

COMING OUT OF HIBERNATION :
THE CANADIAN PUBLIC TRUST DOCTRINE

by

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B.A., The University of Melbourne, 1987
LL.B. (Hons.), The University of Melbourne, 1987

A THESIS SUBMITTED IN PARTIAL FULFILMENT OF
THE REQUIREMENTS FOR THE DEGREE OF

MASTER OF LAWS

in

THE FACULTY OF LAW

We accept this thesis as conforming
to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

September, 1993

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ABSTRACT

This thesis appears to be the first academic recognition of the public trust doctrine at Canadian common law. Surprisingly, despite the explosion of the doctrine in the United States, there has been little consideration of the doctrine by Canadian courts and only one Canadian article on the subject. To date, Canadian interest in the doctrine has been primarily statutory.

In essence, the public trust doctrine means that despite its ownership of natural resources, the government holds certain resources, such as navigable waters, on trust or in a fiduciary capacity for the public. The origins of the doctrine are somewhat vague, but can be traced back to Roman law and the English public rights of navigation and fishing. A review of these public rights reveals that at both law and economics, certain resources are "special" and inherently public in nature.

A long and dusty trail through Canadian law reports reveals that Canadian courts **have** recognized a public trust with respect to navigation and fishing as well as highways. Although the public trust concerning navigation and fishing has lain dormant since the late nineteenth century, the distinctive features of the public rights of navigation and fishing which led both American and Canadian courts to declare a public trust, have been mirrored in Canadian law. Coupled with the initial Canadian

recognition of the public trust, the foundations therefore exist for a modern common law revival of the public trust doctrine in Canada. The likely consequences of recognition of the public trust at Canadian common law are : (1) the recognition of a substantive right, and therefore legal standing, in members of the public to vindicate public trust interests; (2) the imposition of an affirmative fiduciary obligation on government with respect to trust resources; (3) the imposition of an administrative process on government with respect to supervision and disposition of public trust resources; (4) restrictions on alienation of trust resources, in particular the restriction that legislation is required to modify or extinguish public trust resources and, (5) in an environmental context, recognition of the importance of the natural environment and the special and inter-related nature of trust resources.

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ACKNOWLEDGEMENT

My thanks to my supervisors, Dr. Andrew Thompson and Karin Mickelson for their continued patience, encouragement and advice, to Greg McDade and Stewart Elgie from the Sierra Legal Defence Fund (Vancouver) for introducing me to my thesis topic and to Stewart for suggestions and encouragement, to Professor Michael Crommelin, Dean, Faculty of Law, University of Melbourne for introducing me to Dr. Thompson and suggesting a Master of Laws at UBC, to my family for support from afar and finally, to my friends and fellow graduate students who ensured that thesis notwithstanding I still had a truly wonderful year. Thank you.

* * * *

We give thanks for places of simplicity and peace. Let us find such a place within ourselves. We give thanks for places of refuge and beauty. Let us find such a place within ourselves. We give thanks for places of nature's truth and freedom, of joy, inspiration and renewal, places where all creatures may find acceptance and belonging. Let us search for these places : in the world, in ourselves and in others. Let us restore them. Let us strengthen and protect them and let us create them.

May we mend this outer world according to the truth of our inner life and may our souls be shaped and nourished by nature's eternal wisdom.

Michael Leunig, *A Common Prayer*

(Collins Dove : Victoria, Australia, 1991)

INTRODUCTION

As an Australian resident in Canada, I have been continually struck by the diversity and beauty of its wild places and wildlife. The images continue to astound - the slow graceful flight of the bald eagle in the swirling fog in the Plumper Islands, the incredible depth of blue in the ice caves in the Selkirks, the seemingly endless white landscape of the Wapta Icefields and the massive hanging glaciers, the sight of a family of otters, mischievously playing in the ocean in the dusk off Blackberry Point in the Gulf Islands.

The aboriginal influences are strong here too. I particularly remember the native burial site in the Carey group of islands - the carved cedar burial boxes greening with age and the decaying hamatsa headdresses - so peaceful a resting place, fanned by the sea breezes off the tiny strait. The detail of the carved wolf on the totem pole at Mamalilaculla slowly being obscured by vegetation and sea weather - the pole left lying where it fell to return to the soil from whence the tree came.

This thesis is written not just from the depths of a law library, but from travels in Canadian wilderness. It is driven by the belief that natural resources such as water, oceans, parks, wilderness and wildlife are essential to humanity, as well as having intrinsic value which cannot be quantified. While the needs of modern society may require some destruction or alienation of these resources, such action should not be

undertaken lightly and only after due and public consideration of the impacts of the proposed action on the environment. This belief has been reinforced by a year's study of the public trust doctrine.

The public trust is something of an enigma. Academics and judges have confidently asserted that the public trust is a mere right of way, an easement, a public property right, a constitutional limitation, an affirmative fiduciary obligation or, a trust. In essence however, the public trust means that despite its ownership of natural resources, the government holds certain natural resources on trust, or in a fiduciary capacity for the public.

Although the origins of the public trust are somewhat vague, the public trust can be traced to the public rights with respect to navigation, fishing, the seashore and highways. While influenced by Roman law principles regarding the public or common nature of certain resources such as the air, running water, the sea and the seashore, the public rights of navigation and fishing recognized at English common law laid the foundations for the public trust doctrine. Although the public trust has been extended in America to parks, wildlife and highways, the public trust is generally viewed (at least in its original form) as an amphibious doctrine, applying to navigable waters, tidelands, the foreshore and the lands underlying navigable waters.

This thesis began as an attempt to illuminate the murky depths of the public trust, with

a view to ascertaining if a public trust existed at Canadian law. To date, Canadian interest in the public trust has been primarily statutory. The public trust doctrine has been enshrined in the Yukon *Environment Act*¹ and the Northwest Territories *Environmental Rights Act*² and is being considered in British Columbia and Saskatchewan.³

Surprisingly, however, despite the explosion of the doctrine in America, there has been little consideration of the doctrine by Canadian academics and Canadian courts. The sole article on the public trust doctrine at Canadian law recognizes the public rights of navigation and fishing at Canadian common law, but does not identify a specific trust with respect to these rights and makes no mention of highways.⁴ This paper is therefore, probably the first academic recognition of a public trust at Canadian common law.

¹ R.S.W.T. 1988, c. 83 (Supp.).

² S.N.W.T. 1990, c. 28. It must be remembered however, that the Canadian federal government owns the public lands in the Yukon and the Northwest Territories and therefore the legal effect of this legislation is somewhat questionable. On title to public lands in the Territories, see generally : P.W. Hogg, *Constitutional Law of Canada*, 3rd ed., (Toronto, Canada : Thomson Canada Ltd, 1992) at para 29.4 (c) and c. 28.

³ *An Environmental Protection Act for B.C. - A Public Discussion Paper*, (Confidential Draft), December 1992; *First Report of the Standing Committee on the Environment : Report of Environmental Rights and Responsibilities*, April 1993. Although it was recommended initially that the public trust doctrine be included in Ontario's proposed Environmental Bill of Rights (see M. Rankin, *An Environmental Bill of Rights for Ontario : Reflections and Recommendations, A Discussion Paper* at 35-38), it appears that the doctrine will not be included (Ministry of the Environment, *Report of the Task Force on the Ontario Environmental Bill of Rights*, July 1992 and *Report of the Task Force, Supplementary Recommendations*, December 1992).

⁴ C. Hunt, "The Public Trust Doctrine in Canada" in J. Swaigen, ed. *Environmental Rights in Canada* (Toronto : Butterworths, 1981) at 185.

A long and dusty trail through early English and Canadian law reports reveals that Canadian common law **has** recognized a public trust with respect to navigation and fishing, as well as a trust over highways. However, the public trust concerning navigation and fishing has largely lain dormant since the late nineteenth century. Interestingly, the strongest modern common law expression of a public trust in Canada is that with respect to highways.

Chapter One explores the Roman and English common law origins of the public trust doctrine. A consistent theme throughout this Chapter is that public rights arise in certain resources such as the sea, the sea-shore, tidal waters and highways because these resources are ill-suited for private ownership; they are inherently public and "special" in nature. Although there is no resounding declaration of a public trust by English courts, the English common law recognition of public rights in navigable waters, the sea-shore and highways and the corresponding duties of care and protection placed on the Crown laid the foundations for the public trust doctrine. It is clear from the cases that English courts regarded these resources as "special" - despite Crown ownership of these resources, the public rights are paramount to those of the Crown, any grantee of the Crown takes subject to the public rights, incidental rights are protected also and there are significant restrictions on extinguishment. It was undoubtedly these distinctive features of the public rights concerning navigation, fishing and highways, together with the division of title over these resources between the Crown's title or "jus publicum" and the public's title or "jus privatum", which led American and Canadian courts to declare so

confidently a public trust with respect to navigation, fishing and highways.

The public rights of navigation and fishing, and the public rights with respect to highways washed up on American shores as public trust rights. Chapter Two considers the development of the public trust doctrine in America. The history of the American public trust is one of dramatic expansion and remarkable adaptability to changing perceptions of the public interest. The public trust over navigable waters and associated lands has expanded from the traditional trust purposes of commerce, navigation and fishing to embrace recreational and ecological values and preservation of trust resources in their natural state. The trust has expanded also to embrace, somewhat inconsistently, other resources such as parks and wildlife.

Chapter Three considers the development of the public trust doctrine at Canadian common law. As mentioned earlier, the Canadian public trust with respect to navigation and fishing has been in hibernation since the late nineteenth century. However, the distinctive features of the English public rights of navigation and fishing which led both American and Canadian courts to declare a public trust have been mirrored in the Canadian public rights of navigation and fishing. Coupled with the initial recognition of the public trust by Canadian courts, the foundations therefore exist for a modern common law revival of the public trust doctrine in Canada.

Chapter Four explores the consequences of recognition of the public trust doctrine at

Canadian common law. An attempt is made to define the nature of the doctrine, with particular consideration given to the public trust as both a trust and, more broadly, as a fiduciary obligation. The conclusion reached is that at the very least, the public trust imposes a broad fiduciary obligation on government.

As there are few Canadian cases on the public trust doctrine aside from those concerning highways, the focus is on the American case law to predict the likely consequences of recognition of the public trust doctrine at Canadian common law. Importantly however, the distinctive features of the American public trust doctrine are either identical to the features of the public rights of fishing and navigation considered in Chapters One and Three or a logical extension of those features in a modern society. Accordingly, as Canadian law has recognized the public trust doctrine and continuously affirmed the public rights of navigation and fishing, predicting the consequences of a revival of the doctrine at Canadian common law is not a purely hypothetical exercise. At the very least, a revitalized Canadian public trust should embrace the distinctive features of the public rights of navigation and fishing identified in Chapters One and Three. The predicted consequences of recognition of the public trust doctrine at Canadian common law are :

1. the recognition of a substantive right, and therefore legal standing, in members of the public to vindicate public trust interests;
2. the imposition of an affirmative fiduciary obligation on government with respect to trust resources;
- 3 the imposition of an administrative process on government with respect to

supervision and disposition of trust resources (a logical modern day extension of the duty of care and protection imposed on the Crown with respect to the public rights of navigation and fishing);

4. restrictions on alienation of trust resources, in particular the restriction that legislation is required to modify or extinguish public trust resources; and
5. in an environmental context, an increasing recognition of the importance of the natural environment and the special and inter-related nature of trust resources (which facilitates an ecological approach to trust property).

The public trust doctrine does exist at Canadian common law. Although the public trust will not provide a solution to all environmental problems, it will provide both environmentalists and the government with another tool to help protect and manage diminishing natural resources in Canada. This function will be of continued importance until Canadian environmental legislation expands to embrace a wider range of environmental issues and problems and broad administrative discretion is circumscribed by defined statutory limits.

Finally, and probably most importantly, regardless of the specific consequences of recognizing the public trust doctrine at Canadian common law, the public trust serves to remind both government and the private sector that the public has an interest in our diminishing natural environment that should be affirmed and protected.

* * * *

CHAPTER ONE

ROMAN AND COMMON LAW ORIGINS OF THE PUBLIC TRUST

Introduction

This Chapter is divided into two main sections. Part I explores the Roman law and early English common law origins of the public trust. A constant theme throughout Part I is that public rights (the "jus publicum") arise in resources such as the sea, the sea-shore, tidal waters and highways because these resources are inherently public; they are ill-suited for permanent private ownership. Furthermore, particularly with respect to the sea and the sea-shore, there is a perception that the resource **should** be public, because it is somehow "special" in nature.

The recognition of public rights in navigable waters, the sea-shore and highways and the corresponding duties of care and protection imposed on the Crown laid the foundations for the public trust. Part II of Chapter One attempts to ascertain the nature and scope of these public rights and the public rights with respect to coast protection at English common law. The trail through dusty law reports reveals certain distinctive features in the treatment of these resources by the common law. It is clear from the cases that these resources are in some way "special" - the public rights are generally paramount to the rights of the Crown, bind any grantee of the Crown, include incidental rights and there are significant restrictions on extinguishment of the public rights. Part III focuses briefly on the economic approach to common property, which also reinforces the view that certain resources such as waterways and commons are "special" and public in nature.

Although there is no resounding declaration by English courts of a public trust, the public rights in navigable waters, tidelands, highways and coast protection are generally jealously guarded and the Crown is the protector of those rights. It was presumably these distinctive features of the "jus publicum" that led American and Canadian courts so confidently to assert a public trust with respect to navigation, fishing and highways.

Part I - Roman Law and Early English Common Law

Although much has been written about the origins of the public trust in Roman law and the incorporation of Roman law into English common law,¹ a brief examination of these ancient origins is worthwhile for several reasons. First, it reveals that since Roman times, certain resources have, by their very nature, been regarded as "special" and ill-suited to permanent private ownership, and second, it reveals that the public trust has historical roots in English common law and accordingly, "it should be possible to develop a common law concept of the public trust [in Canada] by relying on the same legal roots

¹ See in particular : P. Deveney, "Title, Jus Publicum and the Public Trust : An Historical Analysis" (1976) 1 Sea Grant L.J. 13 and S. Moore, *A History of the Foreshore and the Law Relating Thereto*, 3rd ed. (London : Stevens & Haynes, 1888). For a briefer consideration of the historical background see : J.S. Stevens, "The Public Trust : A Sovereign's Ancient Prerogative Becomes the People's Environmental Right" (1980) 14 U.C.D.L.Rev. 195; M. Selvin, "The Public Trust in American Law and Economic Policy, 1789 - 1920" (1980) Wis.L.Rev. 1403; J.L. Sax, "The Public Trust Doctrine in Natural Resources Law : Effective Judicial Intervention" (1970) 68 Mich.L.Rev. 471; V.P. Nanda & W.K. Ris, Jr., "The Public Trust Doctrine : A Viable Approach to International Environmental Protection" (1976) 5 Ecology L.Q. 291; Comment, "The Public Trust in Tidal Areas : A Sometime Submerged Doctrine" (1970) 79 Yale L.J. 762; R.J. Lazarus, "Changing Conceptions of Property and Sovereignty in Natural Resources : Questioning the Public Trust Doctrine" (1986) 71 Iowa L.Rev. 631.

that fostered the doctrine in the United States".²

The public trust has its origins in Roman law.³ As restated in *The Institutes of Justinian*, under Roman law, "By the law of nature, these things are common to mankind - the air, running water, the sea, and consequently the shores of the sea".⁴ This "natural law" reflected the belief of early writers such as Ovid, Hesiod, Horace and Virgil that in earlier times (the "Golden Age") people lived in total harmony and shared abundant natural resources.⁵

² C. Hunt, "The Public Trust Doctrine in Canada" in J. Swaigen, ed. *Environmental Rights in Canada* (Toronto : Butterworths, 1981) at 185.

³ For a detailed review of the Roman law background to the public trust and the incorporation of Roman law principles by Bracton and Hale, see Deveney, *supra*, note 1.

⁴ T.C. Sandars, ed. & trans., *The Institutes of Justinian*, Book II Tit. I (1), 8th. ed., (London : Longmans, Green & Co., 1888) at 90. Interestingly, one author notes that Justinian intended *The Institutes* as a textbook, not as binding precedent and that accordingly some commentators have argued that no legal doctrine protecting public rights in natural resources existed during the Roman Empire : Lazarus, *supra*, note 1 at 634 n. 12. Similarly, Sandars comments at xxxii - xxxiii that *The Institutes* were to be an elementary work, drawn from *The Institutes of Gaius*. W.A. Hunter, *Roman Law* (London : Sweet & Maxwell, Ltd, 1897) at 91-92 describes *The Institutes* as "an elementary treatise for students" and yet notes that the work was published by a special constitution investing it with the force of law. Thomas makes the same point, commenting that although intended as an "introductory, simple exposition of (in the main) private law for students embarking on a study of law, they yet themselves had the force of law as an integral part of the Emperor's general compilation". J.A.C. Thomas, ed. & trans., *The Institutes of Justinian*, (Cape Town : Juta & Company Ltd., 1975) at vii.

⁵ Lazarus, *supra*, note 1 at 634 n. 111. Deveney, *supra*, note 1 at 28 stresses the importance of this "myth of communality" beyond the Roman era : "the myth of communality has persisted throughout Western history as an underground paradigm of the ideal state : it entered Christianity through the influence of Stoicism and the biblical story of Eden, ran as a constant sub-theme through the social upheavals of the Middle

Corporeal property is divided in *The Institutes* into things capable of private ownership (in nostro patrimonio) and things incapable of private ownership (extra nostrum patrimonium).⁶ Secular things incapable of private ownership fell into one of three categories : (1) things common to all (res communes), (2) things belonging to the state (res publicae) and, (3) things belonging to a corporation (res universitatis).⁷

The air, running water and the sea were all res communes - they "were set apart by their very natures and because they were less susceptible of private acquisition." ⁸ The distinguishing feature therefore of res communes or common property was that it was ill-suited for private ownership; the public could not, as a practical matter, be excluded from the use of the resource.

Private property implies not merely the right of the owner to use the thing of which he is owner, but also the right to prevent anyone else using it, even when such use would not in the slightest degree interfere with his enjoyment of it. But certain objects cannot be so appropriated. The atmosphere, for instance, must be used incessantly by all on pain of death, and no human being can be excluded from the use of it. Private property in the air is physically impossible. Next to the air, the high sea is most difficult of appropriation, and practically no combination of men is ever likely to have such a naval force as would enable them to prevent others using the ocean.⁹

Ages, and had a considerable effect on the common law ... In its demythologised form, the myth of communality still persists in the attitude towards "nature" displayed by many today : there is something "unnatural" in the thought of one man "owning" a mountain or a part of the sea and excluding others."

⁶ Thomas, *The Institutes*, Book II Tit. I, *supra* note 4 at 65.

⁷ Thomas, *ibid.* at 75; Hunter, *supra* note 4 at 309-315 and Sandars, *supra* note 4 at 90.

⁸ Deveney, *supra*, note 1 at 27.

⁹ Hunter, *supra* note 4 at 309.

At Roman law, the seashore, to the line of the highest winter tide, was "res communes" and was incapable of ownership.¹⁰ Although anyone could build on the seashore and would own the building or other construction, once the construction came down, the place where the construction had been became common property once again.¹¹

Interestingly, Deveney argues that although there were "economic stimuli" to the recognition of the foreshore at Roman Law, the "mythical and philosophical aspects of the interface of the sea and dry land" were of equal importance.¹²

Symbolically, the shore is a "liminal" area, a transitional edge, and appears to have been recognised as such in classical antiquity. At common law, the reason usually assigned for the separate status of the sea and shore is the fact that they are incapable of ordinary appropriation and use, but underlying that reason - which in any event becomes less important as technology finds new ways of exploiting coastal area resources - must be recognised the intuitive sense that the sea and shore are in some way "special".¹³

Similar comments have been made about water as a resource. Professor Joseph Sax, the

¹⁰ Thomas, *supra*, note 4 at 65, 75. Sandars, *supra*, note 4 at 91.

¹¹ Thomas, *ibid.* at 75, Sandars, *ibid.* Deveney, *supra* note 1 goes somewhat further, remarking at 30 that, "It was their character as "things common to all" that made the sea and seashore capable of individual appropriation. Each person could use the common things to the limit of his own need, and appropriate what he wanted to his own use - as, for example by building a beach villa or staking out an area of the ocean - and this appropriation made the area private and gave the holder real ownership, which lasted as long as the structures and which was, presumably, heritable and assignable." He states at 29, "the sea and the seashore were 'common to all' only insofar as they were not yet appropriated to the use of anyone or allocated by the state."

¹² Deveney, *supra* note 1 at 27.

¹³ *Ibid.* at 27-28.

author of the seminal American article on the public trust doctrine ¹⁴ and a water law expert, has emphasized that the "central and unambiguous message [is] that water is and always has been a public resource".¹⁵ Stressing the special nature of water as a resource, he remarked, "[w]ater is not like a pocket watch or a piece of furniture which an owner may destroy with impunity. The rights of use in water, however long standing should never be confused with more personal, more fully owned property".¹⁶ Wilkinson also emphasizes the "special treatment" given by many countries to major bodies of water, concluding that :

The real headwaters of the public trust doctrine, then, arise in rivulets from all reaches of the basin that holds the societies of the world. These things were articulated in different ways in different times by different peoples. In some cases the waters ran deep, in other places the waters ran shallow. But the idea of a high public value in water seems to have existed in most places in some fashion.¹⁷

Justinian's rules were incorporated into French law, Spanish law, Mexican law and, through the writings of Bracton, into English common law in the thirteenth century. Bracton did not incorporate *The Institutes* in their entirety however in his work *De Legibus Et Consuetudinibus Angliae* ("Concerning the Laws and Customs of England"). In particular, he omitted section five of *The Institutes*, which provides that there can be no property in the sea-shores. Moore argues that this omission was probably deliberate

¹⁴ Sax, *supra* note 1.

¹⁵ *Ibid.* at 475.

¹⁶ *Ibid.* at 482.

¹⁷ C.F. Wilkinson, "The Headwaters of the Public Trust : Some Thoughts on the Source and Scope of the Traditional Doctrine" (1989) 19 *Envtl. L.* 425 at 431.

because "Bracton must have been well aware that the property in the foreshore was, at any rate in some cases, vested in the subject".¹⁸ The modification of the law to suit differing jurisdictional requirements, which was to occur also in the United States and Canada with respect to the definition of "navigable waters", had already begun.

The most fundamental innovation introduced by English common law however, was the concept of Crown ownership of the foreshore.¹⁹ In contrast, as mentioned earlier, at Roman law the seashore was incapable of permanent private ownership. The *prima facie* presumption that the Crown owns title to the foreshore appears to have been first introduced by Thomas Digges in 1568 in his treatise "Proofs of the Queen's Interest in Lands left by the Sea and the Salt Shores thereof".²⁰ However, in reality, practically

¹⁸ Moore, *supra*, note 1 at 33-34. Deveney, *supra*, note 1 makes the same point at 37. Both Moore and Deveney also note that Bracton's description of the law in England is not always accurate. Moore remarks at 33, "It has, however, been clearly decided that many of the passages which Bracton took from the Civil Law are inconsistent with, and form no part of, the English Common Law." Deveney states at 36 "where Bracton relies on Roman law, and specifically where he lays down the rule that the sea and the seashore were common to all ... he is most probably describing a rule of law he thought desirable, relying on the codified wisdom of the Roman law as a model for the common law, and not stating a rule that actually obtained in England at the time." See also G.J. MacGrady, "The Navigability Concept in the Civil and Common Law : Historical Development, Current Importance, and Some Doctrines That Don't Hold Water" (1975) 3:4 Fla.St.U.L.Rev 511 at 556 and *Blundell v. Catterall* (1821) 5 B & Ald 268 at 290-294, 106 ER 1190 at 1198-1199.

¹⁹ Stevens, *supra*, note 1 at 197-198; Nanda & Ris Jr, *supra*, note 1 at 297; Lazarus, *supra*, note 1 at 633-635; B.S. Cohen, "The Constitution, the Public Trust Doctrine and the Environment" (1970) Utah L.Rev. 388 at 389.

²⁰ Moore, *supra*, note 1 at 33. Moore emphasizes at 33 that this presumption did not originate with Bracton, it being "abundantly clear that Bracton had no idea of any general title existing in the Crown to the foreshore of the kingdom, either by virtue of the prerogative, or as based upon any theory that the foreshore at that time remained in the

the whole of the foreshore was claimed by private interests by the time of Edward I. Moore refers disparagingly to Digges' "invention", and yet observes "having shewn its falsity as a theory based upon true fact ... [it is] further pointed out that it is as full of vitality today as it was when Mr Digges invented it".²¹

Digges' prima facie presumption was actively asserted by Elizabeth I and the Stuarts,²² but did not really gain credibility until Sir Matthew Hale wrote his treatise *De Jure Maris et Brachiorum ejusdem* (Concerning the Law of the Sea and its Arms). Hale's treatise became the standard text on the sea and navigable and private waters and is referred to almost religiously in the early English and American cases. Deveney stresses that it "would be difficult to overemphasize the influence of either the author or the work on the development of American law".²³

Two key features of Hale's treatise are first, the acceptance, albeit on questionable

Crown as parcel of the great waste of the realm not granted out."

²¹ *Ibid.* at 184.

²² Interestingly, it appears that Charles I may have been beheaded as a result of such assertions. One of the causes cited to support his beheading was the "taking away of men's rights under colour of the King's title to land between high and low water marks"; Article 26 of the Grand Remonstrance presented to Charles I on December 1, 1641, cited in Lazarus, *supra*, note 1 at 635 n. 19 and, Moore, *ibid.* at 310.

²³ *Supra*, note 1 at 44. Deveney refers at 44-45 to the wonderful description of Hale in *Ex parte Jennings* 9 Cow. 518, 536a (N.Y.Ct. of Errors 1826) as "[His words] almost justify, in respect to his writings, the extravagant encomium ... that, "with a mind beaming the effulgence of noonday, he sat on the bench like a descended god!".

grounds,²⁴ of the *prima facie* theory of Crown ownership²⁵ and, second, the introduction of the concept of *jus publicum* (that part of the law concerning public affairs) into English common law.²⁶ Regarding the *jus publicum*, Hale stated :

That the people have a publick interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached by exactions ... For the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the king's subjects; as the soil of a highway is, which though in point of property it may be a private man's freehold, yet it is charged with a publick interest of the people, which may not be prejudiced or damnified.²⁷

Accordingly, the king's title to the seashore was a qualified title, with the public retaining a "beneficial" interest in the seashore. While the king could alienate his private rights or title, the *jus privatum*, he could not extinguish or alienate the public rights or *jus publicum*.²⁸ Any "grantee" of the *jus privatum* from the Crown (usually by immemorial custom or prescription) was similarly obliged to respect the public rights,

²⁴ Deveney, *supra*, note 1 at 45; MacGrady, *supra*, note 18 at 562-568; and Moore, *supra*, note 1 c. XIII (for a discussion of the first cases affirming the *prima facie* theory under the reign of Charles I).

²⁵ "The shore is that ground that is between the ordinary high-water and low-water mark. This doth *prima facie* and of common right belong to the king, both in the shore of the sea and the shore of the arms of the sea" : *De Jure Maris*, in Moore, *supra*, note 1 at 378.

²⁶ Deveney, *supra*, note 1 at 45.

²⁷ *De Jure Maris*, in Moore, *supra*, note 1 at 404-405.

²⁸ Hale appears to regard the *jus publicum* as a **servitude**, stating early in his treatise, "Though fresh rivers are in point of propriety as before *prima facie* of a private interest; yet as well fresh rivers a salt, or such as flow and reflow, may be under these two **servitudes**, or affected by them; viz. one of prerogative belonging to the king, and **another of publick interest, or belonging to the public in general.**", *De Jure Maris* in Moore, *supra* note 1 at 371-372.

"for the *jus privatum*, that is acquired to the subject either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers or arms of the sea are affected for public use."²⁹

Importantly, together with the recognition of the *jus publicum* came certain responsibilities and obligations. Lord Hale refers to affirmative duties imposed on the Crown:

And another part of the king's jurisdiction in reformation of nuisances is, to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage ... and as the highways by land are called *alta viae regiae* so these publick rivers for publick passage are called *fluvii regales*, and *haut streames le Roy* ... because they are of publick use, and **under the king's special care and protection.**³⁰

It seems likely therefore, that Hale's division of title to the seashore into the *jus publicum* and the *jus privatum*, together with the imposition of guardianship type obligations upon the Crown laid the initial foundations for the public trust doctrine at common law. Although Deveney claims that there "is no suggestion of a public trust in Lord Hale's writings"³¹, he does concede that Hale's description of the King as "vindicator and defender of the public's rights" could be construed as imposing a "trust" obligation on

²⁹ *Ibid.* at 389-390.

³⁰ *Ibid.* at 374.

³¹ Deveney, *supra* note 1 at 48.

the Crown to preserve the *jus publicum*.³²

Part II - English Common Law

Introduction

It is difficult to pinpoint exactly when the seeds of the public trust doctrine were sown in English common law. In *A.G. for B.C. v. A.G. for Canada, A.G. for Ontario* [1914] A.C. 153 (Privy Council), Viscount Haldane stated with respect to the public right to fish in tidal waters :

[T]he subjects of the Crown are entitled as of right not only to navigate but to fish in the high seas and tidal waters alike. The legal character of this right is not easy to define. It is probably a right enjoyed so far as the high seas are concerned by common practice from time immemorial, and it was probably in very early times extended by the subject without challenge to the foreshore and tidal waters ... The right into which this practice has crystallized resembles in some respects the right to navigate the seas or the right to use a navigable river as a highway, and its origin is not more obscure than that of these rights of navigation.³³

Certainly, as mentioned earlier, Hale's recognition of public rights (the "*jus publicum*") in navigable waters, the sea-shore and highways arguably laid the foundations for the

³² Deveney, *supra* note 1 at 48. Deveney states however that the "trust" duty was unrelated to questions of title and conveyancing. Other academics have asserted that the public trust doctrine has no foundation in English common law : see in particular, T.P. Brady, "But Most of It Belongs to those Yet to be Born : The Public Trust Doctrine, NEPA, and the Stewardship Ethic" (1990) 17 :3 B.C. Env'tl. Aff. L. Rev. 621 at 629, and MacGrady, *supra* note 18 especially at 547 and 568. Professor Sax in his article "Liberating the Public Trust Doctrine From its Historical Shackles" (1980) 14 U.C.D.L. Rev. 185 refers at 189 to medieval French law and claims that "the proper sources for the legal public trust doctrine today [are] the tradition of the commons in medieval Europe".

³³ [1914] A.C. 153 at 169. In considering the rare examples of exclusive fishing rights in tidal waters, he remarks at 170-171; "The origin of these rare exceptions to the public right is lost in the darkness of the past as completely as is the origin of the right itself".

public trust. Interestingly however, there has been little detailed academic consideration of the early treatment of these public rights by the English common law. Although the early American and Canadian courts recognised a public trust with respect to navigable waters, tidelands, fishing and highways, the period between the reception of Roman law principles into English common law and the declaration of a public trust by American and Canadian courts is largely uncharted territory in public trust writings. However, such a review is necessary if the nature of the public trust doctrine at Canadian and American law is to be fully understood. This section seeks to define the nature of these public rights, the precursor to the public trust, with a view to better understanding the scope of the public trust doctrine.

Navigation and Fishing

There is some doubt as to whether the assertion of public rights of fishing and navigation existed in England prior to the signing of the Magna Charta in 1215.³⁴ Similarly, the actual scope of the rights protected by the Magna Charta has been queried, one commentator stating that "the common law has expanded the Magna Charta almost unrecognisably over the years"³⁵ and another referring to "the process of creative

³⁴ Nanda & Ris, *supra*, note 1 at 298; Cohen, *supra*, note 19 at 389; Lazarus, *supra*, note 1 at 635 n. 16.

³⁵ Comment, "The Public Trust in Tidal Areas", *supra*, note 1 at 767. This article reviews the history of the Magna Charta in some detail, the author stressing that, "Every grain of public interest protection to be found in the Magna Charta was subsequently seized upon and developed to illogical and unhistoric lengths by a legal system struggling to adapt the law of the foreshore to new and more demanding economic and political conditions" at 766. See also Lazarus, *supra* note 1 at 635 n. 16.

judicial misunderstanding in favour of public rights".³⁶ The Magna Charta did however, reflect a doctrinal trend back to protection of the public interest especially with respect to navigation and fishing rights, and was largely a response to a process of "proliferating private ownership and control of tidal areas".³⁷ References to the Magna Charta in the case law on navigation and fishing generally relate to the inability of the Crown to create an exclusive fishery. It is now well settled at English and Canadian common law that "since the Magna Charta no new exclusive fishery could be created by Royal grant in tidal waters, and that no public right of fishing in such waters, then existing, can be taken away without competent legislation".³⁸

Navigable Waters

Key to recognising the public rights of fishing and navigation was establishing that the water in question was "navigable" and, accordingly, the very early cases seem to focus primarily on this issue. In *Fitzwalter's (Lord) Case* (1674) 1 Mod Rep 105, affirmed in *Carter v. Murcot* (1768) 4 Burr 2162, [1558-1774] All ER Rep 620, the court held,

³⁶ Deveney, *supra* note 1 at 39. Deveney refers however at 39 to the Magna Charta as "the original source of the public's rights in the coastal area, both because of its demonstration of the principle that the king was subject in some ways to the people, and because of several specific limitations on his powers."

³⁷ Comment "The Public Trust in Tidal Areas", *supra* note 1 at 765. Similarly Deveney, *supra* note 1 at 39 remarks that "Magna Carta is primarily a protest by the landed barons against infringements of their property rights".

³⁸ *A.G. for British Columbia v. A.G. for Canada* [1914] AC 153 (PC) affirming the House of Lords' decision in *Malcomson v. O'Dea* (1863) 10 HL Cas 593, 11 ER 1155; *Meisner v. Fanning* (1842) 3 N.S.R. 97 (T.D.); *Donnelly v. Vroom* (1907) 40 N.S.R. 585 (T.D.) and *Rose v. Belyea* (1867) 12 N.B.R. 109 (C.A.).

citing Hale, that in the case of a river that flows and reflows, and is an arm of the sea, the right of fishing is prima facie common to all. Although the flowing and re-flowing of the tide did not of itself determine a river to be navigable, it was prima facie and cogent evidence of navigability : *Fitzwalter's (Lord) Case* supra, *Warren v. Matthews* (1703) 6 Mod. 73, 91 ER 312, *Miles v. Rose* (1814) 5 Taunt. 705, 128 ER 868 and, *R. v. Montague* (1825) 4 B & C 598, 107 ER 1183.³⁹ However, to be navigable, the river "must be one which may fairly be said to be within the influence of the ebb and flow of the tides in the ordinary course of things" : *Reece v. Miller* (1882) 8 QBD 626 DC, at 631.

The public rights of navigation and fishing which were "attached" to navigable waters had certain distinct features :

- (i) the public rights were paramount to the rights of the Crown;
- (ii) any grantee from the Crown took subject to the public rights;
- (iii) incidental rights were included;
- (iv) the public rights could be extinguished only by legislation;
- (v) the Crown (and later government) had certain affirmative duties with regard to the care and protection of those public rights.

³⁹ See also : *R. v. Smith* (1780) 2 Doug KB 441, 99 ER 283; *Malcomson v. O'Dea* (1863) 10 HL Cas 593 at 619, ("the soil of all navigable rivers ... so far as the tide flows and reflows, is prima facie in the Crown, and the right of fishing is prima facie in the public"); *Murphy v. Ryan* (1868) IR 2 CL 143, citing Hale, *De Jure Maris*; *Lichester (Earl) v. Raishleigh* (1889) 61 LT 477, 5 TLR 739; *Sim E. Bak v. Ang Yong Huat* [1923] AC 429 (PC).

Public Rights Paramount

The main public rights associated with navigable rivers and the original core of the public trust were the right of navigation and the right of fishing, which is often subsumed within the broader public right of navigation. These rights were considered to be of such fundamental importance that they were paramount to the rights of the Crown as owner of the foreshore and the soil under navigable rivers. The common law right of navigation in a river was paramount to the power of the Crown with respect to that river : *Williams v. Wilcox* (1838) 8 Ad & Ed 314, 112 E.R. 857.

Grantee Took Subject To Public Rights

As these rights were paramount to the rights of the Crown, any grantee from the Crown took subject to the public rights. In *A.G. v. Parmeter* (1811) 10 Price 378, 147 E.R. 345, the court held that even a grant of the foreshore by Letters Patent was insufficient to extinguish the jus publicum between the high and low water mark :

It is perfectly clear that all the soil under the salt water between high-water mark and low-water mark is the property of the Crown. Such property has certainly been (as it may be) communicated in a great many instances to the subject, but that is always subservient to the public right of the King's subjects generally. It is compared by Lord Hale ... to the case of a highway. The private right of the Crown may be disposed of, but the public right of the subject cannot ... the King can in no degree affect the public right of a subject passing and re-passing upon the salt water. A grant of the soil must be considered as subject to the public right.⁴⁰

⁴⁰ (1811) 10 Price 378 at 400-401. The same point is made in other early cases such as : *A.G. v. Burridge* (1822) 10 Price 350; *Williams v. Wilcox* (1838) 8 Ad & Ed 314; *A.G. v. Wright* [1897] 2 QB 318 and *Fitzhardinge (Lord) v. Purcell* [1908] 2 Ch 139.

The position is aptly summarised by the House of Lords in *Gann v. Free Fishers of Whitstable* (1865) 11 HL Cas.192, 11 E.R. 1305 :

The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with the right of navigation, which belongs by law to the subjects of the realm ... If the Crown therefore grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right, and he cannot in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right.⁴¹

Given that the public rights of navigation and fishing were paramount to the private rights of the Crown in the foreshore and the soil under navigable waters and, bound any grantee from the Crown of such soil, what was the scope of these rights ?

More Than A Right Of Access - Incidental Rights Included

Many modern commentators refer to the right of navigation and/or the public trust as primarily a right of access to trust resources.⁴² Although there is some support in the case law for this view,⁴³ a broader review of the early common law indicates that

⁴¹ (1865) 11 HL Cas. 192 at 207-208.

⁴² See for example : H.C. Dunning, "The Public Trust : A Fundamental Doctrine of American Property Law" (1989) 19 Env'tl. L. 515 at 519; M.C. Blumm, "Public Property and the Democratization of Western Water Law : A Modern View of the Public Trust Doctrine" (1989) 19 Env'tl.L. 573, especially at 579-580.

⁴³ In particular *Orr Ewing v. Colquhoun* (1877) 2 App.Cas. 839. In that case, the House of Lords held that the right of navigation was not a right of property. Lord Gordon and Lord Hatherly described the right of navigation as being similar to or the same as a right of way.

classifying the right of navigation as merely a right of passage is unduly restrictive. For a start, the public right of navigation is not just a right of passage, it encompasses also the "ordinary incidents of navigation" : *A.G. v. Wright* [1897] 2 QB 318; the rights ancillary or incidental to the right of navigation : *Gann v. Free Fishers of Whitstable* (1865) 11 HL Cas. 192; *Fitzhardinge (Lord) v. Purcell* [1908] 2 Ch 139; *Iveagh v. Martin* [1961] 1 QB 232 and *Alfred F. Beckett Ltd v. Lyons* [1967] Ch 449. The right of navigation is "for the purposes of commerce, trade and intercourse, and also the liberty of fishing in the sea or the creeks thereof" : *Blundell v. Catterall* (1821) 5 B & Ald 268 at 298, 106 ER 1190 at 1201.

The right of navigation has been held to include incidental rights such as the right to anchor : *Gann v. Free Fishers of Whitstable, supra*; the right to fix moorings in the soil of the foreshore for the purposes of mooring boats : *A.G. v. Wright, supra*; the right to remain for a convenient time : *Iveagh v. Martin, supra*; the right to load and unload : *Iveagh v. Martin, supra, Tate & Lyle Industries Ltd v. Greater London Council* [1983] 2 AC 509; and, the right to ground : *Colchester Corporation v. Brooke* (1845) 7 QB 339. ⁴⁴ However, the public rights with respect to the foreshore include neither the right to pass over the shore for the purpose of bathing in the sea : *Blundell v. Catterall* (1821) 5 B & Ad 268, affirmed in *Brinckman v. Matley* [1904] 2 Ch 313; nor, the right to enter upon the foreshore to collect sea-washed coal : *Alfred F. Beckett Ltd, supra*.

⁴⁴ The list of incidental rights was prepared primarily from *Halsbury's Laws of England*, vol. 49, 4th ed. (London : Butterworths, 1984) para 893.

Legislation Required To Extinguish Public Rights

It seems unlikely that so much importance would be attached to the right of navigation if it was a right of access or passage only. In particular, why impose significant restrictions on the power to alienate the resource just to protect a right of passage ? As mentioned earlier, the right of navigation could not be destroyed by Royal Grant or Letters Patent because the Crown was incapable of alienating the *jus publicum*. Although it was later recognised that Parliament could extinguish the right of navigation, legislation was required. In *R. v. Montague* (1825) 4 B & C 598, 107 E.R. 1183, the court held that the right of navigation could be extinguished only by Act of Parliament, writ of *quod damnum* ⁴⁵ or, by natural causes such as the recess of the sea or an accumulation of mud. Similarly, the public right of navigation could be taken away or diminished by licence granted by a public body only provided it was duly authorised by legislation to do so : *Kearns v. Cordwainers' Co.* (1859) 6 CBNS 388, 161 E.R. 508.

Role And Duties Of The Crown

Another important feature of the right of navigation indicating that it is more than a right of way is the role of the Crown, and later, government. As noted in *Gann v. Free Fishers of Whitstable* *supra*, the Crown's ownership "is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with, the right of

⁴⁵ A writ of *quod damnum* is "an original writ issuing out of Chancery to a sheriff directing him to summon a jury to inquire whether the proposed step would be detrimental to the public ... This process has long fallen into desuetude" : *Halsbury's Laws of England*, vol. 21, 4th ed. (London : Butterworths, 1981) para 143.

navigation".⁴⁶ Likewise in *Brinckman v. Matley* [1908] 2 Ch 313, Lord Justice Vaughan Williams stated that the "Crown holds the foreshore upon the terms that it must recognise the jus publicum, whatever it may be, over the foreshore, and do nothing inconsistent with that jus."⁴⁷ Furthermore, as mentioned earlier with reference to Lord Hale and the "jus publicum", the duties of the Crown with respect to public resources such as the foreshore were active ones - there was a "duty which the law casts on the Crown of reforming and punishing all nuisances which obstruct navigation of public rivers" : *Williams v. Wilcox* (1838) 112 ER 857 at 864.⁴⁸

Although the courts in these cases do not actually describe the Crown's role as that of trustee, it seems clear that some form of fiduciary obligation is imposed on the Crown - the Crown holds the resources in question, subject to the interests of the public, and in cases of nuisance, must actively protect the resource by removing the obstruction. Public rivers are, in Lord Hale's words "under the king's special care and protection."

The Public Rights As A Public Trust

One of the first descriptions of this obligation as a trust obligation appears to have been

⁴⁶ (1965) 11 HL Cas. 192 at 207-208.

⁴⁷ [1904] 2 Ch 313 at 325.

⁴⁸ See also : *A.G. v. Terry* (1874) 9 Ch. App. 423 per Sir W.M. James, L.J. at 432, "where a public body is entrusted with the duty of being conservators of a river [in this case by Act of Parliament], it is their duty to take proceedings for the protection of those who use the river", which included removing obstacles to navigation. In addition, see the discussion later in this Chapter on "Coast Protection" and the positive duty imposed on the Crown to protect the realm of England from the incursions of the sea.

by Best J. in his dissenting judgment in *Blundell v. Catterall* (1821) 5 B & Ald 268, 106 E.R. 1190. At issue in the case was whether the public had a right at common law to pass over the sea shore for the purpose of bathing in the sea. The plaintiff, who was lord of the manor and the owner of the soil of the sea shore and the exclusive right to fish on the shore with stake nets, brought an action in trespass to prevent the defendant from transporting people in carriages from a place above the high-water mark across the sea shore to the sea for the purpose of bathing. The defendant's argument that the King's subjects had a common law right to pass over the sea shore for the purposes of bathing was rejected by the majority, primarily because there had been no specific recognition of such a right either by Lord Hale in *De Jure Maris* or, by the common law. Holroyd J. stated that "[t]he present claim ... is not ... supported either by necessity, by general usage of the realm, which forms the common law, or by special usage in the particular place; nor is it to be found in our law books" and, further, the claim was inconsistent with many passages in Lord Hale's treatise.⁴⁹ Abbott C.J., reflecting a singularly restrictive view of the development of the common law, commented that :

Now, if such a common law right existed, there would probably be some mention of it in our books; but none is found in any book, ancient or modern. If the right exist now, it must have existed at all times; but we know that sea bathing was, until a time comparatively modern, a matter of no frequent occurrence, and that

⁴⁹ (1821) 106 ER 1190 at 1202-1203. Interestingly, Holroyd J also stated at 1201 that the recognition of a general public right to use the sea shore, even for temporary purposes, would be "inconsistent with the nature of permanent private property". This seems somewhat strange given that Hale specifically states that "The jus privatum that is acquired to the subject, either by patent or prescription, must not prejudice the jus publicum wherewith public rivers and arms of the sea are affected for public use", quoted in *Blundell v. Catterall*, *ibid.* at 1193. For recognition of the public trust at Irish common law, see *Murphy v. Ryan* (1868) IR 2 C.L. 143 at 149.

the carriages, by which the practice has been facilitated and extended, are of comparatively modern invention.⁵⁰

In contrast to the majority, Best J. considers the much broader question of public access to the sea-shore. In his view, the "universal practice of England shews the right of way over the sea-shore to be a common law right".⁵¹ A key theme throughout his judgment is the nature of the resource at issue and its importance to the public. Not only is "free passage of the sea shore ... essential to the convenience and safety of navigation",⁵² but the "right of bathing in the sea, which is essential to the health of so many persons, is as beneficial to the public as that of fishing, and must have been well secured to the subjects of this country by the common law".⁵³ Accordingly, "free access to the sea is a privilege too important to Englishmen to be left dependant on the interest or caprice of any description of persons".⁵⁴

Importantly, the public nature of the resource arises not just because of human demands (the anthropocentric rationale), but also because the very nature of the resource was seen as ill-suited for private ownership :

But the barrenness of the greatest part of the sea [being the sea shore] has prevented it from becoming the subject of exclusive property. It is useful only as a boundary and an approach to the sea, and therefor, ever has been, and ever

⁵⁰ *Ibid.* at 1205.

⁵¹ *Ibid.* at 1194.

⁵² *Ibid.* at 1195.

⁵³ *Ibid.* at 1196.

⁵⁴ *Ibid.* at 1193.

should continue common to all who have occasion to resort to the sea.⁵⁵

Having explained the rationale for the public nature of the sea shore, he concludes :

The shore of the sea is admitted to have been at one time the property of the King. **From the general nature of this property, it could never be used for exclusive occupation. It was holden by the King, like the sea and the highways,** for all his subjects. The soil could only be transferred, **subject to this public trust;** and general usage shews that the public right has been excepted out of the grant of the soil.⁵⁶

The public trust arose therefore because of the inherently public nature of the property concerned, like the sea and the highways. The public rights in the sea shore (the "jus publicum") were to be preserved and protected by the King as trustee of those rights.

Highways

The analogy by Best J. of the foreshore with highways is an interesting one, because in other instances the comparison (and it has been a frequent one) has probably reinforced the perception that the right of navigation is just a right of way. For example, in *A.G. v. Johnson* (1819) 2 Wils Ch 87, 37 E.R. 240 at 246, the Lord Chancellor, Lord Eldon, stated that "the subject has a right to use that which may be called a water-highway, and which prima facie includes the water between high and low-water mark when it covers the soil" and in *Williams v. Wilcox* (1838) 8 Ad & Ed 314, 112 ER 857, the court notes that "It is clear that the channels of public navigable rivers were always highways",

⁵⁵ *Ibid.* at 1196.

⁵⁶ *Ibid.* at 1197.

although the court recognised that the analogy with highways was not complete.⁵⁷ In *Iveagh v. Martin* [1961] 1 QB 232, Paull J. stated that the "rights of navigation are analogous to the rights of the public on a highway on land, that is to say, the right of coming and going and doing these things incidental thereto".⁵⁸

However, it is similarly restrictive to regard the *jus publicum* in respect of highways as merely a right of passage or right of way. Certainly, as discussed in greater detail later in this paper, early American and Canadian courts viewed municipal corporations vested with title to public streets as subject to a public trust.⁵⁹ Furthermore, as with the public rights of navigation and fishing, the public rights with respect to highways are special in nature and cannot be extinguished easily.

Role Of The Crown

Although the English cases do not specifically refer to municipal corporations as being under a "trust" obligation with respect to highways, they are described as "guardians of the highways" in several cases, which comes fairly close.⁶⁰ Furthermore, similar to the

⁵⁷ (1838) 8 Ad & Ed 314 at 333.

⁵⁸ [1961] 1 QB 232 at 273.

⁵⁹ For a description of the American cases concerning the public trust in streets, see Selvin, *supra* note 1.

⁶⁰ *Goodson v. Richardson* (1874) 9 Ch App 221 at 223 ("the public authorities who are the guardians of the highways"); *Bagshaw v. Buxton Local Board of Health* (1875) 1 Ch.D. 220 at 225 (refers to the defendants, in whom the public highway was vested under the Town Improvement Acts, as the "guardians of the road").

right of navigation, the public authority is under a duty to prevent and remove obstructions : *Bagshaw v. Buxton Local Board of Health* (1875) 1 Ch.D. 220.

Restrictions On Extinguishment

As with the right of navigation, the public rights with respect to the resource are not extinguished easily. At common law, the rule is "once a highway, always a highway" : *Dawes v. Hawkins* (1860) 6 CBNS 848; *R. v. Platts* (1880) 49 LJQB 848. The public cannot release their rights with respect to a highway once those rights have been acquired, and no authority can bind the public in purporting to release those rights. Most importantly, there is no extinctive presumption or prescription arising from non-user of those rights. ⁶¹ For example, in *Dawes v. Hawkins, supra*, although an ancient highway had been diverted and substituted by a new road which was used by the public for more than 20 years, the court still held that the old road continued to exist in point of law; the public user of the new road being referable to the right of the public to deviate onto adjoining land where a highway is obstructed. Similarly in *Turner v. Ringwood Highway Board* (1870) LR 9 Eq 418, the full extent of the road allowance was upheld despite a long period of non-user. Although the road had been laid out at a width of 50 feet, only 25 feet of the allotted space had been used as an actual road - the remainder had been overtaken by vegetation and fir trees. The situation remained unchanged for 25 years until the Highway Board commenced cutting down the fir trees growing within the 50 feet allotment. In dismissing an action by an adjoining land owner to restrain such

⁶¹ *Halsbury's Laws of England*, vol. 21, *supra* note 45 at para 143.

cutting, the court affirmed that the public rights with respect to the road extended to the whole width of the road, and they were entitled to have the whole width of the road preserved from obstructions. This right was not extinguished because trees had been growing over part of the road allowance for 25 years.⁶²

It seems strange to impose such restrictions on extinguishment if the crux of the public right with respect to highways is one of access or passage only. If passage is so important to the continuation of the right, why is the right not extinguished by a long period without use? It seems that, as Best J. indicated, it is the nature of the resource, rather than the right of passage, that leads to restrictions on extinguishment and the imposition of obligations on municipal corporations with respect to highways.

Coast Protection

The obligation of coast protection appears to have been totally ignored by academics in their discussions of the public trust. The subject warrants consideration however, because it is further evidence that the nature of a particular resource can lead to the imposition of guardianship type obligations on the Crown and government. In addition to the obligations concerning navigable rivers and highways, the Crown has a duty to preserve the realm from the inroads of the sea. In *Isle of Ely Case* (1609) 10 Co.Rep. 141a, 77

⁶² See also *Gerring v. Barfield* (1864) 11 LT 270. In that case, an innkeeper had used part of a public highway for 20 years, for standing his guests' vehicles on market days. Despite this use over such a lengthy period, the court held that the action still amounted to an obstruction and the public right to use the whole width of the road remained.

E.R. 1139, the court stated :

And it is to be known, that by the common law ... the King ought of right to save and defend his realm, as well against the sea, as against the enemies, that it should not be drowned or wasted, and also to provide, that his subjects have their passage through the realm by bridge and highways in safety.⁶³

As with the right of navigation, the Crown was unable to alienate the rights of the public and accordingly, any grantee from the Crown took subject to the obligation to preserve natural or man-made barriers against the sea. In the leading case of *A.G. v. Tomline* (1880) 14 Ch.D. 58, the court was required to consider the defendant purchaser's obligations concerning certain coastal lands. The court found that, when vested in the Crown, the land was held for the public purpose of protecting the land from the sea and that upon transfer, the defendant then came under the same public obligation. Cotton L.J. stated :

In my opinion, the land of the Defendant, when vested in the Crown, was held by the Crown for the public purpose of protecting the land from the sea; **the land could not be granted free and discharged from that duty**, and the Defendant, or those through whom he claims, as they theoretically take from the Crown, must hold the land subject to that duty and cannot be allowed to use the land in such a way as to destroy the natural barrier against the sea.⁶⁴

Significantly, because of the nature of the resource and its importance to the public, the land could not be granted free of the obligation to protect the public. If the land vested in the Crown was a natural barrier against the sea, neither the Crown, nor any grantee

⁶³ (1609) 10 Co.Rep. 141a at 141a. See also : *Hudson v. Tabor* 2 QBD 290 at 293; *A.G. of Southern Nigeria v. John Holt & Co. (Liverpool) Ltd* [1915] AC 599 (Privy Council) at 620; *Henwick v. Essex Catchment Board* [1952] 1 All ER 765 at 766.

⁶⁴ (1880) 14 Ch.D. 58 at 70.

of the Crown, could act in a way which would deprive the public of that natural barrier. Drawing an analogy with the public right of navigation, Cotton L.J. stressed that "where land is vested in the Crown subject to public uses, the grantee of the Crown must take it subject to all the obligations to which the land was subject when in the hands of the Crown".⁶⁵

The obligation of coast protection extends also to artificial barriers, such as sea walls, because these barriers are constructed in furtherance of the Crown's obligations with respect to coast protection.⁶⁶ In *Tomline's* case, James L.J. stated :

That it is part of the duty of the Crown of England to protect the realm of England from the incursions of the sea by appropriate defences, and ... it was no less the duty of the Crown to protect the realm by leaving unimpaired the natural defences which already existed from time immemorial and probably from periods of remote geological antiquity, than to protect it by artificial defences when artificial defences were required.⁶⁷

In *Henly v. Mayor of Lyme* (1828) 5 Bing. 91, 130 E.R. 995 the court affirmed that the King was "bound to take care to guard and protect the shores and lands adjoining the sea from being overflowed by the sea" and that in the borough of Lyme, this duty included an obligation to repair the sea banks and sea walls which had been constructed to protect Lyme against the incursion of sea water⁶⁸ Although upon transfer, the Corporation of

⁶⁵ *Ibid.* at 69.

⁶⁶ Sea walls owe their origin to the prerogative of the Crown to protect the realm against the incursion of sea water : per Greer L.J., *Symes & Jaywick Assoc. Properties v. Essex Rivers Catchment Board* [1937] 1 KB 548 at 559.

⁶⁷ *Ibid.* at 61.

⁶⁸ (1828) 5 Bing. 91 at 109 and 112.

Lyme received also the right to charge tolls and dues, the obligation to repair was not dependent upon receipt of funds -it arose by nature of the property itself :

As long as they hold this estate, whether the estate produces funds or not, they are bound to repair ... the moment they accepted the estate, they contracted the liability to repair, and that liability to repair will attach itself to them as long as they continue to be the owners of the estate.⁶⁹

Tomline's case was applied in *Symes & Jaywick Assoc. Properties v. Essex Rivers Catchment Board* [1937] 1 KB 548. In *Syme's* case, the plaintiffs claimed the right to drain sea water through a sea wall to farm lands behind the wall. In rejecting the plaintiffs' claim, the court noted that not only had the plaintiffs failed to establish they had been licensed by the Essex Rivers Catchment Board to drain the sea water through the wall, but that even if the Board had purported to consent to the plaintiffs' activities, that consent would be inoperative to convey any rights.⁷⁰ Although the court fails to address whether the legislature can override the public's rights to sea defences,⁷¹ it is clear that the right is seen as so fundamental that the Crown and land owners cannot override it and, impliedly, any legislation seeking to extinguish the right would need to be clear and express :

According to the ancient law of the land, sea defences were constructed for the purpose of keeping the sea out and not for letting it in. The Crown had a duty, no doubt of imperfect obligation in that the subject had no means of enforcing it, to maintain the sea defences of the country; and where such defences exist I cannot see how a person becoming entitled to land outside the sea wall could ever

⁶⁹ *Ibid.* at 112.

⁷⁰ [1937] 1 KB 548 at 559 and 571-572.

⁷¹ Scott L.J. does however, state at 571 that "neither at common law nor by any **existing** statute can an owner of land outside the sea wall possess a right to send sea water through the sea wall".

acquire the right to drain sea water through the sea wall on to the land within, or to do anything to the sea wall likely to have that result.⁷²

Scott L.J. saw the "old common law principle of public policy that our farm lands ought to be protected from the sea" as so important, he held that the *Land Drainage Act* 1930⁷³ impliedly recognised and enshrined the principle.⁷⁴

Part III - Economic Treatment of Common Property

Common or public property is treated as special not just at law, but also at economics.⁷⁵

The traditional economic theory with respect to common property resources was developed by Garrett Hardin in his article "The Tragedy of the Commons".⁷⁶

Commencing with the fundamental economic assumption that each individual is a rational self-maximizer, he argues that the rational economic conclusion with respect to common property is to exploit the resource to maximize private profits. However, as all other users of the commons will, if acting rationally in an economic sense, also pursue maximum personal gain, the commons inevitably will be destroyed. He concludes that:

⁷² *Ibid.* 571-572.

⁷³ 20 & 21 Geo. 5, c. 44.

⁷⁴ *Ibid.* at 572.

⁷⁵ I am indebted to my thesis supervisor, Dr. Andrew Thompson for the suggestion that I consider the economic approach to common property as a means of reinforcing the notion that certain resources are "special" in nature and ill-suited for private ownership.

⁷⁶ (1968) 162 Science 1243, reprinted in part in E. Hughes, A. Lucas & W. Tilleman, *Environmental Law and Policy* (Emond Montgomery Publishers Ltd : Toronto, Canada, 1992) at 7:11-7:12.

Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit - in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.⁷⁷

Common or public property therefore is seen as contrary to the supposed market certainties that flow from private property. The position, as summarized by Rose⁷⁸ is that, "exclusive private property is thought to foster the well-being of the community, giving its members a medium in which resources are used, conserved and exchanged to their greatest advantage",⁷⁹ or to describe the theory in economic terms, "[a] secure, exclusive right to resource extraction imparts the incentive to the user to utilize the resource at an optimal rate".⁸⁰ Public property is anathema to many economists because "uncertainty about property rights invites conflicts and squanders resources".⁸¹ Accordingly, the traditional economic preference is either for private or government ownership of natural resources.

Hardin's economic theory of common property has however, been called into question.

⁷⁷ *Environmental Law & Policy*, *ibid.* at 7:12.

⁷⁸ C. Rose, "The Comedy of the Commons : Custom, Commerce, and Inherently Public Property" (1986) 53:3 U. Chi. L. Rev. 711.

⁷⁹ *Ibid.* at 713.

⁸⁰ G.C. Stevenson, *Common Property Economics - A General Theory and Land Use Applications* (Cambridge : Cambridge University Press, 1991) at 3.

⁸¹ Rose, *supra* note 78 at 716.

Of particular concern is the over-simplification that any multiple-user system will inevitably lead to destruction of the resource. Various authors have focused on the positive and rational economic aspects of common ownership of natural resources and the numerous and successful examples of common property across cultures and throughout history as well as into the present day.⁸² Generally the key to a successful common property regime is some form of restriction of access or limitation of entry as well as some form of coordinated management.⁸³ Distinctions are therefore drawn between "open access resources" (which have no property rights attached to them)⁸⁴ and "common property", which is a limited access, and generally managed resource,⁸⁵ and Hardin's theory is confined to "open access resources" with no management scheme. Public trust resources which would clearly fall into this definition of "common property" include fisheries, public lands and parks.

As indicated in Part I of this Chapter, many natural resources are seen as ill-suited for

⁸² See : Stevenson, *supra* note 80 and his discussion of the centuries old system of the Swiss grazing commons, which continues to this day and, D.W. Bromley, ed., *Making The Commons Work - Theory, Practice and Policy* (San Francisco, California : Institute for Contemporary Studies, 1992) which provides 8 different studies of common property regimes around the world.

⁸³ Stevenson, *ibid.* at 2-3.

⁸⁴ Stevenson, *ibid.* at 8 defines an "open access resource" as a "depletable, fugitive resource characterized by rivalry in exploitation; it is subject to use by any person who has the capability and desire to enter into harvest or extraction of it; and its extraction results in symmetric or asymmetric negative externalities."

⁸⁵ Stevenson, *ibid.*, and D.W. Bromley, "The Commons, Property and Common-Property Regimes" in Bromley, *supra* at 3, at 3-4 and 11-14.

private appropriation, they are somehow "special" and public in nature. Interestingly, this view is also mirrored in some of the economics literature. Stevenson argues that :

It is important to recognize that common property [as defined above] might provide a solution to the open access problem, because certain resource characteristics or social situations may require a common property solution, whereas a private property solution might fail. Consider a fishery, a ground water aquifer, or certain wide-ranging wildlife. How do we vest property rights in such natural resources ? Short of committing them to a sole owner, which may be completely incompatible with optimal firm size, it is impossible. The resources themselves cannot be physically divided up into individual units. Clearly, if these resources are to be exploited, multiple users must perform the job. To avoid the undesirable results of open access, some type of common property solution must be found. Thus, the physical characteristics of the natural resource sometimes dictate a common property solution.⁸⁶

Accordingly, it appears that "common property" is not only recognized as a "special" category, but also, contrary to Hardin's theory, it can have positive economic consequences. Rose argues that in addition to purely private property and government controlled private property (controlled by government because of market failure), there is a third category of "inherently public property".⁸⁷ She argues that this third category of property existed because collective public rights in certain property was the "optimal alternative".⁸⁸ Collective property rights in public trust resources such as roads and navigable waterways promoted commerce through returns to scale (greater value through greater participation)⁸⁹ and protection from the dangers of privatization such as holdouts

⁸⁶ Stevenson, *ibid.* at 4.

⁸⁷ *Supra* note 78 at 720.

⁸⁸ *Ibid.* at 721.

⁸⁹ *Ibid.* at 766-769.

and monopolies.⁹⁰

Accordingly, although this summary of economic treatment of common property has been somewhat brief and simplistic, it is clear that the notion that certain resources are "special" and public in nature is an interdisciplinary one, being recognized at both law and economics.

Conclusion

English courtrooms did not echo to the resounding declaration of a public trust. However, it is clear that the public rights of navigation and fishing and the public rights concerning highways were regarded as "special" at English common law. The special nature of the public rights is particularly evident with regard to the public rights of navigation and fishing, but also can be seen in the courts' treatment of the public trust concerning highways. It was undoubtedly the distinctive features of these public rights, (in particular the guardianship obligations of the Crown) together with the division of title to resources into the *jus publicum* and the *jus privatum* that led the American and Canadian courts confidently to assert a public trust.

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⁹⁰ *Ibid.* at 749-750.

CHAPTER TWO

THE DEVELOPMENT OF THE PUBLIC TRUST IN THE UNITED STATES

Introduction

The public rights with respect to navigation, fishing, the foreshore and highways came ashore in the New World as public trust rights. American courts had no hesitation in declaring a public trust over navigation, fishing, the foreshore and highways based on their review of English common law. American judges were neither reticent about changing the common law to suit American jurisdictional and geographical needs nor fearful of adjusting the doctrine to meet changing social values. Although revitalized by Professor Joseph Sax in 1970,¹ the American public trust has been dynamic since its inception.

The history of the public trust in the United States is one of dramatic expansion and remarkable adaptability. The public trust has been described as "one of the most flexible and innovative mechanisms of United States environmental law" ² and the public uses to which tidelands are subject as "sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favouring one mode of utilization over another."³ Part I of this Chapter explores the

¹ Sax, *supra* note 1 Ch. 1.

² Nanda & Ris, *supra* note 1 Ch.1 at 292.

³ *Marks v. Whitney* 491 P. 2d 374 (1971) at 380.

initial reception and recognition of the doctrine into American law. Part II focuses on the application of the public trust to navigable waters and the foreshore, and explores the modern extension of traditional trust purposes to embrace ecological and aesthetic values and the preservation of trust lands in their natural state. Part III considers the application of the public trust to highways and the nineteenth century redefining of the trust to facilitate economic development.

The application of the public trust doctrine to wild places and wild animals has experienced a chequered history in the United States. Part IV explores the common law foundations for a public trust over parks and wildlife and seeks to highlight the inconsistencies inherent in adopting an ecosystemic approach to water based trust resources while denying public trust recognition to parks and wildlife.

Part I - Reception of the Public Trust Doctrine Into American Law

After the American Revolution, the individual states acquired sovereign status and inherited all the rights of the English Crown within their borders. With the adoption of the common law, the state legislatures also inherited the responsibilities of the English Crown as trustee over trust property.⁴ New states to the Union obtained the same rights and responsibilities on the basis of the "equal footing doctrine", which accords equal status to all states in the Union : *Pollards Lessee v. Hagan* 44 U.S. (3 How) 212 229 (1845).

⁴ Selvin, *supra* note 1 Ch.1 at 1405.

The reception of the public trust from common law into American law is summarized in *Shively v. Bowlby* 152 US 1, 38 L. ED 331, 14 S Ct 548 (1894) as follows :

At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation ... Upon the American Revolution, these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States ... The new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters, and in the lands under them within their respective jurisdictions.⁵

The landmark American public trust case is however, *Illinois Central Railroad v. Illinois* 146 U.S. 387 (1892). In that case, the Illinois state legislature sought, inter alia, to repeal an extensive grant of submerged lands in Lake Michigan, in fee simple, to the Illinois Central Railroad Company. In delivering the judgment of the court, Mr Justice Field noted that the State had placed under the control of the railroad company nearly all the submerged lands of the Chicago harbour and that the company could "manage and practically control the harbour of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally."⁶

In holding that the State was not competent to make such a grant, Field J. stated :

[T]he State holds the title to the lands under Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law ... But it is a title different in character from that which the State

⁵ 152 U.S. 1 at 57. See also *Martin v. Waddell* 41 U.S. (16 Pet.) 367 (1842) which outlines the position with respect to the original 13 States. Upon the Revolution, the peoples of each State became sovereign and in that character hold absolute right to all navigable waters subject only to the rights since surrendered by the Constitution to the general government.

⁶ 146 U.S. 387 at 451.

holds in lands intended for sale ... It is a title **held in trust for the people of the State that they may enjoy the navigation** of the waters, carry on commerce over them, and have liberty of **fishing** therein. ⁷

Although Field J. recognised that the interests of the people could in many instances be improved by the construction of wharves, piers etc. for which the State could grant parcels of the submerged lands, this was very different from the abdication by the State of control over navigable lands under an **entire** harbour.

Such abdication is not consistent with the exercise of that trust which requires the State to preserve such waters for the use of the public. The trust devolving upon the State for the public ... cannot be relinquished by a transfer of the property. **The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.** ⁸

Although described (and arguably recognised) as the "lodestar" in American public trust law ⁹, and frequently cited in public trust cases, the decision has been criticised as lacking in authority.¹⁰ However, what is clear from the case is the importance of the public interest in the resource. The public trust arose because the property in question was that :

[I]n which the whole people are interested ... The harbour of Chicago is of immense value to the people of the State in the facilities it affords to its vast and constantly increasing commerce; and the idea that its Legislature can deprive the State of control of its bed and waters and place the same in the hands of a private

⁷ *Ibid.* at 452.

⁸ *Ibid.* at 453.

⁹ Sax, *supra* note 1 Ch.1 at 489.

¹⁰ Lazarus, *supra* note 1 Ch.1 at 638-639 stating that it is "far from clear what source of law the Court was drawing upon to reach its result" and, "The court did not cite any relevant precedent in Illinois law to support the decision".

corporation created for a different purpose ... is a proposition that cannot be defended.¹¹

Part II - Waters : A Question of Navigability

The American courts were quick to declare a public trust with respect to navigable waters and tidelands. In describing the situation in England, the United States Supreme Court in *Martin v. Waddell* 41 U.S. (16 Pet.) 367, 10 L.Ed. 366 (1842) referred to the "dominion and property in navigable waters being held by the king as a public trust".¹²

The situation in England was viewed as somewhat different to that in America because title to navigable waters in England was held "by a single individual [the sovereign] in trust for the whole nation".¹³ In contrast, as mentioned earlier, in America, after the Revolution, the "people themselves became sovereign" and in that character, held absolute right to all navigable waters subject only to the rights since surrendered by the constitution to the general government.¹⁴

The traditional scope of the public trust was limited to tidal waters and lands exposed and covered by the tide : *National Audubon Soc. v. Superior Court ("Mono Lake" case)* 658 P. 2d 709 (Cal. 1983) at 719 and the traditional trust purposes were those of navigation, commerce and fishing : *Marks v. Whitney, supra*. However, the traditional scope of the

¹¹ 146 U.S. 387 at 453 - 454.

¹² 10 L.Ed. 366 (1842) at 411.

¹³ *Ibid.*

¹⁴ *Ibid.*

trust was changed as early as *Illinois Central Railroad v. Illinois*, *supra* to suit the different American geographical and jurisdictional needs. Under English law, the public trust applied to all navigable waters subject to the ebb and flow of the tide; tidal water and navigable water being regarded as synonymous terms. However, this approach was rejected by the court in *Illinois Central* as being "wholly inapplicable to our condition" because "[s]ome of our rivers are navigable for great distances above the flow of the tide".¹⁵ Accordingly, the trust applied to waters that were navigable in fact.

The inappropriateness of the English test for navigability was considered at some length in *State v. Superior Court (Lyon)*, 29 Cal. 3d 210, 625 P. 2d 239 (1981). At issue in that case was whether the State of California owned the lands under non-tidal, navigable lakes. The decision was particularly significant because of the vast areas that would be affected by the decision; some 4,000 miles of shoreline along 34 navigable lakes and 31 navigable rivers. Mosk J., who delivered the majority judgment of the Californian Supreme Court, acknowledged that some of the original 13 states adopted the English rule (equating navigability with tidal flow) because most of their waters were tidal. Placing the common law rule in the Californian context he stated that "the English rule was obviously inappropriate as the nation expanded westward, where there were great rivers and lakes which were navigable in fact, even though they were not subject to the ebb and flow of the tide." ¹⁶

¹⁵ 146 U.S. 387 (1892) at 435 and 436.

¹⁶ 625 P. 2d 239 (1981) at 244.

As in *Illinois Central*, the English rule was rejected, Mosk J. asserting that "our courts have never adhered slavishly to common law doctrines if they were unsuitable to the circumstances of our people".¹⁷

Arguably one of the most significant extensions of the public trust doctrine occurred with the Californian decision in *Marks v. Whitney, supra*. The case is important not for the resource in question (tidelands) but for the trust uses identified by the Californian Supreme Court. The Court acknowledged that the traditional trust purposes were those of navigation, commerce and fisheries and that these purpose had been interpreted as including the right to fish, hunt, bathe and swim, and boating and general recreation. However, in an enlightened recognition of the inter-relatedness of trust resources and the surrounding environment, the Court went on to say :

There is growing recognition that one of the most important public uses of the tidelands - a use encompassed within the tidelands trust - is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favourably affect the scenery and climate of the area.¹⁸

Furthermore, the court concluded that it "is not necessary to here define precisely all the public uses which encumber tidelands", thus providing for further extensions of the trust in the future.

¹⁷ *Ibid.*

¹⁸ 491 P. 2d 374 (1971) at 380.

The decision set in motion a series of Californian decisions which not only recognise but actively advocate the importance of trust resources as part of an ecosystem. This approach is particularly evident in *State v. Superior Court (Lyon)*, *supra* and *State v. Superior Court (Fogarty)* 29 Cal. 3d 240, 625 P. 2d 256 (1981). In *Lyon's* case, the Court described the type of lands involved in the case as a "resource which is fast disappearing in California; they are of great importance for the ecology, and for the recreational needs of the state." ¹⁹ Citing *Berkeley (City of) v. Superior Court* 26 Cal. 3d 515, 606 P. 2d 362 (1980), the Court confidently asserts that the purpose of preserving the property in its natural state is a valid trust purpose. ²⁰

In *Fogarty's* case, Mosk J. (who again delivered the majority judgment) develops this theme even further. Aside from the question of estoppel, the issues were the same as those raised in *Lyon's* case. In his judgment, Mosk J. expands upon his comments in *Lyon's* case that preserving the property in its natural state is a valid trust purpose. In a remarkable passage, which could have been extracted from *Equinox* magazine, he noted:

The shorezone is a fragile and complex resource. It provides the environment necessary for the survival of numerous types of fish ... birds ... and many other species of wildlife and plants. These areas are ideally suited for scientific study, since they provide a gene pool for the preservation of biological diversity. In addition, the shorezone in its natural condition is essential to the maintenance of good water quality, and the vegetation acts as a buffer against floods and erosion.

¹⁹ 625 P. 2d 239 (1981) at 242.

²⁰ *Ibid.* at 248 and 250.

The close relationship of the life forms in the shorezone to one another and to the condition of the bed of the stream or lake, the delicate balance among them, and the adverse effects of reclamation and development of these areas have been documented in numerous studies and reports. ²¹

In recognising "the urgent need to prevent deterioration and disappearance of this fragile resource", Mosk J. introduces another innovative idea, that the State can limit public use of the resource in areas which are endangered by overuse.²² This suggestion, that public access to public trust resources can be restricted **as part of the State's obligations in fulfilling the trust** is a major development. Historically, the public trust has been perceived as a means of ensuring a right of access to certain public trust resources for various public purposes.²³ Furthermore, as discussed in Chapter One, the public's rights to trust resources are seen as so fundamental, they are preserved even after long periods of non-use.²⁴

²¹ 625 P. 2d 256 (1981) at 259.

²² *Ibid.* at 260.

²³ Dunning, *supra* note 42 Ch.1 at 519. For a further extension of the public access theme, see also Blumm, *supra*, note 42 Ch.1 at 579-580 : "the public trust doctrine's overarching thrust is one of public access, either to the trust resources themselves or to decision makers with authority to allocate trust property. This public access theme makes the doctrine a democratizing force by (1) preventing monopolization of trust resources and (2) promoting natural resource decision making that involves and is accountable to the public." For an extensive discussion of the function of the courts in the public trust area as one of democratization, see Sax, *supra*, note 1 Ch.1.

²⁴ See also W.H. Rodgers, Jr. *Environmental Law*, vol. 1, (St. Paul, Minnesota : West Publishing Co., 1986) at 161-162 for a brief discussion of the public trust "both to defy and combat the tragedy of the commons". Rodgers cites at 162 various case examples of the state introducing use limits, closures and restraints "to enhance the commons, not degrade it".

While critics could point to the absence of any direct authority cited in *Fogarty's* case to support the view that a state could restrict access as part of its trust obligations, this argument is a logical extension of the notion that trust resources are interrelated, and that preservation of trust property in its natural state is a valid trust purpose.

Marks v. Whitney, *Lyon's* case and *Fogarty's* case laid the foundation for the Californian Supreme Court's decision in *National Audubon Society v. Superior Court* (the "*Mono Lake*" case), *supra*. In that case the Court had to consider whether the public trust protected navigable waters from harm caused by diversion of non-navigable tributaries. The issue arose because the Department of Water and Power of the City of Los Angeles had been appropriating (under permit) nearly the entire flow of four of the five streams that flowed into Mono Lake. While there was no real dispute concerning the adverse effect these diversions had caused, there was much disagreement as to the effect of both future diversions and the continuing effect of past diversions. Furthermore, the Court was required to consider the interplay between two conflicting systems of legal thought; the Californian water rights system and the public trust doctrine.

In delivering the majority judgment (with which Mosk J. concurred), Brossard J. reflects the Court's earlier concerns with ecological questions. At the outset, he notes that "there seems little doubt that both the scenic beauty and the ecological values of Mono Lake are imperiled" and reference is made to various reports on the effect of the diversions on the

ecology of the lake.²⁵ Although acknowledging that "Mono Lake is a scenic and ecological treasure of national significance"²⁶, the Court stresses that in view of the increasing demands of the state for water, the "state must have the power to grant non-vested usufructuary rights to appropriate water even if diversions harm public trust uses".²⁷ However, before doing so, the effects of the diversions on public trust uses must be considered, and an attempt made "so far as feasible, to avoid or minimize any harm to those interests."²⁸ In contrast, in the case before the Court, the diversion was commenced without any consideration of the impact upon the public trust.

In considering the background and history of the litigation, the Court reviews the competing evidence of the parties as to the effects of future diversions on Mono Lake. This fairly detailed review of matters such as increasing salinity, the threats to migratory and local birds and the potential problems to humans from airborne silt, is implicitly a form of guideline to the State of the matters it should be taking into account when considering the effects of the diversion on public trust uses. Thus, the State is required to look beyond the reduction in water level in Mono Lake and consider the broader ecological ramifications of such a reduction.

²⁵ 658 P.2d 709 (Cal., 1983) at 711 and 714-716.

²⁶ *Ibid.* at 712.

²⁷ *Ibid.* at 712.

²⁸ *Ibid.*

Another significant feature of the case is the further extension of public trust purposes. Once again, the adaptability of the trust is stressed; "[t]he objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways." ²⁹

Significantly, no doubt relying on *Marks v. Whitney* to which the Court refers, the values claimed by the plaintiffs are not the traditional trust purposes of navigation, commerce or fishing.

The principal values plaintiffs seek to protect, however, are recreational and ecological - the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds. Under *Marks v. Whitney* ... it is clear that protection of these values is among the purposes of the public trust.³⁰

The *Mono Lake* case removes any doubt that (at least in California) public trust purposes in waters protected by the trust encompass ecological values. How then, does the Court seek to reconcile these increasingly broader values with the growing need for more water? In addition to the initial investigation the State must conduct to ascertain the effect of the diversion upon the public trust, the State has a duty to exercise "**continuous supervision and control** over the navigable waters of the state and the lands underlying those waters." ³¹ This supervision is required because "parties acquiring rights in trust property generally hold those rights subject to the trust, and can assert no right to use

²⁹ *Ibid.* at 719.

³⁰ *Ibid.*

³¹ *Ibid.* at 712.

those rights in a manner harmful to the trust."³²

Importantly, the State's power as administrator of the public trust extends beyond mere supervision; it is a dynamic duty, one responsive to changes in public knowledge and needs.³³ A grant may be revoked, or the trust invoked against lands previously thought free of the trust.

[T]he state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.

The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust. The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses.³⁴

In summary, the application of the public trust to waters in the United States has expanded markedly from its English common law roots. Not only does the trust apply to non-tidal navigable waters, it also applies to non-navigable tributaries to navigable waters, to tidelands which have been granted to private parties and filled,³⁵ and the

³² *Ibid.* at 721.

³³ See for example : *City of Milwaukee v. State* 193 Wis. 423 at 449, 214 N.W. 820 at 830 (1927), "The trust reposed in the state is not a passive trust; it is governmental, active and administrative ... the trust, being both active and administrative requires the law making body ... not only to preserve the trust, but to promote it". Similar comments are made in *Save Ourselves, Inc. v. Louisiana Envtl Control Cmsn* 452 So. 2d 1152 (La 1984) and *District of Columbia v. Air Florida, Inc.* 750 F.2d 1077 at 1083, (D.C. Cir. 1984), "It has evolved from a primarily negative restraint on states' ability to alienate trust lands into a source of positive state duties."

³⁴ *Ibid.* at 728.

³⁵ *Berkeley (City of) v. Superior Court of Alameda County* 26 Cal. 3d 515, 606 P. 2d 362 (1980).

shorezone of non-tidal navigable lakes.³⁶ The purposes or uses of the trust have expanded even more dramatically. From traditional purposes of navigation, commerce and fishing, the trust now embraces a broad range of recreational purposes, the preservation of trust resources in their natural state and ecological values. The state's obligations in fulfilling the trust also may include the power to exclude access to trust resources in areas endangered by overuse.

Part III - Highways

As mentioned in Chapter One, there was no clear expression of a public trust over highways at English common law, although some cases did refer to the municipal corporations or highway authorities as "guardians of the road". However, despite the absence of a clear English pronouncement of a public trust, American courts confidently declared that a municipal corporation was trustee of city streets on behalf of the public.³⁷ For example, in *People v. Kerr* 27 N.Y. 188 (N.Y. App.Div. 1862), 37 Barb. 357 the New York Court of Appeals in determining that the construction of railroads in certain New York city streets would not constitute a public nuisance, stressed that the City of New York was seised in fee of the land in all of the streets in trust, to keep the

³⁶ *State v. Superior Court of Placer County* 29 Cal. 3d 240, 625 P. 2d 256 (1981). For a detailed summary and case list of the resources protected by the public trust, see Rodgers, *Environmental Law*, *supra* note 24 at 158-160.

³⁷ Although the comparison between the public right of navigation and the public rights concerning highways is a frequent one, going back as far as Hale, I am indebted to Selvin, *supra*, note 1 Ch.1 for alerting me initially to the possibility of a public trust over highways, and to the American cases on point. See also Lazarus, *supra* note 1 Ch.1 at 640-641.

same open and used as streets.

The city of New York takes and holds the fee of the streets which have been opened under the statute referred to, in trust, that they should be kept open and used as streets and for that only. This is a trust for the benefit of the public not of the adjacent proprietors alone, nor of the inhabitants or citizens of New York alone, but of the whole people.³⁸

Similarly, in *Story v. N.Y. Elevated Railway Co.* 90 N.Y. 122 (1882), (applied in *Lahr v. Metropolitan Elevated Railway Co.* 104 N.Y. 268 (1887)), the court affirmed that land that had been dedicated for city streets was held by the city on trust for the public. The court stated that although New York City held title to the city streets, "It is held, not as private property but in trust for public use" : *Kellinger v. Forty-Second Street Railway Co.* 50 N.Y. 206 (1872).³⁹

It is important to mention however, that the public trust over city streets recognised in *People v. Kerr*, *supra* and *Story's case*, *supra*, has a legislative base.⁴⁰ By an act of

³⁸ 27 N.Y. 188 (N.Y. App.Div. 1862) at 198-199. See also : *Milhau v. Sharp* 27 N.Y. 611, 15 Barb. 193 (N.Y. App. Div. 1853) In referring to a municipal corporation's powers over city streets, the court in *Milhau* stated at 622 "Those powers were given to the corporation as a trust, to be held and exercised for the benefit of the public from time to time, as occasion might require, and they could neither be delegated to others, nor effectually abridged by any action of the corporate authorities".

³⁹ 90 N.Y. 122 (1882) at 159.

⁴⁰ This is specifically recognised in both cases : *People v. Kerr* 27 N.Y. 188 (1862) at 190, 197 and 212; *Story v. N.Y. Elevated Railway Co.* 90 N.Y. 122 (1882) at 156-158.

1813 ⁴¹ it was declared that the "mayor, aldermen and commonalty of the city of New York shall be seised of the lands taken for streets" and that the streets were to be held in trust and left open for streets.⁴²

However, it appears that the legislation may have been merely declaratory of the common law and at the very least would apply, regardless of the legislation, to land granted or dedicated for public streets. In *People v. Kerr, supra*, Emot J. stresses that because the municipal corporation is a public authority and holds property by a delegation of sovereign power, "[w]hatever right of domain or enjoyment the municipal body possesses by such a title are of the nature of public and not private property".⁴³ In the same case, Wright J. acknowledges that although the "effect and object of the act of 1813, in relation to the streets in question, were to establish a public trust for the benefit of the whole people", ⁴⁴ he recognises that the municipal corporations have stood as trustees with respect to city streets since 1793.⁴⁵

⁴¹ The Act appears to have been entitled "An act to reduce several laws relating to the city of New York into one act", and to belong to a series of Street Opening Acts of 1691, 1787 and 1801 : *Story's case, supra* at 156.

⁴² *Story's case, supra* at 157. With respect to the trust obligation, the Act provided : "In trust nevertheless that the same be appropriated and left open for or as part of a public street, avenue, square or place forever, in like manner as the other public streets in the said city are, or of right ought to be" : *Story's case, supra* at 157.

⁴³ 27 N.Y. 188 (1862) at 203, and see his comments at 199-200.

⁴⁴ *Ibid.* at 212.

⁴⁵ *Ibid.*, Wright J. stating that, "The character which the corporation has uniformly sustained has been that of trustee for the public. It was as such trustee that the State, in 1793, conveyed to it, all its title, estate and interest in such street." Church CJ makes

The early American case law concerning city streets reflects both the broader pressure which a growing population and economy and increased technology placed on public trust resources and, the remarkably flexible and adaptable nature of the public trust doctrine. The public trust doctrine was not reduced to an archaic legal doctrine with the expansion of modern cities, it grew to embrace advances in transportation technology and public sanitation.⁴⁶ Improvements to the health and economic development of cities were upheld even though such advances frequently involved the diversion of public trust resources to private companies. Selvin refers to "extraordinary grants of privilege"⁴⁷ to railroad companies, waterfront development companies, individual riparian proprietors and the early utility companies all made in the name of public interest; "that public interest being synonymous with the economic development and growth of the urban areas".⁴⁸

However, despite the generosity of these grants, Selvin does identify "clearly articulated limits" on the power of the state legislature to alienate trust resources. In particular,

similar comments in *Kellinger v. Forty-Second Street Railway Co.* 50 N.Y. 206 (1872) at 208. While recognising that a statutory trust was expressly created in 1813 with respect to streets, he clearly recognises that a trust existed prior to that date, and that it arose for a variety of reasons : "The corporation of the city of New York has acquired by grant, dedication or confiscation the title in fee to the land on which the streets are laid, but the title thus vested is held not as private property, but in trust for public use, and such as was acquired under the act of 1813 is by that act expressly declared to be held in trust for the purpose of maintaining public streets."

⁴⁶ Selvin, *supra*, note 1 Ch.1 at 1417-1419.

⁴⁷ *Ibid.* at 1421.

⁴⁸ *Ibid.*

although the state could alienate title to trust properties, it could not abdicate regulatory control over those properties.⁴⁹

Selvin concedes that the extension of the public trust doctrine to private ownership of trust resources went way beyond the scope of the public rights envisaged by Hale. However, in summarizing the application of the public trust doctrine in the United States, she argues it was this redefining of the "public interest" which ensured the continuing existence of the public trust in an era of fundamental change :

Nineteenth century jurists saw the trust doctrine as a pliable one; the court determined that the legitimate uses of trust property could expand with technology and changing political and economic needs. The "public good" might often best be served by the private development of trust property - perhaps by a railroad or pipeline company - even if that development disrupted the traditional public uses of the property. This adaptability saved the trust doctrine from becoming an artifact of Lord Hale's time.⁵⁰

As mentioned in Part II of this Chapter, the "public interest" is now being redefined to reflect growing public concern about the environment and the need for preservation and conservation of precious and diminishing natural resources.

⁴⁹ *Ibid.*, at 1421-1422. See similar comments at 1412.

⁵⁰ *Ibid.*, at 1422. Lazarus, *supra* note 1 Ch.1 at 641 also refers to the utilization of the public trust concept to promote economic development. In addition to cases concerning city streets, he refers to the use of the doctrine by Californian courts to facilitate access by growing cities to water. He remarks that "the traditional trust doctrine concept in the United States became as much a legal basis for economic expansion as for resource protection."

Part IV - Parks and Wildlife : To Be Or Not To Be Within The Public Trust

In view of the expansive scope of trust purposes discussed earlier with respect to navigable waters, and especially the emphasis placed on ecological values, it would seem a matter of course that parks and wildlife would be protected public trust resources in their own right. As Hunter remarks in relation to land :

There is no inherent reason however, why the public trust doctrine as expounded in *Marks* should not protect all ecologically important lands ... If one of the purposes of the public trust is to protect the land's ecological integrity, then ecology should be relevant to defining which lands are subject to the trust. Those lands associated with particularly significant or scarce ecological resources warrant stewardship on behalf of the public and should be granted protection.⁵¹

However, the approach of the American courts to wild places and wildlife has been somewhat disjointed and disappointing. Most importantly, the courts have failed to keep step with the developments in California concerning the ecological values of trust resources. Nonetheless, as this section will seek to establish, the foundations exist at American common law for the public trust to be applied to both parks and wildlife.⁵²

⁵¹ D.B. Hunter, "An Ecological Perspective on Property : A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources" (1988) 12 H.E.L.R. 311 at 374. For a similar call for a more ecological approach to resource allocation in connection with the public trust, see also : G.D.Meyers, "Variation on a Theme : Expanding the Public Trust Doctrine to Include Protection of Wildlife" (1989) 19 Env'tl. L. 723; A. Rieser, "Ecological Preservation as a Public Property Right : An Emerging Doctrine in Search of a Theory" (1991) 15:2 H.E.L.R. 393 and H.Bader, "Antaeus and the Public Trust Doctrine : A New Approach to Substantive Environmental Protection in the Common Law" (1992) 19 B.C. Env'tl. Aff. L. Rev. 749.

⁵² Several commentators have queried the appropriateness of "extending" the public trust doctrine to wildlife and parks. Dunning, *supra* note 42 Ch.1 remarks at 519, "Exciting as extension of the public trust doctrine to these new frontiers may be to many, it would be well to acknowledge that the doctrine currently draws a great deal of strength and legitimacy directly from its long historical link with navigable water. Much remains to be done to make the public trust doctrine a truly effective tool to preserve public values

Parks

As early as 1912, the American courts could confidently assert that land which had been dedicated as an inner city public park was subject to a trust in favour of the people. In *Higginson v. Slattery* 212 Mass 583, 99 N.E. 523 (1912), the Court was called upon to consider whether the City of Boston could be restrained from erecting a building in an inner city public park. The Court conducted an extensive review of earlier American authorities, citing cases such as *Holt v. City of Somerville* 127 Mass. 408 at 411, where the court stated, " [t]he legal title became vested in the city not for its own use in a corporate capacity, but in perpetual trust for the use of all who at any time might enjoy the benefit of a public park." Likewise in *Clark v. Waltham* 128 Mass. 567 at 569, the court deciding that the city held "the park not for its own profit or emolument but for the direct and immediate use of the public". Similarly, the Boston Common, which was dedicated by its owners "for the common use of the inhabitants of Boston as a training field and cow pasture" was subject to a trust. In *Steele v. Boston* 148 Mass. 578 at 580, the court concluded "the city holds the Common for the public benefit, and not for its emolument, or as a source of revenue, and ... maintains the Common solely for the benefit of the public". Interestingly, playgrounds and public shade trees acquired and maintained by cities and towns were held to be analogous to inner city parks; "the town is not the owner of the playground in any ordinary sense. The property is held under the

in navigable water and associated natural resources; consequently it might be best at this time not to seek to extend the public trust doctrine to entirely new areas". See also Lazarus, *supra*, note 1 Ch.1 especially at 687-691 and 710-713, for criticism of the public trust as a tool for promoting environmental protection and conservation.

statute solely for public use" : *Kerr v. Brookline* 208 Mass. 190, 94 N.E. 257.

Although the Court in *Higginson* recognised that the public purpose of land may be changed by law and devoted to some other public purpose, the legislation before the Court did not show the required legislative intent. In a frequently cited passage, the Court concluded :

Land appropriated to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation to that end ... The policy of the commonwealth has been to add to the common law inviolability of parks express prohibition against encroachment by buildings, highways, steam or street railways.⁵³

A dominant theme evident in the case excerpts referred to in *Higginson* is that trust uses of parks do not extend to commercial enterprise or profit making activities; the city does not hold the park for its own "profit or emolument". This theme reappears throughout the American case law. For example, in *Gould v. Greylock Reservation Commission* 350 Mass. 410, 215 N.E. 2d 114 (1966) the Court was called upon to invalidate, inter alia, a lease of 4,000 acres in Greylock State Reservation to Mount Greylock Tramway Authority and to prohibit the Greylock Reservation Commission and the Authority from proceeding with a scheme for the leased area for a ski resort, ski lifts and aerial tramway.

Citing the passage in *Higginson* referred to earlier, the Court reviewed the relevant

⁵³ 99 N.E. 523 (1912) at 527 - 528.

legislation. In concluding that the development proposal was not authorized by the legislation, the Court referred to "one troublesome aspect" of the development project:

This recreational scheme, in the profits of which Resort [Services Inc] is to share, is to compete with private recreational ventures of similar character. The profit sharing feature and some aspects of the project itself strongly suggest a commercial enterprise ... we find no express grant to the Authority of power to permit use of public lands and of the Authority's borrowed funds for what seems, in part at least, a commercial venture for private profit.⁵⁴

In contrast to the resounding affirmation of the importance of commerce in *Illinois Central* ⁵⁵, and the "expansion" of the public trust over city streets to embrace private enterprise within the terms of the trust, discussed earlier, there seems to be a perception in these cases of "dirty money"; that commercial enterprise and parks are mutually exclusive, at least in the absence of clear legislative intent to the contrary. Interestingly, a similar view is expressed in the *Mono Lake* case, *supra* about trust resources generally. Although recognising that the public trust doctrine does not prevent the state from choosing between trust uses, the Court comments as follows:

Most decisions and commentators assume that "trust uses" relate to uses and activities in the vicinity of the lake, stream, or tidal reach at issue ... The tideland cases make this point clear; after *City of Berkeley v. Superior Court* ... no one could contend that the state could grant tidelands free of the trust merely because the grant served some public purposes, such as increasing tax revenues, or because the grantee might put the property to a commercial use. ⁵⁶

Thus "increasing tax revenues" or putting the property to a "commercial use" will not displace the trust, because such public purposes are not seen as synonymous with public

⁵⁴ 215 N.E. 2d 114 (1966) at 126.

⁵⁵ "The harbour of Chicago is of immense value to the people of the State in the facilities it affords to its vast and constantly increasing commerce", 146 U.S. 387 (1892) at 454.

⁵⁶ 658 P. 2d 709 (Cal. 1983) at 723-724.

trust purposes.⁵⁷ The point is worth emphasizing because the view that trust purposes do not embrace commercial enterprise is consistent with the greater importance now being placed on ecological values and indicative of the public trust evolving to meet changing public values concerning trust resources. Furthermore, if ecological values are so important, the call for parks to be subject to the public trust becomes even stronger.

The Redwood National Park litigation affirmed the application of the public trust doctrine to national parks in the United States. In a series of three cases,⁵⁸ the United States District Court was asked to decide whether the Secretary of the Interior had taken reasonable steps to protect the resources of Redwood Park, and if not, whether his failure to do so had been arbitrary, capricious or an abuse of discretion. The Park had been established in 1968 pursuant to the *Redwood National Park Act* 16 U.S.C.A. Secs. 79a - 79j "to preserve significant examples of primeval coastal redwood ... forests and the streams and seashores with which they are associated for purposes of public inspiration, enjoyment, and scientific study."

⁵⁷ The test in *Illinois Central* supra is a twofold test : The control of the State for the purposes of the trust will not be lost unless (1) the grant is used in promoting the interests of the public, or (2) there is no substantial impairment of the public interest in the land and waters remaining; 146 U.S. 387 at 453.

⁵⁸ *Sierra Club v. Department of Interior* 376 F. Supp. 90 (1974) (whether the Sierra Club's claim disclosed a cause of action); *Sierra Club v. Department of Interior* 398 F. Supp. 284 (1975) (whether the Secretary of the Interior had satisfied his statutory and public trust duty in relation to Redwood Park); and *Sierra Club v. Department of Interior* 424 F. Supp. 172 (1976) (reviewing whether the Department had complied with its duties).

In the first case, *Sierra Club v. Department of Interior* 376 F.Supp. 90 (1974), the Court held that the Secretary had both "general fiduciary obligations" under the *National Park Service Organic Act* 16 U.S.C. ⁵⁹ and specific statutory duties under the *Redwood National Park Act*. In describing the Secretary's fiduciary duty, the Court refers to *Knight v. United Land Association* 142 U.S. 161, 12 S.Ct 258; 35 L.Ed. 974 (1891) :

The Secretary [of the Department of the Interior] is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out and that none of the public domain is wasted or disposed of to a party not entitled to it. ⁶⁰

Interestingly, particularly in the Canadian context, this "trust responsibility" is described as analogous to the trust relationship of the Secretary toward the Indians. The similarity between the public trust doctrine and the fiduciary obligation of the Canadian and provincial governments to First Nations peoples is considered in greater detail in Chapter Four.

In *Sierra Club v. Department of the Interior* 398 F. Supp. 284 (1975), the second Redwood Park case, the Court reaffirms that the *National Park Service Organic Act*

⁵⁹ Section 1 of that Act provides for the creation of the National Park Service in the Department of the Interior. The Service is required to "promote and regulate the use of Federal areas known as national parks, monuments and reservations ... by such means and measures as conform to the fundamental purpose of said parks, monuments and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." This section is remarkably similar to section 4 of the Canadian National Parks Act R.S.C. 1970, c. N-13, as amended.

⁶⁰ 142 U.S. 161 (1891) at 181.

imposes a trust :

[T]here is, in addition to these specific powers [under the *Redwood National Park Act*], a general trust duty imposed upon the National Park Service, Department of the Interior, by the *National Park System Act* ... to conserve scenery and natural and historic objects and wildlife ... and to provide for the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.⁶¹

Reviewing the actions of the Secretary, the Court concluded that the defendants had "unreasonably, arbitrarily and in abuse of discretion ... failed, refused and neglected" to perform the duties imposed on them by the *National Park System Act* and the *Redwood National Park Act* and ordered that within a reasonable time, the defendants exercise their powers and perform the duties imposed upon them to afford full protection to the Park from adverse consequences of logging and provide the plaintiffs with a progress report upon compliance with the order, or, in lieu of compliance, a report as to why the order has not been complied with.⁶²

Unfortunately, the application of the public trust doctrine to parks since the Redwood Park litigation has been somewhat inconsistent. In *Sierra Club v. Andrus* 487 F.Supp. 443 (D.D.C. 1980) a different U.S. District Court concluded that the *National Park Service Organic Act* did not impose any special trustee duties upon the Secretary of the Interior. Although the plaintiff relied on the three Redwood Park cases, the Court does

⁶¹ 398 F.Supp. 284 (1975) at 287.

⁶² In the third Redwood Park case, *Sierra Club v. Department of the Interior* 424 F.Supp 172 (N.D. Cal. 1976) the Court reviewed the actions taken by the Secretary and concluded that the Department of the Interior had complied with the Court's earlier order.

not refer to these cases in the judgment. Instead the Court focuses on the Report of the Senate Committee on Energy and Natural Resources (which approved an amendment to the *National Park Service Organic Act* in 1978) to support its conclusions that the statutory duties imposed upon the Secretary under the *National Park Service Organic Act* comprise all the responsibilities which the Secretary must faithfully discharge.⁶³

There is however, further American authority to support the view that the public trust applies to parks at common law. In *Paepcke v. Public Building Cmsn of Chicago* 46 Ill. 2d 230, 263 N.E. 2d 11 (1970) a group of Chicago citizens brought an action to prevent the Public Building Commission and several other City of Chicago authorities from implementing plans to construct a school and recreational facilities in two parks. The reasoning of the Court is somewhat curious; in dismissing the action the Court held that the owners of property in the vicinity of the parks had no private property right of continuation of park use. Why the Court speaks in terms of private property rights is not quite clear, unless referring to the public trust. However, what is clear is that the Court accepted without question that the parks were trust properties. In this case, the Chicago General Assembly had dedicated the lands in question for use as public parks and

⁶³ The court stated at 449, "By asserting an explicit statutory standard [in the 1978 amendment] 'as the basis of any judicial resolution of Park management issues', Congress eliminated 'trust' notions in National Park System management." One commentator has criticised this decision, describing the conclusions as "difficult to support". He remarks that "The language of the 1978 amendment is simply not clear; if anything, it seems implicitly to impose trust obligations on the National Park Service by referring to the 'high public value and integrity of the National Park System.'" : C.F. Wilkinson, "The Public Trust in Public Land Law" (1980) 14 U.C.L.D.L.Rev. 269 at 292.

accordingly, "[s]uch a dedication having been made by the sovereign, the agencies created by it hold the properties in trust for the uses and purposes specified and for the benefit of the public." ⁶⁴

The dedication, while creating a trust, was not irrevocable however. Trust lands could be diverted by explicit and open action of the legislature. In this case, the legislation was sufficiently broad and comprehensive to allow the diversion proposed.

A similar clash of interests occurred in *Clements v. Chicago Park District* 96 Ill. 2d 26, 449 N.E. 2d 81 (1983). In that case, a group of citizens objected to the development of a golf driving range in a Chicago city park. Although the reasoning of the majority as to why construction of the driving range was a valid park purpose is fairly weak, the Court clearly assumed that the park was subject to the public trust. Similarly, in another Illinois case, *Wade v. Kramer* 459 N.E. 2d 1052 (Ill. App. 4 Dist. 1984), although not upholding the trust in regard to the construction of a bridge and connecting highway, the Court clearly accepted that the conservation area, wildlife and archaeological remains to be affected by the construction were subject to the public trust.

Wildlife

The protection of wildlife under the public trust has experienced an equally chequered history. It has been argued that the public trust in its original form contemplated the

⁶⁴ 263 N.E. 2d 11 (1970) at 15.

protection of wildlife within its scope.⁶⁵ In *Arnold v. Mundy* 6 N.J.L. 1 (1821) at 17, Chief Justice Kirkpatrick remarked, in terms reminiscent of *The Institutes of Justinian*, that :

[C]ommon property according to writers upon the law of nature and of nations, and upon the civil law, are the air, the running water, the sea, the fish and the wild beasts. But inasmuch as things in which a sort of transient usufructuary possession only can be had ; and inasmuch as the title to them and to the soil by which they are supported, and to which they are appurtenant, cannot well, according to the common law notion of title, be vested in all the people; therefore the wisdom of that law has placed it in the hands of the sovereign power, to be held, protected and regulated for the common use and benefit."⁶⁶

Early American cases held wildlife to be subject to the ownership of the state in trust for the people. In *LaCoste v. Dept of Conservation* 263 U.S. 545 (1924), citing the case of *Geer v. Connecticut* 161 U.S.519 (1896), the Court stated that "[t]he wild animals within its borders are, so far as capable of ownership, owned by the State in its sovereign capacity for the benefit of all its people."⁶⁷ Similarly in *Fields v. Wilson* 186 Ore. 491, 207 P. 2d 153 (1949) at 156 :

⁶⁵ Meyers, *supra*, note 51 at 724. Meyers at 729 draws an analogy between water and wildlife to support his argument that wildlife should be subject to a public trust. He notes that (1) in its natural state, water and wildlife can not be owned but are subject to usufructuary rights only and (2) ownership of wildlife, like water, has historically been treated as an aspect of sovereignty. For a discussion of the public trust doctrine as a means to save endangered species, in particular fish, see S.W. Reed, "Fish Gotta Swim : Establishing Legal Rights to Instream Flows Through the Endangered Species Act and the Public Trust Doctrine" (1991-1992) 28 Idaho L. Rev. 645.

⁶⁶ 6 N.J.L. 1 (1821) at 71.

⁶⁷ 263 U.S. 545 (1924) at 549. See also *State Department of Environment Protection v. Jersey Central Power & Light Co.* 125 N.J. Super. 97, 308 A. 2d 671 (1973). The court stated at 673, "wild animals, including fish, within the jurisdiction of a State as far as they are capable of ownership, are included in the public trust". Significantly, the court held that the public trust could be damaged by pollution.

Beavers are animals *ferae naturae*, "and while in a state of freedom their ownership, so far as a right of property can be asserted, is in the state, not as a proprietor, but in its sovereign capacity for the benefit of and in trust for its people in common" : *Monroe v. Withycombe* 84 Or. 328 at 334.

However, in *Hughes v. Oklahoma* 441 U.S. 322, 60 L.Ed 2d 250, 99 S Ct 1727 (1979), the United States Supreme Court expressly overruled *Geer v. Connecticut* with respect to commerce clause challenges to statutory regulation of natural resources. State ownership of wildlife was described as a "19th century legal fiction". ⁶⁸ Rehnquist J dissenting, Burger J concurring with his dissent, argued that the concept expressed by the "ownership" doctrine in *Geer* was not obsolete :

[T]he ownership language of *Geer* and similar cases is simply a shorthand way of describing a State's substantial interest in preserving and regulating the exploitation of the fish and game and other natural resources within its boundaries for the benefit of its citizens. ⁶⁹

Reviewing the majority judgment, Rehnquist J. notes that the majority may not have entirely overruled the principles in *Geer*. He refers to the fact that the majority specifically recognise that:

1. the State's interest in conservation and protection of wild animals is a legitimate social purpose; and
2. overruling *Geer* does not leave the State powerless to protect and conserve

⁶⁸ 60 L.Ed 2d 250 (1979) at 261. This wording is taken from the case of *Douglas v. Seacoast Products Inc.* 431 U.S. 265 cited in the judgment

⁶⁹ *Ibid.* at 265.

wildlife within its borders.⁷⁰

The comments of Mr Justice Rehnquist reflect the views of the United States Supreme Court in the earlier decisions of *Baldwin v. Fish & Game Cmsn of Montana* 436 U.S. 371, 56 L.Ed 2d 354, 98 S Ct 1852 (1978) and *Douglas v. Seacoast Products Inc.* 431 U.S. 265, 52 L.Ed. 2d 304, 97 S Ct 1740 (1977). In *Baldwin*, Blackmun J., who delivered the majority judgment, disagreed that *Geer* had no remaining vitality :

The fact that the State's control over wildlife is not exclusive and absolute in the face of federal regulation and certain federally protected interests does not compel the conclusion that it is meaningless in their absence.⁷¹

Burger J., who concurred with the majority in *Baldwin*, commented that although the *Geer* doctrine is "admittedly a legal anachronism of sorts"⁷² the doctrine is not completely obsolete, rather, "[i]t manifests the State's special interest in regulating and preserving wildlife for the benefit of its citizens."⁷³ The actual extent of State control over wildlife is not, however, really explained in any detail in these recent Supreme Court cases, although Burger J. in *Baldwin* does identify certain limitations on the State's power. For example, a State is prohibited from offending the Fourteenth Amendment or restricting use of or access to wildlife in a way that burdens interstate commerce.⁷⁴

⁷⁰ *Ibid.*

⁷¹ 56 L.Ed. 2d 354 (1978) at 367.

⁷² *Ibid.* at 371.

⁷³ *Ibid.*

⁷⁴ *Ibid.* at 371-372.

Until *Re Steuart Transportation Company* 495 F. Supp. 38 (1980) it was unclear whether or not the public trust still applied to wildlife. In overruling *Geer* had the United States Supreme Court abolished not merely state ownership, but the public trust as well ? At issue in *Re Steuart* was whether or not the Federal government and the government of Virginia could sue a vessel owner for damage caused to migratory waterfowl, claiming statutory penalties and cleanup costs.

The United States District Court accepted Steuart's argument that the State of Virginia did not own the waterfowl in question; the "authority in support of this position is clear and voluminous." ⁷⁵ However, the Court noted that :

[M]any of the cases refuting a state's claim to ownership of resources turned upon principles of federalism and pre-emption by federal legislation of state control measures. Neither of these principles is applicable to the current issue before this Court. ⁷⁶

The Court then commented that neither the Federal nor Virginian government sought recovery for the value of the waterfowl based upon a claimed ownership interest. Rather, recovery was sought under either, or both, the public trust doctrine and the doctrine of *parens patriae*.⁷⁷ The Court concluded that both of these doctrines supported the claims

⁷⁵ 495 F.Supp. 38 (1980) at 39.

⁷⁶ *Ibid.* at 39-40.

⁷⁷ Under the doctrine of *parens patriae*, the "state acts to protect a quasi-sovereign interest where no individual cause of action would lie" : *ibid.* at 40. Here, as no individual citizen could seek recovery for the waterfowl, and "the state certainly has a sovereign interest in preserving wildlife resources", *ibid.*, the claim was supportable under the doctrine. See also *Maine v. M/V Tamano* 357 F.Supp. 1097 (D.C. Me 1973) which held that a state may sue for injury to its water and wildlife under a *parens patriae* theory.

for the waterfowl. With respect to the public trust doctrine, the Court stated :

Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. **Such right does not derive from ownership of the resources but from a duty owing to the people.** See eg *Toomer v. Witsell* 334 U.S. 385 ... (upholding state's right "to conserve or utilize its resources on behalf of its citizens.") ⁷⁸

Unfortunately, the Court does not elaborate further on the application of the public trust doctrine to wildlife. What is the extent of the "duty owing to the people" ? And, even more importantly given the Court's earlier comments concerning principles of federalism, how does the public trust interact with federal law ?

Subsequent judicial consideration of *Re Steuart* has failed to clarify matters. Rather, the case has been cited as one of the few examples where the public trust doctrine has been held to apply to the Federal government. ⁷⁹ The case has however, been accepted as authority for the proposition that a public trust applies to wildlife. In *U.S. v. Burlington Nthn Railroad Co.* 710 F.Supp. 1286 (D.Neb. 1989) on a motion for partial summary judgment, the U.S. District Court (Nebraska) held that the United States had the right to recover damages for lost wildlife in a waterfowl production area. Referring to the Redwood Park litigation *supra*, *Knight v. United Land Association, supra* and *Re Steuart*, the Court concluded :

In view of this trust position, and its accompanying obligations, it appears that the United States, much like the States in their *parens patriae* capacities ... can

⁷⁸ *Ibid.* at 40.

⁷⁹ See for example, *District of Columbia v. Air Florida, Inc.* 750 F.2d 1077 (1984).

maintain an action to recover for damages to public lands and the natural resources on them, which in this action would encompass the destroyed wildlife.

⁸⁰

The application of the public trust at common law to parks and wildlife has ebbed and flowed. Although there is common law authority for the continued application of the trust to these resources, the extent of the doctrine's application is still somewhat uncertain. Furthermore, the view that the *National Park Service Organic Act* imposes a trust on the Secretary and the Department of the Interior has not been universally accepted.

The fact that there is still so much uncertainty as to whether the public trust applies to parks and wildlife in the United States is surprising in view of the expansive and evolving list of trust purposes with regard to tidelands, navigable waters and non-navigable tributaries to navigable waters. Furthermore, given that the rationale of the public trust is now increasingly viewed as one of preservation and conservation of invaluable resources,⁸¹ there is no reason for the exclusion of wild places and wild

⁸⁰ 710 F.Supp. 1286 (1989) at 1287. See also: *Owsichuk v. State Guide Licensing* 763 P.2d 488 (Alaska 1988), note 12 at 495. Referring to *Hughes v. Oklahoma*, *supra*, the Court stated "Nothing in the opinion however, indicated any retreat from the state's public trust duty discussed in *Geer*". *Re Steuart* was cited as further support for the view that the public trust still existed independently of state ownership of wildlife.

⁸¹ Support for this view can however be found in America as early as 1909. In the *Report of the National Conservation Commission* S.Doc. No. 676, 60th Cong., 2d Sess. 109 (1909), Secretary Holmes stated the basis of the trust as follows : "The resources which have required ages for their accumulation to the intrinsic value and quality of which human agency has not contributed, which there are no known substitutes, must serve as the welfare of the nation. In the highest sense, therefore, they should be regarded as

things from the public trust. In *Morse v. Oregon Div of State Lands* 34 Or. App. 853, 581 P. 2d 520 (1978), affirmed 285 Or. 197, 590 P.2d 709 (1979), the Oregon Court of Appeals gave the following reasons for the existence of the trust :

The severe restriction upon the power of the state as trustee to modify water resources is predicated not only upon the importance of the public use of such waters and lands but upon the **exhaustible and irreplaceable nature of the resources and its fundamental importance to our environment. These resources, after all, can only be spent once.** Therefore, the law has historically and consistently recognised that rivers and estuaries once destroyed or diminished may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee.⁸²

Conclusion

The growth of the public trust doctrine in the United States has been quite remarkable. The key to the continued existence of the doctrine, despite significant social, industrial and economic change has undoubtedly been the adaptability and flexibility of the trust; what one commentator has described as its almost "chameleon-like" nature.⁸³ Selvin, in a detailed historical review of the public trust doctrine in American law and economic policy, emphasizes how the doctrine has mirrored fundamental shifts in societal and judicial values.⁸⁴ As discussed in Part IV of this Chapter, the public trust doctrine has embraced partial private ownership of trust resources as a means of fostering economic development. Now, however, as considered in Part III, the trust is being used to facilitate

property held in trust for the use of the race rather than for a single generation ..." in Cohen, *supra*, note 19 Ch.1 at 388 n. 4.

⁸² 34 Or.App. 853 at 860.

⁸³ Blumm, *supra* note 42 Ch.1 at 579.

⁸⁴ Selvin, *supra* note 1 Ch.1.

preservation and conservation of trust resources - the "public" values of the public trust have shifted yet again. Selvin identifies this shift in direction as follows :

State and federal judges during the nineteenth century typically resorted to the trust concept to uphold governmental or private behaviour that they deemed to be in "the public interest" and throughout the century they consistently defined that public interest to be largely synonymous with regulated economic growth. In recent years, however, the courts have begun to invoke the public trust doctrine to uphold private or governmental actions as being in the "best interests of the public" when those actions alleviate pollution, or reserve scenic, historical, or other natural resources for public recreation, scientific study, or preservation or insure greater public access to these resources.⁸⁵

* * * *

⁸⁵ *Ibid.* at 1438.

CHAPTER THREE

DEVELOPMENT OF THE PUBLIC TRUST DOCTRINE AT CANADIAN COMMON LAW

Introduction

Although it appears that the only explicit reference to a public trust at English common law is that by Best J. in *Blundell v. Catterall*, *supra*, as with the early American courts, Canadian courts confidently asserted that there was a public trust with respect to the public rights of navigation and fishing and the public rights concerning highways. This recognition was based largely on the English cases discussed in Chapter One. In contrast however, to the explosion of the public trust doctrine and public trust authors in the United States, the Canadian common law public trust has been largely dormant. This may have been due in part to problems with lack of legal standing for environmental plaintiffs. Given the relaxation of standing requirements by the Canadian Supreme Court in *Finlay v. Canada (Minister of Finance)* [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321 (considered in Chapter Four), standing should no longer pose a barrier to common law actions vindicating the public trust.

Likewise, Canadian academic interest in the subject has been virtually non-existent. As mentioned in the Introduction, this paper is probably the first academic recognition of a public trust doctrine at Canadian common law. The sole journal article on the public trust doctrine in Canada is less than optimistic about the development of the doctrine at

Canadian common law.¹ Although Hunt notes that "the public right of fishing and navigation is well established in Canada, even though its scope is fairly narrow",² she concludes "it appears that there have not been any successful attempts to broaden the scope of the right or to have the Crown characterized as a trustee in relation to public rights".³ She does not mention the three cases cited in this Chapter identifying a trust with respect to navigation and fishing and makes no mention of the public trust over highways.

Part I of this Chapter explores the three early Canadian cases which recognize a public trust over the public rights of navigation and fishing as well as the Canadian public rights of navigation and fishing generally. Unfortunately, despite this early recognition of the public trust, the Canadian public trust concerning navigation and fishing has been in hibernation since the late nineteenth century. The public rights of navigation and fishing may have been recognized consistently by Canadian courts, but the public trust with respect to those rights has been idle, quietly lying in some back eddy, awaiting discovery by a perseverant environmental law student. Importantly, however, the distinctive features of the English public rights of navigation and fishing identified in Chapter One which led American and Canadian courts to confidently assert a public trust are mirrored in Canadian law, thereby providing a solid foundation to revitalize the public trust with

¹ Hunt, *supra* note 2 Ch.1.

² *Ibid.* at 166.

³ *Ibid.* at 167.

respect to these two public rights.

Part II considers the public rights with respect to highways. Interestingly, the strongest modern expression of the public trust doctrine in Canada is that concerning highways. Although the public trust over highways is unlikely to be expanded to embrace the public rights of navigation and fishing, or a broader public trust over resources which are "special" in nature, the public trust over highways is at least modern day evidence of the public trust doctrine at Canadian common law.

The fact that the public trust is at various stages of development in Canada should not preclude its re-awakening. The Canadian affirmation of the distinctive features of the public rights of navigation and fishing, coupled with an initial express recognition of the public trust have served to lay the foundations for a modern Canadian common law revival of the public trust. The likely consequences of such a revival are considered in Chapter Four.

Part I - Navigation and Fishing

As with the American courts, Canadian courts were quick to recognize a public trust with respect to the public rights of navigation and fishing. That recognition was however, both limited in scope and fairly shortlived.

The earliest Canadian articulation of the public trust with respect to navigation and fishing appears to have been in *R. v. Meyers* (1853) 3 U.C.C.P. 305. In that case, concerning a nuisance action for obstruction of a navigable river, Macauley J. conducts an extensive review of the English authorities, (covering approximately 39 pages) to ascertain what constitutes a "navigable river" at common law. Referring to this judgment and the English authorities, McLean J. states that :

Without therefore attempting to find in English cases any distinct authorities to guide us in the decision of questions relating to streams at the distance of some thousand miles from the influence of the tides, I have no hesitation in stating it as my opinion that the great lakes and the streams which are in fact navigable, and which empty into them in these provinces, must be regarded as **vested in the crown in trust for the public uses for which nature intended them** -that the crown, as the guardian of public rights, is entitled to prosecute and to cause the removal of any obstacles which obstruct the exercise of public right, and cannot by force of its prerogative curtail or grant that which it is bound to protect and preserve for public use.⁴

In *R. v. Lord* (1864) 1 P.E.I. 245, in determining whether the erection of a weir on the foreshore below the ordinary high water mark for the purposes of collecting seaweed constituted a nuisance, Peters J. considered the scope of the public rights of navigation and piscary (fishing):

The right of property in the sea and the soil at the bottom, and also the land between high and low marks, is in the Sovereign, but, though the King has the property, the people have the necessary use. But these rights of use are only the rights of piscary and navigation ... **With respect to these public rights, viz. navigation and fishery, the King is**, in fact, nothing more than a trustee of the public and has no authority to obstruct, or grant to others, any right to obstruct, or abridge the public in the free enjoyment of them. But subject to these rights

⁴ (1853) 3 U.C.C.P. 305 at 357. *R. v. Meyers* was considered in *Dunstan v. Hells Gate Enterprises Ltd* (1987) 20 B.C.L.R. (2d) 29 (C.A.) but only with respect to the dedication of highways.

the King may grant the soil of the shore and all private rights of the Crown with it.⁵

Similarly, in the Canadian Supreme Court decision of *R. v. Robertson* (1882) 6 S.C.R. 52, in deciding, inter alia, whether an exclusive right of fishing existed in part of the Miramichi River, Ritchie C.J. was in no doubt that the Crown was the trustee of the public right of fishing. Having earlier affirmed the Irish decision of *Murphy v. Ryan* (1868) IR 2 C.L. 143,⁶ he concluded that :

[T]he ungranted lands in the province of New Brunswick, being in the crown for the benefit of the people of New Brunswick, **the exclusive right to fish** follows as an incident, and **is in the crown as trustee for the benefit of the people of the province exclusively.**⁷

Strong J. in *R. v. Robertson, supra*, also describes the Crown as trustee of the public. In considering whether exclusive rights in fisheries could be granted in large navigable non-tidal rivers, he remarks that this is "a question the solution of which must depend on whether the beds of such rivers are vested in the Crown in right of the Dominion, not as part of its domain, but as **trustee** for the public, or in the owners of the adjacent lands, inasmuch as the right of fishing would in the first case be in the public as of

⁵ (1864) 1 P.E.I. 245 at 257. *R. v. Lord* was considered in *North Saanich (District) v. Murray* [1974] 1 W.W.R. 179, but there was no mention of the public trust.

⁶ "[T]he right of fishing in the sea, and in its arms and estuaries, and in its tidal waters, wherever it ebbs and flows, is held by the common law to be publici juris, and to belong to all the subjects of the Crown - the soil of the sea, and its arms and estuaries, and tidal waters being **vested in the Sovereign as a trustee for the public**" : *Murphy v. Ryan* (1868) IR 2 C.L. 143 at 149.

⁷ (1882) 6 S.C.R. 52 at 126.

common right, but in the second vested in the riparian proprietors".⁸ While he does not answer this question, it is clear that if title was vested in the Crown, it would be as trustee.

Accordingly, as these three early Canadian cases indicate, Canadian common law has recognised and affirmed a public trust doctrine with respect to the public rights of navigation and fishing. Furthermore, it appears that the public trust with respect to the public right of fishing may be imposed on the Crown in its capacity as *parens patriae*.⁹ However, aside from these early cases, and the cases concerning highways (considered in greater detail in Part II) there appears to have been no specific endorsement or mention of the public trust in subsequent cases. Attempts to extend the public trust to provincial and national parks in Canada have not led to judicial pronouncements on the doctrine. In *Green v. Ontario* (1973) 2 O.R. 396 (Ont.H.C.), considered in Chapter Four, the plaintiff's attempt to assert a statutory public trust pursuant to the *Provincial Parks Act*¹⁰ was summarily rejected by the court. The public trust doctrine was raised

⁸ *Ibid.* at 138. See also his comments at 132 concerning American public trust cases.

⁹ See : *Mann v. The Queen* (1 June 1990), Vancouver A881092 (B.C.S.C.) and again (25 April, 1991) Vancouver A881092 (B.C.S.C.) (application to strike out entire amended statement of claim dismissed); and G.C. La Forest, *Water Law in Canada - The Atlantic Provinces* (Information Canada : Ottawa, 1973) at 197. Although LaForest cites the case of *McNeill v. Jones* (1894) 26 N.S.R. 299 in support of this proposition, I am unable to find any argument or statement to this effect in the case. The *parens patriae* doctrine has been raised also as a basis for the public trust doctrine in America with regard to wildlife - see Ch.2, Wildlife.

¹⁰ R.S.O. 1970, c. 371.

also in litigation concerning logging in Wood Buffalo National Park, but as the case was settled there was no consideration of whether a public trust existed under the *National Parks Act*.¹¹ The most recent judicial consideration of the public trust doctrine appears to be the unreported decision of *Mann v. The Queen*.¹² However, as the decision only involved a chambers application, there was little consideration of the public trust doctrine. This case is considered in greater detail in Chapter Four.

What then is the nature and scope of the rights of the Canadian public trust with respect to fishing and navigation ? Has the public trust been whittled away ? Although there may not have been subsequent judicial affirmation of a public trust with respect to navigation and fishing, it is clear that the distinctive features of the English public rights of navigation and fishing considered in Chapter One are recognised also at Canadian law. A grantee from the Crown takes subject to the public rights of navigation and fishing, incidental rights are encompassed in the public rights, legislation is required to extinguish the rights and, the Crown has a duty of guardianship, protection and preservation. The public trust over navigation and fishing may not have been continuously upheld, but the special nature of the public rights of navigation and fishing has certainly been affirmed. As argued in Chapter Four, the fact that these distinctive features have been recognized by Canadian courts in addition to the initial recognition of the public trust doctrine, lays the foundations for a modern common law revival of the public trust doctrine in Canada.

¹¹ R.S.C. 1970, c. N-13, as amended.

¹² *Supra*, note 9.

Navigable Waters

Although the early Canadian courts relied heavily on the English common law to define the perimeters of the public rights of navigation and fishing, the courts were prepared to recognise that some English common law principles could be inappropriate in a Canadian context. As mentioned earlier, at English common law, the test of navigability was based primarily on tidal flow, and the soil of rivers so far as the tide flowed and reflowed was prima facie in the Crown : *Malcomson v. O'Dea* (1863) 10 HL Cas 593. Title to non-tidal rivers was generally in the adjoining private riparian owners, as their title extended by presumption to the centre of the waterway in question. As stated in *Bristow v. Cormican* (1878) 3 App Cas 641 , "[i]t is clearly and uniformly laid down in our books, that where the soil is covered by the water forming a river in which the tide does not flow, the soil does of common right belong to the owners of the adjoining land".¹³

Inland lakes, regardless of their size, were subject to private ownership also. In *Johnston v. O'Neill* [1911] AC 552, the House of Lords held that no public right of eel fishing existed in Lough Neagh. Although the lake was navigable in fact and, was the largest inland lake in the United Kingdom, covering an area of 150 square miles, because the lake was non-tidal, there was no public right of fishing. Lord McNaughten referred to two "incontrovertible" propositions :

1. the Crown is not of common right entitled to the soil or waters of an

¹³ (1878) 3 App Cas 641 at 665-666. See also : *Lamb v. Newbiggin* (1844) 1 Car. & Kir 549 at 541 and *Bickett v. Morris* (1866) LR 1 Sc & Div 47 at 58.

inland non-tidal lake; and

2. no right exists in the public to fish in the waters of an inland non-tidal lake.

He further stressed that these principles apply regardless of the size of the lake, even if the lake in question is so large that it may be termed an inland sea.¹⁴

In contrast, in both Canada and the United States where there was no prior history of private Anglo-European ownership, the English test of navigability was gradually rejected, mainly because it did not encompass the large rivers, which extended inland far beyond the reaches of the tide and, the huge inland lakes. Importantly, it was obviously seen as inappropriate that title to such resources be vested in private ownership, rather than the public or the Crown on behalf of the public.¹⁵ In holding that the St Lawrence river was a navigable river, the court in *Dixon v. Snetsinger* (1873) 23 U.C.C.P. 235

¹⁴ [1911] AC 552 at 577-578. Although there is no general English common law right of public navigation or fishing in navigable non-tidal waters, a public right of navigation can be established by (1) immemorial usage or custom : *Orr Ewing v. Colquhoun* (1877) 2 App Cas 839; *Bourke v. Davis* (1889) 44 Ch D 100 at 120; (2) Act of Parliament : *R. v. Betts* (1850) 16 QB 1022, or by order made under the authority of an Act of Parliament; or (3) by express grant or dedication by the owner of the soil of the river or lake : *Halsbury's Laws of England*, vol.49, *supra*, note 44 Ch.1 at para 910.

¹⁵ In *Gage v. Bates* (1858) 7 U.C.C.P. 116 at 119-120, Richards J noted that if the English test of navigability were adopted in Canada, "then our great lakes and rivers flowing for hundreds or miles, which in many places along their course are the boundary and common highway between this province and a foreign country, must be considered as subject to the incidents of small inland streams ... and subject to exclusive rights of fishing, etc, which may be granted by the Crown to the proprietors of adjacent land, or other rights which there vest in the owners of the soil adjacent to the shores of these streams".

(C.A.), applying *Parker v. Elliott* (1852) 1 U.C.C.P. 470, *Gage v. Bates* (1858) 7 U.C.C.P. 116 and *R. v. Meyers, supra*, stated :

[T]his rule of the common law as to navigable rivers, which when applied to rivers in an insular country such as England may be perfectly consistent with reason and common sense, but which is neither conformable to reason or common sense when applied to such a river as the St. Lawrence, which is not only a highway dividing the territories of different nations for the greater part of its extent, but which traverses more than half a continent, and with a little assistance from art is navigable for ... more than 1,500 miles above tide waters, and which in its course forms lakes more than 100 miles in width".¹⁶

Similarly, in *Fort George Lumber Co. v. Grand Trunk Pacific Railway* (1915) 9 W.W.R.

17, Clement J. remarked :

There is, however, a strong current of authority in Canadian cases that the rule of the common law of England denying the existence of a public right of navigation in non-tidal waters is not the law of Canada even in those provinces which have adopted the common law of England as the basis of their jurisprudence.¹⁷

The rule that a public right of navigation exists over waters which are navigable in fact,

¹⁶ (1873) 23 U.C.C.P. 235 at 245. See also *Gage v. Bates* (1858) 7 U.C.C.P. 116, especially at 119-120; *Parker v. Elliott* (1852) 1 U.C.C.P. 470, especially at 488-489 ("either the rule of the common law of England has been, by common and universal interpretation, most reasonably held not to apply to the lakes and great rivers of Canada, or else the whole of the lands of riparian proprietors ... must be taken to extend no further, and to leave the land covered with water ungranted and the property of the Crown").

¹⁷ (1915) 9 W.W.R. 17 at 18-19. See also: *R. v. Roberston* (1882) 6 S.C.R. 52, especially at 129-132 (English rule "is not applicable to the great rivers of this continent"); *Keewatin Power Co. v. Kenora (Town of)* (1906) 13 O.L.R. 237, especially at 249-255. To the contrary, ie affirming the English rule, see : *Fares v. R.* [1929] Ex.C.R. 144, especially at 151-152 and, *Keewatin Power Co. v. Kenora (Town of)* (1908) 16 O.L.R. 184 (C.A.), varying the decision of Anglin J in *Keewatin, supra*. In *McFeeley v. B.C. Electric Railway Co.* [1918] 1 W.W.R. 339, applying the English test of navigability, the court held that False Creek as an arm of the sea is a tidal water which is prima facie evidence of the right of the public to navigate it.

regardless of whether they are tidal or non-tidal, has been re-affirmed recently in *Friends of the Oldman River v. Canada (Minister of Transport and Minister of Fisheries and Oceans)* [1992] 1 S.C.R. 3, 2 W.W.R. 193¹⁸

Given that Canadian courts were prepared to modify the common law to suit Canadian requirements, what other alterations, if any, were made to the public rights of navigation and fishing ? Generally, the scope of the public rights remained much the same and mirrored the distinctive features of the rights at English common law.

Legislation Required to Extinguish the Public Rights

As in England, the public rights of navigation and fishing were seen as so fundamental that legislation was required to extinguish or diminish the right. In *Wood v. Esson* (1886) 9 S.C.R. 239 it was held that the Crown could not, without legislative sanction, grant the right to obstruct navigation. Similarly, in *Saint John Harbour Commissioners & A-G of Canada v. Eastern Coal Docks, Ltd* (1935) 8 M.P.R. 499 in considering whether the right of navigation in the St. John River had been removed, Richards J. stated :

A grant from the Crown, therefore, of the soil of a tidal river below high water mark does not take away the public right of navigation. This may be done, however, and can only be done, by Act of Parliament (or by authority of Parliament).¹⁹

¹⁸ [1992] 1 S.C.R. 3 at 54-55, citing *A.G. v. Johnson* (1819) 2 Wils. Ch. 87, 37 E.R. 240 and, *Wood v. Esson* (1884) 9 S.C.R. 239.

¹⁹ (1935) 8 M.P.R. 499 at 508. See also : *Isherwood v. Ontario & Minnesota Power Co.* (1911) 2 O.W.N. 651; *McNeil v. Jones* (1894) 26 N.S.R. 299; *R. v. The Woldingham* [1925] Ex.C.R. 85, especially at 87 ("It is of course beyond question that the right of

Furthermore, it appears that the legislation must be clear and explicit to extinguish or diminish the right of navigation : *Nicholson v. Moran* (1949) 4 D.L.R. 571, citing *Champion & White v. Vancouver* [1918] 1 W.W.R. 216. In *Nicholson's* case, the court held that because section 7 of *The Navigable Waters Protection Act* ²⁰ was a permissive section only, it could not render legal an obstruction of navigable water.

Grantee Takes Subject to Public Rights

As with English common law, because the Crown could not alienate the public rights in tidal lands, any grantee of the Crown took subject to those rights - a "grantee of the foreshore holds it subject to the jus publicum of navigation and fishing" : *Tweedie v. R.* (1915) 52 S.C.R. 197.²¹ Similarly, in *Donnelly v. Vroom* (1907) 40 N.S.R. 585, in rejecting a claim for an exclusive right of fishery, the court stated :

The right of navigation, as well as that of fishing, is paramount to the rights of a mere owner of the soil. In other words, the public right of navigation and fishing is not, and cannot be, affected nor diminished by any transfer of the soil of an arm of the sea, or its shores, to an individual.²²

navigation can only be extinguished by Act of Parliament"); and *Fort George Lumber Co. v. Grand Trunk Pacific Railway* (1915) 9 W.W.R. 17, especially at 18 ("The Crown's ownership of the bed or soil underlying tidal waters is subject to a paramount right in the public to navigate such waters and to fish therein ... and the Crown without Parliament cannot derogate from those rights").

²⁰ R.S.C. 1927, c.140.

²¹ (1915) 52 S.C.R. 197 at 214. See also : *Brown v. Reed* (1874) 15 N.B.R. 206 at 210 ("it is abundantly clear by all the authorities that a grant of land between the high and low water mark (this subject matter of grant being jus privatum in the sovereign) must be subject to the jus publicum, or public right of King and people"); and *McNeil v. Jones* (1894) 26 N.S.R. 299.

²² (1907) 40 N.S.R. 585 at 592.

Incidental Rights

Incidental rights were recognised and protected also - the ownership of the bed of the sea "is subject to the servitudes arising from the public rights of navigation and fishing and the rights concomitant with and subsidiary to them" : *Capital City Canning Co. v. Anglo British Columbia Packaging Co.* (1905) 11 B.C.R. 333.²³; the right of navigation is not confined to the right of navigating and passing along navigable waters : *R. v. Lord* (1864) 1 P.E.I. 245 at 249. Although the scope of ancillary rights recognised at Canadian common law seems somewhat narrower than those rights upheld by English courts, incidental rights such as the right to moor or anchor : *Nicholson v. Moran* (1949) 4 D.L.R. 571; *Saint John Harbour Commissioners & A.G. of Canada v. Eastern Coal Docks, Ltd* (1935) 8 M.P.R. 499 and the right to collect seaweed : *R. v. Lord* supra, have been recognised. With respect to the right of fishing, the right of the public to fish on the sea shore between the high and low water marks includes the right to take shell fish : *Donnelly v. Vroom* (1907) 40 N.S.R. 585 at 591. However, where water covering the land of a private owner is navigable, regardless of whether or nor the public have the right to navigate in such water, the public is not entitled to hunt, shoot or fish within the precincts of the private property under the guise of using the water for navigation purposes : *Rice Lake Fur Co. Ltd v. McAllister* (1925) 56 O.L.R. 440 and there is no common law right in the public to use the beach above high water mark for the purposes

²³ (1905) 11 B.C.R. 333 at 339.

of fishing : *Parker v. Elliott* (1852) 1 U.C.C.P. 470 ²⁴

Role and Duties of the Crown

Although there are less authorities on point, it would appear that, as with the English public rights of navigation and fishing, the Crown has certain affirmative duties with respect to those rights at Canadian law. Canadian courts have re-affirmed that the Crown's ownership of navigable waters cannot be used to derogate from or interfere with the public rights of navigation and fishing.²⁵ A duty of guardianship, protection and preservation has been recognized also. In *R. v. Meyers* (1853) 3 U.C.C.P. 305 (considered earlier as a public trust case), Macauley J. stated that, "the Crown, as the guardian of public rights, is entitled to prosecute and to cause the removal of any obstacles which obstruct the exercise of public right, and cannot by force of its prerogative curtail or grant that which it is bound to protect and preserve for public use".²⁶

The Public Rights as Either a Right of Way or a Property Right

As with the early English cases, comparisons are frequently made between the public rights with respect to highways and the public right of navigation - "every public river

²⁴ Hunt, *supra*, note 2 Ch.1 also concludes that the scope of the public right of navigation and fishing is "fairly narrow". See generally her discussion of the Canadian cases at 164-167.

²⁵ See for example : *Clarke v. Edmonton (City)* [1930] S.C.R. 137, [1929] 4 D.L.R. 1010; *McInsley v. Gilley* (1907) 7 W.L.R. 22.

²⁶ (1853) 3 U.C.C.P. 305 at 357.

or stream is *alta regia via* (the king's highway)" : *R. v. Meyers* (1853) 3 U.C.C.P. 305 at 318; "if the locus in quo is a public navigable river, then it is a public highway, and all her Majesty's subjects of common right may pass over it in boats and fish therein" : *Gage v. Bates* (1858) 7 U.C.C.P. 116 at 121 and, in *R. v. The Woldingham* [1925] Ex.C.R. 85 at 89, "a river is a highway as a road is". However, the right of navigation is a public right, which is to be distinguished from a right of access to water by a riparian proprietor, which is a private right: *Electrical Development Co. v. Ontario (Attorney General)* (1917) 38 O.L.R. 383 (reversed on another point : [1919] A.C. 687, 47 D.L.R. 10); *Baldwin v. Chaplin* (1915) 21 D.L.R. 846.

In *Stephens v. MacMillan* (1954) O.R. 133, the Supreme Court of Ontario interprets the public rights with respect to highways and navigation very narrowly. Citing the English case of *Orr Ewing v. Colquhoun* (1877) 2 App. Cas. 839, affirmed in *Friends of the Oldman River, supra*, the court states that the right of navigation is not a right of property, but a right of way and the "nature of the rights of the public in navigable waters are the same or similar to the rights of the public in a highway".²⁷ This approach is somewhat strange given that the public rights of navigation and fishing clearly run with the land, as a grantee of tidal lands is bound by the public rights. Furthermore, if the public right of navigation is not a property right, why does the court then go on to describe the right as "paramount to any right that the Crown or a subject

²⁷ (1954) O.R. 133 at 143.

may have in navigable waters" ? ²⁸

In contrast to *Stephens'* case, other Canadian courts have described the public rights in navigable waters as a right of property. In *R. v. Meyers* (1853) 3 U.C.C.P. 305, Macauley J., citing various English authorities, refers throughout his judgment to a "public easement" in navigable waters.²⁹ In *Parker v. Elliott* (1852) 1 U.C.C.P. 470 at 470, Macauley J. again refers to a public easement, commenting that the foreshore is subject to the public easements of navigation and fishing. Similarly, in *Brown v. Reed* (1874) 15 N.B.R. 206 (C.A.), Ritchie J. describes the public rights over the land between the high and low water marks as an "easement of passing and re-passing both over the water and the land" ³⁰, and in *Capital City Canning Co. v. Anglo British Columbia Packaging Co.* (1905) 11 B.C.R. 333, Duff J. refers to "the servitudes arising from the public rights of navigation and fishing and the rights concomitant with and subsidiary to them".³¹ However, in *A-G of British Columbia v. A-G of Quebec* [1914] A.C. 153, Viscount Haldane, who delivered the judgment of the court, stated that the right of fishing in tidal waters is not a right of property but a right equally open to all

²⁸ *Ibid.* at 146.

²⁹ (1853) 3 U.C.C.P. 305 at 320-322, 324 and 348.

³⁰ (1874) 15 N.B.R. 206 (C.A.) at 210. In support of this statement, Ritchie J cites the English cases of *A.G. v. Burridge* (1822) 10 Price 350, 147 ER 335; *A.G. v. Parmeter, Re Portsmouth Harbour* (1811) 10 Price 378, 147 ER 345 and *Colchester Corp'n v. Brooke* (1845) 7 Q.B. 339, 115 ER 58.

³¹ (1905) 11 B.C.R. 333 at 339.

the public.³²

Part II - Highways

Despite early recognition of a public trust with respect to navigable waters, the strongest Canadian expression of the public trust is that concerning highways. While the public trust over highways in Canada is unlikely to be of significant benefit to environmentalists seeking to re-assert the doctrine over navigable waters and other natural resources, it does provide a modern day example of a public trust over a public resource.

As mentioned earlier, there was no clear expression of a public trust over highways at English common law, although some cases did refer to the municipal corporations or highway authorities as "guardians of the road". However, despite the absence of a clear English pronouncement of the public trust, Canadian courts had no hesitation in declaring that a municipal corporation was trustee of city streets on behalf of the public. The Canadian Court of Queen's Bench in *Sarnia (Town of) v. Great Western Railway Company* (1861) 21 U.C.Q.B. 59, stated :

The property vested in the municipality is a qualified property, to be held and exercised for the benefit of the whole body of a corporation ... [the municipality] may be said to hold the freehold, but then it is only as trustees for the public, and not by virtue of any title which confers a right of exclusive possession.³³

Town of Sarnia was affirmed by Lennox J. and Masten J. in *Re J.F. Brown Co.Ltd. and*

³² [1914] A.C. 153 at 172.

³³ (1861) 21 U.C.Q.B. 59 at 62.

City of Toronto (1916) 36 O.L.R. 189, Lennox J. stating that, "It does not matter at all that the soil and freehold of the streets is now vested in the municipalities. They have always been and are still trustees for them for the public, and for specific limited purposes, that is for highway purposes alone".³⁴ In *J.F.Brown*, the court reviewed the decision of the Official Arbitrator that the City of Toronto was liable to pay compensation to the respondents, J.F.Brown Co. Ltd, for the construction of public lavatories under and on a city street adjacent to the respondents' department store. The respondents alleged that the seepage, smoke and the misconduct of men using the conveniences had led to a reduction in business and therefore they should be compensated by the municipal corporation pursuant to s. 325 of the *Municipal Act*³⁵ for injurious affection of their land.

In rejecting the municipal corporation's argument that its powers with respect to highways were equivalent to those of a private individual owner of land in fee simple, Masten J. considered both the relevant legislation and the common law, and concluded, "[b]ut neither here nor in England, during all the years that the local authorities have owned the surface, has it ever been held that such municipal ownership is an absolute beneficial ownership, identical with the rights of private ownership".³⁶ On the contrary, citing *Town of Sarnia, supra*, and *Chavigny de la Chevrotiere v. Montreal (City of)*

³⁴ (1916) 36 O.L.R. 189 at 203.

³⁵ R.S.O. 1914, c. 192.

³⁶ *Ibid.* at 227.

(1886) 12 App. Cas. 149 at 159 (considered later), he concluded that the corporation's title was a qualified property held by the corporation as trustee for the public. With respect to the *Municipal Act*, Masten J. stated:

A consideration of the sections of the *Municipal Act* relating to highways (429 - 486) confirms the view that the municipal corporation are trustees for all the King's subjects of the highway so vested in them, and that it remains the right of all such subjects to pass over the highway without obstruction, and that this right is paramount and cannot be infringed, even by the municipal authority itself, except under express statutory powers.³⁷

Accordingly, both at common law and pursuant to the *Municipal Act*, municipal corporations hold highways on trust for the public. The *Municipal Act* does not expressly refer to or create a trust, it merely specifies that municipal corporations hold title to highways. The trust arises because such ownership has been held at common law to be a qualified ownership for the benefit of the public.³⁸

Canadian courts have consistently recognised a public trust over highways : *Vancouver (City of) v. Burchill* [1932] S.C.R. 620 at 625 ("The land-owner enjoys the absolute right to exclude anyone and to do as he pleases upon his own property. It is idle to say that the municipality has no such rights upon its streets. It holds them as trustee for the public."); *Big Point Club v. Lozon* [1943] O.R. 491 at 495 ("Ownership of highways is

³⁷ *Ibid.*

³⁸ Section 433 of the *Municipal Act*, which is expressly referred to by the court, provides that "Unless otherwise expressly provided, the soil and freehold of every highway shall be vested in the corporation or corporations of the municipality or municipalities, the council or councils of which for the time being have jurisdiction over it under the provisions of this Act". In *J.F. Brown, supra*, Masten J at 226 notes that the predecessor legislation was to the same effect.

held by municipalities in trust for all such of the King's subjects as have occasion to make use of them for lawful purposes, or in order to gain access to or egress from adjacent lands"); and *Re McKillop and City of Vancouver* (1954) 11 W.W.R. (N.S.) 593 (B.C.) at 597 ("A municipality holds its streets as trustee for the public").³⁹

However, it appears that the situation in Canada with respect to highways may differ from that in England. In *Octave Chavigny de la Chevrotiere v. Montreal (Cite de)* (1886) 12 App Cas 149, the Privy Council in affirming that a public trust applies to highways in Canada stated that :

There is a distinction between the Canadian law and the law of this country as to public highways. The Canadian law agrees rather with the law of Scotland, which is founded on the civil law, namely, that when a street or road becomes a public highway the soil of the road is vested in the Crown if there is no other public trustee, or, if there is a corporate body that fills the position of trustee, then in that corporate body in trust for public use.⁴⁰

As the public place at issue in the case had become a highway both at common law and by registration under the applicable legislation, the appellant's claim to resume private possession of such a public place was rejected.

In contrast to the public trust with respect to navigable waters, the public trust over highways has been recognised recently in Canada in *W.A.W. Holdings Ltd v. Summer*

³⁹ See also : *Re Ottawa & Nepean* (1910) 2 O.W.N. 480 at 483, "The highways are vested in the Crown for the purpose and to the extent of enabling them to perform more effectually their duties to keep them in repair for the benefit of the public"; and, *Re Ogilvie Flour Mills Co. Ltd and Winnipeg* [1927] 1 W.W.R. 833 at 845.

⁴⁰ (1886) 12 App.Cas. 149 at 159.

Village of Sundance Beach [1980] 1 W.W.R. 97 (Alta. Q.B.) and *Calgary (City of) v. Cominco Ltd* [1983] 2 W.W.R. 320.

In *W.A.W. Holdings Ltd*, the primary issue was the scope of public access to certain road allowances, which were under the control and management of a summer village which had been incorporated under the *Municipal Government Act*.⁴¹ The applicant, the owner of a new subdivision adjoining the summer village, sought permission from the village to clear pedestrian pathways on the road allowances to facilitate access from the new subdivision to the public beaches and waters of Pigeon Lake, fronting the village. The village refused permission.

Referring to *Vancouver v. Burchill*, *supra*; *Big Point Club v. Lozon* *supra*; *Re J. F. Brown Co. Ltd. and Toronto and Ontario H.E.P.C. v. Grey* (1924) 55 O.L.R. 339, Miller J held that the road allowances were held in trust by the village for the general public. The fact that the summer village had taken over the management and control of the road allowances from the county did not preclude the recognition of a public trust.

[W]hen the summer village took over management and control of the road allowances it assumed the same obligations vis-a-vis the public that the county had regarding the said lands. When the county approved the original House subdivision application and took title to the various dedicated parcels of land, I think it is abundantly clear that it intended to hold the dedicated lands in trust to protect the public's access, at convenient points, to the waters of Pigeon Lake.

⁴¹ R.S.A. 1970, c. 246.

The summer village must manage and control the lands upon the same trust.⁴²

Although the public had access to the lake on roads at either end of the village, this was "no proper answer to the trust which the summer village assumed".⁴³ While Miller J. recognized that the village council members were acting in what they perceived to be the best interests of their constituents in attempting to preserve their current use and enjoyment of "their" part of the lake, he stated that "in so doing I think that they have trammelled the rights of the public and have not fulfilled the trust which the summer village assumed when it took over the control and management of these three road allowances".⁴⁴

The decision in *W.A.W. Holdings* was reversed on appeal by the Alberta Court of Appeal in *Summer Village of Sundance Beach v. W.A.W. Holdings Ltd* [1981] 1 W.W.R. 581. Harradence J.J.A., who delivered the judgment of the court, disagreed that the county took the lands impressed with a trust and, also disagreed that the summer village "had engrafted upon its control of the dedicated lands (ie the road allowances) the trust referred to by the learned chambers judge".⁴⁵ Instead, the county "took the lands subject

⁴² [1980] 1 W.W.R. 97 at 113. Although Miller J finds that the county **intended** to hold the road allowances in trust, this has not been a pre-condition to the recognition of the trust in the other Canadian cases he cites.

⁴³ *Ibid.* at 116.

⁴⁴ *Ibid.*

⁴⁵ [1981] 1 W.W.R. 581 at 590.

to the duties imposed by statute".⁴⁶ Likewise, the summer village, as an authority incorporated under statute "would assume that authority subject only to whatever restrictions were spelled out in the Act itself [the *Municipal Government Act*, R.S.A. 1970, c. 264] or other legislation pertaining thereto."⁴⁷

Although Harradence J.J.A. refers to the cases cited by Miller J., he makes no attempt to reconcile those decisions with his assertion that the county was not under a trust obligation with respect to highways. He cites no authority in support of this proposition and, his denial of a trust is contrary to the decision of the Supreme Court of Canada in *Vancouver v. Burchill*, *supra*.

The anomalous nature of the *Sundance Beach* decision is recognised in *Calgary (City of) v. Cominco*, *supra*. After reviewing the various Canadian authorities mentioned earlier, Egbert J. states :

From a reading of the above cases, it would seem to be firmly established that ... municipal powers which relate to roadways are to be strictly construed. In the absence of express statutory authority, a municipality is without power to obstruct or authorize the obstruction of roadways, however beneficial the work leading to the obstruction may be in a general sense. **The municipality holds title to the roadways but it does so in trust for those who pass and re-pass over the roadways.**⁴⁸

However, in light of the decision in *Sundance Beach*, the court felt compelled to hold

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ [1983] 2 W.W.R. 320 (Alta. Q.B.) at 331.

that the position in Alberta is different to that in the other provinces. Acknowledging that it was difficult to reconcile the decision in *Sundance Beach* with the Supreme Court of Canada's decision in *Vancouver (City of) v. Burchill, supra* (where the court held that municipalities held city streets as trustee for the public), Egbert J. sought to reconcile the two decisions by suggesting that "if there is a trust, it can only be exercised in accordance with the duties imposed upon a council by statute."⁴⁹

In summary, it is clear that Canadian common law recognises a public trust over highways. Although the position in Alberta is somewhat unclear, in other provinces such as British Columbia, Ontario and Manitoba, municipal corporations hold title to local streets and highways on trust for the public.

Restrictions on Extinguishment

In addition to express recognition of a trust over highways, the distinctive features of the *jus publicum* with respect to highways recognised at English common law are recognised also at Canadian common law, especially the restriction on extinguishment. As with English common law, the maxim "once a highway, always a highway applies". In *Nash v. Glover* (1876) 24 Gr. 219, affirmed in *Niagara Navigation Co. v. Niagara (Town of)* (1914) 31 O.L.R. 17, *Big Point Club v. Lozon* [1943] O.R. 491 and *Dunstan v. Hells Gate Enterprises Ltd* (1985) 22 D.L.R. (4th) 568 (B.C.S.C.), the Ontario Court of Chancery held that despite possession by the plaintiff of an original road allowance for

⁴⁹ [1983] 2 W.W.R. 320 at 332.

40 years or more, the municipality could resume possession of the road and re-open it. Citing *Regina v. Hunt* (1865) 16 U.C.C.P. 145, the court noted that once a road had acquired the legal title of a highway, the Crown could not, by grant of the soil and freehold of the highway, deprive the public of their right to use the road. Although in the present case, Vice-Chancellor Proudfoot found no intention on behalf of the Crown to grant the original road allowance to anyone, he stated that :

[A]n original road allowance cannot be extinguished except by proceedings under the Acts referred to; that a grant even by the Crown cannot extinguish it; that **the right of the public remains in perpetuum, though it may lie dormant, it may be revived, until steps under the Acts have killed it.**⁵⁰

As with the public rights of navigation and fishing, the public rights concerning highways were seen as so fundamental, the Crown was incapable of extinguishing those rights without legislative authority. In *Regina v. Hunt* (1865) 16 U.C.C.P. 145, applied in *Nash v. Glover, supra*, the court held that once a road has once acquired the legal title of a highway, it is not in the power of the Crown, by grant of the soil and freehold to a private person, to deprive the public of their right to use the road. Wilson J. concluded that the cases "shew beyond all question that a public road laid out by a duly authorised crown surveyor ... cannot be altered afterwards by the crown, unless duly altered according to the statute".⁵¹

⁵⁰ (1876) 24 Gr. 219 at 222. The court also referred to the case of *Dawes v. Hawkins* 8 C.B.N.S. 878 in which Byles J stated "It is also an established maxim - once a highway, always a highway - for the public cannot release their rights, and there is no extinctive presumption or prescription. The only methods of legally stopping a highway are, either by the old writ of quod damnum, or by proceedings before magistrates under the statute."

⁵¹ (1865) 16 U.C.C.P. 145 at 158.

Similarly, in *Hydro-Electric Power Commission of Ontario v. Grey (County of)* (1924) 55 O.L.R. 339 the court stressed that the public rights with respect to highways could be extinguished only by legislation :

It has long been recognised in the Courts of Ontario and England that the right of the public to free passage along the King's highway is paramount, and cannot be interfered with even by the Crown itself, but only by Parliament or the Legislature.⁵²

Significantly, not just any legislation would suffice. To extinguish the public rights in a highway, explicit legislation is required; the Act must "express such an intention in language that is unmistakable".⁵³ In *Hydro-Electric Power Commission of Ontario*, *supra*, Masten J. emphasized that :

[T]he right of the public in the King's highway has always been jealously guarded by the Courts and is not lightly to be interfered with. There is no question but that the Legislature of Ontario can by statute, modify or abolish that right; but, if it is to be modified and the rights of the public curtailed or affected, the will of the Legislature must be unequivocally expressed.⁵⁴

These restrictions on extinguishment of the public rights with respect to highways re-affirm that public rights in "special" resources cannot be disposed of lightly by the government. Other restrictions on government dealings with public trust resources are

⁵² *Hydro-Electric Commission of Ontario v. Grey (County of)* (1924) 55 O.L.R. 339 at 344. See also *Nash v. Glover* (1876) 24 Gr. 219 at 220, "there is no power in the executive to extinguish an original road allowance, that the only mode by which that can be accomplished is, the manner pointed out by the Act. The road allowances are perpetual until altered or extinguished by the proper legal authority."

⁵³ *Hydro-Electric Power Commission*, *ibid.* at 346.

⁵⁴ *Ibid.* at 344. See also : *Code v. Jones & Town of Perth* (1923) 54 O.L.R. 425 at 426, ("There is no inherent right or authority in the municipality to place an obstruction upon the highway, such right or authority must be expressly conferred by the Legislature"); *Big Point Club v. Lozon* [1943] O.R. 491 at 496

considered in greater detail in Chapter Four.

Conclusion

The public trust doctrine does form part of Canadian common law. Although the public trust with respect to navigation and fishing has lain dormant since the late nineteenth century, the distinctive features of the English public rights of navigation and fishing which led to the initial American and Canadian assertion of a public trust exist also at Canadian common law. This re-affirmation of these distinctive features, together with the initial recognition of a public trust over navigation and fishing have laid the foundations for a modern revival of the public trust doctrine in Canada. Canada already has one modern example of the public trust with the public trust over highways. The time has now come for a re-awakening of the public trust doctrine with respect to natural resources. The reasons for and the consequences of such a revival are considered in Chapter Four.

* * * *

CHAPTER FOUR

THE CONSEQUENCES OF RECOGNITION OF THE PUBLIC TRUST DOCTRINE

Introduction

Having identified in Chapter Three that the public trust doctrine does exist at Canadian common law, albeit at various stages of development, two questions inevitably arise. First, what exactly is the public trust and, second, what are the consequences of recognition of the public trust doctrine at Canadian common law ?

Despite the myriad American academic articles concerning the public trust, the academics generally agree that the public trust doctrine defies precise description. Rodgers comments that, "the public trust is resoundingly vague, obscure in origin and uncertain of purpose; it serves a variety of functions, mimics other doctrines, and for these reasons is not easily researchable" ¹ and Blumm remarks that "one of the reasons for the popularity of the public trust is that it sometimes seems as if it's all things to all people"². Part I of this Chapter attempts to define the nature of the doctrine, with particular consideration of the public trust as a trust and, more broadly, as a fiduciary obligation. The conclusion reached is that, at the very least, the public trust doctrine imposes a broad fiduciary obligation on government.

¹ Rodgers, *supra*, note 24 Ch.2 at 155.

² Blumm, *supra* note 42 Ch.1 at 575.

Part II considers the consequences that flow from recognition of the public trust. As there are so few Canadian cases on the doctrine, aside from those concerning highways, the primary focus is on the American authorities. However, the distinctive features of the American public trust are either identical to the features of the public rights of navigation and fishing, or a logical development of those features in a modern age. Given that Canadian common law recognizes the public rights of navigation and fishing as well as the public trust doctrine, it should be realistic to argue that any modern re-awakening of the public trust already embraces or should embrace the distinctive features of the public trust identified by American courts.

As with the public rights of navigation and fishing considered in Chapters One and Three, the American case law indicates that any grantee of public trust resources generally takes subject to the public trust, the government has an affirmative duty of care and protection with respect to trust resources (in effect a fiduciary obligation) and, there are significant restrictions on extinguishment. Additional to these features and in keeping with modern developments in administrative and environmental law, a private citizen has standing to enforce the trust without the need to show special damage and government is subject to a procedural obligation to consider the effects of proposed activities on both trust resources and values protected by the public trust.

The fact that the distinctive features of the public rights of navigation and fishing are re-affirmed and extended under the public trust doctrine reinforces the conclusion reached

in Chapter One that certain resources and the public rights in those resources are special in nature. Of all the potential consequences considered in Part II to flow from recognition of the public trust doctrine at Canadian common law, the two most important ones are first, the recognition that the public trust imposes an administrative process on government which circumscribes statutory obligations and discretion and second, the recognition and enhancement of the fact that certain resources are special and deserving of careful management and protection.

Part I - The Nature of the Public Trust

Introduction

Seeking to define the nature of the public trust is no simple task. As with the public rights of navigation and fishing there is no real consensus among either academics or judges as to the precise nature of the public trust.³ It has been confidently asserted that the public trust is a "public property right"⁴ and "squarely rooted in property law"⁵,

³ The academic debate on the public trust doctrine has in some quarters become quite heated and somewhat "less than scholarly". See for example, J.L. Huffman, "A Fish Out of Water : The Public Trust Doctrine in a Constitutional Democracy" (1989) 19 *Env'tl. L.* 527, especially at 568 where, in criticizing Professor M. Blumm's comments about the trust refers to "what is surely the longest footnote in this symposium issue". Professor Blumm in reply, "Public Property and the Democratization of Western Water Law", *ibid.* at 597 n. 108 remarks that "Professor Huffman's frequent criticisms of the public trust doctrine ... have earned him the reputation of being the Darth Vader of the public trust."

⁴ Dunning, *supra* note 42 Ch.1 at 515.

⁵ Lazarus, *supra* note 1 Ch.1 at 642.

an easement,⁶ a type of covenant running with the land,⁷ an American constitutionally protected right,⁸ and, a source of four remedies :

- (i) a public easement guaranteeing access to trust resources;
- (ii) a restrictive servitude providing insulation against takings claims;
- (iii) a rule of statutory and constitutional construction disfavouring terminations of the trust; and
- (iv) a requirement of reasoned administrative decision making.⁹

The main focus however, of this Part will be on the public trust as both a trust and, more broadly, as a fiduciary obligation.

The Public Trust as a Trust

Although its name may imply that it is a trust, at least of sorts, the view that the public

⁶ See for example : Huffman, *supra* note 3 at 527 and 561; H.C. Dunning, "The Significance of California's Public Trust Easement for California Water Rights Law" (1980) 14 U.C. Davis L. Rev. 357; M.K. McCurdy, "Public Trust Protection for Wetlands" (1989) 19 Env'tl. L. 683 at 691; *Marks v. Whitney* 6 Cal. 3d 251 at 259, 491 P. 2d 374 at 380.

⁷ S.W. Reed, "The Public Trust Doctrine : Is it Amphibious" (1986) 1 J. Env'tl. L. & Litig. 107 at 118.

⁸ Cohen, *supra* note 19 Ch.1 at 388. See also C.F. Wilkinson, "The Headwaters of the Public Trust : Some Thoughts on the Source and Scope of the Traditional Doctrine" (1989) 19 Env'tl. L. 425 for discussion of the public trust doctrine as part of federal constitutional law.

⁹ Blumm, *supra* note 42 Ch.1, especially at 582.

trust is in fact a trust has not been universally accepted.¹⁰ While there is certainly Canadian and American authority to support the view that the public trust is in fact a trust¹¹, there may be some debate in Canada as to whether or not the public trust is a "political" trust or a "true" trust. This distinction was raised in the English cases of *Tito v. Waddell (No.2)* [1977] 3 All E.R. 129 and *Kinloch v. Secretary of State for India in Council* (1882) 7 App. Cas. 619 and considered more recently in *Guerin v. The Queen* (1984) 13 D.L.R. (4th) 321 at 331.¹² The gist of the distinction is that a political trust pertains to "higher matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to

¹⁰ See in particular, Huffman, *supra* note 3, especially at 534-545. Huffman argues that the public trust does not have the 3 essential elements of a trust, namely a creator, a trustee and a beneficiary. Huffman argues that although the state or government is presumably the trustee and the public the beneficiary, there is no creator of the trust. Interestingly, Huffman does concede at 561 that the public trust "in its original formulation ... could arguably be described as a trust". At note 146 he comments that "In a legal regime that recognised title to waters and submerged lands in the King, it was possible to describe the rights held in common by members of the public as either an easement or as an equitable interest in property in which the King held legal title. Because the King was clearly distinct from the people (that is the trustee and the beneficiary were not the same entity) the trust model is applicable. Nevertheless, the questions of who created the trust and thus its purpose, remain unanswered."

¹¹ See for example : *R. v. Meyers* (1853) 3 U.C.C.P. 305 at 357; *R. v. Lord* (1864) 1 P.E.I. 245 at 257; *R. v. Robertson* (1882) 6 S.C.R. 52 at 126 and 138; *Illinois Central Railroad Company v. Illinois* 146 U.S. 387, 13 S.Ct. 110; *Cinque Bambini Partnership v. Mississippi* 491 So. 2d 508 at 511 (Miss. 1986); *Phillips Petroleum Co. v. Mississippi* 108 S.Ct. 791 (1988); *Morse v. Oregon Div. of State Lands* 34 Or. App. 853, P. 2d 520 (1978); *National Audubon Society v. Superior Court of Alpine City* 658 P. 2d 709 (Cal. 1983).

¹² See also : *Rustomjee v. The Queen* (1876) 2 Q.B.D. 69; *Administrator of German Property v. Knoop* [1933] Ch. 439; *Town Investments Ltd v. Department of the Environment* [1978] AC 359.

the prerogative and to the authority of the Crown".¹³ Consequently, being a "governmental obligation"¹⁴ or "sovereign act"¹⁵, a political trust is not enforceable in the courts. In contrast, a "true trust", or trust in the "lower sense" is justiciable.¹⁶

In *Guerin's* case, Dickson J. (as he then was) expressed "some doubt as to the cogency of the terminology of 'higher' and 'lower' trusts" ¹⁷ and sought to confine the political trust cases to those concerning "the distribution of public funds or other property held by government."¹⁸ Both Dickson and Wilson JJ. emphasized the fact that in the political trust cases the funds at issue were the property of the Crown and none of the parties claiming as beneficiaries could show an interest in the funds independent of the treaty,

¹³ *Kinloch, supra* at 625-626.

¹⁴ *Tito, supra* at 222. At 216-217, in seeking to differentiate between governmental obligations and trust obligations, the court stated, "When it is alleged that the Crown is a trustee, an element which is of special importance consists of the governmental powers and obligations of the Crown ... If money or other property is vested in the Crown and is used for the benefit of others, one explanation can be that the Crown holds on a true trust for those others. Another explanation can be that, without holding the property on a true trust, the Crown is nevertheless administering that property in exercise of the Crown's governmental functions." Interestingly, the court in *Tito's* case acknowledged that there is "a certain awkwardness in describing as a trust a relationship which is not enforceable by the courts" and that "in common speech in legal circles 'trust' is normally used to mean an equitable relationship enforceable in the courts and not a governmental relationship which is not thus enforceable."

¹⁵ L.A. Sheridan & G.W. Keeton, *The Law of Trusts*, 11th ed. (Barry Rose Publishers Ltd : Chichester, England, 1983) at 58.

¹⁶ *Kinloch, supra* at 626.

¹⁷ (1984) 13 D.L.R. (4th) 321 at 334.

¹⁸ *Ibid.* at 336.

statute or other instrument alleged to give rise to an enforceable trust.¹⁹ In contrast, in *Guerin's* case, the Indian's interest in land both pre-dated and existed independently of the *Indian Act*.²⁰

Public trust cases can be distinguished from the political trust cases on the same grounds, namely, public rights under the public trust exist independently of legislative or executive action. The political trust cases could, however, be raised in an attempt to defeat statutory versions of the public trust. In these instances, unless public trust rights existed independently of the statute, it could be argued that the government was merely fulfilling its governmental obligations.

Such an argument can be rejected however, on several grounds. First, the international aspect of the political trust cases should be emphasized, particularly as international dealings between governments are more likely to attract the classification "sovereign acts". *Kinloch's* case, *supra*, involved the "grant" of war booty by Royal Warrant to the Secretary of State for India in Council "in trust" for the members of certain armed forces. Treaties were involved also in the political trust cases of *Rustomjee v. The Queen* (1876) 2 Q.B.D. 69 and *Civilian War Claimants Association Ltd v. R.* [1932] AC 14. *Tito's* case, *supra* involved an agreement between a mining company and the landowners of a British Protectorate to establish a fund from mining royalties for the benefit of the

¹⁹ *Ibid.* at 336 and 358-359.

²⁰ R.S.C. 1952, c. 149.

landowners. Accordingly, the political trust cases can arguably be distinguished from domestic statutory trusts. Furthermore, it would appear that the sovereign is deemed to have agreed to act in the capacity of trustee simply by assenting to legislation imposing the trust. In *R. v. Mayor of Blenheim* (1907) 28 N.Z.L.R. 249, Cooper J stated :

Although the sovereign cannot be compelled to accept a trust, he may sustain the character of a trustee by accepting the trust, and he has undoubtedly the capacity to take the estate and execute the trust. **Where a statute vests public property in the sovereign for particular purposes, then the sovereign, being named in the statute, and having assented to the statute, and having the capacity to take the estate and execute the trust, holds the property on the trusts created by the statute.** There may be a difficulty in finding and enforcing a remedy in the Courts of law if the trust is not carried into effect, but that difficulty does not affect the capacity of the sovereign to take the estate as a trustee.²¹

Aside from the performance of "governmental obligations" and "sovereign acts", it would appear that the Crown can be classified as a trustee.²² The difficulty, however, as mentioned in *Mayor of Blenheim, supra* is not so much in categorizing the Crown as a trustee but in enforcing the trust against the Crown. The position is summarized as follows in *Lewin on Trusts* :

²¹ (1907) 28 N.Z.L.R. 249 at 256.

²² It is clear from *Tito's case, supra*, that the Crown can be a trustee if it agrees to do so. The court referred to the case of *Civilian War Claimants Association Ltd v. R.* [1932] AC 14 and the dictum of Lord Atkin at 27, "There is nothing, so far as I know, to prevent the Crown acting as agent if it chooses deliberately to do so." Lord Atkin's comments were affirmed in *A.G. v. Nissan* [1969] 1 All ER 629 at 647. See also : W.J. Mowbray, *Lewin on Trusts*, 16th ed. (Sweet & Maxwell : London, 1964) at 13; L.A. Sheridan & G.W. Keeton, *The Law of Trusts*, 11th ed. (Barry Rose Publishers Ltd : Chichester, England, 1983) at 58; *Re Collins & Ontario Pension Commission; Re Batchelor & Ontario Pension Commission* (1986) 56 O.R. (2d) 274 (Div. Ct.) at 285 (although the court did not hold that the Pension Commission, a governmental authority, was a trustee, it did hold that it was equivalent to a trustee); *Williams v. A.G. (N.S.W.)* (1913) 16 C.L.R. 404; and see also Hunt, *supra* note 2 Ch.1 at 176-178.

The sovereign may sustain the character of a trustee so far as regards the capacity to take the estate and to execute the trust, but it is doubtful if a beneficiary can, by any legal process, enforce the performance of the trust. The right of the beneficiary is clear : the defect lies in the remedy.²³

If the public trust is in fact a trust, it would appear that classical trust law does not apply to the public trust or, if it does, to a lesser extent. Nanda and Ris claim that although the public trust doctrine "borrows many concepts from classical trust law, the doctrine is less rigid in its application."²⁴ Hunt concludes that, "while the American system has borrowed from classical trust law, it has done so cautiously, resulting in a doctrine which is less rigid in its application than traditional trust concepts".²⁵

²³ Lewin on Trust, *ibid.* at 13 and, see the authorities cited in that text at n. 30. See also Hunt, *supra* note 2 Ch.1 at 177-178, but remember that her article was written prior to *Guerin's* case, *supra*.

²⁴ Nanda & Ris, *supra* note 1 Ch.1 at 296-297. The authors refer to Sax's article, *supra* note 1 Ch.1 and his conclusion at 553 that "Perhaps the most striking impression produced by a review of public trust cases in various jurisdictions is the sense of openness which the law provides; there is generally support for whatever decision a court might wish to adopt".

²⁵ Hunt, *supra* note 2 Ch.1 at 180. Hunt does however remark at 179 that "classical trust law has not generally been applied in the American public trust cases". See also *State of Nevada v. U.S.* 512 F. Supp. 166 (1981) at 172, where the court in considering the responsibilities of Congress with respect to public lands stated that the trust responsibilities of Congress were not the same as those of a private trustee to trust beneficiaries. But see *Idaho Forest Industries v. Hayden Lake Watershed Improvement District* 112 Idaho 512, 733 P. 2d 733 (Idaho 1987) where Bakes J at 738, Shepherd CJ and Donaldson and Huntley JJ concurring, said "The public trust doctrine is based upon common law equitable principles. That is, the administration of land subject to the public trust is governed by the same principles applicable to the administration of trusts in general."

The approach of the American courts in the cases considered in Chapter Two consistently support the view that if classical trust law does apply to the public trust, it does so only in a very loose sense. There is generally little attention given to the pre-requisites to establishing a trust, aside from frequent references to the state as trustee, and less frequent references to the public as beneficiary.

Although there may be some benefit in the application of classical trust law to the public trust, in particular the benefit of a presumption in favour of protection of trust resources, and a "trust law preference for the continuance of the trust and the prohibition of invasion of the corpus" ²⁶, the application of classical trust law to the public trust is likely to be less advantageous in the long term, posing barriers to claimants seeking to uphold the trust and further muddying the waters of the doctrine.

The Canadian case of *Green v. Ontario* (1972) 34 D.L.R. (3d) 20 is a good example of the difficulties that can arise from strict application of classical trust law to the public trust. The case is the only reported Canadian decision in which the public trust has been raised.²⁷ Although the case was dismissed on the grounds that the plaintiff lacked

²⁶ Cohen, *supra* note 19 Ch.1 at 392. See also V.J. Yannacone, Jr. & B.S. Cohen, *Environmental Rights and Remedies*, vol. 1 (Rochester, New York : The Lawyers Co-Operative Publishing Co., 1972) at 14. As with Cohen, the authors stress at 14 that the effect of such presumptions is to shift the burden of proof "to the despoiler of the environment to come forward with the evidence to prove the necessity for damaging the trust corpus".

²⁷ As mentioned in Chapter Three, the public trust doctrine has been raised also in litigation concerning Wood Buffalo National Park and in the unreported decisions of *Mann v. R.*

standing, Lerner J considered and resoundingly dismissed the argument that a statutory trust had been created by the *Provincial Parks Act*.²⁸ Pursuant to section 2 of that Act:

All provincial parks are dedicated to the people of the Province of Ontario and others who may use them for their healthful enjoyment and education, and the provincial parks shall be maintained for the benefit of future generations in accordance with this Act and the regulations.

The Sandbanks Provincial Park was established some two years after the Province of Ontario had entered into a written lease with Lake Ontario Cement Ltd for a parcel of land forming part of the sand banks and some lands under the waters of West Lake. The lease was for a period of 75 years and permitted the lessee to excavate unlimited quantities of sand from the land. The Park was adjacent to these leased lands. The case is accordingly similar to the Redwood Park litigation considered in Chapter Two in that the action complained of was occurring outside (or here primarily outside) the park area.

The plaintiff, a researcher for Pollution Probe at the University of Toronto, alleged that by permitting the use of the lands adjoining the park for sand excavation, the Province of Ontario was in breach of the statutory trust imposed by section 2 of the *Provincial*

(1 June, 1990), Vancouver A881092 (B.C.S.C.) and (25 April, 1991) Vancouver A881092 (B.C.S.C.). This case is considered later in this Chapter.

²⁸ R.S.O. 1970, c. 371.

Parks Act mainly because certain "towering sand dunes" located partly within the park but primarily on the leasehold property, constituted a "unique ecological, geological and recreational resource required to be maintained for the benefit of the people of Ontario". Interestingly, no argument appears to have been made that the lands in question (being lands under and adjacent to a lake) were subject to a public trust at common law.²⁹ Perhaps the lake was not thought to constitute a navigable waterway at Canadian law.

In rejecting the plaintiff's claim that a statutory trust had been created, Mr Justice Lerner raised various objections based on classical trust law. One objection was uncertainty of subject matter. Lerner J. concluded that because section 3 (2) of the Act empowered the Province to increase, decrease or even close down a park, there could not be a trust. Referring to a source of classic trust law, Keeton's *Law of Trusts*, Lerner J. remarks that a trust can only arise at law if the trustee could be **compelled** in equity to hold trust property on behalf of some person/s. In his view, section 3 (2) indicated that there was no such compulsion.³⁰

This reasoning is curious for two reasons. First, as mentioned earlier, it is doubtful whether classical trust law should be applied to the public trust doctrine. If it is, the American case law indicates classical trust law has been applied only loosely. Second, any significant review of American public trust law will reveal that dedication of trust

²⁹ Counsels' arguments and authorities are not cited in the case.

³⁰ (1972) 34 D.L.R. (3d) 20 at 31.

property is not irrevocable.³¹ The American case law clearly recognises that the state has the power to change the uses of the trust. It is precisely because of this power that there are strict rules of interpretation governing uses of trust property. Any statute purporting to abandon the trust will be strictly construed; the intent to abandon must be "clearly expressed or necessarily implied" : *City of Berkeley v. Superior Court* 26 Cal. 3d 515, 606 P.2d 362 (1980). Abandonment of the public use will not be implied if any other inference is reasonably possible and, if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, that interpretation is to be adopted : *People v. California Fish Co.* 166 Cal. 576, 138 P. 79. (1913).

Mr Justice Lerner's next objection to the plaintiff's argument is that the beneficiaries (presumably "the people of Ontario and other who may use [the parks]") were not readily ascertainable. As Hunt points out, this is unlikely to be a problem in future in view of developments in classical trust law since the case was decided.³² Furthermore, it has not been a bar to the application of the public trust doctrine in the United States.

³¹ See also Hunt, *supra* note 2 Ch.1 at 175-176 and the discussion of the power of trustees at classical trust law to alter the nature of trust property and, possibly also to actually decrease the size of the trust property.

³² *Ibid.* at 176. Referring to the English House of Lords decision in *McPhail v. Doulton* (1971) A.C. 424, Hunt notes that trustees may no longer be required to identify every person within the class of beneficiaries. It may now be sufficient simply to "identify a reasonable and sufficient number of beneficiaries so that the trustees can discharge their duty of considering the range of possible recipients and thereby make an informed choice."

A more interesting objection raised by Lerner J. is that because the *Provincial Parks Act* gives the Province "unfettered and wide-ranging powers in the operation and use of its parks" ³³, including the use of parks for private business enterprises and other gainful activities, the plaintiff's action for breach of trust must fail.

Mr Justice Lerner's reasons for this conclusion are somewhat ambiguous. He may be arguing that the government has sufficient discretionary power under the legislation to authorize sand mining. This seems unlikely given the wording of section 2 of the Act. Alternatively, he may be suggesting that the existence of such broad discretion prevents a trust arising. However, as Hunt rightly points out, the fact that a trustee has discretionary powers with respect to the operation of the trust does not preclude the existence of a trust.³⁴ Possibly, Lerner J. is suggesting that the commercial nature of the activities is inconsistent with a public trust over parks. As mentioned earlier in Chapter Two in relation to parks, there is a perception by some courts that parks and private enterprise are, in the absence of clear legislative intent, mutually exclusive. However, the fact that the legislation permits commercial enterprise would not of itself extinguish the trust or preclude the creation of the trust. Rather, because such uses would generally not be regarded as consistent with trust purposes (see restrictions on alienation, discussed below), private parties would only acquire a right to use the park subject to the public trust. As the Court stated in the *Mono Lake* case considered in Chapter Two :

³³ (1972) 34 D.L.R. (3d) 20 at 31.

³⁴ Hunt, *supra* note 2 Ch.1 at 176.

Except in those rare instances in which a grantee may acquire a right to use former trust property free of trust restrictions, the grantee holds subject to the trust, and while he may assert a vested right to the servient estate (the right of use subject to the trust) ... he can claim no vested right to bar recognition of the trust or state action to carry out its purposes.³⁵

Mr Justice Lerner concludes his judgment with the comment that "the action is vexatious and frivolous. I say this because the plaintiff had to know of the existence and terms of the lease and that it pre-dated by a substantial period of time, the establishment of Sandbanks Provincial Park."³⁶ It would be interesting to see how a Canadian court would approach this argument today, given American decisions such as the *Mono Lake* case, *supra*. As mentioned earlier, in that case the court was held to have a **continuing duty of supervision** over trust property. Furthermore, the state had the power to reconsider allocation decisions. The need to do so would be even more pressing where, as in the *Green* case, the initial resource allocation decision had failed to weigh and consider public trust purposes. The scope of the supervisory role of the state is considered later in this Chapter with respect to the public trust as an administrative process.

The decision in *Green's* case was based on the fact that the plaintiff had no standing and

³⁵ 658 P.2d 709 (Cal., 1983) at 723.

³⁶ (1973) 2 O.R. 396 at p. 408.

accordingly, Mr Justice Lerner's comments concerning the public trust were obiter dicta only. Although the public trust alleged in that case had a statutory base, it is interesting that there was no consideration of American public trust law. Given the explosion of the public trust doctrine in the United States since the 1970's, future Canadian cases on the public trust are unlikely to mirror the same disregard for American case law. Furthermore, for the reasons outlined above, and the less stringent standing requirements set out in *Finlay v. Canada (Minister of Finance)* [1986] 2 S.C.R. 607 (considered later in this Chapter) it is most unlikely that the case would be decided the same way today.

Although Mr Justice Lerner's application of classical trust law may be questionable, Hunt refers to two other problems which may arise from the application of classical trust law to the public trust doctrine, both of which are mentioned earlier. These are, first, the difficulties in classifying the Crown as trustee and second, the limited range of remedies that may be enforced against the Crown for any breach of its trust duties. She concludes that "there are grave substantive and procedural problems arising from the application of classical trust law in a public trust context".³⁷

The Public Trust as a Fiduciary Obligation

It would seem therefore that a preferable way to approach the public trust doctrine would be either to apply classical trust law very loosely or, to classify the public trust more broadly as a fiduciary obligation imposed on government, rather than a trust per se.

³⁷ Hunt, *supra* note 2 Ch.1 at 178.

Certainly the more flexible nature of the law regarding fiduciaries would seem more appropriate to the public trust doctrine than the law governing a specific type of fiduciary relationship, namely classical trust law. As with the public trust doctrine, the law concerning fiduciaries has evolved to meet the changing needs of society, and the courts have deliberately refrained from confining the perimeters of fiduciary relationships. In *Tufts v. Sperry* [1952] 2 TLR 516, Sir Raymond Evershed, M.R. quoting from *Tate v. Williamson* (1866) 2 Ch. App. 55 remarked with respect to fiduciaries :

I observe and repeat that "the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise." The existence of the jurisdiction and the right and duty to exercise it must in every case depend on the special facts of that case and the inferences properly to be drawn from them.³⁸

Similar comments were made by the Australian High Court in *Hospital Products v. U.S. Surgical Corporation* (1984) 156 CLR 41, 55 ALR 417. Gibbs C.J., having noted that the authorities provided no comprehensive statement of the criteria by which a fiduciary relationship could be established, concluded :

I doubt if it is fruitful to attempt to make a general statement of the circumstances in which a fiduciary relationship will be found to exist. Fiduciary relations are of different types, carrying different obligations ... and a test which might seem appropriate to determine whether a fiduciary relationship existed for one purpose might be quite inappropriate for another purpose.³⁹

³⁸ [1952] 2 TLR 516 at 522. He further commented at 552 that "the jurisdiction is not circumscribed by reference to defined limits".

³⁹ (1984) 55 A.L.R. 417 at 432. See also Mason J, as he then was, at 454, "the courts have declined to define the concept [of a fiduciary], preferring instead to develop the law in a case by case approach" and at 458, "every such transaction must be examined on its merits with a view to ascertaining whether it manifests the characteristics of a fiduciary relationship."

In keeping with judicial reluctance to define conclusively the characteristics of a fiduciary relationship, the courts have consistently asserted that the categories of fiduciary are not closed.⁴⁰

Despite the absence of definitive hallmarks of a fiduciary relationship, certain key features can be distilled from the case law. Professor Weinrib, whose work has been cited in various cases,⁴¹ stresses that "the hallmark of a fiduciary relation is that the relative legal positions are such that one party is at the mercy of the other's discretion".⁴² In Weinrib's view, the fiduciary obligation functions as a method for controlling discretion, "the fiduciary obligation is a device for regulating the conduct of a fiduciary where a fiduciary, through delegated power, can affect the legal position of the principal".⁴³

Several cases have emphasized that it is the combination of discretionary power in one party, and vulnerability in the other, that have led to the imposition of a fiduciary

⁴⁰ *Tufton v. Sporni*, *supra* note 38 at 522; *English v. Dedham Vale Properties Ltd* [1978] 1 W.L.R. 93 at 110; *Laskin v. Bache & Co. Inc.* (1971) 23 D.L.R. (3d) 385 at 392; *Goldex Mines Ltd v. Revill* (1974) 54 D.L.R. (3d) 672 at 680; *Guerin v. The Queen* (1984) 13 D.L.R. (4th) 339 at 341; *Hospital Products Ltd v. United States Surgical Corporation*, *supra* note 39 at 432 and 434; *Mabo v. Queensland* (1992) 66 A.L.R. 408 per Toohey J at 491.

⁴¹ See in particular : Dickson J (as he then was) in *Guerin v. The Queen* (1984) 13 D.L.R. (4th) 339 at 340-341 and Mason J (as he then was) in *Hospital Products Ltd v. United States Surgical Corporation* (1984) 55 ALR at 454.

⁴² E.J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1 at 7.

⁴³ *Ibid.* at 9.

obligation. In *Guerin's* case, *supra*, Dickson J. in holding that the Crown was under a fiduciary obligation to the Indians, focused on the fact that Indian title to land was inalienable, except by surrender to the Crown. He stressed that this surrender requirement had been introduced to prevent the Indians from being exploited by prospective purchasers. The Crown, in a very paternalistic manner, undertook the responsibility of deciding on the Indians' behalf, where their best interests lay - the Indians were regarded as incapable of making such decisions themselves.⁴⁴

The vulnerability of the principal need not be pre-existing; it may arise because of the power of the fiduciary to adversely affect the interests of another party. In *Hospital Products Ltd*, *supra*, Mason J. (as he then was) remarked :

The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary ⁴⁵

The same point was made by Toohey J. in *Mabo v. Queensland* (1992) 66 A.L.R. 408.

In discussing the power of the Crown to alienate aboriginal land, he said :

[T]his power and corresponding vulnerability give rise to a fiduciary obligation

⁴⁴ *Ibid.*, especially at 340. See also *Re Heyl & Lac Minerals Ltd* (1985) 50 O.R. (2d) 535, aff'd (1985) 52 O.R. (2d) 224. Citing *Guerin's* case, the court at 551 emphasized that the two shareholders were "at the mercy of the other's discretion" and that their interests were "affected by and ... dependent on the manner in which the fiduciary used the discretion which had been delegated to him".

⁴⁵ (1984) 55 A.L.R. 417 at 455.

on the part of the Crown. The power to destroy or impair a people's interests in this way is extraordinary and is sufficient to attract regulation by Equity to ensure that the position is not abused. The fiduciary relationship arises, therefore, out of the power of the Crown to extinguish traditional title by alienating the land or otherwise; it does not depend on an exercise of that power.⁴⁶

The nature of the public's interests in public trust resources is in many ways analogous to that of aboriginal interests in land. The legal nature of the interest tends to defy precise description and yet as discussed in Chapter One, there is a recognition that the relationship between the people and the resource is a special one. Furthermore, the power of the state to destroy or impair the public's interests in diminishing and valuable public resources is enormous. In many instances, once destroyed or severely damaged, these resources are lost forever and the impact on the global environment can be devastating. As Hunter remarks:

Another major ecological tenet is that the world is finite. The earth can support only so many people and only so much human activity before limits are reached. This lesson was driven home by the oil crisis of the 1970's as well as by the pesticide scare of the 1960's. The current deterioration of the ozone layer is another vivid example of the complex, unpredictable and potentially catastrophic effects posed by our disregard of the environmental limits to economic growth ... In short, the environment imposes constraints on our freedom; these constraints are not the product of value choices but of the scientific imperative of the environment's limitations.⁴⁷

To many aboriginal people, their connection with the land is a connection with life, a spiritual and cultural connection. While most Western societies have, to a large extent, "lost" this spiritual and cultural connection, the public interest in preserving the environment is also, ultimately, a connection with life. If the environment is destroyed,

⁴⁶ (1992) 66 A.L.R. 408 at 493.

⁴⁷ Hunter, *supra* note 51 Ch.2 at 314.

so also is the ability to sustain human life. The power of governments to destroy or impair this life connection, both in the present and for the future is, to use Toohey J.'s expression, "extraordinary" and similarly deserving of protection.⁴⁸

Having concluded that the government is, at the very least, under a broad fiduciary obligation with respect to public trust resources, what is the scope of that fiduciary obligation ? As with the public rights of navigation and fishing considered in Chapters One and Two, it is clear from the American cases that the state has a duty of care and protection with respect to trust resources and that this duty is an affirmative duty. In *City of Milwaukee v. State* 214 N.W. 820 (1927), the court asserted that :

The trust reposed in the state is not a passive trust; it is governmental, active and administrative ... the trust, being both active and administrative, requires the lawmaking body to act in all cases where action is necessary, not only to preserve the trust, but to promote it.⁴⁹

⁴⁸ See also : R.H. Bartlett, "The Fiduciary Obligation of the Crown to the Indians" (1989) 53 Sask. L. Rev. 301. In addition to stressing the combination of power and discretion as a source of the fiduciary obligation, Bartlett focuses on two other elements, control and management. He argues at 305 and 313 in particular that broad powers of control and management over Indian lands gives rise to the accountability of the Crown as a fiduciary. Toohey J in *Mabo, supra* makes a similar point, arguing at 493 "Moreover if, contrary to the view I have expressed, the relationship between the Crown and the Meriam people ... were insufficient to give rise to a fiduciary obligation, both the course of dealings by the Queensland Government [creation of reserves, appointment of trustees] ... and the exercise of control over or regulation of the Islanders themselves by welfare legislation ... would certainly create such an obligation". This control and management argument could have particular application in Canada with respect to statutory regimes for parks, fisheries etc.

⁴⁹ 214 N.W. 820 at 830. See also *District of Columbia v. Air Florida, Inc.* 750 F. 2d 1077 (D.C. Cir. 1984) at 1083, "It has evolved from a primarily negative restraint on states'

Similarly in *State Dept. of Environmental Protection v. Jersey Central Power & Light Co.* 125 N.J. Super. 97, 308 A. 2d 671 (1973), the Superior Court of New Jersey in holding that the public trust had been diminished by the operations of the power company which caused a sudden drop in water temperature, stated that :

The State has not only the right but also the **affirmative fiduciary obligation** to ensure that the rights of the public to a viable marine environment are protected, and to seek compensation for any diminution of trust corpus.⁵⁰

Part II - The Consequences of Recognition of the Public Trust Doctrine

Introduction

The review in Chapter One of the public rights of navigation and fishing and the public rights with respect to highways revealed that both at law and economics, certain resources (and the public rights in those resources) are regarded as "special". One of the primary consequences of the public trust doctrine has been to enhance this recognition. As with the public rights of navigation and fishing a grantee of trust rights generally takes subject to the trust, incidental rights are protected also, there is an affirmative duty of care and protection imposed on government with respect to trust resources and there

ability to alienate trust lands into a source of positive state duties"; and the cases cited in Lazarus, *supra* note 1 Ch.1 at 650 n. 112.

⁵⁰ 308 A. 2d 671 (1973) at 674. Interestingly, mirroring the law of fiduciaries, the court stated at 674, "In regard to the damage allegedly done to the public trust, the court is not limited to any set definition of a pollutant. Rather, the court will determine whether under traditional notions of damages, damage has occurred." See R.W. Johnston, "Water Pollution and the Public Trust Doctrine" (1989) 19 *Env'tl. L.* 485 for argument that the public trust doctrine should operate to protect against water pollution and preserve water quality.

are significant restrictions on extinguishment. In particular, as with the public rights considered in Chapter One, legislation is required to extinguish the public trust.

In contrast, however, to the public rights considered in Chapter One, the public trust has responded to the needs of a modern age and an increasing concern for the environment. No longer is it necessary to show special damage to enforce the public rights - the public trust gives private citizens standing to enforce the trust. While this feature has to some extent been by-passed by recent developments in the American and Canadian law of standing, the public trust has not been made redundant. In America, the public trust has been found to impose an administrative process on government in its dealings with the trust. Most importantly, this process obligation has been held to circumscribe legislative discretion and obligations. This latest development is a logical extension of the duty of care and protection with respect to the public rights of navigation and fishing. Originally imposed on one individual, the King, the obligation now rests on a large leviathan, the modern day government and administrative bureaucracy. Some form of process obligation was inevitable if the government's fiduciary obligation with respect to public trust resources was to be fulfilled.

Although this Chapter refers primarily to the American public trust case law, many of the consequences of recognition of the public trust doctrine flow directly from the distinctive features of the public rights of navigation and fishing considered in Chapter One. As mentioned in Chapter Three, these rights form part of Canadian common law

and are similar in scope to their English predecessors. The American re-affirmation and expansion of some of these distinctive features, such as legal standing and an administrative process obligation on government, have served to emphasize once again that certain resources and the public rights in those resources are special and deserving of careful management and protection.

Although the public trust doctrine has been enshrined in legislative form in the Yukon and the Northwest Territories,⁵¹ and is being considered in British Columbia and Saskatchewan,⁵² there is still an important place for a common law public trust doctrine in Canada, especially given the weakness of Canadian environmental law. There are arguably five main consequences which will flow from recognition of the public trust doctrine at Canadian common law :

1. the recognition of a substantive right, and therefore legal standing, in members of the public to vindicate public trust interests;
2. the imposition of an affirmative fiduciary obligation on government with respect to trust resources;
3. the imposition of an administrative process on government with respect to supervision and disposition of trust resources;
4. restrictions on alienation of public trust resources; and

⁵¹ *Environment Act*, R.S.W.T. 1988, c.83 (Supp.); *Environmental Rights Act*, S.N.W.T. 1990, c. 28. See the comments concerning the dubious legal effect of this legislation *supra* note 2, Introduction.

⁵² See the sources listed *supra* note 3, Introduction.

5. in an environmental context, an increasing recognition of the importance of the natural environment and the special and inter-related nature of trust resources (which facilitates an ecological approach to property).

As mentioned earlier, these features are either identical to the features of the public rights of navigation and fishing (the precursor to the public trust) or are a logical development of those features in a modern society.

The Public Trust as a Substantive Right

Initially, it would seem that the most obvious consequence of recognition of the public trust doctrine at Canadian common law is the provision of standing to private citizens. Certainly, the early promoters of the public trust doctrine in the United States were concerned primarily with empowering citizens to enforce the trust. The public trust was seen as a means for providing citizens with the necessary legal interest or legal right required to confer standing to sue.⁵³ Sax, in his initial and influential article on the public trust doctrine stressed that for the public trust doctrine to be a useful environmental tool it had to serve three functions :

- (i) it must contain some concept of a legal right in the general public;
- (ii) it must be enforceable against the government; and

⁵³ Lazarus, *supra* note 1 Ch.1 at 646 and 658. Lazarus notes at 658 that at the time Professor Sax wrote his initial article on the public trust doctrine a citizen had to show an injury to a legal interest to possess standing to sue. Furthermore, the legal right had to be "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege" : *Tennessee Elec. Power Co. v. Tennessee Valley Authority* 306 U.S. 118 (1939) at 137-138.

- (iii) it must be capable of an interpretation consistent with contemporary concerns for environmental quality.⁵⁴

As is evident from the cases discussed in Chapter Two, courts in the United States have generally upheld the right of private citizens to bring actions to vindicate the public trust.⁵⁵ Lazarus, in his extensive review of public trust litigation in the United States divides cases since 1970 into three main categories :

- (i) private citizens suing the government for allegedly violating the doctrine;
- (ii) private citizens suing other private parties for allegedly violating the doctrine; and
- (iii) the government suing private parties for allegedly violating the doctrine.⁵⁶

Interestingly, Lazarus' review of American public trust cases revealed that it was the government, and not individual members of the public, that was the party invoking the doctrine in the majority of cases. He concludes that the third category of public trust litigation "has been one of the most important areas of development for the doctrine, if

⁵⁴ Sax, *supra* note 1 Ch.1 at 474

⁵⁵ See also Lazarus, *supra*, note 1 ch.1 at 646.

⁵⁶ *Ibid.* at 645-646.

not the most important".⁵⁷ As discussed later with regard to restrictions on extinguishment of public trust resources, the public trust doctrine can serve to enhance government power at the expense of private property interests.

If a primary rationale for the public trust doctrine is to provide private citizens with legal standing to uphold the public trust, the continued relevance of the doctrine could be questioned, given the Canadian Supreme Court's recognition of public interest standing in *Finlay v. Canada (Minister of Finance)* [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321.⁵⁸

Although the case did not involve environmental issues it has been said that "[t]he *Finlay* decision gave environmentalists formal access to the courts."⁵⁹

⁵⁷ Ibid., at 646. This pattern has been repeated in cases brought under the Michigan Environmental Protection Act. The legislation, which is in effect an environmental bill of rights, empowers private citizens and government agencies to sue other public or private entities "for the protection of air, water, and other natural resources and the public trust therein from pollution, impairment or other destruction." Public agencies have been frequent plaintiffs in MEPA litigation; see generally J.L. Sax & R.L. Conner, "Michigan's Environmental Protection Act of 1970 : A Progress Report" (1972) 70 Mich. L. Rev. 1003 at 1007; R.L. Abrams, "Thresholds of Harm in Environmental Litigation : The Michigan Environmental Protection Act as Model of a Minimal Requirement ?" (1983) 7 H.E.L.R. 107 at 118-119.

⁵⁸ Lazarus, *supra* note 1 Ch.1 makes this criticism with respect to the American public trust doctrine. He argues at 660 that "The law of standing ... has dramatically evolved to embrace the particular characteristics of a case or controversy involving environmental injuries ... The rationale of the trust doctrine was unnecessary." It should be noted however, that his criticisms concerning the continued reliance on the public trust doctrine as an environmental tool are based to a large extent on the development of the police power in the United States, as well as advances in nuisance law and administrative law. See especially 658-665 and 674-680.

⁵⁹ S.A.G.Elgie, "Environmental Groups and the Courts : 1970-1992" in G. Thompson, M.L. McConnell & L.B. Huestis, eds., *Environmental Law and Business in Canada* (Canada Law Book : Aurora, Ontario, 1993) at 202.

Prior to *Finlay's* case, the general rule regarding standing was that where a question of public right or public interest was raised, the Attorney-General was the proper plaintiff. A member of the public could not sue for declaratory or injunctive relief in such a case **unless** the citizen could establish "a sufficient private or personal interest in the subject matter of the proceedings".⁶⁰ Such private or personal interest could be established if the citizen could show interference with a private right or, special damage peculiar to the citizen and resulting from the interference with the public right.⁶¹

However, in a series of decisions,⁶² the Supreme Court introduced an exception to the general rule. The Supreme Court held, in effect, that where there was a challenge to the constitutionality or operative effect of legislation, the court had a discretion to recognize public interest standing. The question raised in *Finlay's* case was whether the court had discretionary power to recognize public interest standing in cases involving non-constitutional challenges to statutory authority for administrative action. The Supreme Court held that it did have such power, provided the following criteria were satisfied :

⁶⁰ *Finlay's* case, *supra*, (1986) 33 D.L.R. (4th) 321 at 329.

⁶¹ *Ibid.* at 330. See generally the court's discussion of the authorities and the meaning of "interference with a private right" and "special damage" at 330-331.

⁶² *Thorson v. A.G. for Canada (No. 2)* (1974) 43 D.L.R. (3d) 1, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeill* (1975) 55 D.L.R. (3d) 632, [1976] 2 S.C.R. 265 and, *Minister of Justice of Canada v. Borowski* (1981) 130 D.L.R. (3d) 588, [1981] 2 S.C.R. 575.

- (i) the issue had to be justiciable;⁶³
- (ii) the issue must be "serious" and raised by a person with a "genuine interest in the issue";⁶⁴ and
- (iii) there must be "no other reasonable and effective manner in which the issue may be brought before a court".⁶⁵

It is clear from the case law that public interest standing applies to environmental issues as well.⁶⁶ In his review of public interest environmental law suits, Elgie ⁶⁷ concludes that since the *Finlay* case, standing generally has been granted to environmental plaintiffs bringing administrative actions.⁶⁸ Elgie does however identify other barriers to

⁶³ On the question of justiciability, the court noted at 340 "where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government."

⁶⁴ *Ibid.* at 341.

⁶⁵ *Ibid.*

⁶⁶ See for example : *Energy Probe v. Canada (A.G.)* (1989) 3 C.E.L.R. (N.S.) 262 (Ont. C.A.); *Western Canada Wilderness Committee v. Minister of Environment & Parks (B.C.)* (1988) 25 B.C.L.R. (2d) 93 (B.C.S.C.) especially at 97 where the judge remarked "The mere fact that the petitioners are without a legal or economic interest in the resolution of the issue they raise cannot be sufficient to deny them standing ... They must be regarded as concerned citizens interested in ensuring that lawful process is followed when decisions affecting the protection and management of wildlife in British Columbia are being made"; *Reese v. Alberta (Minister of Forestry, Lands & Wildlife)* (1992) 123 A.C. 241 (Alb. Q.B.).

⁶⁷ Elgie, *supra* note 59 at 202.

⁶⁸ *Ibid.* He notes at 202 n. 138 that out of approximately 50 administrative actions he has identified since 1987, public interest standing was denied under the *Finlay* test in only one case.

administrative actions by environmental plaintiffs. In addition to the high costs of litigation (reduced somewhat with the provision of legal services by public interest environmental law organizations),⁶⁹ he stresses that :

Since 1987, the principal limitation on administrative actions by environmental groups has been the overall weakness of environmental legislation in Canada. There are two aspects to this weakness. First, a number of important environmental issues simply are not addressed by legislation in Canada. For instance, there is no legislation dealing with protection of endangered species in most provinces and at the federal level.⁷⁰ Second, Canadian environmental legislation tends to confer very wide discretion on officials who are delegated the task of administering statutes ... Because Canadian environmental legislation places relatively few concrete environmental obligations on government officials, there are correspondingly few opportunities for administrative actions.⁷¹

Despite Elgie's conclusions as to the positive effect of *Finlay's* case in opening the door to environmental plaintiffs, the public trust doctrine is not redundant as regards administrative actions. Where applicable as a common law doctrine, the public trust doctrine could operate to some extent to "fill the gaps", both where there is no relevant legislation and where the legislation is relatively weak because of broad discretionary powers conferred on administrators. For example, if as has been argued in the United States,⁷² wetlands are subject to a public trust at Canadian common law, adverse

⁶⁹ *Ibid.* at 205. Elgie notes however, that losing plaintiffs are still at risk of paying the other side's legal costs.

⁷⁰ He notes at 207 n. 186 that only 3 provinces have passed endangered species legislation, namely Manitoba, Ontario and New Brunswick and that similar claims can be made regarding protection of wetlands and wilderness areas.

⁷¹ *Ibid.* at 207.

⁷² *Robbins v. Dept. of Public Works* 355 Mass. 328, 244 N.E. 2d at 577 (1969); *Just v. Marinette County* 56 Wis. 2d 7, 201 N.W. 2d 761 (1972). See also M.K. McCurdy, "Public Trust Protection for Wetlands", *supra* note 6.

administrative action with respect to that resource could be challenged under the common law public trust doctrine. The public trust doctrine can therefore (at least in certain areas) provide both a cause of action and standing in the absence of appropriate environmental legislation. More importantly, if as argued below, the public trust imposes an administrative process which the government and its administrators must follow when making decisions affecting trust resources, the public trust doctrine could complement the statutory regime. Accordingly, despite broad statutory discretion, administrators would still be required to comply with common law process requirements imposed by the public trust - administrative discretion and statutory obligations would therefore be circumscribed by the public trust doctrine.

The Public Trust as an Administrative Process

In addition to providing private citizens and government with the right to bring legal action, it appears from some of the recent American cases that the public trust doctrine imposes what may be best described as an "administrative decision-making process" on government.⁷³ In this section the primary focus will be on administrative process obligations in an environmental context. The process obligations could also, for example,

⁷³ Blumm, *supra* note 42 Ch.1 at 589-594 argues that this process is in fact an example of judicial insistence on 'hard look' administrative decision making. Blumm notes at 589-590 that under the 'hard look' doctrine, courts require agencies to "(1) offer detailed explanations of their decisions, (2) justify departures from past practices, (3) allow effective participation in the regulatory process of a broad range of affected interests, and (4) consider alternatives to proposed actions. He concludes at 590 that the result of the 'hard look' doctrine "has been a judicial emphasis on process fairness and 'reasoned decision making' from administrators, rather than particular substantive results."

embrace requirements such as ensuring that government obtains a proper price when disposing of public trust property.

As mentioned earlier, this administrative process obligation is a logical modern extension of the duty of care and protection imposed on government with respect to the public rights of navigation and fishing given the size of modern government and the explosion of administrative authorities. The American cases indicate that in its dealings with trust resources, the government is not free to alienate trust resources at will, even with legislative authority. As the court stated in *Kootenai Environmental Alliance v. Panhandle Yacht Club* 105 Idaho 622, 671 P. 2d 1085 (1983) :

[M]ere compliance by these bodies [the State Land Board and the State Department of Lands] with their legislative authority is not sufficient to determine if their actions comport with the requirements of the public trust doctrine. The public trust doctrine at all times forms the outer boundaries of permissible government action with respect to government resources.⁷⁴

Due regard must accordingly be given to the effect of the proposed disposition on both trust resources and the interests protected by the public trust. One academic has even argued that "full implementation of the public trust doctrine requires at a minimum an environmental assessment and, in most cases worth the effort of litigating, a full environmental impact statement."⁷⁵

⁷⁴ 671 P. 2d 1085 at 1095.

⁷⁵ Reed, *supra* note 7 at 108. See also his discussion of process obligations at 117-121.

One of the clearest expressions of this administrative process is the Californian case of *National Audubon Society v. Superior Court* 658 P. 2d 709 (Cal. 1983), the "Mono Lake" case, considered in Chapter Two. As mentioned in Chapter Two, the case involved the effect of the diversion of non-navigable tributaries into Mono Lake. The plaintiffs, the National Audubon Society, brought an action to prevent the Department of Water and Power of the City of Los Angeles from continuing to divert water from Mono Lake on the grounds that the shores, bed and waters of the lake were protected by a public trust.

Although the court recognised that the state did have the power to grant non-vested usufructuary rights to appropriate water, even if such diversions harmed public trust uses, such a decision could not be made lightly.⁷⁶ Coupled with the power to diminish the public trust came certain responsibilities. The court made the following comments regarding the role and responsibilities of the state :

1. the "core of the public trust doctrine is the state's authority as sovereign to exercise a **continuous supervision and control** over the navigable waters of the

⁷⁶ Interestingly, the court distinguished between the types of waters and lands subject to the public trust doctrine, remarking at 712 that "The corollary rule which evolved in tideland and lakeshore cases barring conveyance of rights free of the trust except to serve trust purposes cannot, however, apply without modification to flowing waters". Although the court held that the state could grant rights to appropriate water even if such diversion harmed the public trust, the court noted at 721 and 723 that parties acquiring rights in trust property generally acquire those rights subject to the public trust.

state and the lands underlying those waters"; ⁷⁷

2. before water diversions were approved, the effect of the diversions upon interests protected by the trust (which included environmental and recreational values) had to be considered and the state should "attempt, so far as feasible, to avoid or minimize any harm to those interests" ⁷⁸ ; the state "has an **affirmative duty to take the public trust into account** in the planning and allocation of water resources and to protect public trust uses whenever feasible"; ⁷⁹
3. the continuing power of the state as administrator of the public trust extended to "the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust" ⁸⁰, in its continuing role as supervisor, the "state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs". ⁸¹

⁷⁷ 658 P. 2d 709 at 712. Blumm, *supra* note 42 Ch.1 at 529 n.95 comments that continuous state supervision has been emphasized also in *Kootenai Envtl. Alliance v. Panhandle Yacht Club* 105 Idaho 622 at 631, 671 P. 2d 1085 at 1094 (1983); *Caminiti v. Boyle* 107 Wash. 2d 662 at 672, 732 P.2d 989 at 995 (1987); *In re Stone Creek Channel Improvements* 424 N.W. 2d 894 at 903 (N.D. 1988).

⁷⁸ *Ibid.*

⁷⁹ *Ibid.* at 728. For a discussion of cases imposing procedural requirements as part of the public trust, see Blumm, *supra* note 42 Ch.1 at 591 n. 86 and 592.

⁸⁰ *Ibid.* at 723.

⁸¹ *Ibid.* at 728. See also *Kootenai Envtl. Alliance*, *supra* note 77 671 P. 2d at 1094, "the state is not precluded from determining in the future that this conveyance is no longer compatible with the public trust".

The American public trust doctrine therefore embraces a procedural obligation to consider the effects of proposed diversions on both the trust resource and values protected by the trust. In the Mono Lake case, the court stressed that "an objective study and reconsideration of the water rights in the Mono Basin is long overdue". The court considered matters such as the effects of increased salinity of the lake, the decline of the lake's shrimp population and its corresponding impact on migratory birds using the lake as well as the loss of nesting sites. The impact of the diversions on humans was considered also, in particular the respiratory problems which could be caused by airborne silt, further reductions to an already declining shrimp industry and, more generally, the fact that "the lake's recession obviously diminishes its value as an economic, recreational and scenic resource."⁸²

Most importantly however, it would appear that the procedural requirements imposed by the public trust doctrine are not displaced by legislation; rather, the public trust complements statutory obligations and discretions. For example, in *United Plainsmen Association v. North Dakota State Water Conservation Commission* 247 N.W. 2d 457 (1976) an injunction was sought against the State Water Conservation Commission and the State Engineer restraining the State Engineer from issuing future water permits for power and energy production until there was a comprehensive short and long-term plan for the conservation and development of the State's natural resources. The plaintiffs

⁸² *Ibid.* at 716. For another example of factors to be considered by government in carrying out its public trust obligations, see *Shokal v. Dunn* 109 Idaho 330 at 339, 707 P. 2d 441 at 450 (1985).

alleged that such a plan was required by both legislation and the public trust doctrine.

The Supreme Court of North Dakota rejected the plaintiffs' argument that the relevant legislation imposed mandatory planning responsibilities upon the State Engineer as a condition precedent to the issuance of water permits. However, the court then stated :

The foregoing, however, does not relieve the Commission and State Engineer of mandatory planning responsibilities with respect to the issuance of water permits ... We agree with United Plainsmen that **the discretionary authority of state officials to allocate vital state resources** is not without limits but is **circumscribed by what has been called the Public Trust Doctrine.**⁸³

In describing the scope of the common law obligations imposed by the public trust doctrine on the State Engineer, the court stated :

In the performance of this duty of resource allocation consistent with the public interest, the Public Trust Doctrine requires, at a minimum, a determination of the potential effect of the allocation of water on the present water supply and future water needs of this State. This necessarily involves planning responsibility. The development and implementation of some short- and long-term planning capability is essential to effective allocation of resources [in accordance with the statutory requirement] "without detriment to the public interest in the lands and waters remaining".⁸⁴

Given that Canadian common law already recognises that the government has an affirmative duty as guardian and protector of the public rights of navigation, it should be realistic to argue that any modern Canadian re-awakening of the public trust should embrace the administrative process requirement developed by the American courts.

⁸³ 247 N.W. 2d 457 (1976) at 460. See also *Kootenai Environmental Alliance v. Panhandle Yacht Club* 671 P. 2d 1085 (1983) at 1095.

⁸⁴ *Ibid.* at 462.

Despite the differences in legal culture between the United States and Canada, in particular that Canadian courts are generally more traditional and conservative in their approach, as mentioned previously, the administrative process requirement is a logical modern extension of the public rights of navigation and fishing and should form part of a revitalized Canadian public trust doctrine. Interestingly, in the unreported decision of *Mann v. The Queen*⁸⁵, it was assumed that the public trust did impose certain process obligations on government. The plaintiffs, a group of British Columbia residents and commercial fishermen alleged that the defendants (the Queen in right of Canada and in right of British Columbia; the Minister of Fisheries, the Fraser River Area Manager and the Department of Oceans and Fisheries) had adopted a policy of preferring Indian claims to the Fraser River Salmon Fishery over their own claims and those of other commercial fishermen. As part of this policy, the defendants had allocated 500,000 Fraser River sockeye salmon to the holders of Indian food fishing licences in priority to the plaintiffs and other commercial fishermen.

The plaintiffs claimed, inter alia, that such an allocation was in breach of the public trust or fiduciary duty under which the Queen in right of Canada and in right of British Columbia holds all Canadian fisheries. Significantly, the public trust or fiduciary duty was alleged to require that:

- (i) the fishery be managed and conserved for the benefit of all present and future generations;

⁸⁵ (1 June 1990), Vancouver A881092 (B.C.S.C.).

- (ii) decisions with respect to the use and enjoyment of the fishery resource by members of the public be made in a fair and rational fashion, in the public interest, after following fair procedures, including hearing all interested parties, and not be made in an arbitrary and capricious or discriminatory manner; and
- (iii) no preference or priority be created in favour of any prior individual or group in and to the fishery or any portion thereof.

The case has yet to be heard by the British Columbia Supreme Court, and so it is unknown whether the plaintiffs' arguments as to the existence and the scope of the public trust with respect to fisheries will be upheld.⁸⁶ The plaintiffs' argument as to the **form** of the decision-making process is particularly interesting, and seems to extend the American case law. The plea for more public participation in the decision-making process is however, consistent with developments in British Columbia, and elsewhere in Canada, to involve the public more directly in government decisions involving land use and resource allocation.⁸⁷

⁸⁶ The decision involved a chambers application by the defendants for (1) a declaration that the court should decline jurisdiction over the defendants and (2) an order that the plaintiffs' action be struck out on the grounds that it disclosed no reasonable claim or was otherwise an abuse of process. MacKinnon J dismissed the application, ruling that the issue of breach of public trust or fiduciary obligation raises a **constitutional issue** with respect to the rights of the federal and provincial Crown pertaining to the fisheries. In a second application, (25 April, 1991) Vancouver A881092 (B.C.S.C.), Mackinnon J dismissed the defendants' application to strike out the entire amended statement of claim.

⁸⁷ See for example : Commission on Resources and Environment, *Report on a Land Use Strategy for British Columbia*, August, 1992. The Report stresses that, "The traditional

Mention should, however, be made of the recent Canadian Supreme Court decision in *Friends of the Oldman River v. Canada (Minister of Transport and Minister of Fisheries and Oceans)* [1992] 1 S.C.R. 3, 2 W.W.R. 193, which to a large extent has already paved the way for due administrative consideration of environmental concerns. The court held that the Minister of Transport in his capacity as a decision maker under the *Navigable Waters Protection Act*⁸⁸ was subject to the *Environmental Assessment and Review Process Guidelines Order* and, accordingly, had to consider the environmental impacts of the proposed Oldman Dam. It is interesting to note that the Order did not specifically include environmental criteria as part of decision-making powers under federal legislation and yet it was still held to be mandatory.

Of particular significance to the public trust doctrine is the Supreme Court's emphasis on both the importance of the environment⁸⁹ and the need to include environmental considerations in the decision-making process. Mr Justice La Forest, who delivered the

approach to land and resource allocation, based primarily on the responsibility of statutory decision-makers, is no longer accepted in British Columbia as necessarily the best way to make decisions. One of the main reasons that the Commission on Resources and Environment was established is that the public feels alienated from the decision-making process, and is demanding a more significant and meaningful involvement." See also the various provincial reports referred to *supra* note 3, Introduction.

⁸⁸ R.S.C. 1985, c. N-22.

⁸⁹ La Forest J commences his majority judgment with the comment at 3, "The protection of the environment has become one of the major challenges of our time". Furthermore, his definition of "environment" at 37 is a broad one, "I cannot accept that the concept of environmental quality is confined to the biophysical environment alone; such an interpretation is unduly myopic and contrary to the generally held view that the "environment" is a diffuse subject matter".

majority judgment, stressed that "[s]urely the potential consequences for a community's livelihood, health and other social matters from environmental change are integral to decision making on matters affecting environmental quality, subject of course, to the constitutional imperatives".⁹⁰ Referring to the Australian decision of *Murphyores Incorporated Pty Ltd v. Commonwealth of Australia* (1976) 136 C.L.R. 1 (H.C.) (which held that the federal Minister of Minerals and Energy could consider an inquiry under the *Environmental Protection (Impact of Proposals) Act* 1974-1975 (Cth) in deciding whether to approve an export licence for a mining company), La Forest J. concluded :

The case points out the danger of falling into the conceptual trap of thinking of the environment as an extraneous matter in making legislative choices or administrative decisions. Clearly, this cannot be the case. Quite simply, the environment is comprised of all that is around us and as such must be a part of what actuates many decisions of any moment. Environmental impact assessment is, in its simplest form, a planning tool that is now generally regarded as an integral component of sound decision-making.⁹¹

The *Oldman Dam* case involved delegated legislation directed specifically towards environmental impact assessment and review. Mr Justice La Forest's comments are not, however, confined to the Guidelines Order and are likely to have much broader ramifications for judicial constraints on administrative decisions concerning the environment, especially if the public trust doctrine is revitalized at Canadian common law.

⁹⁰ [1992] 1 S.C.R. 3 at 37.

⁹¹ *Ibid.* at 70-71.

Restrictions on Extinguishment and Alienation

(i) Legislation Required to Extinguish the Public Trust

As with the public rights of navigation and fishing considered in Chapters One and Two, it is clear from the Canadian public trust cases concerning highways and the American public trust cases generally that legislation is usually required to modify the public trust.

In *People v. California Fish Co.* (1913) 166 Cal. 576, 138 P. 79, the court stated :

[S]tatutes purporting to authorize an abandonment of ... public use will be carefully screened to ascertain whether or not such was the legislative intention, and that intent must be **clearly expressed or necessarily implied**. It will not be implied if any other inference is reasonably possible. And if any interpretation of the statute is reasonably possible which would not involve a destruction of the public use or an intention to terminate it in violation of the trust, the courts will give the statute such interpretation.⁹²

This approach mirrors the principle in *Higginson v. Treasurer & Sch. House Commrs of Boston* 212 Mass. 583, 99 N.E. 525 that public interest lands devoted to one public use cannot be diverted to another inconsistent public use without plain and explicit legislation authorizing the decision. The rule has been consistently applied by American courts.⁹³

⁹² 138 P. 79 (1913) at 88.

⁹³ See for example : *City of Berkeley v. Superior Court of Alameda* 26 Cal. 3d 515, 606 P. 2d. 362 (1980); *National Audubon Society v. Superior Court of Alpine City* 658 P. 2d 709 (Cal. 1983); *Gould v. Greylock Reservation Commission* 350 Mass. 410, 215 N.E. 2d 114 (1966); *CWC Fisheries, Inc. v. Bunker* 755 P. 2d 1115 (Alaska 1988) and *Robbins v. Dept. of Public Works* 355 Mass. 328, 244 N.E. 2d at 577 (1969). But see *Kootenai Envtl. Alliance v. Panhandle Yacht Club* 671 P. 2d 1085 (Idaho 1983) especially at 1091 and 1095. The court disagreed at 1091 that trust resources could be alienated only by express legislative mandates. However, the court stressed that "public trust resources may only be alienated or impaired through open and visible actions, where the public is in fact informed of the proposed action and has substantial opportunity to respond to the proposed action before a final decision is made." The court

Interestingly, this is also the rule with respect to extinguishment of aboriginal interests in land. In the recent unreported British Columbia Court of Appeal decision in *Delgamuukw v. The Queen*,⁹⁴ the court affirmed that a clear and plain legislative intention is required to extinguish aboriginal title.⁹⁵ Mr Justice Macfarlane, Williams and Taggart JJ. concurring, stated that this requirement "stems from the special relationship between the Crown and aboriginal people which has existed since the assertion of sovereignty and which is particularly apparent in relation to Indian interests in land".⁹⁶ Referring to the fact that the fiduciary obligation of the Crown to aboriginal peoples provides a "guiding principle" in interpreting section 35 of the *Constitution Act, 1982*, he argues that it must also "bear on the proper test to be applied to legislation purporting to extinguish aboriginal title".⁹⁷ Accordingly, he concludes :

In my view, the honour of the Crown, arising from its role as the historic protector of aboriginal lands, requires a clear and plain intent to extinguish aboriginal title that is express or manifested by unavoidable implication ... The clear and plain test, whether applied to vested rights, property rights, or aboriginal rights, ensures respect for and protection of those special rights. Although aboriginal rights cannot be so easily described in terms of English property law, they are to be regarded as unique and important. But, like vested rights and property rights, they may be impaired or extinguished with or without compensation by a clear and plain exercise of competent legislative power. However, the legislative intent to do so will be implied only if the interpretation

noted also that "decisions made by non-elected agencies will be subjected to closer scrutiny than will legislative decisionmaking."

⁹⁴ (25 June, 1993) Vancouver CA 013770 (B.C.C.A.).

⁹⁵ *Ibid.* at 47, per Macfarlane J and at 181, per Lambert J.

⁹⁶ *Ibid.* at 47.

⁹⁷ *Ibid.* at 48.

of the statute permits no other result.⁹⁸

This reasoning is interesting because if the source of the "clear and plain legislation" requirement is the fiduciary obligation of the Crown to aboriginal peoples, then the same requirement should apply in relation to the Crown's fiduciary obligation to the public with respect to public trust resources. As guardian and protector of public trust lands, the government should be similarly restricted in its ability to extinguish trust resources. Furthermore, as with aboriginal interests in land, the "clear and plain legislation" requirement should apply regardless of whether the public's interest in public trust land is a property right.

(ii) Public Purpose and Substantial Impairment

In addition to the requirement that conveyances of trust property must have legislative authority, it appears that there are further restrictions on alienation. Although decided in 1892, the case of *Illinois Central Railroad Company v. Illinois* (1892) 146 U.S. 387, 13 S.Ct. 110 (discussed in some detail in Chapter Two) is consistently cited in American cases as authority for the following propositions :

1. the state, as administrator of the public trust, does not have the power to abdicate its role as trustee in favour of private parties;⁹⁹ and

⁹⁸ *Ibid.* at 48.

⁹⁹ See for example *City of Berkeley v. Superior Court of Alameda* 606 P. 2d 362 at 365; *Priewe v. Wisconsin State Land & Improvement Co.* 93 Wis. 534, 67 N.W. 918 (1896), *aff'd* 79 N.W. 780 (1899); *McLennan v. Prentice* 55 N.W. 764. Referring to trust lands, the court stated at 770 "The state has no proprietary interest in them, and cannot abdicate its trust in relation to them".

2. trust land can be granted to private parties free of the public trust only if:
 - (i) the proposed uses are consistent with trust purposes; or
 - (ii) the grants do not substantially impair the public interest in the trust resources remaining.¹⁰⁰

The American cases concerning both the public purpose requirement and substantial impairment prohibition have not resulted in a tidy set of principles governing restrictions on modification of public trust interests - as Sax notes "the case law has not developed in any way that permits confident assertions about state power."¹⁰¹ Lazarus identifies a variety of approaches to the public purpose requirement, ranging from a general relationship between the proposed governmental action and a legitimate public purpose, to a requirement that the purpose "have some connection with the substantive concerns of the trust doctrine".¹⁰² In some instances this has required a connection to the traditional trust purposes of navigation, commerce and fishing, which since the Californian decisions of *Marks v. Whitney*, *supra* and *Mono Lake*, *supra*, include recreational and ecological values. As previously mentioned in Chapter Two, the court in the Mono Lake case stressed that the purpose of the proposed activity on trust property

¹⁰⁰ See for example : *City of Berkeley*, *supra* at 365; *National Audubon Society*, *supra* note 92 at 721; *CWC Fisheries, Inc.*, *supra* note 92 at 1119; *Kootenai Env'tl. Alliance*, *supra* note 92 at 1089; *State v. Public Service Commission* 81 N.W. 2d 71 (1957) at 74, citing *Merwin v. Houghton* 146 Wis. 398 at 410, 131 N.W. 838 and, *Orion Corp. v. State of Washington* 747 P. 2d 1062 (Wash. 1987) at 1073.

¹⁰¹ Sax, *supra* note 1 Ch.1 at 486.

¹⁰² Lazarus, *supra* note 1 Ch.1 at 651.

had to be more than a public purpose such as increasing tax revenues or commercial use of the property - the purpose of the activity had to be connected more closely to the public trust.

Thus, the public trust is more than an affirmation of the state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right only in rare cases where the abandonment of that right is consistent with the purposes of the trust.¹⁰³

Regardless however, of the purpose requirement, Lazarus concludes that "the tests have proved susceptible to flexible application"¹⁰⁴ and have even embraced developing a public trust water resource to build an airport runway, one judge arguing that the airport would promote not only commerce, but possibly also navigation.¹⁰⁵

The prohibition against substantial impairment of trust resources embraces the administrative process requirements referred to earlier in this Chapter. Namely, prior to alienating trust resources the government must consider the potential impacts of the proposed activity on the public trust. Although Lazarus notes that some courts have prohibited any real harm to the public trust, he argues that in recent decisions, the courts "have recognized that destruction of trust resources is sometimes necessary, and therefore, they will impose a public trust standard that calls for heightened administrative

¹⁰³ 658 P. 2d 709 (Cal. 1983) at 724.

¹⁰⁴ Lazarus, *supra* note 1 Ch.1 at 651.

¹⁰⁵ *Ibid.* at 652, citing *Morse v. Oregon Div. of State Lands* 285 Or. 197 at 217, 590 P. 2d 709 at 716 (1979).

justification for the action."¹⁰⁶ The *Mono Lake* case is a good example of this approach.

(iii) Grantee Takes Subject to the Public Trust

Generally, however, as with the public rights of navigation and fishing, a grantee takes subject to the public trust. In the *Mono Lake* case, *supra*, the court referred to "those rare instances in which a grantee may acquire a right to use a former trust property free of trust restrictions."¹⁰⁷ In all other cases, the grantee held the trust property subject to the trust. The grantee's interest was in the nature of a "vested right to the servient estate (the right of use subject to the trust)"¹⁰⁸ and the grantee could "claim no vested right to bar recognition of the trust or state action to carry out its purposes".¹⁰⁹ In a similar vein, other courts have emphasized that all conveyances of trust property are subject to the state's retained supervisory authority,¹¹⁰ or that private fee simple property rights are "impressed" with the trust.¹¹¹

¹⁰⁶ *Ibid.* at 654.

¹⁰⁷ 658 P. 2d 709 (Cal. 1983) at 723.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Lazarus, *supra* note 1 Ch.1 at 655 n. 159 citing *United States v. 1.58 Acres of Land* 523 F. Supp. 120 (D. Mass 1981) at 124; *Bortz Coal Co. v. Commonwealth* 2 Pa. Commw. 441 at 453-454, 279 A. 2d 388 at 396 (1971).

¹¹¹ Lazarus, *ibid.*, at n. 160 citing *People v. California Fish Co.* 166 Cal. 576 at 588, 138 P. 79 at 84 (1913); *State v. Superior Court (Lyon)* 29 Cal. 3d 210 at 228, 625 P. 2d 239 at 250 (1981). See also Sax, *supra* note 1 Ch.1 at 487; "since the state has an obligation as trustee which it may not lawfully divest, whatever title the grantee has taken is impressed with the public trust and must be read in conformity with it."

As mentioned earlier, the government has been an active proponent of the public trust doctrine. Lazarus comments that the public trust doctrine has served as a theory of "enhanced sovereign authority", enabling government to assert that "the doctrine limits that nature of valid private property rights in those resources, rendering permissible governmental measures that impinge on those private interests."¹¹² Interestingly, this experience mirrors the efforts of Queen Elizabeth and the Stuarts (discussed briefly in Chapter One) to assert the prima facie presumption of Crown ownership in the foreshore and thereby defeat private title. However, in contrast to Thomas Digges' efforts to establish this presumption, there is significantly more legal American authority to support claims by either government or private citizens that private title to public trust property is circumscribed by the public trust. The theory that the grantee of trust property has no vested right or interest in that property has achieved prominence in the United States as a defence to expropriation of property claims, the argument being that because public trust rights both pre-date and survive grants of trust property, action taken to enforce the trust does not constitute an unconstitutional expropriation of property. Needless to say, the use of the public trust doctrine as a defence to expropriation claims has been controversial and has sparked much academic discussion and debate.¹¹³

¹¹² *Ibid.*

¹¹³ See for example : Huffman, "Avoiding the Takings Clause Through the Myth of Public Rights : The Public Trust and Reserved Rights Doctrines at Work" (1987) 3 J. Land Use & Envtl. L. 171; Comment, "The Fifth Amendment as a Limitation on the Public Trust Doctrine in Water Law" (1984) 15 Pac. L.J. 1291; Lazarus, *supra* note 1 Ch.1 at 648-649 and 655; Blumm, *supra* note 42 Ch.1 at 584-587; Hunter, *supra* note 51 Ch.2. For a recent example of the public trust as a defence to a takings claim, see *Orion Corp. v. State of Washington* 747 P. 2d 1062 (Wash. 1987).

This debate could have particular relevance to British Columbia and the current controversy over the provincial government's "obligation" to pay compensation to mining companies for restriction or extinguishment of mining rights by allocation of mining lands to park status. The contentious debate over the fate of the Tatshenshini River and the issue of compensation payable to Geddes Resources is a topical example of this controversy.¹¹⁴ In Canada, it would appear that in the absence of contrary legislation, compensation must be paid to mining companies in such instances.¹¹⁵ However, if a public trust is recognized over such property, it could be argued, based on the American authorities and the navigation and fishing cases, that because the mining companies never received a fully vested right to the property in question, no compensation is payable. As grantees of public trust property, their title was subject to the public trust and any action taken in promotion of the trust and the values protected by the trust, such as the establishment of a public park, would not give rise to an expropriation of property and therefore, no compensation would be payable. The political consequences of denying compensation in such cases would be significant and should not be easily discounted. The public trust doctrine could however, serve to justify a significant reduction in the amount

¹¹⁴ For a detailed review of the issues involved, see : Commission on Resources and Environment (British Columbia), *Interim Report on Tatshenshini/Alsek Land Use - Volume One : Report and Recommendations*, January, 1993. The British Columbia Provincial Government decided to declare the area a provincial park, rather than permit the proposed copper mine to proceed. This prompted the local mining industry to threaten an exodus to South America and more "mining friendly" environments; an exodus which apparently has been silently occurring over the past few years anyway.

¹¹⁵ *The Queen in Right of British Columbia v. Tener* (1985) 17 D.L.R. (4th) 1 (S.C.C.), applied in *Casamiro v. British Columbia* (1991) 80 D.L.R. (4th) 1 and *Cream Silver Mines v. British Columbia* (1991) 85 D.L.R. (4th) 269, under appeal.

of compensation payable in such instances.

(iv) Prohibition Against Alienation of Entire Trust Resource

A further possible restriction on alienation of public trust resources is the extent to which the state can extinguish an entire public trust resource. While it is generally recognized that the state is not required to preserve public trust resources as inviolate and that alterations to and diversions of public trust resources are permissible,¹¹⁶ (subject to the purpose requirement and substantial impairment restrictions mentioned earlier), it would appear that the state is not empowered to destroy an entire trust resource. In the *Illinois Central* case, *supra*, the Supreme Court held that the legislature could not convey the **entire** waterfront of the city to a private person free of the trust, stressing that the legislature did not have the power to "give away nor sell the discretion of its successors".¹¹⁷ Similar comments were expressed in the earlier American case of *Arnold v. Mundy* 6 N.J.L. 1 (1821). The court stressed that the state "cannot make a direct and absolute grant, divesting all the citizens of their common right; such a grant, or a law authorizing such a grant, would be contrary to the great principles of our

¹¹⁶ See for example : *State v. Public Service Commission* 81 N.W. 2d 71 (1957) at 74; *City of Milwaukee v. State* 193 Wis. 423 at 451, 214 N.W. 820 at 830, "It is not the law, as we view it, that the state, represented by its Legislature, must forever be quiescent in the administration of the trust doctrine, to the extent of leaving the shores of Lake Michigan in all instances in the same condition and contour as they existed prior to the advent of the white civilization in the territorial area of Wisconsin."

¹¹⁷ *Illinois Central, supra*, 146 U.S. at 460, 36 L.Ed. at 1045.

constitution, and never could be borne by a free people."¹¹⁸ Likewise in *State v. Public Service Commission* 275 Wis. 112, 81 N.W. 2d 71 (1957) the court affirmed that while the public trust doctrine "does not prevent minor alterations of the natural boundaries between water and land"¹¹⁹, the state was restricted from destroying the whole of a public trust resource; "[e]ven for a public purpose, the state could not change an entire lake into dry land nor alter it so as to destroy its character as a lake".¹²⁰

This prohibition potentially has application to clear-cut logging practices. If the land in question is held to be public trust property, the argument could be raised that as clear-cutting destroys the character of the forest as a forest, the action is illegal at common law. This argument is unlikely to succeed, however, if the clear-cutting is carried out over small and isolated patches of forest - reasonably large areas of public trust land would need to be involved for this prohibition to be invoked with any likelihood of success.

(v) Prohibition Against Abdication by State of its Role as Trustee

Connected to the prohibition against alienation of an entire public trust resource is the prohibition against abdication of the trust. As mentioned earlier, the state as administrator of the public trust does not have the power to abdicate its role as trustee in favour of

¹¹⁸ 6 N.J.L. 1 (1821) at 19.

¹¹⁹ 81 N.W. 2d 71 (1957) at 74.

¹²⁰ *Ibid.* citing *In re Crawford County Levee & Drainage Dist.* 182 Wis. 404, 196 N.W. 874.

private parties. In *Priewe v. Wisconsin State Land & Improvement Co.* 79 N.W. 780 (1899), the court stated that :

The legislature has no more authority to emancipate itself from the obligation resting upon it which was assumed at the commencement of its statehood, to preserve for the benefit of all the people forever the enjoyment of the navigable waters within its boundaries than it has to donate the school fund or state capitol to a private purpose. It is supposed that this doctrine has been so firmly rooted in our jurisprudence as to be safe from any assault that can be made upon it.¹²¹

This prohibition has been affirmed recently in the case of *Caminiti v. Boyle* 107 Wash. 2d 662, 732 P. 2d 989 (1987). The court stressed that "[t]he Legislature has never had the authority ... to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands."¹²²

The Public Trust as a Means of Enhancing the Special Nature of Trust Property

As mentioned in the Introduction to this Chapter, the fact that the distinctive features of the public rights of navigation and fishing are re-affirmed and expanded under the public trust doctrine reinforces the conclusion reached in Chapter One (with reference to both law and economics) that certain resources and the public rights with respect to those resources are "special" and inherently public in nature. In a time of ever decreasing

¹²¹ 79 N.W. 780 (1899) at 781.

¹²² 107 Wash. 2d 662 at 666. Sax, *supra* note 1 Ch.1 at 486 also recognizes the restriction against total abdication, noting that while there is no general prohibition against the disposition of trust properties even on a large scale, "no grant may be made to a private party if that grant is of such amplitude that the state will effectively have given up its authority to govern, but a grant is not illegal solely because it diminishes in some degree the quantum of traditional public uses."

natural resources, the public trust serves to emphasize the importance of the natural environment. There is a recognition, as Justice Holmes once wrote of a river, that a public trust resource is "more than an amenity, it is a treasure".¹²³ Regardless of whether it is a "true" trust or not, the very words "public trust" enhance this recognition. Classifying certain resources as "public trust resources" both reinforces the perception of these resources as "special" and, emphasizes that government has certain fiduciary responsibilities to the public in its management of those resources.

Significantly, the public trust also facilitates an ecological approach to trust resources - the special value of trust resources is not to be viewed in isolation, but as part of a "common property" and a "common future". Many commentators are now arguing that this type of recognition is an "ecological imperative". As Hunter remarks,

Historically, we have changed the environment to fit our conceptions of property. We have fenced, ploughed and paved. The environment has proven malleable, and to a large extent still is. But there is a limit to this malleability, and certain types of ecologically important resources ... can no longer be destroyed without enormous long-term effects on environmental and therefore social stability. To ecologists, the need for preserving sensitive resources does not reflect value choices but rather is the necessary result of objective observations on the laws of nature.¹²⁴

This broader view of public trust resources is particularly evident in the Californian cases of *Marks v. Whitney* 491 P. 2d 374 (1971), *State v. Superior Court (Lyon)* 29 Cal. 3d 210, 625 P. 2d 239 (1981), *State v. Superior Court (Fogarty)* 29 Cal. 3d 240, 625 P. 2d

¹²³ *New Jersey v. New York* 283 U.S. 336 (1931) at 342, cited in Dunning, *supra* note 42 Ch.1 at 523.

¹²⁴ Hunter, *supra* note 2 Ch.1 at 315.

256 (1981) and *National Audubon Society v. Superior Court* (the "*Mono Lake*" case) considered in Chapter Two. Not only did the courts affirm that recreational and aesthetic values formed part of the public trust, as did preservation of trust properties in their natural state as ecological units, the courts focused on trust resources as part of a broader ecosystem. The judicial environmental assessment conducted in these cases serves as a guide both to government and administrative authorities as to the matters to be taken into account in fulfilling the administrative process obligation referred to earlier in this Chapter. Ecological questions would therefore appear to constitute an integral part of administrative decisions affecting or likely to affect public trust resources.

If, as has been argued in this Chapter and Chapter One, the public trust and its precursor, the public rights of navigation and fishing and the public rights with respect to highways, apply to certain resources because they are special in nature, it would seem inevitable that any Canadian version of the doctrine would expand to embrace other "special" resources in much the same way as the American public trust has done, or is doing. Hunter in particular advocates focusing on the nature of the property in question, arguing as part of a broader ecological theory of property :

Courts, when faced with a public trust claim, look to the historical development of property in the state to see whether the property is subject to a trust. Such an inquiry obscures the real issue of which types of property *should* be held in common and why. The answer should not lie in an analysis of current reviews of land ... Nothing inherent in the public trust doctrine necessitates a purely historical mode of analysis or its current narrowness ¹²⁵

¹²⁵ Hunter, *supra* note 51 Ch.2 at 371. He remarks at 374, "If one of the purposes of the public trust is to protect the land's ecological integrity, then ecology should be relevant

Accordingly, rather than adopting a narrow, legalistic approach focusing on which resources have historically been classified as trust resources, the approach should be to ask whether, according to current values, the resources are special in nature, and ill-suited or inappropriate for private exploitation. The public trust could, therefore expand to embrace wetlands, endangered species, rare examples of old growth forest, fragile Alpine grasslands and so on.

Since its inception, the public trust doctrine has adapted to incorporate and reflect changing perceptions of the public interest. As discussed in Chapter Two, the public trust with respect to highways was redefined in the United States in the late nineteenth century to facilitate economic development. Now, however, the focus of the American public trust doctrine is increasingly directed towards protection, preservation and conservation of the diminishing natural environment. This focus reflects broad based public concern for the environment. Governments and government authorities in Canada are now recognizing this public interest in the natural environment. In the *Interim Report on Tatshenshini/Alsek Land Use* ¹²⁶, the Commission on Resources and Environment stated:

The way we define and evaluate wilderness may also alter over time, as society's needs and perspectives change. In recent decades, the diminishing amount of land

to defining which lands are subject to the trust." For similar arguments advocating extensions of the public trust to other resources for ecological reasons, see Rieser, *supra* note 51 Ch.2 and Meyers, *supra* note 51 Ch.2.

¹²⁶ Commission on Resources and Environment, Vol. 1 - Report and Recommendations, January, 1993.

that is unchanged by human use has dramatically changed social perspectives of the nature and value of wilderness. The increasing scarcity of wilderness has increased its value, in the eyes of many. In addition, the value of wilderness was historically associated primarily with its ability to provide outstanding recreation experiences, especially appreciation of scenery; today, there is an increasing belief that wilderness should be preserved not just for human use, but also for its own sake and for its capacity to preserve nature, including landforms, ecosystems, biodiversity, and wildlife habitat and populations. Each of these aspects contributes to wilderness qualities, and the whole is seen as greater than the sum of the parts.¹²⁷

The relevance of the public trust doctrine in a modern society is that the doctrine can embrace and enhance changing public perceptions of the importance and role of the natural environment. For the reasons outlined above, the doctrine lends itself particularly well to the notion that certain resources are special and public in nature.

Conclusion

Although somewhat of an enigma, the public trust is not an archaic legal doctrine. As the American experience clearly indicates, the doctrine is incredibly flexible and capable of adapting to meet increasing public concerns about the environment. Although the doctrine mirrors the distinctive features of its precursor, the public rights of navigation and fishing, the doctrine has expanded in the United States in modern times to provide legal standing to private citizens and to impose an administrative decision-making process on government in its management of public trust resources.

Because Canadian courts have both recognized the public trust doctrine and continuously

¹²⁷ *Ibid.* at 25-26.

affirmed the public rights of navigation and fishing, predicting the consequences of recognition of the doctrine at Canadian common law is not a purely hypothetical exercise. At the very least, any Canadian revival of the doctrine should embrace the distinctive features of the public rights of navigation and fishing, namely : the grantee generally takes subject to the public rights, the government has an affirmative duty of care and protection, incidental rights are protected and in addition to other restrictions, legislation is required to modify or extinguish the public rights. In addition, if the doctrine is to have meaning in the age of expanding government and multiple administrative authorities, the doctrine should embrace the process obligations recently imposed by American courts.

The public trust doctrine will not be a panacea for all environmental ills. It is unlikely to expand in the way that the American doctrine has done given that Canadians are less litigious than their American neighbours and Canadian courts tend to be more conservative and traditional in their approach. However, while Canadian environmental legislation remains deficient, there is still an important place for a revitalized public trust doctrine at Canadian common law.

* * * *

CONCLUSION

The public trust is as fluid as the waters from whence it came. It has flowed through the centuries in various forms, crossed countries, cultures and academic disciplines and adapted itself to the local terrain. One reason for the continued existence of the doctrine has undoubtedly been this incredible flexibility. However, the real key to the survival of the public trust doctrine, and its predecessor the public right of navigation and fishing, is the inherent recognition that certain resources are special in nature. Although the permissible allowance of private ownership of trust resources has varied, Roman, English, American and Canadian law have consistently recognized and upheld the special and public nature of resources such as water. It is, therefore, hardly surprising that the public trust doctrine is both resurfacing in an age of increasing environmental concern and recognition of the dangers of continued environmental degradation and extending beyond its amphibious boundaries. Regardless of the potential consequences of recognition of the public trust doctrine at Canadian common law considered in Chapter Four, at the very least the public trust doctrine serves to remind both government and private citizens alike that present and future generations have an interest in our natural environment that should be recognized and protected.

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