

# THE ATTORNEY GENERAL'S STANDING TO SEEK RELIEF IN THE PUBLIC INTEREST: THE EVOLVING DOCTRINE OF PARENS PATRIAE

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*The expression parens patriae in this context refers to the standing of Attorneys General to pursue litigation in the public interest. In this article, the author traces the historical use of the doctrine in public interest claims in England and Canada, contrasting it with its more aggressive employment in the United States where it has been an important part of states' regulatory powers. He then discusses the significance of the Supreme Court of Canada's decision in British Columbia v. Canadian Forest Products Ltd, which confirmed, somewhat surprisingly, that provincial Attorneys General enjoy parens patriae authority equivalent to their US counterparts.*

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*Dans le présent contexte, le terme parens patriae fait référence à la qualité pour agir des procureurs généraux en matière de litige touchant l'intérêt public. Dans le présent article, l'auteur retrace l'historique de l'application de la doctrine parens patriae dans des poursuites intentées dans l'intérêt public en Angleterre et au Canada. Il compare ensuite cet emploi à l'application plus agressive de la doctrine aux États-Unis, où elle est une composante importante des pouvoirs réglementaires des États. L'auteur examine ensuite la portée de l'arrêt de la Cour suprême du Canada dans l'affaire Colombie-Britannique c. Canadian Forest Products Ltd, qui a confirmé, de façon quelque peu surprenante, que les procureurs généraux provinciaux jouissent d'une autorité parens patriae identique à celle de leurs homologues américains.*

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## 1. Introduction / Overview

In 2006, California launched a lawsuit against six major automobile manufacturers for damages suffered by the State and its citizens as a

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result of greenhouse gas emissions.<sup>1</sup> The remarkable action, premised on the Attorney General's *parens patriae* standing, might at first appear to be a peculiarly American development, some quirk or vestige of the American political and judicial systems. In this article I suggest that, on the contrary, a similar authority to seek relief in the public interest resides in the Attorneys General of the various provinces, as has recently been confirmed by the Supreme Court of Canada in *British Columbia v. Canadian Forest Products Ltd.*<sup>2</sup> But what is the scope of this power? Does *Canfor's* explicit reference to American jurisprudence mean that lawsuits like California's "global warming" action will become an accepted part of the Canadian regulatory landscape? And does the *parens patriae* power extend beyond environmental or nuisance cases, and if so, how far?

Standing as *parens patriae*<sup>3</sup> signifies an Attorney General's common law right<sup>4</sup> to seek relief in the courts on behalf of the public at large. Originally a derivative of the Crown's duty to safeguard interests where there was no other competent legal champion, as in the case of orphans, charitable trusts or excess of corporate authority,<sup>5</sup> *parens patriae* standing over time expanded to embrace civil actions by the Attorney General to enjoin breaches of public law and abate public nuisances, even where other private or public remedies may exist.<sup>6</sup> In *Cowan v. Canadian Broadcasting Corp.*, Schroeder J. A. wrote:

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<sup>1</sup> *California v. General Motors Corporation et. al.* (US Dist. Ct., N. California Dist., filed September 20, 2006). The Attorney General's Complaint alleges (at para. 3) that vehicles manufactured by the defendants account for nine percent of the carbon dioxide emissions in the world and more that 30 percent in California. It continues at para. 6:

The People seek compensation for the large-scale damage caused by these defendants. California seeks a judgment holding each defendant jointly and severally liable for contributing to a public nuisance – global warming and the impacts resulting from global warming in California – and awarding monetary damages to the State. The People also seek a declaratory judgment that each defendant is jointly and severally liable to pay for such additional damages incurred by California in the future for contributing to the ongoing nuisance of global warming.

<sup>2</sup> 2004 SCC 38, [2004] 2 S.C.R. 74 [*Canfor*].

<sup>3</sup> Literally, "parent of the country."

<sup>4</sup> The term "common law" is here used to describe the origin of the Attorney General's standing, notwithstanding the fact that the relief sought, such as injunction or restitution, may be premised in equity.

<sup>5</sup> See generally J.L. J. Edwards, *The Law Officers of the Crown* (London: Sweet & Maxwell, 1964) at 286-95.

<sup>6</sup> Although the term is not consistently used in public nuisance cases, it is generally recognized that the Attorney's standing to pursue such claims is founded in the doctrine of *parens patriae*. See Wilfred Estey, "Public Nuisance and Standing to

Under our law, the Attorney-General is by law the representative of the public interests which are vested in the Crown and are enforceable by the Attorney-General as the Crown's officer.<sup>7</sup>

In the twentieth century, state Attorneys General in the United States began to embrace a more aggressive use of *parens patriae* standing, surging ahead of their Commonwealth counterparts and filing actions in everything from antitrust and consumer protection suits to tobacco litigation, with or without explicit statutory authority and in some cases over vocal objections and even legal challenges from their states' own governments. Particular use of the doctrine was made in environmental claims, with actions launched, not only for injunctive relief on the English model, but for damages as well. Not infrequently, the Attorney General of one state has appeared in the courts of a neighbouring state (or in the federal courts) to seek redress for the effects of pollution that has crossed state lines.<sup>8</sup>

At the same time, the *parens patriae* doctrine remained relatively calcified in England and, by extension, Canada. Attorneys General would file occasional applications seeking relief from nuisance, and would from time to time consent to be named in relator actions conducted by private parties<sup>9</sup> — although in Canada the latter type of action has been in part subsumed by the advent of “public interest

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Sue” (1972) 10 Osgoode Hall L.J. 563 at 566, 576; see also Ontario Law Reform Commission, *Report on the Law of Standing* (1989) at 10, and Law Reform Commission of British Columbia, *Report on Civil Litigation in the Public Interest* (1980), No. 46 at 7.

<sup>7</sup> [1966] 56 D.L.R. (2d) 578 (Ont. C.A.) at 583.

<sup>8</sup> For a concise overview of the use of *parens patriae* suits in the U.S. see Jay L. Himes, “State *Parens Patriae* Authority: The Evolution of the State Attorney General's Authority” in *Protecting the Public: The Role of Private and Public Attorneys General* (Miami, FL: Institute for Law and Economic Policy Symposium, 2004).

<sup>9</sup> An action *ex relatione* is one where the Attorney General agrees to be the nominal plaintiff before the Court, but where the matter is prosecuted entirely by a private individual. Such actions are necessary where the individual does not, in her own right, have standing to bring the action, as is the case in public nuisance where no special loss or damage can be claimed by the individual. For the purposes of the standing of the Attorney General, there is no difference whether the Attorney General consents to a relator action or institutes the case *ex officio*. Edwards writes, *supra* note 5 at 288:

What must not be overlooked is the fact that to proceed in the field within which relator actions obtain, the Attorney-General is not dependent upon the initiative of private individuals, being completely free to set the law in motion at his own behest where any public right is infringed, or where there is an abuse of statutory procedure or power by public authorities. Whether the initiative is taken by a

standing” for individuals.<sup>10</sup> Also fairly rarely, civil injunctions were sought where patterns of breaches of statute law made ordinary prosecution cumbersome or otherwise inconvenient.

In its decision in *Canfor*, however, the Supreme Court of Canada engaged in an extended review — albeit entirely in *obiter dicta* — of the Attorney General’s right to bring actions to recover for harm to the environment, and announced that it was receptive to the broadest range of *parens patriae* claims, not only for nuisance (though this was confirmed), but also for negligence and other torts; and not just for injunctive relief, but for damages as well. By relying extensively on American precedents, the Court indicated that the powers of the Attorneys General of Canadian provinces had not in fact lagged behind their American state counterparts.

So far, no province has taken up the standard offered by the Supreme Court and begun litigating on the American model. This may be due, at least in part, to the Court’s suggestion that environmental claims made by government might well be susceptible to defences based on government inaction, or to pragmatic concerns about antagonizing major industries within provincial borders. But it might also be that the potential scope of the *parens patriae* authority of Attorneys General is not well understood.

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relator or not, the Attorney-General has an absolute discretion whether or not to grant his fiat and permit proceedings to be instituted.

<sup>10</sup> See *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607. LeDain J. wrote in *Finlay* at para. 17:

...The nature of the interest required by a private individual for standing to sue for declaratory or injunctive relief where, as in the present case, a question of public right or interest is raised, has been defined with reference to the role of the Attorney General as the guardian of public rights. Only the Attorney General has traditionally been regarded as having standing to assert a purely public right or interest by the institution of proceedings for declaratory or injunctive relief of his own motion or on the relation of another person. ... In such a case a private individual may not sue for declaratory or injunctive relief without the consent of the Attorney General unless he can show what amounts to a sufficient private or personal interest in the subject matter of the proceedings. It is in this sense that I have referred to the discretionary control of the Attorney General over public interest standing. *Thorson*, *McNeil* and *Borowski* represent a departure from or exception to that general rule...

Nevertheless relator actions do still occur; for a rare recent example of a relator action see *British Columbia (Attorney General) v. Infomap Services Inc.*, [1987] B.C.J. No. 1964 (S.C.) (QL).

This article proceeds in two main parts. In the first, I explore the Attorney General's authority, as it was recognized pre-*Canfor*, to seek remedies in the civil courts to vindicate public rights and enjoin breaches of the public law.

Next, I review the development of *parens patriae* authority in the United States before turning to the Supreme Court's extensive reference to and reliance on American *parens patriae* cases in *Canfor* to confirm the right of provincial Attorneys General to sue polluters for damages to the environment. Reflecting on the American jurisprudence itself, I demonstrate that, although the cases arose in the environmental context, they are not unique to that field. In fact, American *parens patriae* environmental claims are derived from a larger power: protection of a state's "quasi-sovereign" interest in the health and wellbeing — physical and economic — of its citizens. If *Canfor* stands for the proposition that provincial Attorneys General enjoy similar powers, then there might be few constraints on government lawsuits in a wide variety of fields where that interest is implicated.

Finally, I conclude with a series of questions that remain outstanding in light of the Supreme Court's decision.

## 2. *Parens Patriae* Standing to Enjoin the Violation of Public Rights and the Public Law

### A. Generally

As a general proposition, the Attorney General has *parens patriae* standing to seek an injunction to prevent or ameliorate breaches of the public law or public rights.<sup>11</sup> This may be done in cases of public nuisance, or to enjoin breaches of the laws of Parliament and the legislatures.

The Attorney General's role in prosecuting public nuisance claims is well known and little need be added here, except to note that the

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<sup>11</sup> While many cases do not refer to the Attorney General's standing in these applications as "*parens patriae*," it seems clear that the doctrine is indeed the source of the Attorney General's role; see Ian G. Scott, "The Role of the Attorney General and Charter of Rights" (1986-1987) 29 *Crim. L.Q.* 187 at 196 ("[T]he Attorney General has [broad] authority to assert claims on behalf of the public interest to enforce public legal rights. This power is exercised as an officer of the Crown, representing the Crown's *parens patriae* authority."); Law Reform Commission of British Columbia, *Report on Civil Litigation in the Public Interest*, *supra* note 6 at 25 ("The Attorney-General, as the representative of the public as *parens patriae*, has the right to seek redress in the courts whenever a public right is infringed or is threatened with infringement").

Supreme Court of Canada has adopted a very broad definition of what might constitute a public nuisance.<sup>12</sup> In most cases, the Attorney General's authority to prosecute such claims is referred to in a residual way; it is generally discussed in cases where private individuals attempt to advance public nuisance claims themselves. In *Boyce v. Paddington Borough Council*, Buckley J. stated the rule as follows:

A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such that some private right of his is at the same time interfered with (e.g., where an obstruction is so placed in a highway that the owner of the premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.<sup>13</sup>

The conservative approach exemplified by *Boyce* has suffered some erosion on the private side — that is, private individuals now enjoy more opportunities to litigate in the public interest<sup>14</sup> — but the Attorney General's powers to litigate with respect to public rights have been unaffected by the increased appearance of public interest litigants. The private standing cases, while still generally restrictive of an individual's right to sue, have adopted a broad view of what lies in the realm of public rights, presumably encompassing those rights that more properly ought to be vindicated in the name of the Crown. These include excess of statutory authority and breach of the public law, both of which have historically attracted the attention of the Attorney General as *parens patriae*.<sup>15</sup>

With respect to breaches of public statutes, *Halsbury's* describes the Attorney General's role as follows:

The public is interested to see that Acts of Parliament are obeyed, and the Attorney General represents the public as a whole in insisting that the law shall be observed. The court therefore has jurisdiction to grant an injunction at the suit of the Attorney

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<sup>12</sup> “[A]ny activity which unreasonably interferes with the public’s interest in questions of health, safety, morality, comfort or convenience”; see *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 52 [*Ryan*].

<sup>13</sup> [1903] 1 Ch. 109 at 114.

<sup>14</sup> See footnote 10 and accompanying text.

<sup>15</sup> See for instance *Cowan v. Canadian Broadcasting Corp.*, [1966] 2 O.R. 309 (C.A.), and *Rosenberg v. Grand River Conservation Authority* (1976), 69 D.L.R. (3d) 384 (Ont. C.A.).

General in any case where there has been a breach of statutory duty, or where a statutory offence has been committed, for which no other remedy is adequate.<sup>16</sup>

The Attorney General's role is distinct from the enforcement of the statute on its own terms. In *Attorney-General for Ontario v. Grabarchuk*,<sup>17</sup> the Court granted the Attorney General an interim injunction to prevent the defendants from carrying on a business without a licence. In that case, Reid J.A. stated:

There are numerous precedents in England and Australia for the proposition that the Attorney-General, as the protector of public rights and the public interest, may obtain an injunction where the law as contained in a public statute is being flouted... The position of the Attorney-General as custodian of the public interest is the same whether one speaks of England, Australia or Canada.<sup>18</sup>

The Court then went on to find additional authority for injunctive relief in the *Department of Justice Act*<sup>19</sup> which set out powers of the Attorney General.<sup>20</sup>

## *B. When Should an Injunction be Sought? The Question of Other Available Remedies*

### *1) The Traditional Position*

The availability of alternative remedies does not, in and of itself, bar an application by the Attorney General to enjoin a breach of statute. Lord Goddard C.J., in *Attorney-General v. Smith et al.*, wrote:

It has been submitted to me that because the Act provides penalties, and because there is no offence committed before an enforcement notice has been disregarded, I ought not to grant an injunction. I think that the cases which have been cited - particularly *Attorney-General v. Wimbledon House Estate Co. Ltd.*, [[1904] 2 Ch. 34], cited and followed by Devlin J. in *Attorney-General v. Bastow*, [[1957] 1 Q.B. 514] - show that, although a statute may provide a penalty for acts done in breach of

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<sup>16</sup> *Halsbury's Laws of England* (4<sup>th</sup>), Vol. 24, para. 943. Note that the reference to the availability of alternative remedies is not a bar to the Attorney General's application, but it may be a factor in whether the court will, in its discretion, accede to it. This issue is discussed in the next section.

<sup>17</sup> (1976), 67 D.L.R. (3d) 31 (Ont. C.A.) [*Grabarchuk*].

<sup>18</sup> *Ibid.* at 36.

<sup>19</sup> R.S.O. 1970, c. 116, renamed *Ministry of the Attorney General Act* by S.O. 1972, c. 1, s. 9(1).

<sup>20</sup> An equivalent provision is found in B.C.'s *Attorney General Act*, R.S.B.C. 1996, c. 22, section 2(e).

it, if it is a matter of public right, then the Attorney-General is entitled, on behalf of the public, to apply for an injunction.<sup>21</sup>

In *Grabarchuk*, Reid J.A. left little doubt about this question when he stated that the Attorney General may obtain an injunction “notwithstanding that, (a) the statute itself may contain penalties of a different kind, and (b) all possible alternative remedies have not been exhausted.”<sup>22</sup>

This builds upon the English view that the Attorney General must retain a wide — indeed unreviewable — discretion to seek injunctions in the public interest and, if the court finds the breach of the public law as alleged, the injunction will be denied only rarely.<sup>23</sup> It has been held as irrelevant that the breaches were trivial or that the public in fact benefited from the defendant’s transgressions.<sup>24</sup>

At one point in the past it was controversial whether injunctive relief, including at the instigation of the Attorney General, could ever be sought in aid of criminal law.<sup>25</sup> That issue seems to have been put to rest in subsequent cases in which such relief has been granted.<sup>26</sup> A somewhat different question arises in cases where there has already been enforcement by other means, but it has proven ineffective in preventing recurrence. In these cases too, the Attorney General may seek an injunction.<sup>27</sup> Few nowadays suggest, as some once did, that the Attorney

<sup>21</sup> [1958] 2 Q.B. 173 at 185.

<sup>22</sup> *Supra* note 17 at 36.

<sup>23</sup> In *Attorney General v. Bastow*, [1957] 1 Q.B. 514 [*Bastow*], Devlin J. held at 523: “I think that this [C]ourt, once a clear breach of the right has been shown, should only refuse the [Attorney General’s] application in exceptional circumstances.”

<sup>24</sup> *Attorney General v. Harris*, [1961] 1 Q.B. 74 [*Harris*].

<sup>25</sup> See e.g. *Robinson v. Adams*, [1925] 1 D.L.R. 359 (Ont. C.A.).

<sup>26</sup> See e.g. *United Nurses of Alberta v. A.G. (Alta.)* (1980), 25 A.R. 69 (Q.B.), following *Grabarchuk*, *supra* note 17; *Alberta (A.G.) v. Plantation Indoor Plants Ltd.* (1982), 133 D.L.R. (3d) 741 (Alta.C.A.) (rev’d on other grounds (1985), 18 D.L.R. (4th) 319 (S.C.C.)); *Attorney-General of British Columbia v. Couillard et al.* (1984), 11 D.L.R. (4th) 567 (B.C.S.C.). In *Regina v. Odeon Morton et al.*, [1974] 2 W.W.R. 1 (Alta.C.A) the injunction was refused, but only because the alleged lawbreaker (an exhibitor of an assertedly obscene film) had been acquitted in criminal proceedings and therefore there was no crime to enjoin. In *Wilson v. Lawrence*, [1989] B.C.J. No. 521 (S.C.) (QL), Melvin J. held that:

It is obvious that the Attorney General does have status to seek injunctive or other relief from the civil courts with reference to conduct that might otherwise be described as criminal.

<sup>27</sup> In *Attorney-General v. Premier Line, Ltd.*, [1932] 1 Ch. 303 at 313, Eve J. explained the exception to the general rule that statutory remedies are exclusive:

The public is concerned in seeing that Acts of Parliament are obeyed, and if those



General may *only* act through injunction when the statutory remedies have proven insufficient;<sup>28</sup> however, some judges have made it clear that they expect the Attorney General's resort to the civil jurisdiction of the courts to deal with criminal behaviour to be the exception, not the rule. In *Gouriet v. Union of Post Office Workers et al.*, Viscount Dilhorne said:

An Attorney-General is not subject to restrictions as to the applications he makes, either ex officio or in relator actions to the courts. In every case it will be for the court to decide whether it has jurisdiction to grant the application and whether in the exercise of its discretion it should do so. It has been and in my opinion should continue to be exceptional for the aid of the civil courts to be invoked in support of the criminal law and no wise Attorney-General will make such an application or agree to one being made in his name unless it appears to him that the case is exceptional.<sup>29</sup>

In *British Columbia (Attorney General) v. Perry Ridge Waters Users Assn.*, McEwan J. stated *obiter*:

I summarize a great deal of case law in saying that there appears to be considerable authority for the proposition that the Attorney General's resort to the courts for injunctive relief ought to be a final step and not merely a convenient alternative to the application of criminal or other available sanctions.<sup>30</sup>

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who are acting in breach of them persist in so doing, notwithstanding the infliction of the punishment prescribed by the Act, the public at large is sufficiently interested in the dispute to warrant the Attorney-General intervening for the purpose of asserting public rights, and if he does so the general rule no longer operates; the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land.

Buckley, J. said in *Attorney-General v. Ashborne Recreation Ground Co.*, [1903] 1 Ch. 101 at 108:

Moreover, there may be good reason why an injunction should be granted although a penalty is imposed. If there were no remedy except the statutory remedy, a public authority might by circumstances be rendered singularly impotent although it had made bylaws.... [T]hat cannot be the intent of the statute.

In *A.-G. Alta. ex rel. Rooney v. Lees and Courtney*, [1932] 3 W.W.R. 533 (Alta. S.C.), McGillivray, J. wrote at 542:

In the case at bar it is shown that the violations of the Act by these defendants have been open and continuous and that the imposition of penalties has had no effect as a deterrent. It is also clear that the defendants intend to continue as in the past unless restrained by the Court from so doing. In these circumstances I think that I should exercise my discretion in favour of granting an injunction.

<sup>28</sup> The British Columbia Law Reform Commission, *supra* note 6 at 34 (injunctions in aid of the criminal law "probably limited to those situations where the criminal sanction has proven or will prove inadequate, or to cases of emergency").

<sup>29</sup> [1977] 3 All E.R. 70 at 91 [*Gouriet*].

<sup>30</sup> [1997] B.C.J. No. 2348 (S.C.)(QL) at para. 9 [*Perry Ridge*].

## 2) *Standing and Jurisdiction versus Discretion*

It is useful at this point to draw a clear distinction between questions of the Attorney General's standing and jurisdiction, on the one hand, and those of a court's discretion, on the other. In the case of the former, courts have generally, if not universally, acknowledged that the Attorney General enjoys standing and jurisdiction to seek injunctive relief from breaches of the public law, and the Attorney General alone should be the one to decide whether such relief should be sought. In *London County Council v. The Attorney-General*, Lord Halsbury L.C. said:

It may well be that it is true that the Attorney-General ought not to put into operation the whole machinery of the first Law Officer of the Crown in order to bring into Court some trifling matter. But if he did, it would not go to his jurisdiction; it would go, I think, to the conduct of his office, and it might be made, perhaps in Parliament, the subject of adverse comment; but what right has a Court of law to intervene? If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the Courts to determine whether he ought to initiate litigation in that respect or not.... In a case where as a part of his public duty he has a right to intervene, that which the Courts can decide is whether there is excess of power which he, the Attorney-General, alleges. Those are the functions of the Court; but the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other Court. It is a question which the law of this country has made to reside exclusively in the Attorney-General. I make this observation upon it, though the thing has not been urged here at all, because it seems to me very undesirable to throw any doubt upon the jurisdiction, or the independent exercise of it by the first Law Officer of the Crown.<sup>31</sup>

This position has been accepted, at least *obiter*, by LeDain J. writing for the unanimous Supreme Court of Canada.<sup>32</sup> It is equally clear that courts almost always will have jurisdiction to grant such relief; yet the reluctance of the courts can be expected to weigh on the question of discretion. The Attorney General can *seek* the relief, but it is, in the end, in the hands of the courts to decide whether it ought to be *granted*. As Farwell L.J. said in *Attorney-General v. Birmingham, Tame and Rea District Drainage Board*:

<sup>31</sup> [1902] A.C. 165 at 168-69.

<sup>32</sup> In *Finlay*, *supra* note 10 at para. 17 he wrote:

[The Attorney General's] exercise of discretion as to whether or not to give his consent to relator proceedings is not reviewable by the courts: see *London County Council v. Attorney-General*, [1902] A.C. 165, and *Gouriet v. Union of Post Office Workers*, [1978] A.C. 435.

It is for the Attorney-General to determine whether he should commence litigation but it is for the Court to determine what the result of the litigation shall be.... That is to say, the Court cannot say: "You ought never to have instituted these proceedings": it must listen to his application and then adjudicate whether there should be an injunction granted or not.<sup>33</sup>

In *Bastow*,<sup>34</sup> Devlin J. wrote:

The Attorney-General, as I say, is the officer of the Crown who is entrusted with the enforcement of the law. If he, having surveyed the different ways that are open to him for seeing that the law is enforced and that it is not defied, has come to the conclusion that the most effective is to ask this [C]ourt for a mandatory injunction - and I am satisfied that the very nature of a relator action means that he has surveyed those ways and has come to the conclusion - then I think that this [C]ourt, once a clear breach of the right has been shown, should only refuse the application in exceptional circumstances. I am dealing purely with that type of case in which the only substantial ground for not granting an injunction is that there are other remedies available.<sup>35</sup>

His Lordship held that a court, "although retaining its discretion, ought to be slow to say that the Attorney General should first have exhausted other remedies."<sup>36</sup>

In *United Nurses of Alberta v. Alberta (Attorney General)*, Stevenson J. also emphasized the distinction between the Attorney General's right to bring an application in his sole discretion and the court's right to refuse the relief, but he indicated less willingness than Devlin J. to grant the injunction sought by the Attorney General:

...[T]he fact that there are other remedies available is not of itself a ground for refusing an injunction. It may be a ground for exercising a discretion but is not of itself a ground for refusal.

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...I maintain grave reservations about the Crown's method of proceeding. I also think it should be made perfectly clear that the Court is not bound to give an order. The presence of other kinds of sanctions, the consideration of the emergency, and

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See also *Attorney-General of British Columbia v. Couillard et al* (1984), 11 D.L.R. (4th) 567 at 569-70 (B.C.S.C.), where an injunction was sought to stop street prostitution (drawing distinction between suits brought by individuals (like *Gouriet*) and those brought by the Attorney General).

<sup>33</sup> [1910] 1 Ch. 48 at 61 (C.A.).

<sup>34</sup> *Supra*, note 23.

<sup>35</sup> *Ibid.* at 522-23.

<sup>36</sup> *Ibid.* at 521.

the consequences and practicality of the use of the injunction would all have to be weighed.<sup>37</sup>

At present, the weight of authority appears to indicate that the Attorney General need not wait for either government or individuals to exhaust statutory remedies prior to the commencement of the Attorney General's action for an injunction. However, the reluctance of the courts should not be ignored (particularly in cases where the government appears to be ducking enforcement and hiding behind the Court, as I discuss further below), and it must be kept firmly in mind that injunctive relief is equitable and as such discretionary.

### *C. Degrees of Deference and the Test for Injunctive Relief*

#### *1) The Test for an Injunction*

In exercising its discretion to grant an injunction to prevent a breach of the public law, what test should the court apply? Though the matter is not definitively settled, it would appear that the courts will not require the Attorney General to meet the threshold set for ordinary litigants.<sup>38</sup>

Edwards writes that:

The first Law Officer's opinion of the merits of the application for an injunction, reflected in his administrative decision to institute a relator action, is thus properly recognised as entitled to carry considerable weight with the court. As a practical measure, the Attorney-General's action may certainly limit the freedom of the court's judicial discretion, but we must not lose sight of the fundamental rule that the final word rests with the court, which can with equal propriety reject the Attorney's assessment of the circumstances and deny him its aid.<sup>39</sup>

But deference to the Attorney General's decision has occasionally been questioned. In *Attorney-General v. Harris*,<sup>40</sup> Salmon J. suggested that it was not proper for the courts to defer to the judgment of the Attorney General on the question of the appropriateness of injunctive relief, and added that the Attorney General "is for [the purpose of

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<sup>37</sup> (1980), 124 D.L.R. (3d) 64 at paras. 18-22 (Alta. Q.B.).

<sup>38</sup> In Canada, the standard test for interlocutory injunctions requires the satisfaction of three criteria: there is a serious question to be tried, irreparable harm will result if an injunction is not granted, and the balance of convenience favours the applicant.

<sup>39</sup> Edwards, *supra* note 5 at 292-93.

<sup>40</sup> [1960] 1 Q.B. 31.

enjoining illegal behaviour] in no better position to obtain judgement in his favour than any other litigant claiming an injunction.”<sup>41</sup>

The Court of Appeal rejected this assertion, with Pearce L.J. saying:

I do not agree... with [Salmon J.] when he says that the Attorney-General is in no better position than any other litigant. For the Attorney-General represents the community, which has a larger and wider interest in seeing that the laws are obeyed and order maintained. It is this wide element that is apt to be overlooked or undervalued when one considers injury to the public merely in terms of immediate injury.<sup>42</sup>

The Court of Appeal held that a high degree of deference will be shown to the Attorney General's opinion that the activity should be barred by an injunction once the breach has been clearly demonstrated. This is consistent with the statement of Lord Devlin in *Bastow*, that “once a clear breach of the right has been shown, [the Court] should only refuse the application in exceptional circumstances.”<sup>43</sup>

In *Grabarchuk*, Reid J.A. reviewed the English decisions of *Harris* and *Bastow*, and stated:

In my opinion, there is no basis for the application of the usual [injunction] criteria.

If, however, they were applicable I would think that the justice and convenience of the matter lie on the Attorney-General's side. He has a strong prima facie case. If irreparable damage to the public interest must be shown I agree with and apply the following. In *Attorney-General v. Harris*, [1961] 1 Q.B. 74 at p. 95, Pearce, L.J., observed:

... a breach with impunity by one citizen leads to a breach by other citizens, or to a general feeling that the law is unjustly partial to those who have the persistence to flout it.

Respondents argued that the authorities relied on by the Attorney-General are for the most part judgments made after trial and therefore are inapplicable to an application on an interlocutory motion. I cannot see how the principle expressed in those judgments is affected by the time when an application is made or granted. It applies equally to the grant of an interim or a permanent injunction.<sup>44</sup>

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<sup>41</sup> *Ibid.* at 38-39.

<sup>42</sup> *Supra* note 24 at 95.

<sup>43</sup> *Supra* note 23 at 523.

<sup>44</sup> *Supra* note 17 at 39.

So there appear to be two types of tests embodying this deference to the Attorney General's decision to enjoin behaviour. In one, exemplified by the English decision *Bastow*,<sup>45</sup> the Attorney General is regarded as possessing the discretion to determine which illegal behaviour should be enjoined in the interests of the public, and the court will be chary to intervene in that assessment.<sup>46</sup> This is also the perspective endorsed by Edwards. In the second, exemplified by *Grabarchuk*,<sup>47</sup> the criteria of "irreparable harm" and the "balance of convenience" are applied only notionally, with the result that ongoing flagrant breaches of the law will necessarily be found to meet such a threshold.

However, the Attorney General might actually be held to a higher standard with regard to the third aspect of the test for an injunction: whether there is a serious question to be tried. The relief, though it may be sought as a preliminary injunction, is for all intents and purposes the purpose and end of the suit. Professor de Smith writes of the danger that a low threshold could effectively excuse the Crown from affording ordinary procedural justice to a defendant in a criminal proceeding:

Disobedience to an injunction may result in imprisonment of indefinite duration without the benefit of trial by jury. If existing statutory penalties are inadequate to secure compliance, the more appropriate course must surely be to increase them.<sup>48</sup>

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<sup>45</sup> *Supra* note 23.

<sup>46</sup> Not infrequently, the Attorney General is described as having "quasi-judicial functions," as, for example, when he is exercising prosecutorial discretion. In *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372 at para. 32, 2002 SCC 65, the Supreme Court of Canada held:

The court's acknowledgment of the Attorney General's independence from judicial review in the sphere of prosecutorial discretion has its strongest source in the fundamental principle of the rule of law under our Constitution... In *Hoem v. Law Society (British Columbia)* (1985), 20 C.C.C. (3d) 239 (B.C.C.A.), Esson J.A. for the court observed, at p. 254, that:

The independence of the Attorney-General, in deciding fairly who should be prosecuted, is also a hallmark of a free society. Just as the independence of the bar within its proper sphere must be respected, so must the independence of the Attorney-General.

We agree with these comments. The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict.

<sup>47</sup> *Supra* note 17.

<sup>48</sup> S.A. de Smith, *Judicial Review of Administrative Action* 3d ed. (London: Stevens, 1973) at 406.

In keeping with his wariness, de Smith concludes that injunctions should be granted where “a conviction would be highly probable and the matter is one of great urgency.”<sup>49</sup>

There is also support for this in the cases. Recall that in *Bastow*, it was suggested that the injunction will issue “once a clear breach has been demonstrated.” Similarly in *Attorney General of British Columbia v. Couillard et al.*, while Chief Justice McEachern said that “the Attorney General need only show there is a serious question to be tried,”<sup>50</sup> he subsequently spoke approvingly of “proving”<sup>51</sup> a public nuisance rather than simply establishing a *prima facie* case, and made references too to the “overwhelming preponderance of evidence,”<sup>52</sup> and the fact that the Attorney General had established “beyond the slightest shadow of a doubt” that the defendants were engaged in the activities complained of.<sup>53</sup>

## 2) A Sidenote on the Enjoining of Civil Disobedience

Given the courts’ expectation that the Attorney General’s power to seek injunctive relief against breaches of the public law would be exercised only in exceptional cases, it is not surprising that where resort to the civil courts has become routine or even a matter of policy, the courts have bridled at the process.

In British Columbia, the idea that parties aggrieved by disruptive protest should rely on a process of civil suit, injunction, and contempt proceedings as an alternative to enforcement by the Crown of the criminal law has been repeatedly called into question.<sup>54</sup> Moreover, there has been some indication that the reluctance among judges to become the

<sup>49</sup> *Ibid.* at 407.

<sup>50</sup> *Supra* note 26 at para. 24.

<sup>51</sup> *Ibid.* at para. 18.

<sup>52</sup> *Ibid.* at para. 20.

<sup>53</sup> *Ibid.* at para. 4.

<sup>54</sup> Amir Attaran, “Mandamus in the Environment of the Criminal Law: Ending the Anti-Protest Injunction Habit — Issues Arising from *MacMillan Bloedel v. Simpson*” (1999) 33 U.B.C. L. Rev. 181. A number of statements have been made by British Columbian judges to the effect that it should be the Crown and not civil litigants that deals with disruptive or otherwise unlawful protest: *Finning Ltd. v. United Mine Workers of America*, [1992] B.C.J. No. 2855 (S.C.) (QL); *Greenpeace Canada Ltd. v. MacMillan Bloedel Ltd.*, [1994] B.C.J. No. 2148 (C.A) (QL) (per McEachern C.J.B.C. at para. 82 and Wood J.A. at paras. 156-59); *International Forest Products Ltd. v. Kern*, [2000] B.C.J. No. 1533 at paras. 56-60, 75-76 (S.C.) (QL); *Slocan Forest Products Ltd. v. John Doe*, [2000] B.C.J. No. 1592 (S.C.) (QL); *Alliford Bay Logging (Nanaimo) Ltd. v. Mychajlowycz*, [2001] B.C.J. No. 937 (S.C.) (QL); *R. v. Clark* (2001), 207 D.L.R.

*de facto* enforcers of the public law in cases of civil disobedience will be reflected even in cases where the suit is brought directly by the Attorney General, rather than by private parties.

In *British Columbia (Attorney General) v. Sager*,<sup>55</sup> an injunction against alleged trespassers on Crown land was refused where the remedy in the *Land Act*<sup>56</sup> was sufficient and there was no “gap” in the law to necessitate the Attorney General’s involvement. In that case, Quijano J., citing *Perry Ridge*<sup>57</sup> for the proposition that an action by the Attorney General should be a “final step and not merely a convenient alternative to the application of criminal or other available sanctions,” concluded that it would be more “just and convenient” to insist that the government pursue its remedies through the *Land Act*, to afford the defendants the procedural protections set out there.

Quijano J. also referred to the case of *Attorney General for Ontario v. Ontario Teachers’ Federation et al.*,<sup>58</sup> where the Attorney General sought, on a *parens patriae* basis, an injunction to prohibit teachers from striking contrary to the *School Boards and Teachers’ Collective Negotiations Act*.<sup>59</sup> The application was refused on the grounds that this *Act* itself contained robust enforcement provisions which had not yet been employed. MacPherson J. held that the Attorney General could not ignore the remedy and penalty provisions of the *Act*, and that an injunction will only be granted to the Attorney General for a breach of the public law where there has been a repeated flouting of the law and where statutory enforcement mechanisms have proven ineffective. In *Sager*, Quijano J. wrote that MacPherson J.’s decision “reflects a

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(4th) 522 at para. 40 (B.C.C.A.); *Hayes Forest Services Ltd. v. Forest Action Network*, [2004] B.C.J. No. 598 at paras. 17-18 (S.C.) (QL); and *Telus Communications Inc. v. Telecommunications Workers Union*, 2006 BCSC 441 at para. 10. In *Everywoman’s Health Centre v. Bridges* (1990), 54 B.C.L.R. (2d) 273 (C.A.), Southin J.A. said at 285:

There is today the grave question of whether public order should be maintained by the granting of an injunction which often leads thereafter to an application to commit for contempt or should be maintained by the Attorney General insisting that the police who are under his control do their duty by enforcing the relevant provisions of the *Criminal Code*.

But see *ibid.*, which appeared to support the government policy of forcing private parties to seek injunctions to restrain public protest even where an alternative criminal law remedy was available.

<sup>55</sup> (2004), 29 B.C.L.R. (4th) 351 (S.C.) [*Sager*].

<sup>56</sup> R.S.B.C. 1996, c. 245.

<sup>57</sup> *Supra* note 30.

<sup>58</sup> (1997), 36 O.R. (3d) 367 (Gen. Div.) [*Ontario Teachers’ Federation*].

<sup>59</sup> R.S.O. 1990, c. S.2



reasonable limit on the availability of such injunctive relief at common law.”<sup>60</sup>

It is very difficult to reconcile the decisions in *Sager* and *Ontario Teacher's Federation* with the traditional view of deference to the Attorney General's decision to enjoin breaches of the public law. It may be that these cases are outliers - extreme expressions of the courts' obvious frustration with their perceived cooptation by governments politically unwilling to enforce statute law on its terms. Whether or not the policies that the respective governments have adopted for the resolution of such disputes are wise, they may have the effect of undermining the Attorney General's ability to gain injunctive relief for breaches of the public law in other contexts.

### *3) Need the Attorney General Act Independently of Government Influence?*

Despite the cases described in the previous section, it could be argued that, because of the distinctions between the positions of the Attorneys General in England and Canadian provinces, the deference accorded by English courts is not similarly justified here. In Canada, the role of the Attorney General as a member of Cabinet<sup>61</sup> and effectively (if not always titularly) Minister of Justice has required a strong degree of independence for that arm of the Attorney General that approves criminal prosecutions, to ensure that it is not tainted by the political process.<sup>62</sup> There are no similar safeguards in place with respect to the Attorney General's discretion to “prosecute” through civil injunction as *parens patriae*, but Edwards, for one, suggests that the Attorney General must act as independently in the civil realm of *parens patriae* as in the criminal sphere of public prosecutions.<sup>63</sup> Apparent failure to do so may

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<sup>60</sup> *Supra* note 55 at para. 31.

<sup>61</sup> In the United Kingdom the Attorney General has not been a member of Cabinet since 1928; see L.J. King, “The Attorney-General, Politics and the Judiciary” (2000) 29 U.W.A. L. Rev. 155 at 160.

<sup>62</sup> The Court said in *Krieger*, *supra* note 46 at paras. 29-30 that “[m]embership in Cabinet makes the principle of independence in prosecutorial functions perhaps even more important in this country than in the U.K.,” adding that “[i]t is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions.”

<sup>63</sup> Edwards in fact considered the two roles to be an “exact analogy”: *supra* note 5 at 289. See also the extensive discussion of the independence of the Attorney General in Edwards's subsequent work: J. Ll. J. Edwards, *The Attorney General, Politics and the Public Interest* (London: Sweet & Maxwell, 1984). Former Ontario Attorney General Ian G. Scott also believed independence to be an important corollary of all the Attorney General's *parens patriae* activities in *supra* note 11 at 196-98. It is an

be an unarticulated rationale for the reluctance of some Canadian courts to accede to the requests of Attorneys General for injunctions, particularly in those politically-charged incidents of civil disobedience discussed earlier. If that is so, Attorneys General might consider hiring the equivalent of a “special prosecutor” to decide whether to bring *parens patriae* actions where there might be a perception of undue political influence.

On the other hand, the American example indicates that the political nature of the Attorney General’s office does not necessarily preclude the broad exercise of discretion to seek relief on a *parens patriae* basis. Attorneys General in the United States, it will be seen, have enjoyed the broadest discretion of any of their common law colleagues, and in many states they are elected officials with an executive rank at least equivalent to their Canadian counterparts, albeit while remaining separate and independent from both the legislature and the chief executive of the state.<sup>64</sup>

### 3. *The Sources of a Broader Parens Patriae Authority*

#### A. *The Development of the Doctrine in the United States*

##### 1) *Source of the Authority and Independence of its Exercise*

The common law *parens patriae* authority of the state Attorneys General is directly derived from their pre-revolutionary colonial status, and by extension from the Attorney General of England.<sup>65</sup> During the twentieth

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interesting question whether the Attorney General’s decision *not* to instigate a civil action in the public interest ought to be considered as conclusive as the decision not to prosecute. In other words, would the considered refusal by the Attorney General to seek to enjoin a nuisance or breach of statute preclude another person from seeking private or public interest standing to do just that? The question was addressed by Denning J. in the Court of Appeal decision in *Gouriet*, where he proposed that the courts might grant standing to an individual where the Attorney General refused to consent to a relator action; see *Gouriet*, *supra* note 29 at 759. In Canada it may well be that the issue would be subsumed within the recently-recognized category of “public interest standing” for individuals; see *supra* note 10 and accompanying text.

<sup>64</sup> Presently, forty-three American state Attorneys General are elected and forty-eight are free from the control of their states’ governors. This is in contradistinction to the federal Attorney General, a presidential appointee (subject to Senate confirmation) and member of Cabinet. For a review of the relative independence and powers of state Attorneys General, see William P. Marshall, “Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive” (2006) 115 Yale L. J. 2446, <[http://yalelawjournal.org/115/9/2446\\_william\\_p\\_marshall.html](http://yalelawjournal.org/115/9/2446_william_p_marshall.html)>.

<sup>65</sup> The deep history of the Attorney General in England, the colonies, and the early United States has been well canvassed. See e.g. Edwards, *supra* note 5; Hugh

century, the powers of the state Attorneys General began to develop at an impressive pace, to the point that, at more or less the same time that Edwards described the doctrine as a “wide ranging but still somewhat undefined area,”<sup>66</sup> the United States Supreme Court recognized that it “has been greatly expanded in the United States beyond that which existed in England.”<sup>67</sup>

Indeed, while *parens patriae* litigation has remained relatively rare in Canada, it has become so prominent a part of the American legal landscape that J.L. Himes, Chief of the Antitrust Bureau of the Office of the New York Attorney General, recently declared that “[r]epresenting the public interest in affirmative [civil] litigation is a central mission of a state attorney general today.”<sup>68</sup> Certainly no provincial Attorney General could make a corresponding claim.

Procedurally, the power of American Attorneys General to enforce laws or launch actions in the public interest varies from state to state. Marshall explains:

Whether the State Attorney General has the power to initiate criminal or civil actions independent of the Governor is largely a function of statutory authority and, particularly in civil matters, whether the Attorney General is deemed to enjoy common law power. Thus, in *Ohio v. United Transportation, Inc.*, the court held that, because he had common law authority, the Attorney General of Ohio could bring an antitrust action under state and federal law against local taxicab companies without the approval of either the Governor or the General Assembly. The court stated that “the broad inherent common law powers of the attorney general in ... contesting infringements of the rights of the general public” had been long recognized. This common law power, moreover, is quite broad. As the court held in *Florida ex rel. Shevin v. Exxon Corp.*, the Attorney General is entrusted, under the

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H.L. Bellot, “The Origin of the Attorney-General” (1909) 25 Law Q. Rev. 400; William S. Holdsworth, “The Early History of the Attorney and Solicitor General” (1919) 13 Ill. L. Rev. 602; Oliver W. Hammonds, “The Attorney General in American Colonies” in Paul M. Hamlin, ed., *2 AngloAmerican Legal History Series*, ser. 1 (New York: N.Y.U. Sch. of Law, 1939); Marshall, *ibid.*; and Rita W. Cooley, “Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies” (1958) 2 Am. J. Legal Hist. 304.

<sup>66</sup> Edwards, *supra* note 5 at 286.

<sup>67</sup> *Hawaii v. Standard Oil Co.*, 405 U.S. 251 at 257 (1972); also see generally Richard P. Ieyoub & Theodore Eisenberg, “State Attorney General Actions, the Tobacco Litigation, and the Doctrine of *Parens Patriae*” (2000) 74 Tulane L. Rev. 1859; Jack Ratliff, “*Parens Patriae*: An Overview” (2000) 74 Tulane L. Rev. 1847; Susan Beth Farmer, “More Lessons from the Laboratories: *Cy Pres* Distributions in *Parens Patriae* Antitrust Actions Brought by State Attorneys General” (1999) 68 Ford. L. Rev. 361.

<sup>68</sup> Himes, *supra* note 8 at 1.

common law, with “wide discretion” and a “significant degree of autonomy” in determining what is in the public interest. Indeed, the Attorney General’s common law authority is so unfettered that it may allow her to bring suits in the public interest even when other executive officers or agencies oppose such actions.

In other states, however, the courts have held that the Attorney General’s powers are far more circumscribed. In *State ex rel. Haskell v. Huston*, for example, the Oklahoma Supreme Court held that the Attorney General must have the Governor’s permission to maintain a civil nuisance action against an oil company because it is within the Governor’s responsibility to see that the laws are “faithfully administered.” Moreover, in a few states, not only is the Attorney General prohibited from initiating actions without the Governor’s approval, but the Governor can also compel the Attorney General to prosecute an action even when the Attorney General does not want to proceed.<sup>69</sup>

American courts have distinguished between a state’s “sovereign interest” — an interest principally in seeing its laws obeyed, and an obvious equivalent to the Anglo-Canadian tradition of suing for injunctions against breaches of the public law<sup>70</sup> — and a state’s “quasi-sovereign interest,” which has permitted a broader range of actions, including those at issue in the decisions cited by the Supreme Court of Canada in *Canfor*.

## 2) *Initial Development in Interstate Environmental Suits*

The emergence of the robust modern American *parens patriae* doctrine is generally traced to the decision of *Louisiana v. Texas*.<sup>71</sup> There, Louisiana sought to enjoin Texas from quarantining the goods of Louisiana merchants entering Texas. Acknowledging that the “matters complained of affect [Louisiana’s] citizens at large,”<sup>72</sup> the Supreme Court recognized Louisiana’s authority to bring the action as *parens patriae*.<sup>73</sup> In that case, the Supreme Court defined Louisiana’s interest as

<sup>69</sup> Marshall, *supra* note 64 at 2460-61.

<sup>70</sup> The language in the American cases is similar to that in the Canadian decisions; see *Maine v. Taylor*, 477 U.S. 131 at 137 (1986) (“a State clearly has a legitimate interest in the continued enforceability of its own statutes”); *Bowen v. Public Agencies Opposed to Social Sec.*, 477 U.S. 41 at 50 n.17 (1986) (confirming that a state has a “judicially cognizable interest in the preservation of its own sovereignty”).

<sup>71</sup> 176 U.S. 1 (1900).

<sup>72</sup> *Ibid.* at 19 n. 11.

<sup>73</sup> The Court nevertheless dismissed the claim on the grounds that there was no actual controversy between Louisiana and Texas; this was a case of maladministration of laws, something not creating a sufficient controversy to support the State’s action; *ibid.* at 22.

that of a quasi-sovereign type, distinguishing it from a state's proprietary interests:

Inasmuch as the vindication of the freedom of interstate commerce is not committed to the State of Louisiana, and that State is not engaged in such commerce, the cause of action must be regarded, not as involving any infringement of the powers of the State of Louisiana, or any special injury to her property, but as asserting that the State is entitled to seek relief in this way because the matters complained of affect her citizens at large.<sup>74</sup>

*Louisiana v. Texas* was quickly followed by a series of Supreme Court decisions permitting states to invoke *parens patriae* authority to seek injunctions against public nuisances originating outside their borders.<sup>75</sup>

The first flurry of interstate environmental litigation culminated in *Georgia v. Tenn. Copper Co.*,<sup>76</sup> where the U.S. Supreme Court upheld the State of Georgia's standing to enjoin a Tennessee polluter who was allegedly injuring private forests, crops, and orchards in Georgia. The State of Georgia, which owned little of the allegedly damaged property, nevertheless had filed the suit as a private party. The Supreme Court recast the suit as one by a state expressing "quasi-sovereign" interests, and held that the state had established that the defendant's pollutants "threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff State as to make out a case."<sup>77</sup> Justice Oliver Wendell Holmes wrote that:

In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.<sup>78</sup>

Over time, the doctrine progressed to permit suits for damages as well as injunctive relief, and was increasingly used beyond the "state versus state" paradigm. In *Maine v. M/V Tamano*,<sup>79</sup> the Court upheld the

<sup>74</sup> *Ibid.* at 19.

<sup>75</sup> *Missouri v. Illinois*, 180 U.S. 208 (1901) (discharge of waste); *Kansas v. Colorado*, 185 U.S. 125 (1902); *Kansas v. Colorado*, 206 U.S. 46 (1907) (diversion of river water); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907) [*Tenn. Copper Co.*] (air pollution); *North Dakota v. Minnesota*, 263 U.S. 365 (1923) (flooding); *New York v. New Jersey*, 256 U.S. 296 (1921) (water pollution).

<sup>76</sup> *Tenn. Copper Co.*, *ibid.*

<sup>77</sup> *Ibid.* at 238-39.

<sup>78</sup> *Ibid.* at 237.

<sup>79</sup> 357 F. Supp. 1097 (S.D. Me. 1973).

State of Maine's right to sue to recover damages resulting from the defendant's discharge of 100,000 gallons of oil into Casco Bay. The state sought damages for injury to its own property, statutory damages and costs for environmental harm and cleanup, and damages as *parens patriae* for injury to "all of the natural resources lying in, on, over, under and adjacent to its coastal waters."<sup>80</sup> The Court agreed that an injury to Maine's coastal water and marine life would seriously harm the environment of the state and the recreational opportunities and welfare of its citizens and permitted the suit.<sup>81</sup>

### 3) Broader Suits Based on "Quasi-Sovereign Interest"

What is a "quasi-sovereign" interest? In *Maryland People's Counsel v. FERC*, Scalia J. wrote:

A state's interest in those aspects of the welfare of its citizens secured and furthered by government — that is, a state's so-called "quasi-sovereign" interest — is unquestionably sufficient to confer standing upon the state as *parens patriae*.<sup>82</sup>

In *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, Puerto Rico's complaint alleged that members of the Virginia apple industry had violated federal statutes and regulations by "failing to provide employment for qualified Puerto Rican migrant farm workers, by subjecting those Puerto Rican workers that were employed to working conditions more burdensome than those established for temporary foreign workers, and by improperly terminating employment of Puerto Rican workers."<sup>83</sup> It was alleged that this discriminatory conduct affected the Commonwealth of Puerto Rico's right "to effectively participate in the benefits of the Federal Employment Service System of which it is a part" and harmed the Commonwealth's efforts "to promote opportunities for profitable employment for Puerto Rican laborers and to reduce unemployment in the Commonwealth."<sup>84</sup>

The Supreme Court reviewed the development of *parens patriae* cases dealing with standing based on quasi-sovereign interests, which it defined broadly as those lying in the "well-being of the populace."<sup>85</sup> The state's

<sup>80</sup> *Ibid.* at 1098-99.

<sup>81</sup> *Ibid.* at 1101; see also *In re Oswego Barge Corp.*, 439 F. Supp. 312 at 322 (N.D.N.Y. 1977) (upholding New York's *parens patriae* nuisance claim to recover cleanup costs of oil spill).

<sup>82</sup> 760 F.2d 318 (D.C.Cir. 1985) at 321.

<sup>83</sup> *Alfred L. Snapp & Son, Inc. v. Puerto Rico* 458 U.S. 592 (1982) at 598 [Snapp].

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.* at 602.

interest must be distinct from the interests of particular private parties, and it must be “sufficiently concrete to create an actual controversy between the State and the defendant.”<sup>86</sup> The Court recognized that this is a vague concept that “can only be [clarified] by turning to individual cases,”<sup>87</sup> and through “case-by-case development.”<sup>88</sup>

Nevertheless, the Court described two main areas where the state will exercise its quasi-sovereign interest through *parens patriae* litigation, the first being in cases involving “the health and well-being — both physical and economic — of its residents in general,” and in furtherance of its “interest in not being discriminatorily denied its rightful status within the federal system.”<sup>89</sup>

The second category of quasi-sovereign interests described in *Snapp* is already recognized in Canada;<sup>90</sup> the provinces do not need to rely on judicial interpretations of *parens patriae* jurisdiction to have standing on questions of federalism. It is the first category that is of more interest to us; the “interest in the health and well-being — both physical and economic — of its residents in general” is a phrase quite similar to the Supreme Court of Canada’s broad articulation in *Ryan* and *Canfor* of actions that might be brought under the rubric of “public nuisance” as encompassing “any activity which unreasonably interferes with the public’s interest in questions of health, safety, morality, comfort or convenience.”<sup>91</sup>

State Attorneys General have been given standing to protect the economic wellbeing of their states’ citizens, for instance in antitrust claims and other consumer protection actions. Although most states have adopted statutes explicitly granting *parens patriae* authority to their respective Attorneys General,<sup>92</sup> others have recognized that such

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<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.* at 607.

<sup>89</sup> *Ibid.*

<sup>90</sup> Canadian governments, for instance, enjoy the power to refer questions of federalism to superior courts (and in the case of the federal government, the Supreme Court of Canada) for decision. See for example the *Constitutional Question Act*, R.S.B.C. 1996, c. 68. The judicial power in the United States, on the other hand, is constrained under Article III of that country’s Constitution to “cases and controversies,” and binding references in the federal system are not possible.

<sup>91</sup> *Ryan*, *supra* note 12 at para. 52; *Canfor*, *supra* note 2 at para. 66.

<sup>92</sup> See e.g. *In re Lorazepam & Clorazepate Antitrust Litigation*, 205 F.R.D.369 at 386-87 (D.D.C. 2002) (surveying the sources of *parens patriae* authority of state Attorneys General in multi-state antitrust class action brought on behalf of consumers). In some areas, federal statutes have also facilitated state *parens patriae* actions through

authority exists at common law.<sup>93</sup> And while *parens patriae* authority is most fully developed in American federal jurisprudence, state courts have also been forums for such claims. Kanner writes:

While many states lack case law directly addressing *parens patriae* authority to sue, there are no states in which the principle of *parens patriae* has been deemed not a part of the state's law.<sup>94</sup>

In *State by Humphrey v. Ri-MEL, Inc.*, the state alleged wrongdoing by failed health clubs and their owners; when the clubs failed, thousands of members lost their pre-paid fees. In approving the state's standing as *parens patriae*, the Minnesota appellate court stated:

Although there is no express statutory authority for the attorney general's action for

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the granting of standing; see e.g., in the antitrust context, 15 U.S.C. [section] 15c(a) (2000). Congress authorized these suits in part in response to *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973), which held that a state may not sue under federal law as *parens patriae* on behalf of citizen-consumers injured by antitrust violations. See H.R. REP. NO. 94-499, pt. 1, at 5 (1975), reprinted in 1976 U.S.C.C.A.N. 2572 at 2574-75 ("In large part, H.R. 8532 is a response to that case and a recognition that the consuming public currently has no effective means of obtaining compensation for its injuries").

Quite often, of course, states assert a variety of claims premised on multiple bases for standing. In *re Cardizem CD Antitrust Litigation*, 332 F.3d 896 (6th Cir. 2003) cert. denied, 543 U.S. 939 (2004), a lawsuit was brought in the Eastern District of Michigan by several state Attorneys General, asserting claims for monopolization, attempted monopolization, and agreements in violation of federal and state antitrust and unfair competition or consumer protection laws. The Attorneys General sought injunctive relief, civil penalties, damages, disgorgement, restitution, and other equitable relief, asserting "their proprietary capacities on behalf of departments, bureaus, and agencies of state government as injured purchasers or reimbursers; and as *parens patriae* on behalf of natural persons in their collective States, and their respective States' quasi-sovereign interests in fair competition and the health of their citizenry, and/or in their sovereign capacities;" Docket Nos. 03-2514/2635, Order No. 76, Oct. 10, 2003 at 9.

<sup>93</sup> See e.g. *Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554 at 558 (Me.1973) (absent express legislative restrictions, Attorney General has broad powers to vindicate the public interest); *State v. Detroit Lumberman's Association*, 1979-2 Trade Cas. (CCH) at para. 62, 990, 1979 WL 18703 at 6 (Mich. Cir. Ct. 1979) (holding that "[i]t is a matter of public policy to prosecute antitrust violators, and to compensate the public for damages sustained thereby," and that the State could proceed "as *parens patriae* on behalf of its citizens"); *Minnesota v. Standard Oil Co.*, 568 F. Supp. 556 at 563 (D. Minn. 1983); *State by Humphrey v. Ri-MEL, Inc.*, 417 N.W. 2d 102 at 111-112 (Minn. Ct. App. 1988) [*Ri-MEL, Inc.*] (even in the absence of express statutory authority, the Attorney General could bring an action for restitution on behalf of injured consumers "under his broad common law powers and the doctrine of *parens patriae*").

<sup>94</sup> Allan Kanner, "The Public Trust Doctrine, *Parens Patriae*, and the Attorney General as Guardian of the State's Natural Resources" (2005) 16 Duke Env'tl. L. &



restitution on behalf of injured club members, common law has recognized that under the doctrine of *parens patriae* a state may maintain a legal action on behalf of its citizens, where state citizens have been harmed and the state maintains a quasi-sovereign interest. It is also established that Minnesota has a quasi-sovereign interest in protecting the economic health of its citizens.<sup>95</sup>

The U.S. Supreme Court had earlier held that a court hearing a *parens patriae* claim brought on behalf of a particular group should consider whether the challenged conduct affects, either directly or indirectly, a “sufficiently substantial segment of its population.”<sup>96</sup> There is some question, however, about any real “numerosity” requirement in the “substantial segment” analysis, and the Supreme Court has explicitly rejected “any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior.”<sup>97</sup> Where broader harm is foreseeable, even a small number of identified victims is sufficient.<sup>98</sup> *Parens patriae* claims can also be supported on the basis that the impugned conduct has “a destructive societal effect ...,”<sup>99</sup> and even the “indirect effects of the injury... must be considered ... in determining whether the State has alleged injury to a sufficiently substantial segment of its population.”<sup>100</sup>

American courts have also shown receptiveness to *parens patriae* claims where it appears that the wrongdoing would otherwise go without redress, as when the injury may be of a type to render individual litigation unlikely.<sup>101</sup> This is of course familiar territory to students of

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Pol’y F. 57 at 110, <<http://www.law.duke.edu/shell/cite.pl?16+Duke +Envtl. +L.+ &+ Pol%27y+F.+57>>.

<sup>95</sup> *Ri-MEL Inc.*, *supra* note 93 at 112 (citations omitted).

<sup>96</sup> *Snapp*, *supra* note 83 at 607.

<sup>97</sup> *Ibid.*; see also *People v. Peter & John’s Pump House*, 914 F. Supp. 809 at 812. (N.D.N.Y. 1996) [*Pump House*] (“There is no numerical talisman to establish *parens patriae* standing”).

<sup>98</sup> See for example *Persons with AIDS v. Village of Waterford*, 799 F. Supp. 272 (N.D.N.Y. 1992).

<sup>99</sup> *Pump House*, *supra* note 97 at 813; see also *People v. 11 Cornwell Co.*, 695 F.2d 34 (2d Cir. 1982), vacated in part on other grounds, 718 F.2d 22 (2d Cir. 1983) (en banc) [*Cornwell*] (injury to less than a dozen individuals was sufficient where similarly situated persons in the future, and members of the community at large, would be affected).

<sup>100</sup> *Snapp*, *supra* note 83 at 607.

<sup>101</sup> See for example *Maryland v. Louisiana*, 451 U.S. 725 at 739 (1981) (“[I]ndividual consumers cannot be expected to litigate the validity of the First-Use Tax given that the amounts paid by each consumer are likely to be relatively small”). The Second Circuit has written that it is relevant whether individuals “would pursue litigation on the scale necessary to obtain the full relief to which the State thinks its citizens are entitled”: *Connecticut v. Physicians Health Services of Connecticut, Inc.*,

class action suits, and indeed Tribe suggests that a *parens patriae* action may be brought by a state in its quasi-sovereign capacity against businesses

...on behalf of citizen consumers as a statewide “class” of sorts — a group whose members may lack a sufficient economic stake to justify bringing suit as individuals or who may have insufficient incentive, or may otherwise be unable to meet the criteria, to sue as a Rule 23 class.<sup>102</sup>

In *Ri-MEL*,<sup>103</sup> the Minnesota Court of Appeal considered the unavailability of other avenues of redress as a factor supporting *parens patriae* authority. The Court endorsed such actions as a way to represent a group of harmed citizens whose individual injuries might not lead them to bring an action:

Minnesota has an added incentive to bring the action as *parens patriae* to assure its citizens the full benefit of the legislation and ... individuals with small overcharges would likely not avail themselves of their individual remedy because of the burden of pursuing the action. Minnesota has a similar incentive to bring an action on behalf of club members as *parens patriae*, because the injured club members may not avail themselves of their remedy under the Club Contracts Act because of the economic burden of suing on a small claim. The clubs’ closings affected the economic interests of more than 16,000 citizens, and Minnesota does have a quasi-sovereign interest in protecting their economic health.<sup>104</sup>

### *B. The Canfor Decision*

As described above, it has long been established that the Attorney General has standing to pursue injunctive relief to abate or avoid a public

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287 F.3d 110 at 120 n. 14 (2nd Cir. 2002). See also *Cornwell, ibid.* (the fact that individuals would be unable to make out the facts necessary to support an individual claim showing that private litigants could not obtain complete relief); *People v. Town of Walkkill*, 2001 U.S. Dist. LEXIS 13364 at 19-20 (S.D.N.Y. March 16, 2001) (individual suits could not achieve the system-wide injunctive relief sought in the Attorney General’s *parens patriae* claim).

It is unclear whether the absence or inadequacy of individual relief is necessary to permit a state to proceed as *parens patriae* in all cases, or only in those where a suit is advanced on behalf of an identified subclass of citizens. In *Cornwell, ibid.* at 40, it was held that *parens patriae* “standing also requires a finding that individuals could not obtain complete relief through a private suit.”

<sup>102</sup> Laurence H. Tribe, *American Constitutional Law* 3d ed. (New York: Foundation Press, 2000) § 3-20 at 454. Rule 23 is the basis for class action suits in the American Federal Court system.

<sup>103</sup> *Supra* note 93.

<sup>104</sup> *Ibid.* at 112.

nuisance or to stop breaches of the public law. Until recently, it was uncertain whether this right extended to seeking monetary relief. It is true that in rare cases prior to *Canfor*, environmental cleanup claims had succeeded on a *parens patriae* basis,<sup>105</sup> and it was sometimes acknowledged more generally that damages actions could lie at the instance of the Attorney General for breaches of the public law,<sup>106</sup> perhaps even with regard to matters that could not be defined as nuisance under the traditional tests.

It was the Supreme Court of Canada's decision in *Canfor* that formally recognized a broad power of the Attorney General to bring *parens patriae* actions beyond seeking injunctions for public nuisance. In that case, the Court confirmed, at least in *obiter*, that provincial Attorneys General have the potential to be enormously powerful litigants.

*Canfor* was decided in the context of environmental litigation. The government had claimed for a wide variety of losses related to a fire negligently set by the forest company. In the result, the majority dismissed most of British Columbia's claim, which was based on lost revenue for "stumpage" fees, on the basis that the government had not lost such fees because it calculated "stumpage" using a "waterbed effect" — if revenue was lost from one area, it was automatically made up from others. Of more interest for most onlookers was the Court's response to an argument raised late in the procedural history — a direct *parens patriae* claim for degradation of the value of the forest itself.

Binnie J., writing for the majority, said:

Since the time of de Bracton it has been the case that public rights and jurisdiction over these cannot be separated from the Crown. This notion of the Crown as holder of inalienable "public rights" in the environment and certain common resources was accompanied by the procedural right of the Attorney General to sue for their

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<sup>105</sup> *The Queen v. The Ship Sun Diamond*, [1984] 1 F.C. 3 at 31-32 (T.D.), per Walsh J.: "[W]hat was done was reasonable and appears to be a good example of the *parens patriae* principle with the Crown ... acting as what is referred to in civil law as 'bon père de famille.'"

<sup>106</sup> See for instance *Attorney General for Ontario v. Fatehi*, [1984] 2 S.C.R. 536, citing Lord Dunedin in *Glasgow Corp. v. Barclay, Curle & Co.* (1923), 93 L.J.P.C. 1 at 5:

That a person, who, by his action, did something which made the highway impassable, and so destroyed the use of that highway by others, could be interdicted *at the instance of a road authority* I do not doubt ... and *although suits for damages in respect of such action may be sought for in vain in the books, I do not doubt that they would lie.* [emphasis added].

protection representing the Crown as *parens patriae*. This is an important jurisdiction that should not be attenuated by a narrow judicial construction.<sup>107</sup>

The Court reconfirmed the right of the Attorney General to sue to abate nuisances. But the Court's reasoning was not limited to traditional nuisance claims, nor necessarily to environmental torts. Binnie J. held:

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....<sup>108</sup>

However, the majority found that British Columbia had raised its *parens patriae* claim too late, and had not framed its pleadings in such a way as to support a *parens patriae* action for damages to the public weal.

LeBel J., dissenting (with Bastarache and Fish JJ.), would have taken a more generous view of *parens patriae* standing under the circumstances:

...In my view, the fact that the Crown is trying to recover commercial value, or using commercial value as a proxy for the recovery of damages, should not limit the Crown's *parens patriae* jurisdiction. The Crown, in seeking damages, is still fulfilling its general duty, its *parens patriae* function to protect the environment and the public's interest in it. I found my colleague's legal analysis of the Crown's ability to sue in the public interest to be correct, up to the point where he asserts that this ability should somehow be limited at bar. The 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.<sup>109</sup>

The tantalizing feature of *Canfor* may be its apparently unqualified reference to the *parens patriae* power of the Attorneys General of the United States, which Binnie J. discusses at length.<sup>110</sup> Although the discussion of the American jurisprudence principally concerns environmental actions undertaken in accord with the *parens patriae* or public trust doctrines, the Court indicates no principled distinctions between the rights of Attorneys General in the United States and those in Canada.

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<sup>107</sup> *Canfor*, *supra* note 2 at para. 76.

<sup>108</sup> *Ibid.* at para. 81.

<sup>109</sup> *Ibid.* at para. 158.

<sup>110</sup> *Ibid.* at paras. 78-80.

Given that the Supreme Court's decision in *Canfor* did not analyze the *parens patriae* authority beyond the sphere of environmental harm, it is important to re-emphasize the extent to which the American doctrine that the Court endorsed is not limited to such cases. In the United States, the right to pursue environmental actions is itself a derivative of the state's greater interest in the health and welfare of its citizens. Referring to Holmes J.'s invocation of "interest independent of and behind the titles of its citizens, in all the earth and air within its domain" in *Tenn. Copper Co.*,<sup>111</sup> one commentator notes:

Justice Holmes' reference to the right to "breathe pure air" is made in a context that establishes health as an interest that the state may clearly defend through *parens patriae* actions. If harm to "the forests and vegetable life" could be defended through such actions, it follows, *a fortiori*, that health could be protected by *parens patriae* actions. Thus, although pollution often causes aesthetic damage and is a common trigger for *parens patriae* actions, the underlying reason for recognizing causes of action against polluters is because pollution threatens the health and safety of the citizenry.<sup>112</sup>

At least one case suggests that even indirect threats to the health care system can provide support for a *parens patriae* suit. In the state tobacco litigation that led eventually to the \$206-billion multistate settlement agreement in the late 1990s, individual Attorneys General filed actions against tobacco manufacturers to recover costs and damages. Only a handful of these cases, which were based on a number of legal theories, proceeded to an advanced stage of litigation. Only one judicial decision, *State v. Am. Tobacco Co.*, considered a state's standing to maintain a cause of action for harm to the health, safety, and welfare of its people, and in particular "whether the State could maintain this action [against the defendants in] ... common law *in the absence of any statutory provision*."<sup>113</sup> Relying principally on *Snapp*,<sup>114</sup> Folsom J. concluded that the State could bring such an action.

Folsom J. cited *Snapp* for the proposition that states may take actions to protect quasi-sovereign interests "related to either the physical or economic well-being of the citizenry."<sup>115</sup> He then found that the state had a sufficient interest to maintain an action in its quasi-sovereign capacity. He wrote:

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<sup>111</sup> *Supra* note 76 at 237.

<sup>112</sup> Kanner, *supra* note 94 at 107-08.

<sup>113</sup> 14 F. Supp. 2d 956 at 962 (E.D. Tex. 1997) [emphasis added.]

<sup>114</sup> *Supra* note 83.

<sup>115</sup> *Supra* note 113 at 962.

First, it is without question that the State is not a nominal party to this suit. The State expends millions of dollars each year in order to provide medical care to its citizens under Medicaid. Furthermore, participating in the Medicaid program and having it operate in an efficient and cost-effective manner improves the health and welfare of the people of Texas. If the allegations of the complaint are found to be true, the economy of the State and the welfare of its people have suffered at the hands of the Defendants.... It is clear to the Court that the State can maintain this action pursuant to its quasi-sovereign interests found at common law.<sup>116</sup>

#### 4. Conclusions

Reading the American cases in conjunction with the Supreme Court of Canada's unanimous recognition of *parens patriae* authority to pursue claims for damages in *Canfor* leads one to suspect that, just as American courts will allow claims based on a threat to the "interest in the health and well-being — both physical and economic — of its residents in general," the Supreme Court of Canada will uphold a provincial Attorney General's right to sue on a similar basis.<sup>117</sup> At least in environmental claims, but potentially with respect to all the provinces' other "quasi-sovereign" interests as well, the Attorneys General now appear to enjoy the common law powers of Attorneys General in the United States.

Many questions about the future application of *parens patriae* in Canada remain. Binnie J. recognized in *Canfor* that 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.<sup>118</sup>

What are the ramifications of the suggestion by the Supreme Court that the government itself might be vulnerable to defences — and possibly even liability — in the course of such claims?<sup>119</sup> Also intriguing is the potential for Indian bands and First Nations to bring claims under the *parens patriae* doctrine; while such attempts have generally been

<sup>116</sup> *Ibid.* at 962-63 [citations omitted].

<sup>117</sup> *Ryan, supra* note 12 at para. 52; *Canfor, supra* note 2 at para. 66.

<sup>118</sup> *Canfor, ibid.* at para. 81.

<sup>119</sup> For instance if the government itself becomes a defendant third party in a *parens patriae* lawsuit. One Court has even suggested that the decision in *Canfor* might

unsuccessful in the United States,<sup>120</sup> the Canadian courts' recognition of the legal and constitutional status of First Nations may provide a better platform for such claims in this country.<sup>121</sup>

The biggest question is just how much of the American model Canadian courts will be willing to adopt. The *parens patriae* doctrine in the United States has supported actions in a wide variety of circumstances that might be of interest to the provinces of Canada. Could we see restitutionary claims filed against entities that have profited from breaches of the public law? Lawsuits against polluters or manufacturers of dangerous products? Will Canadian courts permit *parens patriae* claims on behalf of particular classes of citizens, or must a broader interest be shown?<sup>122</sup> Will such suits be permitted if civil litigation by

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create new legal duties for government actors. In *P.E.I. v. Canada*, [2005] P.E.I.J. No. 77 (S.C.) (QL), the Court held at para. 37:

If a government can exert its right, as guardian of the public interest, to claim against a party causing damage to that public interest, then it would seem that in another case, a beneficiary of the public interest ought to be able to claim against the government for a failure to properly protect the public interest. A right gives rise to a corresponding duty.

The notion that a legal right of recovery will automatically suggest vulnerability to suit seems far from tautologous. I am not aware of any case where a state has been sued for failure to exercise its *parens patriae* authority. It appears to be a stretch to suggest that the discussion of potentially available defences in *Canfor* in any significant way changes the law of public authority liability *per se*. Even the most earnest champions of *Canfor* as a weapon *against government* seem to regard it as, at most, a progressive tool for statutory interpretation; see e.g. Andrew Gage, "Public Rights and the Lost Rule Principle of Statutory Interpretation" (2005) 15 J. Environ. L. & P. 107 (proposing that the "public trust doctrine" aspects of *Canfor* import an interpretive presumption against interference with public rights).

<sup>120</sup> See *Assiniboine & Sioux Tribes v. Montana*, 568 F. Supp. 269 (D. Mont. 1983) and *Kickapoo Tribe of Ok. v. Lujan*, 728 F. Supp. 791 (D. D.C. 1990). However, one comment observes that, in *Snapp, supra* note 83 at 608 n. 15, the Supreme Court found that Puerto Rico had *parens patriae* standing because it was "similarly situated to a State" and had "a claim to represent its quasi-sovereign interests in federal court at least as strong as that of any State;" see Allan Kanner, Ryan Casey, and Barrett Ristroph, "New Opportunities for Native American Tribes to Pursue Environmental and Natural Resource Claims" (2003) 14 Duke Env'tl. L. & Pol'y F. 155 at 182-3.

<sup>121</sup> Of course it might also be that Canadian courts' recently generous approach to standing for First Nations and Indian band representatives will make resort to *parens patriae* standing unnecessary.

<sup>122</sup> If one views the adoption in Canada of the American *parens patriae* cases as an outgrowth of public nuisance jurisprudence, then there is precedent for a parallel notion to that expressed in the American "quasi-sovereign" jurisprudence, that there is no "numerosity" requirement for a claim, *ex officio* or *ex relatione*. Some of the Anglo-Canadian public nuisance cases have permitted the Attorney General standing to sue on behalf of "a class of the public;" see e.g. *Attorney General of British Columbia ex rel*

individuals is a viable alternative? Can provinces bring *parens patriae* actions against the federal government?<sup>123</sup> Can the federal Attorney General bring *parens patriae* actions on behalf of all the citizens of the country?<sup>124</sup>

If *Canfor* is, as it appears, a rather earnest invitation to provincial Attorneys General to become more like their American cousins, we may see far more American-style public interest litigation in our courts. It is possible that the *parens patriae* action could even become a central

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*Eaton v. Haney Speedways Ltd. and the District of Maple Ridge* (1963), 3 D.L.R. (2d) 48 (B.C.S.C.), citing *Attorney General v. P.Y.A. Collieries* (1957), 1 All E.R. 894 at 900 (H.L.).

<sup>123</sup> In *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447 (1923), the U.S. Supreme Court held at 485-86:

While the state, under some circumstances, may sue in [parens patriae] capacity for the protection of its citizens (*Missouri v. Illinois and Chicago District*, 180 U.S. 208, 241, 21 S. Sup. Ct. 331), it is no part of its duty or power to enforce their rights in respect of their relations with the Federal government. In that field it is the United States, and not the State, which represents them as parens patriae, when such representation becomes appropriate; and to the former, and not to the latter, they must look for such protective measures as flow from that status.

<sup>124</sup> If *Canfor* grants *parens patriae* authority to the provincial Attorneys General, why not their federal counterpart? And what if federal and provincial interests in a particular case (one might imagine offshore oil pollution, or the economic impact of interprovincial trade activity) diverge? The Attorney General of the United States does not appear to have the robust role of his state counterparts in pursuing civil actions against private parties, except where explicitly authorized by statute. This may be because of his distinct position as a presidential appointee and advocate for a particular administration. But in Canada, both the federal and provincial Attorneys are legislators and members of Cabinet. If there is a principled distinction to be drawn in this country, perhaps it is that the subjects of *parens patriae* suits are generally provincial in that they deal with “property and civil rights” within the various provinces. The federal *Department of Justice Act*, R.S.C. 1985, c. J-2 contains language that appears to constrain the federal Attorney on a division of powers basis, something absent from the provincial legislation described earlier:

4. The Minister [of Justice] shall

...

(b) have the superintendence of all matters connected with the administration of justice in Canada, not within the jurisdiction of the governments of the provinces[.]

...

5. The Attorney General of Canada

(a) is entrusted with the powers and charged with the duties that belong to the office of the Attorney General of England by law or usage, *in so far as those powers and duties are applicable to Canada*, and also with the powers and duties that, by the laws of the several provinces, belonged to the office of attorney general of each province up to the time when the Constitution Act, 1867, came into effect, *in so far as those laws under the provisions of the said Act are to be administered and carried into effect by the Government of Canada*[.] [emphasis added].



regulatory tool of the provinces, though this appears far from likely at the current time. Perhaps, for all that is striking in the *Canfor* decision, the silence that has followed it is the most striking thing of all.