" that would have been procured from the sale of

53. *Ibid* at 30 [emphasis added] [internal citations omitted].

54. Mukhomedzyanov, *supra* note 10.

55. *Canfor*, *supra* note 7 at paras 72–83.

56. *Ibid* at paras 1–2.

undamaged lumber, and the loss of lumber revenue from trees that could no longer be logged because they were to be preserved to stabilize the soil.[57]

For the purposes of this article, the Crown, in addition to seeking damages qua landowner of the tract of affected forest, argued that it could also sue in its *parens patriae* capacity as the representative of a public that has an interest in an unspoiled environment.[58] Canfor and the intervenor, Council of Forest Industries, argued that the Crown's claim in tort was limited to its capacity as a private party.[59] In other words, the Crown's *parens patriae* status could not be invoked in a private law claim. The defendant and intervenor asserted that the Crown's attempted posture vis-à-vis the public trust doctrine was limited to the Attorney General within the law of public nuisance where the remedy was injunctive, not compensatory.[60]

Leaving aside the question of whether a public nuisance claim advanced by the Attorney General could warrant compensation in addition to an injunction, a topic the majority in *Canfor* only briefly engaged, the Supreme Court of Canada considered whether it was open to the Crown as the public's representative to advance a private law cause of action pursuant to claims of environmental degradation. The majority reviewed the public trust doctrine's history up until that time. Even though it did not have the benefit of referring to burgeoning atmospheric trust litigation that has since pushed to unleash the doctrine from its historical confines, the majority reviewed *Illinois Central* and a number of other lawsuits that had arisen in the context of US state constitutions.[61] Without neither specifically listing the public trust doctrine as a separate cause of action nor barring its potential use in environmental claims, Binnie J concluded the following:

57. *Ibid* at paras 3, 37–44.

58. *Ibid* at paras 9–10.

59. *Ibid* at para 65.

60. *Ibid*.

61. *Ibid* at para 79.

> It seems to me there is no legal barrier to the Crown suing for compensation as well as injunctive relief in a proper case on account of public nuisance, or negligence causing environmental damage to public lands, and perhaps other torts such as trespass, but there are clearly important and novel policy questions raised by such actions. *These include the Crown's potential liability for inactivity in the face of threats to the environment, the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown in that regard, the limits to the role and function and remedies available to governments taking action on account of activity harmful to public enjoyment on public resources, and the spectre of imposing on private interests an indeterminate liability for an indeterminate amount of money for ecological or environmental damage.*[62]

Even though the majority in *Canfor* found that the Crown was not per se precluded from pursuing damages in the public trust from the corporate defendant (or for the Crown itself to be a defendant in a public trust claim), the lower court proceedings had been limited to a consideration of the Crown as a private property owner. In other words, because the public trust claim had not been fleshed out prior to the matter reaching the Supreme Court of Canada, the majority decided that *Canfor* was not the proper appeal to determine the doctrine's scope.[63] In any event, contrary to Mukhomedzyanov's assertion at the beginning of this section, the Court in *Canfor* did not rule out the possibility for an expansive public trust doctrine, interpreted through any of the three above-noted models (constitutional law, common law, or natural sovereignty) and akin to the approaches taken by courts in the US and other jurisdictions.

In dissent, Lebel J went even further than the majority with respect to the Crown's ability to advance a private law cause of action for violating the public trust. He wrote, "[t]he Crown's *parens patriae* jurisdiction allows it to recover damages in the public interest, even to the extent that the Crown adopts commercial value as a proxy for such damages".[64] Therefore, for Lebel J, the Crown ought to have been entitled to pursue a public trust claim parallel to a claim as a private landowner.

The *obiter* in *Canfor* has been the extent to which the Supreme Court of Canada has engaged with the public trust doctrine that has existed for centuries in other jurisdictions. With that said, in its 2011 decision in *Alberta v Elder Advocates of Alberta Society* (*Elder Advocates*), the Supreme Court of Canada was confronted

62. *Ibid* at para 81 [emphasis added].

63. *Ibid* at para 82.

64. *Ibid* at para 158.

by the limits of the Crown's fiduciary duty to a group of seniors who claimed Alberta's government unlawfully procured accommodation charges in long-term care facilities as a way to subsidize medical expenses that should have been covered by the *Canada Health Act*.[65] The Court in *Elder Advocates* did not engage with, or even mention, the public trust doctrine. However, it outlined some useful principles around the Crown's fiduciary duty to the public that may inform how the public trust doctrine fairs in coming years in climate-related Canadian jurisprudence.

The Supreme Court of Canada erected a high bar for a public fiduciary duty, which consists of three requirements: (i) an undertaking to act in the best interests of a beneficiary, (ii) a duty owed to a defined person or class of persons, and (iii) the fiduciary's power must affect the beneficiary's legal or substantial practical interests.[66] Citing Dickson J in *Guerin v The Queen*, the Court in *Elder Advocates* held that governments owe fiduciary duties in "limited and special circumstances".[67] Concerning the first requirement, McLachlin CJ wrote that for the Crown to put the best interests of a beneficiary in front of its own is "inherently at odds with its duty to act in the best interests of society as a whole".[68] This undertaking—more readily met by private parties such as directors or officers of a corporation or in a professional regulation context—would be rare, if non-existent, for a government actor.

For the second requirement, the Supreme Court of Canada held that "the claimant must point to a deliberate forsaking of the interests of all others in favour of himself or his class".[69] To date, group duties on the part of a government have *only* been found to exist toward Aboriginal peoples in respect of entrusted lands.[70] With respect to the third requirement, for a public fiduciary duty to exist there must be a specific private law interest at issue, such as property rights or fundamental personal rights as are concerned in public guardian contexts.[71]

In short, a public fiduciary duty of the kind which was pursued by the plaintiffs in *Elder Advocates* was, in essence, a mirage. The plaintiffs' claim failed on all three common law prongs. And like that case, there is nothing to suggest a different outcome in the instance a public fiduciary duty claim is forwarded in climate change litigation. Discussed further below, the cause of action, as *Elder Advocates* affirmed, requires a level of specificity in which a beneficiary is identified, and a duty is owed to that beneficiary to the exclusion of others.

65. 2011 SCC 24 [*Elder Advocates*].

66. *Ibid* at para 36.

67. *Ibid* at para 37, citing *R v Guerin*, 1984 CanLII 25 (SCC).

68. *Elder Advocates*, *supra* note 65 at para 44.

69. *Ibid* at para 49.

70. *Ibid* at paras 49–50.

71. *Ibid* at para 51.

Despite some differential climate impacts to particularly marginalized groups—including younger and future generations—there is no evidence of harm to those groups pursuant to government breaching a specified duty it owed to them.

Finally, in the 2014 decision in *Burns Bog*, a case about the alleged responsibility of the federal and BC governments to preserve one of the country's largest raised peat bogs, the Federal Court of Appeal upheld the lower court's determination that *Canfor* opens up the possibility for a public trust doctrine in Canada, but only in circumstances for lands owned by the Crown.[72] In other words, it appears that both the trial and appeal courts in *Burns Bog* were not willing to expand the public trust doctrine from its historical American scope as being a rule of title into a private law cause of action to protect the environment. In any event, since the lands at issue in *Burns Bog* were not owned by the Crown, neither decision applied the doctrine, even in its more traditional form.

D. *The* La Rose *Rejection*

The summary of the above Canadian case law that, in one way or another touched upon the public trust doctrine, predated what is fast becoming an era of climate litigation in which plaintiffs are pursuing governments and potentially even corporations for their part in contributing to a warmer climate. The Federal Court litigation in *La Rose* on behalf of fifteen children and youth from across Canada is one such example. The Court summarized the claims in *La Rose* as follows:

> [T]he plaintiffs collectively describe that climate change has negatively impacted their physical, mental and social health and well-being. They allege it has further threatened their homes, cultural heritage and their hopes and aspirations for the future . . . they claim a particular vulnerability to climate change, owed to their stage of development, increased exposure to risk and overall susceptibility.[73]

Unlike *Mathur v Ontario* (*Mathur*), in which a group of Ontario youths challenged the provincial government's policy decision to claw back an emissions reduction plan first devised by the previous administration,[74] in *La Rose*, the plaintiffs did not challenge specific governmental action. Rather, they argued in the Federal Court that the totality of the government's conduct had the effect of degrading the atmosphere. For our purposes, the plaintiffs in

72. *Burns Bog* FCA, *supra* note 9.

73. *La Rose*, *supra* note 1 at para 2.

74. See *Mathur* 2023, *supra* note 1.

La Rose argued for an expansive iteration of the public trust doctrine as a private law cause of action that "can be relied upon . . . based on the common law or as an unwritten constitutional principle".[75] Akin to the progression that has taken place from the traditional US doctrine to the more expansive one outlined in specific state constitutions as well as the *Foster* litigation, the plaintiffs in *La Rose* argued for government responsibility over the air, including the atmosphere, and the permafrost. They wanted the court to craft a governmental duty of supervision and control as well as a duty to protect the public's right to access, use, and enjoy those resources.[76]

In response to the government's motion to dismiss, the Federal Court held in 2020 that the public trust doctrine is justiciable but did not disclose a reasonable cause of action in the particular case.[77] Justice Manson reviewed the decisions in *Canfor* and *Burns Bog* and concluded that there is a notion of environmental duties to the public that reside with the Crown. Yet, as he wrote, it was preferable to err on the side of caution and thereby reject an approach that would allow for actionable interests under the common law.[78] The Federal Court's conclusion in *La Rose* around the public trust doctrine may not necessarily signal its end in Canadian climate change litigation. Rather, it may simply be that the way in which the claim was structured—to impugn the government's part in atmospheric degradation writ large—was the underlying basis for why Manson J was reticent to approach the doctrine in the same manner as the American court in *Foster*.

To date, the only matter post-*La Rose* that has considered the public trust doctrine has been *Bancroft*.[79] There, despite representations to the contrary, the provincial government had failed to designate a parcel of Crown land as a provincial park, making it amenable for sale to a golf course developer.[80] A conditional agreement was signed between Nova Scotia's Minister of Lands and Forestry and the developer for the latter to turn the coveted land into golf courses without the public's knowledge. Once the agreement came to light, alongside the knowledge that the Crown land at issue had not been protected under statute as a provincial park, Robert Bancroft, a wildlife biologist, and the Eastern Shore Forest Watch Association, an organization formed to promote sustainable forestry, applied for judicial review. They asserted that Nova Scotia's government owns the implicated lands in trust for the public. Flowing from

75. *La Rose*, *supra* note 1 at para 5.

76. *Ibid* at para 84.

77. *Ibid* at para 102.

78. *Ibid* at para 92.

79. *Bancroft* SC, *supra* note 9; *Bancroft v Nova Scotia (Lands and Forestry)*, 2022 NSCA 78 [*Bancroft* CA] (dismissed on mootness grounds).

80. *Bancroft* CA, *supra* note 79 at paras 2–4.

that argument, the public ought to have been given adequate notice and participatory rights in a decision that would dispose of the land to a private party.[81]

Not an instance of climate litigation, *Bancroft* resembled earlier public trust doctrine claims, such as *Illinois Central*, in which the public was contesting the government's sale of invaluable land for private benefit. In any event, the Nova Scotia Supreme Court held that the public trust doctrine does not ground a duty of procedural fairness to an entire public when a government is contemplating to sell public land to a private actor. In the Nova Scotia Supreme Court's view, such a broad procedural duty would turn the executive branch into a legislature, which is shielded from judicial review and correlative private claims.[82]

Echoing past decisions that refused to expand the doctrine's ambit, Brothers J wrote that "recognition of the public trust doctrine proposed by the applicants would not represent the kind of incremental change to the common law that this court is permitted to make".[83] The applicants had argued, as I suggest below, that *Canfor* left the door open to an expansive public trust doctrine that could ground a private law cause of action against or even by a government actor. But, in light of *La Rose*, the Nova Scotia Supreme Court rejected that argument.

For similar reasons to those offered by Manson J in *La Rose*, the Nova Scotia Supreme Court in *Bancroft* concluded that substantially recasting the public trust doctrine in a way the applicants were arguing would have ramifications "which this court is not in a position to accurately predict".[84] Specifically, expanding the public trust doctrine to encompass procedural rights owed to an entire society would give little reason for future courts to limit the doctrine's scope, including its use in a private claim as was the case in *La Rose*. Finally, pushing back on the applicants' reliance on a relatively expansive public trust doctrine as envisioned by some American courts, the Court in *Bancroft* noted the doctrine differs from state to state in the US and has not been adopted by American courts writ large in the expansive manner the applicants were promoting its trajectory take in Canada.[85]

II. Boom: Public Trust in the Age of Climate Change

As mentioned, Canadian courts currently sit at a crossroads with respect to the public trust doctrine. The previous part set the scene for the two

81. *Ibid* at para 26.

82. *Ibid* at para 33.

83. *Bancroft* SC, *supra* note 9 at para 4.

84. *Ibid* at para 153.

85. *Ibid* at para 158.

potential paths the doctrine can take in climate litigation. This part explores the doctrine's continued existence in Canadian jurisprudence, not simply as a rule of title as its historical underpinnings would have it, but rather as a sword that plaintiffs can wield against powerful institutional actors allegedly bound to protect the atmosphere and other natural resources for the public's enjoyment now and in the future.

A. The Doctrine's Unique Potential

Arguably, the public trust doctrine sits alone as a potential tool for government and even corporate actors to be held accountable for their exceptional contributions to a warming planet. As Sax wrote in his now almost half-century-old article that first promoted the idea of the public trust doctrine as a method to force governments to protect the environment, "of all the concepts known to American law, only the public trust doctrine seems to have the breadth and substantive content which might make it useful as a tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems".[86] As detailed in this section, the public trust doctrine may be a more viable path to impute liability in climate change litigation than existing understandings of public nuisance, private trusts, and public fiduciary duties. To ground a civil claim, the doctrine does not require harm to a distinct group of plaintiffs. Moreover, by default, it places responsibility upon governments to maintain the environment for current and future generations. As such, it is able to overcome issues of standing and causation that would hamper other causes of action.

For Sax, public trusteeship over the environment rests upon three principles: (i) the environment is too important to the public to punt to private ownership, (ii) natural resources ought to be freely available to the public, and (iii) the government's purpose is to promote the public interest.[87] From those principles, we can glean a distinct role for governments in protecting the environment. Moreover, all three of those principles implicitly recognize the public's interest in a sustainable environment. That public interest, in the face of the existential threat that climate change poses, thus provides a basis for judges to respond positively to an expansive iteration of the public trust doctrine.

As mentioned, the public trust doctrine may be uniquely placed to respond to the existential threat of climate change, especially since there is no

86. Sax, *supra* note 17. See also *Matthews*, *supra* note 12 at 326, quoting *Neptune City*, *supra* note 12 at 309 ("we perceive the public trust doctrine not to be fixed or static, but one to be molded and extended to meet changing conditions and needs of the public it was created to benefit").

87. Sax, *supra* note 17.

equivalent existing doctrine that can be applied to the government's current and future protection over natural resources for public benefit and enjoyment. For instance, the tort law doctrine of public nuisance has been defined as "any activity which unreasonably interferes with the public's interest in questions of health, safety, comfort or convenience".[88] It concerns explicit interference with public resources but does not necessarily relate to present conservation of natural resources for future use.

To successfully plead public nuisance, plaintiffs must fulfill the "special injury rule"—that the alleged harm is more specific to them than the general public.[89] With that said, youth-led climate cases that have pleaded public nuisance have attempted to overcome that doctrinal barrier by asserting that younger and future generations will be acutely affected by climate-related impacts. Otherwise, like other tort law doctrines, proximity and causation remain significant hurdles to establishing a public nuisance claim. While there may be an evidentiary link between, for example, emitting or spilling toxic substances and negative health outcomes or rising temperatures, a court may not find that connection sufficiently proximate as between a specific defendant and a group of victims.[90]

American courts that have heard climate cases on public nuisance grounds have been divided about the appropriateness of public nuisance as a basis to impute liability for climate change. In *Native Village of Kivalina v ExxonMobil Corp*, the United States District Court for the Northern District of California concluded that the facts associated with climate change were too broad and lacked the specificity required for a public nuisance claim.[91] It wrote that for a public nuisance claim to be successful in a climate action:

> [T]he factfinder will have to weigh, inter alia, the energy-producing alternatives that were available in the past and consider their respective impact on far ranging issues such as their reliability as an energy source, safety considerations and the impact of the different alternatives on consumers and

88. *Ryan v Victoria (City)*, 1999 CanLII 706 (SCC) at para 52.

89. David Bullock, "Public Nuisance and Climate Change: The Common Law's Solutions to the Plaintiff, Defendant and Causation Problems" (2022) 85:5 Mod L Rev 1136. But see Steve Lorteau, "The potential of international 'State-as-polluter' litigation" (2023) 32:2 RECIEL 259 (arguing against the special injury rule).

90. See generally *Mathur* 2020, *supra* note 1 at paras 148–69.

91. 663 F Supp (2d) 863 (ND Cal 2009).

> business at every level . . . then . . . weigh the benefits derived from those choices against the risk that increasing greenhouse gases would in turn increase the risk of causing flooding along the coast of a remote Alaskan locale.[92]

Furthermore, traditional trust elements cannot be expanded to conceptions of a trust for the benefit of an entire public. It will remain to be seen if Canadian courts in the era of climate litigation will require traditional trust principles to be fulfilled for the doctrine to form a private law cause of action. If so, like public nuisance claims, a formidable obstacle in that regard may be for plaintiffs to illustrate some special harm as a result of government or corporate conduct that was not similarly felt by others. In other words, trust law, like public nuisance, requires a level of specificity to the conduct (and the harm) that does not fit well within the facts of climate change. The (in)action of institutional actors with respect to GHG emissions affects us all. As such, an underlying tension in climate litigation—irrespective of the causes of actions pleaded—is whether the harms at issue are better addressed through legislation or, otherwise, through multilateral efforts spearheaded by the executive branch. Separation of powers and justiciability arguments are discussed in more detail below.

Relatedly, entrenched understandings of public fiduciary duties, although they may overlap with a potentially expansive public trust doctrine in Canadian climate litigation, do not capture the responsibility that government and corporate actors have to the public at large to maintain the environment for current and future generations.[93] Plainly, it would be challenging for plaintiffs in climate litigation to fulfill the three-part test from *Elder Advocates*. There is nothing to suggest that governmental or corporate bodies have made an undertaking to preserve the environment for current and/or future generations. And the idea of a duty owed to a defined class of persons is contrary to the notion of a duty owed to the entire public. Put another way, the law of fiduciary duties, like trust and nuisance law, requires one actor's responsibility to flow to one or more specific beneficiaries. The facts of GHG emissions that contribute to climate change are too diffuse to allow for these causes of action to be successful absent clear evidence that a specific actor's duty to another was breached *because* of that actor's contribution to a warming planet.

92. *Ibid* at 874. But see *American Electric Power Co, Inc et al v Connecticut et al*, 564 US 410 at 423 (2011) ("we have recognized that public nuisance law, like common law generally, adapts to changing scientific and factual circumstances") [*American Electrical Power*].

93. To date, public fiduciary duty arguments to protect the environment have arisen with respect to discrete governmental decisions around, for instance, the allocation of fishing licenses. See e.g. *Prince Edward Island v Canada (Fisheries & Oceans)*, 2006 PESCAD 27. See also *Canfor*, *supra* note 7 at para 81. The public trust doctrine may raise novel issues around the existence of fiduciary duties owed to the public by the Crown.

In sum, the common law causes of action that exist today are not well-suited to capture climate-related claims. They require a level of specificity and proof of causation that do not fit neatly with the facts that plaintiffs plead to allege liability for climate change. On the other hand, as discussed further below, the public trust doctrine places responsibility for a sustainable environment on the government, which is required to act in the public interest when making decisions that may affect natural resources in the present and even in the future.

If the historical version of the public trust doctrine is not refashioned by Canadian courts to look more like the doctrine in *Foster* or in specific American state constitutions, it will be ill-suited to climate litigation just like, for instance, public nuisance and fiduciary duties continue to be. Therefore, unless Parliament or provincial legislatures statutorily devise a pathway for the public to bring a private law cause of action for climate-related harms, it will be left to the courts to re-envision existing causes of action or, otherwise, devise new causes of action to respond to allegations of climate liability—an unlikely prospect in Canada given recent appellate court decisions that have refused to create novel causes of action under tort law.[94] The judicial role in expanding the public trust doctrine within the separation of powers is considered next.

B. Promoting the Separation of Powers

Atmospheric trust litigation proceeds on the assumption that "domestic courts have the power to order the political branches to take swift and decisive action responsive to the climate crisis".[95] If the public trust doctrine is going to take root in Canadian jurisprudence to combat climate impacts, it is insufficient to say that it is uniquely placed in the common law to capture the conduct required of government and corporate actors to safeguard the environment. To effectuate the doctrine's unique capacity to hold governments and corporations to account for their climate impacts, independent and politically insulated judiciaries are arguably the most effective vehicle.[96] Provincial and federal courts will have to identify themselves as *the* vessel to manifest the doctrine's usefulness as a weapon to coerce institutional actors to ensure environmental sustainability. Learned Hand's caution that a judiciary unable to enforce

94. See *Merrifield v Canada (Attorney General)*, 2019 ONCA 205 [*Merrifield*] (refusing a novel tort for internet harassment); *Ahluwalia v Ahluwalia*, 2023 ONCA 476 [*Ahluwalia*] (refusing a novel tort for family violence/coercive control). But see *Nevsun Resources Ltd v Araya*, 2020 SCC 5 [*Nevsun*] (recognizing potentially novel torts for violations of customary international law).

95. Wood & Woodward, *supra* note 2 at 644.

96. See Wood, *supra* note 2 at 232–33 ("[p]ublic trust claims hold the potential to summon dormant judicial capacity in ways that statutory claims tend not to").

obligations turns what would amount to a trust to be no more than a precatory admonition applies equally today as to his own time.[97]

Of course, as just said, there always exists the possibility that the Canadian judiciary can devise a wholly new common law cause of action that embodies the responsibility to maintain an environment that current and future generations can enjoy. However, that avenue has not been suggested to date by either litigants or judges involved in climate litigation and, as mentioned above, may not be a likely result.[98] Rather, where the tension currently lies is how broad of an interpretation the public trust doctrine will receive in Canadian jurisprudence, particularly in light of past opinions that span from Binnie and Lebel JJ's comments in *Canfor* to the Federal Court's recent rejection in *La Rose*.

Relevant to the judiciary's role in effectuating the doctrine, Wood and Woodward present three stages of American atmosphere trust litigation.[99] First, courts ought to recognize the paramount judicial role in upholding the plaintiffs' (and by implication, the public's) right to a healthy environment. Arguably, this process has begun in other jurisdictions since courts have robustly pronounced the constitutional and common law bases to plead the public trust doctrine in atmospheric trust litigation. Second, courts must issue declarations of principle in order to guide government actors and provide a remedial framework. Again, while there continues to be a dearth of decisions on the merits, the *Foster* and *Juliana* courts as well as others have pronounced the obligation of government actors to safeguard the environment.[100] The *Foster* court declared emphatically that "[t]he state has a constitutional obligation to protect the public's interest in natural resources . . . If ever there were a time to recognize through action this right to preservation of a healthful and pleasant atmosphere, the time is now".[101]

Third, according to Wood and Woodward, courts must manage the remedy so it serves as a practical means to enforce plaintiffs' rights. This means that courts must "ensure that the political branches fulfill their trust obligation to avoid destruction or substantial impairment to public assets that are needed to sustain future generations".[102] Outside of *Foster*, we have yet to see this third stage in North American climate litigation, especially since US courts have yet to issue a decision that expounds a particular remedy. However, the

97. *Ibid* at 230.

98. *Merrifield*, *supra* note 94; *Ahluwalia*, *supra* note 94.

99. Wood & Woodward, *supra* note 2 at 655–77.

100. For a discussion of the American and international case law, see e.g. notes 10–53 and accompanying text, *above*.

101. *Foster*, *supra* note 8 at 8–9.

102. Wood & Woodward, *supra* note 2 at 668.

aforementioned decisions in South Asian courts—particularly in *Leghari*—have rendered enforceable remedial rulings against government actors.[103]

Perhaps due to its nascence, but also an overly reticent posture taken by Canadian courts thus far, climate change litigation that invokes the public trust doctrine has faltered such that it has not even entered the first stage. The decision in *La Rose* failed to appreciate the paramount role courts can play in combatting climate-related harms in light of inaction on the part of the legislative and executive branches.[104] Both before and after *La Rose*, Canadian courts have been unwilling to take what other jurisdictions have seen as a logical doctrinal step that affirms the public trust doctrine's constitutional and pre-constitutional bases. Consequently, at least to date, both provincial and federal Canadian courts remain outliers when compared with the substantial strides of other jurisdictions to invoke the doctrine as a basis to force governments to protect the environment or, relatedly, make best efforts to fulfill recognized climate targets.

It is hard to disagree with Mary Wood's contention that "[e]xtreme deference works an aberration in the law".[105] The deferential approach taken thus far by Canadian courts assumes the other branches will eventually have the political will to fill the vacuum of enforceable measures that apply to themselves and even other institutions, such as corporations. As was the case in *Mathur* and *Foster*, it is equally likely that governments will choose to roll back climate protections rather than encourage or mandate them.[106] Presumably, as long as judges leave some level of discretion to the political branches as to the specific policies and measures to take in order to reduce climate impacts and meet agreed-upon reduction targets, there is nothing to suggest that courts are impermissibly entering the political arena. That balance between judicial capacity to mandate government action and governmental discretion around specific policies was struck by the Supreme Court of the Netherlands in *Urgenda Foundation v The State of the Netherlands* (*Urgenda*) when presented with justiciability arguments by the Dutch government with respect to its emissions reduction goals.[107] As Karinne Lantz has argued, "Canadian courts could be satisfied that, by assessing the reasonableness of Canadian climate policies without mandating the specific measures to be taken, they are providing

103. *Leghari*, *supra* note 50 (requiring enforcement and implementation of National Climate Change Policy and a list of action points).

104. *La Rose*, *supra* note 1.

105. Wood, *supra* note 2 at 235.

106. *Mathur* 2020, *supra* note 1 at para 29; *Foster*, *supra* note 8 at 1–2.

107. Hoge Raad [Supreme Court], 20 December 2019, *Netherlands v Urgenda Foundation*, ECLI:NL:HR:2019:2007 (SC Netherlands), online (pdf): <elaw.org> [perma.cc/GM22-BBJF] [*Urgenda*].

appropriate deference because the [political] branches would still have the authority . . . to determine precisely how to meet Canada's climate change obligations".[108]

By approaching judiciaries to expand the public trust doctrine to protect the environment for current and future generations, plaintiffs are, in effect, using the courts as a democratization tool, employing a permissible end-around in the face of legislative reticence to coerce institutional actors to curtail their conduct in a way that adheres to established climate targets. Sax corroborates this notion in the following: "the function which the courts must perform . . . is to promote equality of political power for a disorganized and diffuse majority by remanding appropriate cases to the legislature after public opinion has been aroused".[109] Courts are independent institutions at an arm's length from political pressures. Consequently, they can use the public trust doctrine as a method to manifest public sentiment around the imminence of climate change outside of the legislative process. Championing this potential role for the judiciary refutes the notion that unelected and elitist judges are rebutting what the majority of the public wants. In fact, as mentioned below with respect to corporate lobbying, the political branches—not the courts—are more amenable to institutional capture in light of the interests of powerful minority groups.[110]

Briefly, in all three of the models (constitutional law, common law, and natural sovereignty) employed by courts in other jurisdictions, discussed above, there is a strong inclination toward natural law interpretations. Pursuant to any one or more of the models, those interpretations must rise to the forefront of Canadian jurisprudence if courts are going to expand the public trust doctrine in future climate litigation.[111] For Robert Adler, ideas around the protection of the natural environment are, in fact, undergirded by liberty and welfare goals.[112] He argues that the Justinian Code that first enshrined the public trust doctrine utilized a natural law approach—one that continued with the doctrine's adoption into US common law.[113] Like Sax, Adler concludes that a naturalist take of the doctrine will afford it greater flexibility to apply to atmospheric trust litigation, whereas it may be otherwise restricted to a doctrine of property allocation, as it historically was.[114]

108. Karinne Lantz, "The Netherlands v Urgenda Foundation: Lessons for Using International Human Rights Law in Canada to Address Climate Change" (2020) 41 Windsor Rev Legal Soc Issues 145 at 163

109. Sax, *supra* note 17 at 560.

110. Wood, *supra* note 2 at 234.

111. See Robert W Adler, "Natural Resources and Natural Law Part II: The Public Trust Doctrine" (2020) 10:1 Mich J Envtl Admin L 225.

112. *Ibid* at 259, 261.

113. *Ibid* at 229–31.

114. *Ibid* at 274.

Like the approaches taken in judicial decisions from other jurisdictions, Adler cites Gerald Torres and Nathan Bellinger for the notion that the public trust reflects pre-existing or inherent rights that are merely secured, but not necessarily created, by government.[115] As such, natural resources that fall within the public trust ought to be protected for the public's benefit. He writes that "[n]atural law principles can inform or support a legal doctrine adopted via positive law. They can guide judicial analysis of common law issues of first impression. They can influence judicial exercise of equitable doctrines by shedding light on what is just from an historical perspective".[116] He uses the example of the early public trust decision of the Supreme Court of New Jersey in *Arnold v Mundy* for the proposition that "some things . . . by the very law of nature itself, are declared to be the common property of all men".[117] The phrase the "law of nature" was later endorsed by Field J in *Illinois Central*.[118] As discussed above, the idea forwarded by the Supreme Court of New Jersey of some things being the common property of *all* men (and people in general) suggests that the public trust doctrine—recognizing governmental responsibility to protect natural resources writ large for present and future generations—fits well with the notion of a general public duty. Other causes of action in torts or otherwise are not amenable to that level of generality.

The Federal Court in *La Rose* stayed clear of natural law interpretations of the doctrine or of the Constitution.[119] That was also the case in *Mathur* even though the public trust doctrine was not directly at issue there.[120] In both matters, the courts focused predominantly on justiciability concerns and doctrinal tests under sections 7 and 15 of the *Charter*. Similar concerns were forefront of mind in the US and South Asian decisions, discussed earlier, where courts in those jurisdictions welcomed constitutional and pre-constitutional bases for the doctrine's applicability.[121]

C. The Leviathan in an Existential Crisis

The previous two sections in this part discussed the "what" and "where" of a potentially expansive Canadian public trust doctrine that could serve as a doctrinal tool in private law litigation for climate-related harms. This section

115. *Ibid* at 248, citing Gerald Torres & Nathan Bellinger, "The Public Trust: The Law's DNA" (2014) Wake Forest JL & Pol'y 281 at 288.

116. *Ibid* at 249.

117. *Ibid* at 250, quoting *Arnold v Mundy*, 6 NJL 1 at 70 (NJ Sup Ct 1821).

118. *Illinois Central*, *supra* note 14 at 456.

119. *La Rose*, *supra* note 1.

120. *Mathur* 2020, *supra* note 1; *Mathur* 2023, *supra* note 1.

121. See *Oposa*, *supra* note 46; *MC Mehta*, *supra* note 41.

and the next now consider the "who". This article has mentioned that governments will continue to be the primary defendants in Canadian climate litigation, with there being some potential for corporate liability. The public interest aspect of climate-related impacts and the logical duty upon governments (as representatives of the populous) to protect the environment for current and future generations suggests that judges should respond positively to a potentially reformulated and expansive version of the public trust doctrine. This section looks at how that expansive version may be used to elicit government liability. The next section undertakes the same inquiry with respect to corporate actors.

One starting point for government's fiduciary obligation to protect the air and atmosphere as a trust for current and future generations is Aiken J's recognition in *Juliana* that the public trust doctrine is an attribute of sovereignty. She cited the Supreme Court of the United States' decision in *Idaho v Coeur d'Alene Tribe of Idaho* for the proposition that submerged lands, which have consistently fallen within the doctrine's traditional purview, "are tied in a unique way to sovereignty".[122] In a similar vein, Wood and Woodward note that the doctrine arises out of social contract theory, which encompasses the idea of a reciprocal compromise between governing bodies and the public wherein each receives consideration from the other—power and authority for the government that is then wielded for the public's benefit.[123]

Notions of sovereignty or the social contract are inextricably tied to the public interest. In short, governments represent the public's collective will in a way that private actors do not and cannot. A priori, that makes government uniquely placed to protect natural resources and consequently positioned to provide remedies when that protection has fallen below the requisite standard to maintain natural resources for current and future use and enjoyment. If judges accept those principles, the public trust doctrine is ripe for use in climate change litigation.

Wood and Woodward state that "[b]ecause citizens would never confer to their government the power to substantially impair resources crucial to their survival and welfare, the governing assumption of the public trust principle is that citizens reserve public ownership of crucial resources as a perpetual trust to sustain society and the nation".[124] In other words, the public has conveyed authority over the protection of natural resources to the government, but only so long as the government maintains that protection. To operationalize that

122. *Juliana II*, *supra* note 8 at 1256–57; *Idaho*, *supra* note 37.

123. Wood & Woodward, *supra* note 2 at 652 (explaining the plurality opinion of the Supreme Court of Pennsylvania in *Robinson Tp, Washington County v Commonwealth*, 83 A (3d) 901 at 948 (Pa Sup Ct 2013).

124. Wood & Woodward, *supra* note 2 at 650.

understanding, in *Urgenda* the Hague District Court relied upon the "no harm" principle in international law that is, with respect to the environment, enshrined in article 21 of the Dutch Constitution.[125]

Harkening back to the American perspective as fodder for the doctrine's use in Canada in claims against governments, from the republic's first century the Supreme Court of the United States has held that sovereigns have a trust responsibility to manage common resources for the public's benefit.[126] In *Martin v Waddell* (*Martin*), Taney CJ wrote that "[w]hen the revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use".[127] There was no discussion of the atmosphere as part of the public trust, even though today it would be a logical extension of statements made by the Court at that time.

For Canadian jurists, one takeaway from *Martin* is that while direct authority over most natural resources lies with governments, the actual sovereign is the public itself, which ought to be able to hold governments accountable when they have failed to uphold their obligations as trustees. Perhaps more importantly, the above excerpt from *Martin* illustrates how the public trust doctrine is more suitable to climate change cases than other causes of action. Under the doctrine, government's responsibility is to the entire public, which is distinct from the particularized notion of harm that is required for existing torts and fiduciary duties.

Canadian courts have yet to make a pronouncement similar to the *Martin* court. On the contrary, in *Bancroft*, the Nova Scotia Supreme Court held that policy documents that were meant to guide discretionary decision-making did not, by themselves, impose a legally binding duty upon government to protect public lands.[128] Outside of the environmental or climate change context, lower courts have affirmed government's responsibility to maintain and manage public resources, such as finances,[129] the courts,[130] social programs,[131]

125. *Urgenda*, *supra* note 107 at para 4.52. For commentary on the "no harm" principle in international law, see Philippe Sands et al, *Principles of International Environmental Law*, 4th ed (Cambridge, UK: Cambridge University Press, 2018) at 740.

126. *Geer v Connecticut*, 161 US 519 at 529 (1896).

127. *Martin*, *supra* note 18 at 410.

128. *Bancroft* SC, *supra* note 9 at paras 114, 161.

129. *Provincial Court Judges' Association of British Columbia v British Columbia (Attorney General),* 2016 BCSC 1420 at para 23, citing *Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice)*, 2005 SCC 44 at para 30.

130. *Provincial Court Judges' Association of British Columbia v British Columbia (Attorney General),* 2014 BCSC 336.

131. *Ontario English Catholic Teachers Association v His Majesty*, 2022 ONSC 6658 at para 294.

and Aboriginal property rights.[132] As such, a starting point for the doctrine to build momentum in Canadian climate change litigation may be for courts to explicitly recognize that government is uniquely placed to protect natural resources—not only navigable waters, but also the air and atmosphere—for public use and enjoyment.

Lastly, as mentioned above, as an attribute of sovereignty—and one that in the US and other jurisdictions has been interpreted as part of constitutional protections—the public trust doctrine cannot simply be legislated away. This is another reason why it may be a preferable path to impute liability for climate impacts as opposed to existing torts and duties that can be circumscribed or completely overridden by legislation. Relying on *Foster* and *Juliana*, Blumm and Wood argue in the US context that the public trust is "neither waivable nor conveyable".[133] Governments cannot forego their duty to protect the natural environment in circumstances where a competing priority presents itself, even when there may be a short-term or long-term benefit to the public.[134] Likewise, the responsibility to protect the environment cannot be conveyed to a third party. With that said, when the sovereign's duty to fulfill the public trust in maintaining natural resources is contingent upon third-party conduct, governments ought to be able to pursue third parties for the latter's role in harming the environment in a way that attenuates the public's current and future use. One such example is discussed in the next section around potential public trust claims by governments against corporate actors.

D. Corporate Fiduciaries

This article has suggested throughout that the duty to maintain a stable climate system under an expansive iteration of the public trust doctrine lies with government actors, but also corporate actors alleged to have contributed to air pollution and/or atmospheric degradation. It should first be noted that no reasonable interpretation of the public trust doctrine would allow for individuals who allege climate-related impacts to bring civil claims directly against corporations.[135] However, if we follow the logic from the previous section that governments, as sovereign entities that represent collective interests,

132. *Makivik Corp v Canada (Minister of Canadian Heritage) (TD)*, 1998 CanLII 9086 at para 103 (FC).

133. Blumm & Wood, *supra* note 4 at 47; *Juliana II*, *supra* note 8 at 1261.

134. *Juliana II*, *supra* note 8 at 1260 ("[p]ublic trust claims are unique because they concern inherent attributes of sovereignty . . . A defining feature . . . is that it cannot be legislated away").

135. But see *Green v The Queen in right of the Province of Ontario et al*, 1972 CanLII 538 (ON H Ct J) [*Green*] (where the individual plaintiff alleged that the government's lease of a public park to a corporation was a breach of the trust established by the *Provincial Parks Act*, RSO 1970, c 371, s 2). For commentary on *Green*, see Lund, *supra* note 5 at 126–28.

have a duty to maintain the environment in the public trust, then presumably governments are in the position to act on the public's behalf to claim against corporations that have violated that trust. While there has yet to be a corporate climate case in Canadian courts akin to *Milieudefensie v Royal Dutch Shell plc* (*Milieudefensie*),[136] discussed below, the notion of corporate liability for climate-related impacts has not been overlooked. In British Columbia, activists and non-government organizations have promoted the "Sue Big Oil" campaign to encourage the province's city councils to collect a nominal sum from each constituent to fund climate litigation against Canadian oil companies.[137]

The *obiter* in *Canfor* also provides authority for the prospect of corporate liability for violating the public trust. Recall that Binnie J's comments were made in the context of whether the Crown was limited to suing in its capacity as an ordinary landowner or whether it could sue in its *parens patriae* capacity. In either circumstance, those comments (as well as Lebel J's dissent) suggested the potential for an expansive public trust doctrine in which the Crown could claim against another party for breaching the requirement to maintain the environment for public use.[138] Even though a public trust cause of action was not fleshed out by the trial court in *Canfor*, in theory, the provincial government could have advanced a civil claim against Canfor to argue that the corporate defendant breached a public trust vested in the Crown, which requires third parties to conduct themselves in a manner that does not breach that trust.

The various models for recognizing the public trust doctrine's application to climate change litigation, employed in *Juliana* and the above-noted decisions from the Supreme Court of India provide useful frameworks for Canadian courts around corporate climate liability. Even though the public trust doctrine can be interpreted as part of constitutional protections of life, liberty, or, otherwise, due process or equal protection, those protections do not negate the doctrine's understanding pursuant to the common law and/or natural sovereignty models. Without the constraint of necessarily having to fall within a constitutional provision or principle, the doctrine's use in

136. Rectbank Den Hague [District Court of the Hague], 26 May 2021, *Milieudefensie v Royal Dutch Shell plc*, ECLI:NL:RBDHA:2021:5339 (Netherlands), online: <uitspraken.rechtspraak.nl> [perma.cc/A8HF-WFSQ] [*Milieudefensie*].

137. Andrew Gage, "Suing Fossil Fuel Giants" (June 2022), online (pdf): <suebigoil.ca> [perma.cc/9CLP-QZK2]; Kenneth Chan, "Vancouver City Council rejects funding for lawsuit against oil firms", *Daily Hive* (1 March 2023), online: <dailyhive.com> [perma.cc/3Z2N-PDY4]. Despite its efforts, that campaign appears to be on hold after Vancouver's city council voted to reject a proposal to set aside funds to be used in corporate climate litigation.

138. *Canfor*, *supra* note 7 at paras 81, 158.

Canadian climate litigation pursuant to those two models can make it applicable to claims against private actors, such as corporations.[139]

A further basis to suggest the public trust doctrine may be useful in corporate climate litigation, plaintiffs in corporate climate cases may be unable to rely on human rights principles. Despite the Supreme Court of Canada's decision in *Nevsun Resources Ltd v Araya*[140] that seems to have muddied the traditional understanding around the application of international human rights law to private corporations, plaintiffs in corporate climate cases may be hard-pressed to import the language of international human rights. That tension was similarly canvassed by the Hague District Court in *Milieudefensie*.[141] Even though *Milieudefensie* mirrored the arguments made against the Dutch government in *Urgenda*, the plaintiffs in the corporate climate claim could not rely on the European Convention of Human Rights and were thus relegated to duty of care and standard of care arguments under the Dutch Civil Code.[142] If the public trust doctrine is invoked in Canadian jurisprudence pursuant to the common law (and even natural sovereignty) model, it should be available in claims against non-governmental actors.

The guidance from other jurisdictions that plaintiffs in corporate climate litigation ought to heed is that, like government liability, public trust claims may be more likely to succeed when they impugn a particular program (such as plastics production[143] or gas flaring[144]) or identifiable and discrete conduct that significantly spurs climate change (such as false advertising,[145] misappropriation of funds meant for clean energy investments,[146] or failure to

139. The derivative action has emerged as a method to coerce corporations to combat climate change. In 2023, ClientEarth commenced a derivative action against Shell's Board of Directors. See *ClientEarth v Shell Plc*, [2023] EWHC 1137 (Ch).

140. *Nevsun*, *supra* note 94.

141. *Milieudefensie*, *supra* note 136.

142. *Ibid* at 4.4.9.

143. See Tassilo Hummel, "France's Danone faces legal action over plastic use and reporting practices", *Reuters* (9 January 2023), online: <reuters.com> [perma.cc/C32C-6DWE].

144. *Gbemre v Shell Petroleum Development Company of Nigeria Ltd & Ors* (2005), FHC/B/CS/53/05 (FC Nigeria), online (pdf): <climatecasechart.com> [perma.cc/A9Z7-95WZ].

145. *Australian Competition and Consumer Commission v GM Holden Ltd*, [2008] FCA 1428 (Austl); *Australian Competition and Consumer Commission v Global Green Plan Ltd*, [2010] FCA 1057 (Austl) [*Global Green Plan*]; "Qatar World Cup: Climate groups file complaints over 'carbon neutral' claim", *Middle East Eye* (3 November 2022), online: <middleeasteye.net> [perma.cc/LU4Z-7J5E].

146. *Global Green Plan*, *supra* note 145.

disclose climate-related risks of a company's investments[147]). With that said, there are still a number of pending corporate climate cases in jurisdictions around the world that simply allege that a company's carbon emissions, writ large, are a basis to hold it liable for climate-related impacts.[148]

For corporate climate liability, there is currently a debate in American jurisprudence around the displacement of federal common law principles by legislation.[149] As Anne Richardson Oakes has written, in *American Electric Power Co, Inc et al v Connecticut et al* the Supreme Court of the United States "ruled that corporations cannot be sued for [GHG] emissions under federal common law, primarily because the Clean Air Act delegates comprehensive authority to address air pollution to the US Environmental Protection Agency".[150] Whereas legislative displacement in the US has usurped power from the courts to adjudicate corporate climate liability, in Canada there is currently no equivalent foundation for a displacement argument that would serve to supersede all common law claims against corporations for GHG emissions that contribute to climate change. Therefore, Canadian courts continue to be in a position to apply existing common law principles against corporations for climate-related impacts. The question remains not whether legislation has overridden common law principles to curtail or completely bar the public trust doctrine's application, but how expansively Canadian courts will interpret and apply the doctrine.

Finally, to go back to the separation of powers discussion above, sustained lobbying in Canada from corporate-friendly groups has been instrumental in diverting paths that could lead to corporate human rights accountability.[151]

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147. *Abrahams v Commonwealth Bank of Australia* (4 November 2021), New South Wales, FCA (Austl) NSD864/2021, online: <comcourts.gov.au> [perma.cc/6ABD-YGQQ] (order to produce evidence in discovery); Cour d'appel de Versailles [Court of Appeal of Versailles], 18 November 2021, *SA Total Energies SE c Commune de Bize-Minervois*, RG 21/01661 (France), online: <climatecasechart.com> [perma.cc/DZ99-HFWN] [unofficial English translation].

148. See e.g. Commission on Human Rights of the Philippines, *National Inquiry on Climate Change Report* (Quezon City, Philippines: CHRP, 2022); Aliyah Elfar, "Landmark Climate Change Lawsuit Moves Forward as German Judges Arrive in Peru", *State of the Planet* (4 August 2022), online: <news.climate.columbia.edu> [perma.cc/9N6H-V5RG].

149. See *American Electric Power*, *supra* note 92 at 424: "The test for whether congressional legislation excludes the declaration of federal common law is simply whether the statute 'speak[s] directly to [the] question' at issue" [internal citation omitted].

150. *Ibid*; Anne Richardson Oakes, "Judicial Resources and the Public Trust Doctrine: A Powerful Tool of Environmental Protection?" (2018) 7:3 Transnational Envtl L 469 at 470.

151. Charlotte Connolly, *Lobbying by mining industry on the proposed Canadian Ombudsperson for Responsible Enterprise (CORE)* (Toronto: Justice and Corporate Accountability Project, 2019) [JCAP Report].

It is uncontroversial to suggest that industry conglomerates such as the Mining Association of Canada (MAC) and the Prospectors and Developers Association of Canada (PDAC) have played a role in gutting the Canadian Ombudsperson for Responsible Enterprise of investigative powers.[152] Likewise, MAC and PDAC have lobbied extensively against bills that have included private law causes of actions for corporate human rights violations abroad.[153]

It is a reasonable assumption that corporate-friendly groups will continue to have substantial lobbying power to ensure that the legislative landscape around corporate liability will remain weak for climate-related impacts, just as it is the case for human rights violations on the part of Canadian multinationals that operate in the global south.[154] In that vacuum, the onus will be on independent judiciaries to advance liability principles against corporations that have contributed to a violation of the public trust.[155] Otherwise, courts will, in result, just be following the tack taken by the elected branches to craft the law around climate-related liability in a way that prioritizes short-term economic gain over the necessity to curb climate impacts for the benefit of current and future generations.

Of course, the corporate perspective can be bolstered in front of the courts just as it can before the elected branches of government via lobbying efforts by industry groups and individual companies. In *Juliana*, the National Association of Manufacturers, the American Fuel & Petrochemical Manufacturers, and the American Petroleum Institute intervened to defend the government's fossil fuel practices.[156] Likewise, corporate-friendly groups have the ability to intervene in common law public trust actions against corporate defendants. However, unlike corporate lobbying efforts, conglomerates or individual corporations that appear before the courts would be limited to doctrinal and policy arguments rather than some implicit promise of financial and/or political incentives that would encourage the recipients of those incentives to skew climate change laws in favour of corporations.

152. *Ibid*.

153. *Ibid* at 2.

154. See e.g. Amanda Watkins, "New report on oil and gas lobbying and the impacts on Canada's path to net zero", *SHARE* (16 September 2022), online: <share.ca> [perma.cc/KQZ5-PZQU].

155. See Benjamin N Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 23 ("[t]he rules and principles of case law have never been treated as final truth, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice").

156. Those intervenors eventually withdrew from the case. See Blumm & Wood, *supra* note 4 at 60. See also Chelsea Harvey, "These fossil-fuel groups joined a historic climate lawsuit. Now, they want to get out of it.", *Washington Post* (26 May 2017), online: <washingtonpost.com> [perma.cc/28B9-MW4D].

III. Bust: The Death of Public Trust?

The previous part canvassed doctrinal bases for Canadian courts to apply an expansive iteration of the public trust doctrine against government and corporate defendants. As it currently stands, the doctrine has yet to be applied by Canadian courts, whether it be as a rule of property or as a basis to compel protection of the air and atmosphere.[157] For the doctrine to enter the fray of Canadian law, it would take an interpretative turn from the courts or a legal transplant from recent American or Asian jurisdictions that have applied one or more of the constitutional law, common law, or natural sovereignty models to recognize the doctrine within their legal systems. Although such a development is not out of the question—especially given the Supreme Court of Canada's favourable commentary in *Canfor*—the alternative path may, in fact, be the one of least resistance.

Mukhomedzyanov rightly sees what continues to be a divide between the judiciary and academy—the former viewing the doctrine legalistically in light of its historical origins limited to procedural rights in certain natural resources and the latter promoting an aspirational stance.[158] The American author James Huffman, one of the doctrine's fiercest critics in climate litigation, has written that "[t]here are . . . two histories of the public trust doctrine. One founded in Anglo-American custom and case law. Another founded in the imaginations of now two generations of advocates in search of a fail-safe guardian of the environment".[159] Like the Federal Court in *La Rose*, Canadian judges may continue to decide that the doctrine is not part of Canadian common law; and even if it is, that it remains, as the Court in *Burns Bog* noted, a rule of title that merely prohibits government from divesting property in a way that would compromise the public use of highways, navigable waters, or fishing.[160]

To substantiate the doctrine's limited scope, Huffman relies on the seminal English treatise on the law of the sea, *De Jure Maris*, written in the nineteenth century by Hale CJ.[161] In it, Hale CJ determines that ownership

157. See e.g. *Green*, *supra* note 135 (public trust doctrine provides no reasonable cause of action); *Nestle Canada Inc v Ontario (Ministry of Environment)*, [2013] OERTD No 54, 2013 CarswellOnt 11509 (ON Environmental Review Tribunal) (decided on statutory grounds).

158. Mukhomedzyanov, *supra* note 10.

159. Huffman, *supra* note 15 at 15. See also Adler, *supra* note 111 at 241 ("[s]ome scholars argue that, even if the public trust doctrine is a correct statement of English common law modified by American law, it simply confirms government title to a narrow category of lands beneath navigable waters" [internal citations omitted])..

160. Huffman, *supra* note 15 at 17.

161. Huffman, *supra* note 15; Matthew Hale, *A Treatise Relative to the Maritime Law of England* (London: 1787) at part 1.

of the *jus publicum* was derived from the public's fishing and navigation rights, even though those rights were not contingent upon state ownership.[162] Huffman also cites judicial interpretations of nineteenth- and twentieth-century transfers and leases of submerged lands for private use for the proposition that the doctrine is exclusively an evidentiary rule that assesses whether private owners have restricted public access to navigable waters. Huffman's contention is that *Illinois Central* neither extended the doctrine beyond navigation and fishing nor prohibited the State of Illinois from alienating the submerged lands at issue.[163]

Huffman criticizes Aiken J's expansive interpretation of the public trust doctrine in *Juliana*, even though per se Aiken J did not see the need to apply the doctrine beyond submerged lands in navigable waters, as climate change is inextricably tied to rising sea levels and ocean acidification.[164] Huffman views the decision in *Juliana* as misinterpreting what has always been meant to be an evidentiary rule to ensure that private parties do not prohibit public access and use of navigable waters. He writes scathingly:

> *Juliana* is part of a nationwide barrage of lawsuits in search of judges willing to make new law in the name of urgency or necessity. If after the appeals are exhausted, new, judicially created, public rights become the law of the land, they will have arisen not from the wisdom of Justinian, but from the imaginations of activist judges.[165]

There is much to be criticized about Huffman's own argument, but a few points suffice here. For one, his hesitation to allow for judiciaries to expand the public trust doctrine beyond navigable waters as well as beyond a rule of title is peculiar, especially since the doctrine (distinct from other causes of action that require a level of specificity and causation for there to be liability) can serve as a logical basis to compel governments to protect the air and atmosphere from impending catastrophes related to climate change. Without assuming anything about Huffman's views on climate change's real and present danger, why ought we prefer Justinian wisdom of centuries ago over a logical extension of a common law doctrine that pairs government's historical obligation to protect navigable waters with government's present obligation to protect the atmosphere?

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162. Huffman, *supra* note 15 at 20.

163. *Ibid* at 22.

164. *Ibid* at 32 ("*Juliana* is part of a nationwide barrage of lawsuits in search of judges willing to make new law in the name of urgency or necessity"). See also *Juliana I*, *supra* note 36.

165. *Ibid* at 22.

Although Huffman presents cases out of California and Hawaii that interpret relevant state constitutional provisions in a manner that supports his conservative stance, he does not consider that the doctrine can be open to wider interpretations outside of statutory strictures.[166] Unlike statutory interpretation, common law incrementalism need not be bound by the doctrine's Roman or English origins. Rather, interpretations under the common law model—as was the case in *Juliana*—can apply doctrine in light of prevailing circumstances. Arguably, there is no crisis more pressing than climate change. Huffman's interpretation of the doctrine would render it almost useless—cornered to the bowels of property law litigation and disputes around the use of navigable waters. Plainly, it is perplexing to be debating public access to fishing and navigation when there is the real prospect that there may no longer even be fish or navigable waters left to access.

Pre-Confederation Canadian common law adopted the notion of the *jura publica* in fishing and navigation.[167] Even early post-confederation interpretations adopted a narrow approach. In *The Queen v Robertson* (*Robertson*), tasked with considering the public right of fishing in the Miramichi River, the Supreme Court of Canada held that "the exclusive right to fish follows as an incident, and is in the crown as trustee for the benefit of the people of the province, exclusively".[168] Of course, that interpretation does not suggest that the doctrine is anything other than a rule of title vested in the Crown. With that said, *Robertson* pushes back on the recent assertion of the Nova Scotia Supreme Court in *Bancroft* that a trust obligation cannot be owed to the entire public.[169] And again, the recognition that the public trust doctrine applies to the public at large distinguishes it from existing understandings of, for instance, public nuisance and public fiduciary duties that are inimical to harm incurred by the entire public.

Alongside viable critiques around the scope of natural resources the doctrine encompasses as well as its historical restriction as a rule of title, there continues to be a legitimate concern around indeterminate liability that the Supreme Court of Canada likewise expressed in *Canfor*. The idea that a current provincial or federal administration could be subject to an injunction or monetary damages seems unfair given the unpredictability of climate change. A similar sentiment was expressed in the Federal Court's decision in *La Rose* where Manson J was hesitant to impose a blanket governmental duty of supervision

166. *Ibid* at 27–31.

167. Kate Penelope Smallwood, *Coming out of hibernation: the Canadian public trust doctrine* (LLM Thesis, University of British Columbia, 1993) [unpublished] at 80; Mukhomedzyanov, *supra* note 10 at 325, citing *R v Meyers*, 1852 CarswellOnt 86 at para 138, [1853] OJ No 204 (UCCP).

168. *The Queen v Robertson*, 1882 CanLII 25 (SCC).

169. See *Bancroft* CA, *supra* note 79.

and control over the environment—especially since such a broad-based duty is likely beyond any one government's capacity.[170]

At least in the short-term, it is impractical for Canadian governments to regulate emissions-producing industries (such as oil extraction, mining, and shipping) in order to curb their climate impacts in a way that would reverse Canada's contribution to a warming planet. This is not to suggest that Canadian governments ought not be coerced or cajoled to expend further investment into clean energies. But, until those energies provide a complete substitute for existing industries (and can surpass political obstacles around job retention for workers in existing high-emissions industries), Canadian jurisdictions will continue to rely on domestic and foreign oil, natural gas, and other carbon-based products.

To pin air and atmospheric sustainability wholly on governments—and particularly under a doctrine that was never meant to expansively hold governments accountable as such—may be unduly reductionist. Of course, this does not negate the point made in the previous part that governments are likely the ones best positioned to curtail climate impacts given that they have the unique ability to represent the public will and, as such, have a responsibility to prioritize the public interest. However, a private law cause of action that holds government to account for past conduct and requires it to modify current and future behaviour assumes that climate change is *only* attributable to governments. Climate change accountability is layered and, accordingly, ought to be directed at governments as well as companies and individuals. As noted above, there is corporate influence from industry groups, individual companies, and even factions within government that would be left largely unscathed if the doctrine—as a broad-based foundation for government liability—were to be adopted as a panacea to curb climate impacts.[171]

Finally, and related to the practicality of holding governments accountable, there continue to be justiciability concerns. In *La Rose*, justiciability arguments arose in the context of whether the doctrine even exists in Canada as an unwritten constitutional principle.[172] Justice Manson concluded it does not constitute such a principle.[173] Likewise, the Ontario Superior Court in *Mathur* recently held that there is no unwritten constitutional principle of societal preservation.[174] Even if future courts were to conclude the opposite (i.e., that the doctrine or the principle of societal preservation is an unwritten constitutional principle), judiciaries may not be best-placed to consider a broad-based duty

170. *La Rose*, *supra* note 1 at para 53.

171. See e.g. Reuters, "Canadian Conservative party votes not to recognize climate crisis as real", *The Guardian* (20 March 2021), online: <theguardian.com> [perma.cc/RQ8Y-EUQJ].

172. *La Rose*, *supra* note 1 at paras 5, 57–58.

173. *Ibid* at paras 96–100.

174. *Mathur* 2023, *supra* note 1 at paras 165–70.

owed by governments to current and future generations. Even as an unwritten constitutional principle, the doctrine may only be justiciable when there are specific, discrete, and discernable resources that ought to be used and enjoyed by a particular population, such as an Indigenous community that has historically relied upon a particular natural resource for its livelihood. That type of factual matrix is distinct from one that places accountability for the Earth's habitability on how a particular federal or provincial administration or, otherwise, a particular governmental body regulates GHG emissions.

If the doctrine eventually faces its demise in Canada, where would climate change plaintiffs turn? They may be relegated to tort law doctrines found in negligence or public nuisance or, otherwise constitutional arguments under sections 7 and 15 of the *Charter* recently forwarded and partly rejected by the Ontario Superior Court in *Mathur*.[175] As discussed, public nuisance seems ill-fitted for climate-related suits because it does not capture the breadth of the climate crisis. Although it is garnering some recent positive academic commentary as a basis to combat climate change,[176] public nuisance has not been understood—even in its most expansive readings—as a cause of action that requires governments to act in the public interest in a way that maintains the use and enjoyment of natural resources for current and future generations. In the case law from the above-mentioned foreign jurisdictions as well as the academic commentary that has surrounded it, only the public trust doctrine has encapsulated the notion of present and future environmental protection for the public's benefit. Otherwise, negligence claims would face major stumbling blocks around proximity and causation, both of which elicit the above-noted concerns around indeterminate liability. Those concerns are not readily applicable to the public trust doctrine that, by default, recognizes government as the logical caretaker of the environment in the public interest.

For constitutional arguments still at issue as cases like *La Rose* and *Mathur* proceed through appellate processes, future Canadian courts will have to determine whether section 7 and 15 *Charter* arguments can apply to broad-based climate-related impacts as opposed to a specific policy or legislative decision that affronts internationally agreed-upon climate targets. From lower court decisions in *Mathur* and *La Rose*, it does not seem like the former set of claims would constitute a reasonable cause of action. In that case, as a broad-based measure to challenge insufficient steps taken to mitigate the climate crisis, litigation may itself be a limited tool since it would have to concern discrete governmental decisions that explicitly contravene previously published climate goals.

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175. *Ibid*; *La Rose*, *supra* note 1. See also *American Electric Power*, *supra* note 92 (public trust claim dismissed).

176. Linda S Mullenix, *Public Nuisance: The New Mass Tort Frontier* (Cambridge, UK: Cambridge University Press, 2023).

Conclusion

For judges first willing to accept the public trust doctrine into Canadian law and then expand it from its traditional scope—pursuant to one or more of the constitutional law, common law, or natural sovereignty models discussed here—the doctrine can be a useful tool to force governments and corporations to curb GHG emissions. With that said, the very real possibility remains that Canadian courts (specifically the Supreme Court of Canada, if and when it decides to clarify *obiter* comments made in *Canfor*) may follow suit with the decisions in *La Rose* and *Bancroft* that the judiciary is not best placed to impose a broad-based public trust of environmental protection for current and future generations, pressing as the need for it may be. This article has canvassed each of those paths at a juncture in which it appears that climate litigation is on the rise in Canadian courts. As suggested, if the doctrine finds life in Canada, it may be uniquely positioned to tackle conservation efforts over other common law and equitable doctrines that do not capture climate change's ubiquitous harm to the public as well as its impact on current and future generations.

In "A Wake Up Call for Judges", Goodwin J of the United States Court of Appeals for the Ninth Circuit aptly stated that "[t]he current state of affairs . . . reveals a wholesale failure of the legal system to protect humanity from the collapse of finite natural resources by the uncontrolled pursuit of short-term profits . . . [T]he third branch must now recognize its obligation to provide a check on government exercise of power over the public trust".[177] Far from assuming that courts' adjudicative jurisdiction necessarily extends to climate litigation in all circumstances, it is undeniable that climate change's impacts are becoming more frequent and intense with every passing year. Absent multilateral efforts or domestic legislation that significantly reduces global carbon emissions in a way that not only mitigates but reverses atmospheric degradation, independent, progressively minded, and, yes, *courageous* judiciaries may be the last vestige of hope for advocates and activists attempting to preserve the Earth's habitability for future generations.

177. Alfred T Goodwin, "A Wake-Up Call for Judges" (2015) 2015:4 Wis L Rev 785 at 785–86, 788.