

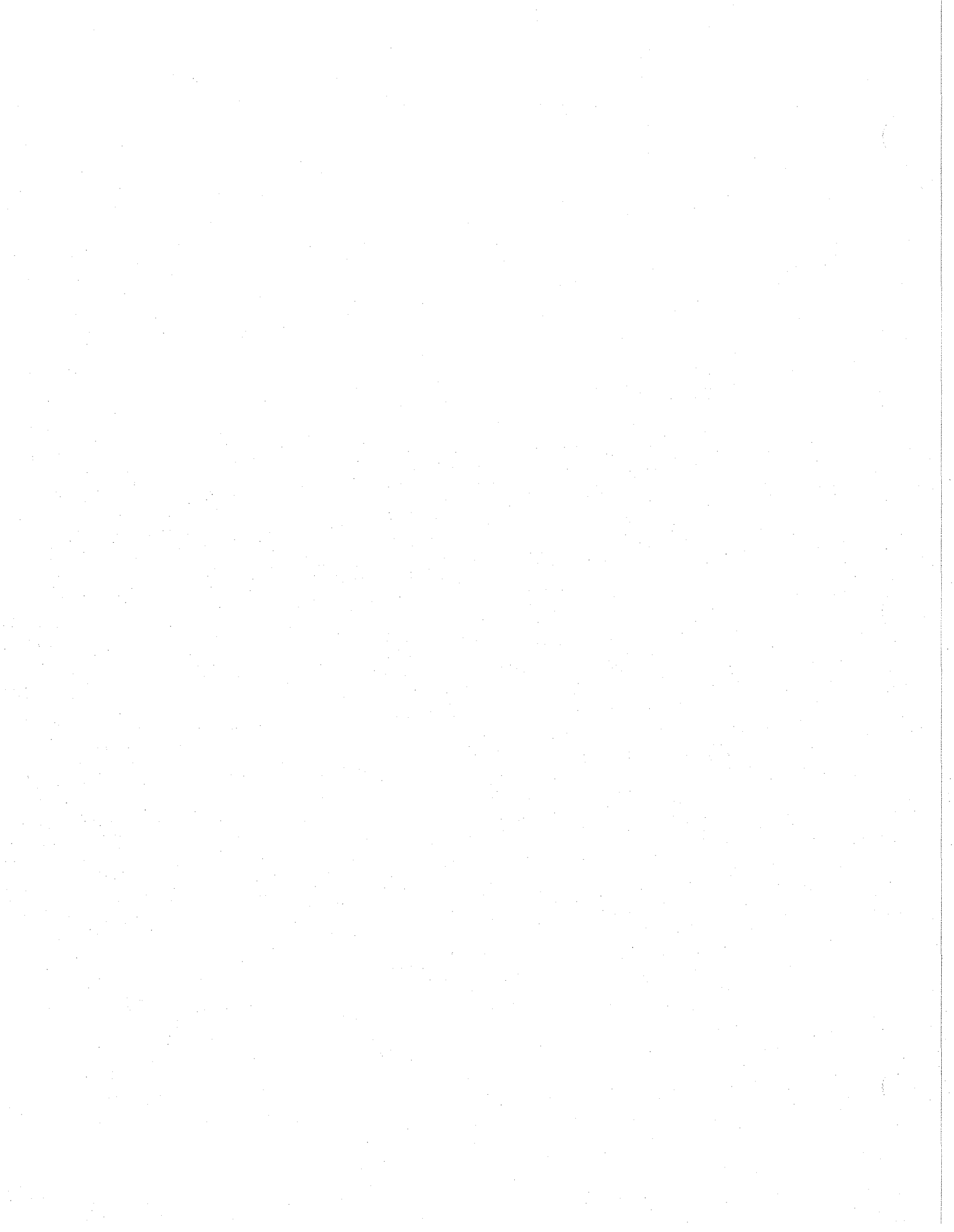
ENVIRONMENTAL LAW CONFERENCE—2007

PAPER 9.1

## Public Environmental Rights: A New Paradigm for Environmental Law?

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## PUBLIC ENVIRONMENTAL RIGHTS: A NEW PARADIGM FOR ENVIRONMENTAL LAW?

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Abstract - The Supreme Court of Canada's affirmation of the existence of public environmental rights in *Canadian Forest Products v. B.C.* is the latest in a long line of authority recognizing the existence of public rights in respect of the natural environment. These rights form the basis for a new way of looking at environmental laws. While the courts and academic commentators have tended to view environmental law as a modern phenomenon, and environmental legislation as enacted from a blank legal slate, the existence of common law public environmental rights suggests another view. If public environmental rights are viewed as central to environmental law, then environmental statutes must be interpreted as affirming these pre-existing rights. Far from being a new constraint on land owners and other private actors, this new paradigm sees environmental laws as expanding the legal tools available to enforce legal constraints which existed all along. This approach is supported by a body of case law which affirms that legislation must, absent clear legislative intent, be interpreted in favour of existing public rights. In addition, the emergence of the public trust doctrine in Canadian law would provide further support for this narrative. Adopting such an approach to environmental law puts both environmental legislation and the public's rights on a stronger legal footing, and could form the basis for a major shift in how environmental law is understood in Canada.

### I. Introduction

The Supreme Court of Canada has written about the fundamental importance of environmental protection to Canadians. However, despite such general statements as to the importance of the issue, the judicial approach to environmental protection remains largely unchanged—if somewhat more sympathetic than in the past.

I suggest that the reason for the absence of a shift in the case law is in large part because environmental lawyers have failed to articulate a compelling story about the legal nature of environmental problems. Gay and lesbian rights activists have successfully shifted the debate from whether homosexuality is a crime (and a sin) to how the rights of gays and lesbians should be recognized in Canadian law. From

being mere wards of the state, lawyers have obtained constitutional protection for the traditional land rights of their aboriginal clients. But no parallel shift in the legal understanding of environmental law has occurred during the same period.

Increasingly social scientists, political theorists and philosophers are telling us that it's all about the story. The way we look at the world, and understand problems that are put to us, is about a socially constructed "paradigm."

The mainstream legal way of looking at environmental issues is that they are a recent phenomenon about which the law has traditionally said little. Consequently, the lead in addressing these problems must come from the legislator, who is well placed to evaluate the impacts of these new political concerns on existing private property rights and other public demands.

However, the common law contains all the elements of an alternate story. As the Supreme Court of Canada recently noted, the idea that the public has rights in respect of the natural environment has long roots in the common law, dating back to its earliest origins. It is my view that the existence of common law public environmental rights provides the basis of a story that can be used to frame environmental problems in an entirely different light. I submit that this is the way in which judges can begin to give effect to the fundamental value of environmental protection while remaining solidly rooted in the common law tradition.

Having titled my paper *Public Environmental Rights: A New Paradigm for Environmental Law*, I must first begin by explaining what public environmental rights are, and why I assert that they exist in Canadian law.

I will then discuss the implications of those rights for understanding environmental laws. This includes a strong principle argument that an underlying purpose of many environmental statutes is the protection of these public rights, and, in any event, a presumption that such statutes are not intended to authorize infringement with these public rights.

The Supreme Court of Canada, in *Canfor*, has suggested that at least some public environmental rights may also give rise to a trust-like obligation on the part of the Crown to manage these resources so as to protect the public right.

## II. What are Public Environmental Rights?

A public right is a legally enforceable right held not by an individual, or a community, but by the public at large. La Forest J., in his classic text on water law, explained:

By public rights is not meant rights owned by government, whether federal, provincial or municipal. These bodies may own land and water rights ... in the same way as private individuals, in which case they are, in a manner of speaking, public rights. But what is here called public rights are those vested in the public generally, rights that any member of the public may enjoy.<sup>1</sup>

This paper is focused on public rights in relation to environmental features – and to the natural environment. The Supreme Court of Canada, in *B.C. v. Canadian Forest Products* ("Canfor"), adopted the phrase "public environmental rights" in relation to such rights, noting that: "The notion that there

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1 G. La Forest. *Water Law in Canada – The Atlantic Provinces*. (Ottawa: Information Canada, 1973) at 178. Although written in the context of public rights arising from navigable rivers, the definition is more generally applicable.

are public rights in the environment that reside in the Crown has deep roots in the common law.<sup>2</sup> In particular, the court quoted several early authorities that spoke of public rights in respect of “running water, air, the sea and the shores of the sea.”<sup>3</sup>

The Supreme Court in *Canfor* unanimously held that such rights could be the basis of a claim for damages in Public Nuisance. However, the fact that the majority disallowed the claim in that case, on the basis of a defect in the pleadings and because there had not been an opportunity to hear submissions on the more “novel” implications of those rights, has resulted in a perception that the Court’s comments were *obiter*. As a result, there remains some skepticism of the existence of public rights in respect of the natural environment.

It would probably take too long to discuss, in detail, the reasons for believing that public environmental rights do exist at common law in Canada. In order to explore the consequences of the existence of public environmental rights, the skeptic may need to suspend his or her disbelief for the moment.

Nonetheless, there is not a complete absence of academic comment on the subject. Notably, Mario Faieta, in *Environmental Harm: Civil Actions and Compensation*, cited case law concerning public nuisance claims for environmental damage<sup>4</sup> in support of the view that:

The common law has recognized a public right to clean air and to clean lakes, rivers and other watercourses. The courts have recognized that the imposition of statutory duties and obligations, enacted for the public’s benefit, also creates ‘public rights.’<sup>5</sup>

Faieta goes on to discuss public rights claims arising from public nuisance law in respect of air, water, soil, flora and fauna, and noise.

Jerry De Marco has suggested that the Supreme Court of Canada has recently indicated that a more general right to a safe environment exists. In addition to the court’s statements in *Canfor*, he summarizes these authorities as follows:

Taken together, the judgments in *Canadian Pacific*, *Hydro-Quebec* and *Imperial Oil*, as well as several provincial and territorial statutes, clearly recognize the existence of environmental rights. *Imperial Oil*, *Hydro-Quebec* and *Montreal* provide further recognition of duties and entitlements that are similar to environmental rights. ...<sup>6</sup>

In addition to these general approaches, there are several academic comments on the existence of specific types of public environmental rights. Tim Bonyhady, in his landmark discussion of public rights in England, cites several authorities in support of the view that air continues to be subject to public rights:

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2 *British Columbia v. Canadian Forest Products*, [2004] SCC 38 at para. 66 [hereinafter *Canfor*].

3 *Ibid.*, at para. 74 citing de Bracton.

4 This approach to identifying public rights is based on the frequent definition of public nuisance in terms of an action to enforce public rights. Thus, the Supreme Court, in *Canfor*, adopted the following definition: “The conduct complained of must amount to ... an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort and other forms of interference.”: *Canfor*, *supra*, n. 2, at 66, citing *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201, para. 52. Indeed, one earlier authority has described a claim in public nuisance as a nuisance that is an “injury to the ‘property of mankind.’”: *Robinson v. Adams* (1924), [1925] 1 D.L.R. 359 (Ont. C.A.).

5 M. Faieta et al. *Environmental Harm: Civil Actions and Compensation*. (Toronto : Butterworths, 1996) at 46.

6 J. De Marco. “The Supreme Court of Canada’s Recognition of Fundamental Environmental Values: What Could be Next in Canadian Environmental Law?” 17 J.E.L.P. 160 (2007) at 175.

In Roman law air was classified as *res communes* which meant that it was regarded as subject to public use but was thought to be incapable of ownership. ... [I]t is probably still appropriate to regard air as *res communes* since it remains open to public use and, in its ordinary state, is not the subject of property rights.<sup>7</sup>

Bonyhady is less optimistic about the existence of a public right to use water in England, although he notes that such a right seems to have existed prior to the middle of the nineteenth century, and that it may continue to exist in some commonwealth jurisdictions.<sup>8</sup> At a minimum, a credible argument for the existence of a public right to water can be made here in Canada.<sup>9</sup>

I have recently argued that the common law doctrine of dedication and acceptance, as applied by the Supreme Court of Canada and the Ontario Court of Appeal, supports the view that public rights exist in respect of lands set aside for public purposes, including park lands.<sup>10</sup>

While the precise nature and extent of public environmental rights may continue to be debated, I think that there is every reason to suppose that the Supreme Court was correct in suggesting that Public Environmental Rights exist in Canada, and they can form the basis for new developments in environmental law in Canada.

### III. Consequences of Public Environmental Rights

Accepting, for the moment, that the common law has recognized, or could recognize, some fairly significant public environmental rights to, for example, air, and parkland, the next question is: what are the consequences of those rights.

The traditional answer to this question has been: in practice, very little. At common law the interference with a public right would amount to an actionable public nuisance. As John McLaren has noted, this cause of action is often attractive to the environmental public interest litigant:

Given the environmental litigant's concern for championing what he conceives to be the public interest, public nuisance which purports to protect the individual in the exercise of his public rights and which has its genesis in criminal actions to

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7 Bonyhady, at 196. The clearest authority cited by Bonyhady is *Colls v. Home and Colonial Stores Ltd.* (1904), [1904] A.C. 179 at 182-3, in which the Earl of Halsbury stated that air "is the common property of all, or, to speak more accurately, it is the common right of all to enjoy it, but it is the exclusive property of none." Bonyhady also cites *Millar v. Taylor* (1769), 4 Burr. 2303, 2356, 2357; 98 E.R. 201, 230; *Chasemore v. Richards* (1859), 7 H.L.C. 349; 11 E.R. 140, 152, *Lacroix v. The Queen* (1954), 4 D.L.R. 470, 476; *Re the Queen in Right of Manitoba and Air Canada* (1978), 86 D.L.R. (3d) 631.

8 *Ibid.*, at 191-92.

9 The Canadian courts began developing their own case law in the mid-nineteenth century, just at the same time that the English courts were shifting away from the *res communes* doctrine in relation to water. At least one case explicitly notes that the reason for this departure from the common law as articulated by Bracton was the need to accommodate a rapidly industrializing English society—a consideration which hardly applied to the then newly settled Canada: *Ormerod v. Todmorden Mill Co.* (1883), 11 Q.B.D. 155 at 160, per Cave, J. Moreover, the history of water use by early settlers, and the fact that large areas of riparian land remain publicly owned, support the view that the British departure from the *res communes* doctrine was and is inappropriate for Canada. Indeed, while the current BC *Water Act* no longer makes reference to a right to use unlicensed water for domestic purposes, the BC Court of Appeal has ruled that such a right does still exist, since such use is not illegal under the Act, although it is a "fragile right," subject to extinguishments if a water licence is granted over that water: *Steadman v. Erickson Gold Mining Corp.*, 1989 CarswellBC 34 (C.A.) at para. 22.

10 Gage, A. "Highways, Parks and the Public Trust Doctrine" to be published in 18(1) J.E.L.P. (Fall 2007) (the "Highways and Parks article").

counteract publicly offensive pursuits, such as causing noxious odours, dust, soot and noise, and fouling public thoroughfares and waterways, would seem to be an obvious choice. Superficially, an action which appears to stress the plaintiff's concern for the public interest has obvious attractions for the litigant emphasizing the environmental perspective.<sup>11</sup>

However, the rules for standing in relation to public nuisance mean that in general only the Attorney General—or his or her designate—can bring a claim.<sup>12</sup> In a modern era of environmental legislation, the government generally pursues environmental protection through statutory means, meaning that public nuisance claims as a means of protecting the environment have been largely emasculated.

Despite some commentary and criticism of the common law's restrictive approach to public nuisance actions, for the most part this is where the discussion of public rights, and their implications has ended. According to this view, public environmental rights—if they exist at all—are irrelevant, an historic curiosity doomed to take a back seat to modern, statutory environmental protection.

Another view, however, is that the existence of public environmental rights has profound consequences for the way in which environmental legislation is understood and interpreted. Viewing environmental legislation in terms of its relationship with pre-existing common law environmental rights allows a lawyer to reframe the legal story. I will first examine this paradigm and what it means for how we characterize environmental laws. I will then summarize the considerable body of case law, much of it old, but nonetheless uncontradicted, that supports this shift in paradigm, concerning the judicial presumption that legislation should be interpreted as not intending to authorize interference with public rights. Finally, I will explore some examples of how this new paradigm, and the supporting case law, might result in different legal conclusions being reached.

### A. The Paradigm Shift

Most of the jurisprudence and academic comment on environmental law in the past several years have understood environmental law as a modern innovation. Prior to the modern era environmental concerns were minor or non-existent, and new laws were required after the industrial revolution to restrain the worst excesses of the market place and of private property rights. Environmental legislation is viewed as representing a departure from a previous era where private property owners were allowed to do whatever they wanted, provided there was no direct interference with other property owners.<sup>13</sup> According to this view, public rights, while potentially still forming the basis of claims in public nuisance, are of limited importance and have a questionable legal status.

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11 J. P. McLaren. "The common law nuisance actions and the environmental battle - Well-tempered swords or broken reeds?" in *Osgood Hall Law Journal*, Vol. 10, No. 3, December 1972, 505 at 511.

12 Someone other than the Attorney General may bring a claim in public nuisance if they are "specially affected" in a manner different from the rest of the public: *Stein and Tessler v. Gonzales et al.* (1984), 58 B.C.L.R. 110 at 112 and 113-14, cited in *Gleneagles Concerned Parents Committee Society v. British Columbia Ferry Corp.*, 2001 BCSC 512 at para. 79. There is considerable uncertainty over precisely how this test is to be applied, which may be a further factor in deterring public interest litigants from using this tort: See *Gagnier v. Canadian Forest Products* (1990-11-08), BCSC C894108, [1990] BCSC 11267.

13 The irony is that in many cases the common law evolved with the industrial revolution to accommodate the free-market ideology that accompanied it. Thus, as noted above, the English common law prior to the 1850s did recognize a public environmental right to use water, but this approach was abandoned as impractical in the industrial era: *supra*, notes 8 to 9. In actual fact the pre-industrial revolution common law did not always involve the unfettered private property interests that proponents of the mainstream paradigm assume. See also my discussion of the Writ of *Ad Quod Damnum* in A. Gage, 15(2) J.E.L.P. 107 (April 2005) ("Gage").

There is another equally compelling story: environmental problems and competing demands on resources have always existed, albeit on a smaller scale than is often the case now, and a range of legal tools evolved to deal with those problems. Far from starting from a blank slate, environmental legislation can be viewed as affirming and building upon the existing common law concepts. Environmental laws do not ignore or replace public environmental rights, but are the means by which the Crown protects such rights—the public’s legally recognized interests in respect of the environment.

By shifting the emphasis from the statute in its modern form without reference to environmental rights and responsibilities that exist at common law, a very different understanding of environmental legislation emerges.

American Professor Mary Wood has pointed out that the concept of the public trust doctrine—a concept discussed in more detail below, but which is itself derived from the existence of public environmental rights—can be used as a basis for a similar shift in the story told about environmental legislation. She refers to this change in the background story as a paradigm shift. While I believe that this idea is implicit in my earlier writing and work on public environmental rights, I am indebted to Professor Wood’s work for using the term “paradigm” to describe the significance of the shift in thought.

There is a proven paradigm of thinking that is organic to landscapes across the United States. This way of thinking is reflected in the goals of every major federal environmental statute. The Supreme Court expressed it as foundational doctrine in cases rendered over a century ago. Indeed, this way of thinking has guided societies of the world for millennia. I refer to it as Nature’s Trust. Unfortunately, this ancient paradigm of environmental law has been all but forgotten by modern agencies whose regulations spread like an invasive species across the legal landscape.<sup>14</sup>

The traditional legal view is that the law is primarily about protecting individual rights and especially property rights. The law is struggling to address environmental concerns—which have only recently become significant—in the context of a legal system which is primarily concerned with pre-existing individual rights. Thus, a private property owner has a general right to pollute until government steps in and restricts that right.

Under the public environmental rights framework, however, the common law has, since its inception, recognized public rights in respect of the environment. Environmental concerns may now have an unprecedented importance, but they have always been an important concern of the legal system. As a result, private property owners have acquired their property subject to a pre-existing common law duty not to negatively affect the rights of their neighbours, including the public’s environmental rights; government regulation develops and expands upon the existing public rights in respect of a clean environment, adding additional remedies and powers to protect those rights.

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14 M. Wood. “Nature’s Trust: Reclaiming an Environmental Discourse,” 25 *Virginia Environmental Law Journal* 431 (2007) at 447.



Consider the differences in perspective:

The public's environmental interests are protected by statute alone	Public has common law rights in respect of Environment
Government's job is to balance private rights and environmental interests; where there is a conflict, the private rights, as the earlier of the two, should be favoured.	Government's job is to protect both public and private rights; where there is a conflict, the public rights, as the earlier of the two, should be favoured.
Until environmental legislation is enacted, the environment has no legal protection. New environmental laws, therefore, can be viewed as restricting or infringing on private rights.	At common law a violation of the public's environmental rights amounts to a public nuisance. Environmental legislation expands on the protections available to these public rights. Private land owners were already obliged to avoid infringing public rights, so environmental legislation generally will not create new liability or infringe on existing private rights.
Government has discretion to allow interference with the environment. If the Legislator intends to restrict that discretion it would do so in clear language.	If the Legislator intended to give government discretion to interfere with public environmental rights, it would do so in clear language.
The government owes procedural fairness to people directly affected by government decision, but not to the general public.	Public rights are as significant to government decisions as private ones; the government has a duty to consult the public, as holders of environmental rights, as well as people more directly affected by government decisions.

One major advantage to this paradigm shift is that it reflects the way, in the author's experience, that the public tends to understand their relationship to environmental values. While there is no single monolithic entity known as the public, many, probably most, members of the public believe that they have a right to clean air, and to clean water. They believe that the government will protect these rights. Consequently, the public environmental rights framework represents both a way to translate concerns of members of the public into legal language and, conversely, a way to explain environmental law in a way that may understandable to members of the public.

## B. Statutory Interpretation

If this new paradigm sounds like a vague idea without legal foundation, it is important to recognize that there is already strong authority that public rights play a key role in understanding statutes. Although it has been largely overlooked in recent jurisprudence and academic commentary, the Canadian courts have, in interpreting statutes, recognized a presumption that the Legislator would not, absent a clear and unambiguous intention to do so, intend to interfere with existing public rights. This is an application of the more general, and better known, rule that legislation should be interpreted as not infringing existing legal rights.

When I mentioned to a colleague that I thought that the statutory presumptions regarding public environmental rights gave rise to a new paradigm for understanding environmental laws, he observed that in many ways a presumption of statutory interpretation represents a new paradigm—a new assumption about what has priority and what is important.

In any event, the surprisingly large and well developed body of case law applying this presumption of interpretation is discussed at some length in my article, *Public rights and the lost principle of statutory interpretation*. I will summarize some of the findings of that paper, below.

This presumption of interpretation started with cases concerning the Crown's prerogative powers and the question of whether the Crown can interfere with public rights absent authority from Parliament. Thus, a public right "can only be modified or extinguished by an authorizing statute, and as such a Crown grant of land of itself does not and cannot confer a right to interfere with navigation."<sup>15</sup>

According to this principle, grants or licenses made by the Crown will not be interpreted, absent a clear intention to do so, as authorizing interference with public rights:

... [T]he Crown cannot grant a license to commit a public nuisance. It would be licensing an individual to do that which interferes with a right which is the common inheritance of the people. ... [S]uch a license is not to be implied: it would be derogating from the honour of the Crown to assume an intention to do that which would be injurious to the people ...<sup>16</sup>

This principle is also applicable to the interpretation of legislation. Thus, in 1910, Iddington J. referenced:

[T]he well-known rule that anything in the way of legislation abridging the public rights or the rights of any of the public in favour of one acquiring a concession from Parliament or other legislative body must be construed strictly, and that the right must not be extended by implication.<sup>17</sup>

This principle can even constrain the apparently unlimited discretion of a statutory decision-maker, on the basis that if the legislature had intended the discretion to be used in a way inconsistent with the public right, it would have said so explicitly. Thus, in a case concerning the ability of the federal Minister of Fisheries to discriminate against fishers of Japanese origin, the Supreme Court of Canada, upheld by the Judicial Committee of the Privy Council, explained:

The [fishing license] regulations in question thus affect both public and private rights of fishing, and they should not be interpreted to derogate from those rights further than may be requisite to give the regulations their necessary and due effect ... It is true that the licensing power is committed to the head of the Department [of Fisheries], and no doubt it will be administered with due care, but, if it were intended that he should exercise a discretion to refuse a license to a qualified applicant, there would, I should think, have been something expressive and definitive of that intention ...<sup>18</sup>

Similarly, absent explicit statutory authority, general statutory provisions authorizing the ownership, management or regulation of roads or marketplaces, do not allow a local government to exclude

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15 *Friends of the Old Man River Society v. Canada (Ministry of Transport)*, [1992] 1 S.C.R. 3 at 55.

16 *Attorney General v. Harrison* (1866), 12 Gr. 466 (U.C. Ch.); see also *Rhodes v. Perusse* (1908), 41 S.C.R. 264 at 268-9.

17 *British Columbia Electric Railway v. Crompton* (1910), 43 S.C.R. 1 at 13; for a range of other cases discussing this principle, see Gage, *supra*, n. 13, at 121-24.

18 *Reference re Fisheries Act, 1914 (Canada)*, [1928] S.C.R. 457 at 476-7, *aff'd*, [1929] 3 W.W.R. 449 (Canada P.C.).

members of the public from using those lands or to turn those lands over to a purpose that might limit the public's rights in respect of those roads.<sup>19</sup>

Less clear is whether the courts may infer procedural protections where a statute impacting public rights does not explicitly provide for such procedural steps, in a manner analogous to the presumption of procedural fairness in respect of private rights. For example, would a court ever infer a statutory intention that a decision-maker give public notice prior to making a particularly significant decision, or hold a public hearing? While there are, so far as the author is aware, no Canadian cases in which the courts have gone so far,<sup>20</sup> there is authority that procedural steps explicitly provided for in a statute impacting the public's rights will be strictly construed:

[Their Lordships] content themselves with saying that there is excellent authority for requiring statutory conditions to be strictly fulfilled if interference with public rights is to be justified.<sup>21</sup>

Second, where a statute does explicitly set out public hearing and notice requirements related to a public right, administrative law requirements will be adapted to recognize the public's general interest. Thus, it is not necessary to show that a defect in public notice prejudiced the petitioner. It is enough if the notice would not have been clear to a reasonable person; prejudice to the public will then be inferred.<sup>22</sup>

Finally, public rights can be an important factor in understanding the purpose behind environmental legislation. Thus, in *Friends of the Oldman River Society v. Canada*, the Supreme Court of Canada turned to the common law public right of navigation to understand the *Navigable Waters Protection Act*:

[T]he relevant 'context' should not be too narrowly construed. Rather, the context must include the circumstances which led to the enactment of the statute and the mischief to which it was directed ... In [examining this context], it is useful to return to some of the fundamental principles of water law in this area, particularly those pertaining to navigable waters. It is important to recall that the law of navigation in Canada [includes] the ancient common law public right of navigation ...<sup>23</sup>

Taken as a whole, then, there is clear authority that legislation governing public rights should be interpreted as not intending to interfere with public rights. For environmental legislation it may be argued that the purpose behind the legislation is actually to protect the same interests that have been traditionally addressed through the legal concept of public rights, and, consequently, that a broad and liberal interpretation of the legislation requires effect to be given to those rights, and efforts on the part of the executive, absent clear authorization by the legislator, to limit those rights should be constrained.

19 *Vancouver v. Burchill*, [1932] S.C.R. 620; *Calgary (city of) v. Cominco Ltd.*, [1983] 2 W.W.R. 320 (Alta. Q.B.) at 331; *Guelph v. The Canada Company* (1854), 4 Grant 632; *Hamilton v. Morrison* (1868), 18 U.C.C.P. 228; *In re Peck v. Galt* (1881), 46 U.C.Q.B. 211; *Affleck v. Nelson (City)* (1957), 23 W.W.R. 386 (B.C.S.C.); for discussion of these and other cases, see the Highways and Parks article, *supra*, n. 10.

20 There is authority in the US arising from the public trust doctrine: see M.C. Blum, "Public Property and the Democratization of Western Water Law" (1989) 19 *Envtl. L.* 573 at 590 for discussion of the "hard look doctrine."

21 *Burrard Inlet Tunnel & Bridge Co. v. "Eurana" (The)*, [1931] 1 D.L.R. 785 at 790 (Canada P.C.); see also *SPEC v. Canada (Attorney General)*, 2003 FCA 239 at paras. 65-67 (Fed. C.A.).

22 *Wilson v. Secretary of State for the Environment* (1972), [1973] 1 W.L.R. 1083 (Q.B.), adopted by *Central Ontario Coalition Concerning Hydro Transmission Systems v. Ontario Hydro* (1984), 10 D.L.R. (4<sup>th</sup>) 341 at 368 to 371 (Ont. Div. Ct.).

23 *Friends of the Oldman River*, *supra*, n. 15, at 53.

Thus these cases—discussing the importance of public rights in understanding environmental and other legislation—affirm the validity of an environmental law paradigm based on public rights.

### C. Public Trust Doctrine

A concept that is closely related to the idea of public environmental rights, is the “Public Trust Doctrine.” This doctrine holds that there are certain public rights that are so important that the Crown holds them in trust for the public at large.

It is my feeling that public rights do not depend upon the existence of a trust for their legal effect; as I have pointed out above, public rights have a direct impact on how environmental legislation should be interpreted, as well as forming a compelling story about the legal role of environmental legislation. Indeed, I have argued that a particularly strong presumption that legislation will be interpreted in light of common law public environmental rights will have effects that look very much like some versions of the public trust doctrine, but without any reference to trust law.<sup>24</sup>

Nonetheless, the existence of a trust in respect of public environmental rights could only strengthen the legal effect of such rights, and may expand their impact beyond the walls of statutory authority. In addition, there is some recent academic and judicial comment on the subject, and it remains quite possible that the Canadian courts will eventually adopt some version of the public trust doctrine in respect of some or all of the public environmental rights. This development, if it occurs, would further strengthen the new paradigm, adding the idea of a fiduciary obligation to an already compelling story.

The highest authority available is the Supreme Court’s favourable comments on the American public trust doctrine in *Canfor*, followed by the observation that the Canadian law might recognize some sort of equivalent fiduciary obligations on the part of the Crown in respect of public rights:

It seems to me that 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 ... but there are clearly important and novel policy questions raised by such actions. These include the Crown’s potential liability for *inactivity* in the face of threats to the environment, the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown in that regard, the limits to the role and function and remedies available to governments taking action on account of activity harmful to public enjoyment of public resources, and the spectre of imposing on private interests an indeterminate liability for an indeterminate amount of money for ecological or environmental damage. [Emphasis in original]<sup>25</sup>

These are useful observations and may well form the basis of a compelling argument that the public trust doctrine exists in Canada. It is notable that the Prince Edward Island courts recently refused to strike out a claim against the federal government based upon a public trust owed in respect of fisheries.<sup>26</sup> Despite some developments, however, my own sense is that further work is required to complete a theoretical framework for the existence of such fiduciary obligations before the courts will accept a general public trust doctrine.

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24 Gage, *supra*, n. 13, at 136-9.

25 *Canfor*, *supra*, n. 2, para. 81.

26 *Prince Edward Island v. Canada (Minister of Fisheries and Oceans)*, 2005 CarswellPEI 78 (T.D.); on appeal the Appeal Division also did not suggest that the claim was not supportable, but held that it was within the exclusive jurisdiction of the federal court: 2006 CarswellPEI 72.

Some of this work has been done by a number of academic commentators.<sup>27</sup> In particular, Scott Kidd's recent article is useful for its discussion of the relationship between the fiduciary duties owed to aboriginal peoples and the public trust doctrine.<sup>28</sup>

I have advanced the view that in relation to parks in particular there is already a strong argument for the existence of a fiduciary obligation, which may be explained by the relationship between the doctrine of dedication and acceptance (through which highways and parks can be created at common law) and process by which charitable trusts are created (dedication of land for a charitable purpose and acceptance of that dedication by the trustee).<sup>29</sup> I have hopes that this approach may be useful in developing a more general theory of public fiduciary duties in respect of public environmental rights in Canada, but further work is required in this regard.

Nonetheless, as this theory develops, it may well further strengthen the new paradigm discussed above.

#### D. Examples of the Paradigm Shift

It may be helpful to give some examples of how this public rights paradigm changes the way that environmental statutes should be interpreted.

My employer, West Coast Environmental Law, was one of four environmental intervenors before the Supreme Court of Canada in *BC Hydro v. the Environmental Appeal Board (B.C.)*. The majority in the BC Court of Appeal in that case had ruled that BC Hydro, due to the way in which it was created and the wording of BC's *Waste Management Act*, was not responsible for the cost of remediating contamination caused by its predecessor, BC Electric, prior to 1957. Essentially BC Hydro's argument revolved around the claim that due to the wording of the statute which created it as a Crown corporation it had not acquired any liability from BC Electric Ltd. that did not already exist at the time of the amalgamation in 1961. Since the *Waste Management Act* had not "created" the liability for contaminated sites until 1997, this liability had not existed in 1961.<sup>30</sup>

A fundamental flaw in this position, from the point of view of the intervenors, was that in 1957 liability had existed at common law. The contamination in question had spread to several properties and the Fraser River, and almost certainly would have been actionable in public nuisance at the time the nuisance was created. From the intervenors' position, the *Waste Management Act* powers cannot be understood without reference to the common law liability; what the Act did in 1997 was to expand that liability and give the government new tools for dealing with it.

Unfortunately, the Supreme Court of Canada never heard the intervenors' submissions on this point. Instead, in allowing the appeal it heard only from BC Hydro, and then allowed the appeal, adopting the narrower technical reasons of Madame Justice Rowles' dissent at the BC Court of Appeal, without

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27 S. Kidd, *Keeping public resources in public hands: advancing the public trust doctrine in Canada*, (Mar. 2006), 16 J.E.L.P. 187-209; K. Smallwood, *Coming Out of Hibernation: The Canadian Public Trust Doctrine* (Unpublished Masters Thesis, UBC: 1993) ("Smallwood"); J. Maguire, *Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized*, 7 J.E.L.P. 1; C. Hunt, "The Public Trust Doctrine in Canada" in J. Swaigen, ed. *Environmental Rights in Canada* (Toronto: Butterworths, 1981) ("Hunt") at 185; B. von Tigerstrom, "The Public Trust Doctrine in Canada," 7 J.E.L.P. 379; Gage, *supra*, n. 13, at 136 to 139.

28 Kidd, *Ibid.*

29 Highways and Parks paper, *supra*, n. 10. This argument is derived from the existing case law concerning government obligations in relation to the operation and maintenance of highways.

30 *BC Hydro v. B.C. (Environmental Appeal Board)*, 2003 CarswellBC 1866; 2003 BCCA 436 (C.A.).

hearing from any of the other parties or the interveners.<sup>31</sup> Hopefully, however, this example illustrates how a shift in the story about environmental values can give rise to legal arguments which would have been overlooked in the old paradigm.

Consider also the many authorities that hold that statutory decision-makers should be given considerable discretion in determining the scope and terms of an environmental assessment. It is only when a government decision-maker has acted in a patently unreasonable manner that a decision as to the scope of an environmental assessment will be reviewed.

These authorities generally proceed from the assumption that environmental assessment legislation grants an unconstrained political discretion to the Minister responsible, based on the need to balance competing interests. As a result, it is extremely difficult to challenge the decision as to how an environmental assessment should be scoped.

However, if an environmental assessment is viewed not as an essentially political exercise, but a legislative attempt to ensure that public environmental rights are fully considered before major projects proceed, then an entirely different approach would be warranted. Presumably the Legislator would have expected the Minister to include in the scope of the environmental assessment any aspect of the project which is likely to impact on the public's rights.

Thus, in *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)*, the Newfoundland Court of Appeal prefaced its discussion of the discretion of the province's Minister of Environment to exempt consideration of certain aspects of a project from a joint federal-provincial assessment of the Voisey Bay mine in Labrador with a discussion of the significance of environmental assessments for protecting the public's rights:

Both the Parliament of Canada and the Newfoundland Legislature have enacted environmental assessment legislation ... The regimes created by these statutes represent a public attempt to develop an appropriate response that takes account of the forces which threaten the existence of the environment. If the rights of future generations to the protection of the present integrity of the natural world are to be taken seriously, and not to be regarded as mere empty rhetoric, care must be taken in the interpretation and application of the legislation. Environmental laws must be construed against their commitment to future generations and against a recognition that, in addressing environmental issues, we often have imperfect knowledge as to the potential impact of activities on the environment. ... [Environmental Assessment legislation] must be regarded as something more than a mere statement of lofty intent. It must be a blueprint for protective action.<sup>32</sup>

With this background, the Court, not surprisingly, went on to interpret the scope of the environmental assessment broadly, and the Minister's jurisdiction to exclude aspects of that project narrowly. This case, unlike the others cited above, did not concern the Ministerial discretion in setting the scope of an environmental assessment, but rather the approach to be taken in interpreting a memorandum of understanding setting out the scope. However, while concerning a different legal issue, the approach taken by the Court of Appeal is fundamentally different from the approach taken in those cases.

In addition to putting environmental values on a much stronger legal footing, public environmental rights allow for a common thread running through environmental law as a discipline. Environmental law—in all its diverse forms—can be characterized as that branch of the law related to the protection of the public's rights in respect of the natural environment.

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31 [2005] 1 S.C.R. 3.

32 *Labrador Inuit Association v. Newfoundland (Minister of Environment and Labour)* (1997), 152 D.L.R. (4<sup>th</sup>) 50 (Nfld. C.A.) at 55-56.

#### **IV. Conclusion**

While further academic and judicial work is required, there is strong authority that the public has rights in respect of the natural environment. If these rights are viewed not as a legal curiosity, but as a fundamental feature of environmental law, they can form the basis of a new narrative about the nature of environmental law.

While mainstream legal analysis has treated environmental laws as an entirely modern response to a modern problem and largely political in nature, pre-existing public environmental rights represent a challenge to these assumptions. Under this view, environmental legislation is not an expression of a new political reality, but an exercise of an ongoing government responsibility to protect public environmental rights. As such, the legislation does not impose new obligations on polluters and others causing environmental harm, but expands on the legal tools available to deal with such individuals at common law.

This approach is supported by case law that holds that legislation should be interpreted, absent a clear legislative intent, as supporting, and in any event not undermining, existing public rights. In addition, the emergence of the concept of the public trust in Canadian law has the potential to further strengthen and expand upon this approach to analyzing environmental laws.

