The Public Trust Doctrine in Canada

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In the United States, each state's Supreme Court is the final interpreter of its state law; the United States Supreme Court is limited to deciding matters of federal law. It just so happens that the public trust doctrine is widely, though not uniformly, understood to be a matter of state law.

In the Canadian legal system, the Supreme Court of Canada is the "court of last resort" for appeals from any appellate court in Canada. In other words, the nature of the public trust doctrine in Canada is not as varied as the United States and is thus easier to pinpoint.

There are three key differences between the US and Canadian Public Trust Doctrine:

1. The public trust doctrine in Canada focuses more on incorporating classical trust law concepts

2. The Canadian public trust law is based heavily and drawn from fiduciary obligations

3. Canadian litigants tend to use the public trust doctrine to challenge substantive merits rather than procedure of governmental actions

For more information: Anna Lund, "Canadian Approaches to

America's Public Trust Doctrine: Classic Trusts, Fiduciary duties & Substantive Review" (2012) 23:2 J. Env. L. & Prac. 105 (WL Can)

The public trust doctrine in Canada is still in early stages of development; there have only been a handful of cases over the past decades where it has been argued and even fewer where it has been considered. Below are the milestone cases that have brought the public trust doctrine to attention in the Canadian legal system:

HISTORY AND EVOLUTION OF THE PUBLIC TRUST DOCTRINE IN CANADA

Green v. The Queen in right of the Province of Ontario et al., [1973] 2 O.R. 396, 1972 CanLII 538 (ON SC)

This case is significant because it supports the idea that the public trust doctrine must align with classical trust concepts. This case suggests that Canadian courts will not grant substantive equitable remedies unless an express trust in the environmental interest is proven with certainty.

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Therefore, it seems from ***Green*** that when pursuing a public trust claim, the language establishing the trust, the property included in the trust, and the beneficiaries of the trust must all be certain. However, it is difficult to establish these elements when pursuing a public trust claim, as evidenced in ***Green***.

***Canadian Parks and Wilderness Society v. Wood Buffalo National Park (Superintendent)*, [1992] F.C.J. No. 553, 1992 CarswellNat 763**

Although this case does not show how Canadian courts deal with the public trust doctrine, it is worth noting that the Plaintiffs in the case used the public trust doctrine to protect non-traditional resources which is in the same vein as using the doctrine to protect resources threatened by climate change.

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***Walpole Island First Nation et al. v. Canada (Attorney General)*, 2004 CanLII 7793, [2004] O.J. No. 1970**

This case shows how the Governments of Canada and Ontario attempted to use the public trust doctrine to deny land claims by two First Nations. The Crown argued that it holds title in trust of the public and that Aboriginal title to the lakebed was incompatible with the common law public right of navigation over a lake. This shows the flexibility of the public trust doctrine in Canada. It can expand to cover new resources and new uses (like in ***Canadian Parks and***

Wilderness Society v. Wood Buffalo National Park) but can also be employed for traditional uses and resources like navigation and lakebeds.

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British Columbia v. Canadian Forest Products Ltd, 2004 SCC 38, [2004] 2 SCR 74

This case is important as the Supreme Court of Canada left the door open for the public trust doctrine in obtaining damages for harms to the environment. However, the Court's decision indicates that Plaintiffs who bring this argument must lay the proper groundwork at trial to resolve the difficult issues that such arguments raise.

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Prince Edward Island v. Canada (Fisheries& Oceans), 2006 PESCAD 27, 2006 CarswellPEI 72 (SC (TD))

This case is significant because it shows how public trust duties in Canada are based on fiduciary law. This focus on fiduciary law is a marked difference from the American public trust doctrine.

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North Vancouver (City) v. Seven Seas S.R., [2000] F.C.J. No. 1468, , 2000 CarswellNat 2076 (FC)

This case shows that the public trust doctrine cannot be used to support the private use of public resources – a finding that is consistent with other public trust cases.

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Nestle Canada Inc. v. Ontario (Ministry of the Environment), [2013] OERTD No. 54, 2013 CarswellOnt 11509

This case is a good example of how lower-level courts are likely to interpret and apply the Supreme Court of Canada's *obiter* regarding the public trust doctrine in ***British Columbia v. Canadian Forest Products Ltd*, 2004 SCC 38**. This case also illustrates an example of where courts can avoid direct rulings on the common law public trust doctrine and instead make rulings based on statutory grounds (in this case, the *Ontario Water Resources Act*).

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Burns Bog Conservation Society v. Canada (Attorney General), 2012 FC 1024, [2012] FCJ No. 1110

This case is significant because the Federal Court firmly denied the application of the public trust doctrine and held that the public trust doctrine is not the law in Canada. This case also illustrates how closely the public trust doctrine in Canada is tied to fiduciary law, since the Court held that a public trust duty could not be imposed on the federal Crown concerning lands it did not own.

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Despite some courts being open to the possibility, a claim based on the public trust doctrine has not yet succeeded in Canada. There are only a handful of cases over recent decades where the public trust doctrine has been argued and considered. However, there is renewed hope with the ongoing case of ***La Rose v. Her Majesty the Queen***, where the Plaintiff applied the public trust doctrine to greenhouse gas emissions and climate change in Canada.

Application of the Public Trust Doctrine to Climate Change in Canada

La Rose v. Her Majesty the Queen, 2020 FC 1008, [2020] F.C.J. No. 1037

Similar to ***Juliana v. United States***, the youth Plaintiffs in ***La Rose*** sought to apply the public trust doctrine to the protection of the climate system and resources in Canada. However, unlike in the USA, the public trust doctrine has not been established in Canadian law.

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Similar to ***La Rose***, the public trust doctrine argued in ***Lho'imggin et al. v. Canada* 2020 FC 1059**, a case brought by Indigenous Plaintiffs alleging that Canada had failed to enact legislation that adequately addressed climate change. However, the Federal Court held that the claim was not justiciable and did not discuss the public trust doctrine.

As of now, the public trust doctrine is still unrecognized in Canada, and courts are seemingly unwilling to apply the public trust doctrine to climate change. Instead of adopting the public trust doctrine, courts may avoid direct rulings and instead decisions are made on statutory grounds (e.g. ***Nestle Canada Inc. v. Director Ministry of the Environment***).

In conclusion, the public trust doctrine is still in early stages of development in Canada. There have only been a handful of cases over the past 40 years where it has been argued, an even more limited number where it has been substantively considered by the courts, and none where the public trust doctrine has been accepted by a court.