Extending the Public Trust Doctrine's Application to Alberta Parkland

Law: 526 – Independent Research Project

Jesse Fear

Co-author: Francesca Gimson

University of Alberta

Supervising Professor: Cameron Jefferies

April 20, 2021

Word Count: 9577

Contents

The Environment and Parks

Since the 1972 Stockholm Conference on the Human Environment, the international community has increasingly turned its attention towards creating more unified standards for environmental protection. In 2017, the International Union for Conservation of Nature and Natural Resources (IUCN), the leading authority on protected areas, created a globally applicable standard for protected area conservation. This standard focuses on three areas: (1) good governance; (2) sound design and planning; and (3) effective management. The cited objective of the global standard is "to provide a global benchmark for protected and conserved areas to assess whether they are achieving successful conservation outcomes through effective and equitable governance and management". At the time of writing, there are 49 protected areas on the Green List, with 86 additional candidate protected areas. None of those protected areas or candidate protected areas are located in Canada.

While the standard for IUCN designation would perhaps require a broader overhaul of parks legislation, creating stronger protections for the Alberta *Parks Act* would constitute an important step towards implementing the Green List's underlying principles. More rigorous management of provincial parks would also align better with the calls under the *Convention on Biological Diversity*, which Canada ratified in 1993. The *CBD* calls for more rather than less management of protected areas.

Further, Principles 2 and 5 of the *Stockholm Declaration* place responsibility to future generations as integral to current environmental law. The principles read as follows:

Principle 2

> The natural resources of the earth, including the air, water, land, flora and fauna, and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate…
>
> Principle 5
>
> The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.

These general principles have guided international environmental law since their inception and are invoked directly by the Alberta Parks website, which states that it "[conserves] Alberta's landscapes for current and future generations".

Federally, Canada signed and ratified the *CBD* in 1992 and is a party to 116 international environmental agreements and instruments in total. These agreements include the *United Nation Convention on the Law of the Sea*, the *United Nations Framework Convention on Climate Change* and its *Paris Agreement*, and the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*. Canada's ratification of these agreements shows a general intended federal commitment to the protection of parkland and biodiversity. Yet this federal commitment does not translate entirely to the provincial level, particularly where Alberta's approach to parks protection and legislation is concerned.

Alberta's provincial parks are steeped in a long history of recreation and community for Alberta residents. The first parks legislation in Alberta was passed in 1930. This era of parks

legislation was defined by a focus on public recreation. The first parks were relatively small sites that provided spaces for Albertans to swim, play, and eat, as they had already been doing. Starting in 1959, parks legislation began to be more involved and aligned with conservation and protection efforts in addition to those recreational goals as it expanded to include wilderness and natural areas.

The current parks regime is governed by three pieces of provincial legislation: the *Provincial Parks Act*, the *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act,* and the *Willmore Wilderness Park Act*. These pieces of legislation set out eight possible classifications for parkland in Alberta. There are four classifications established under the *Wilderness Areas Act*: (1) wilderness areas (2) ecological reserves (3) heritage rangelands and (4) natural areas. Wilderness areas are aimed at the preservation and protection of natural heritage and "non-consumptive, nature-based outdoor recreation". Ecological reserves are aimed at the preservation and protection of natural heritage "in an undisturbed state for scientific research and education". Heritage rangelands are aimed at the preservation and protection of "natural features that are representative of Alberta's prairies" and use grazing to maintain their ecology. Finally, natural areas are aimed at the preservation and protection of "sites of local significance" and allow for "low-impact recreation and nature appreciation activities".

There are three further classifications for parks established under the *Parks Act*: (1) Provincial Parks (2) Provincial Recreation Areas and (3) Section 7 Land. Provincial parks place a greater emphasis on supporting recreation, tourism, and "natural heritage appreciation activities" that are compatible with the environment. There are 76 provincial parks currently

established under the *Parks Act* totalling 609,831.66 acres of land. Provincial recreation areas are dedicated to outdoor recreation and encouraging tourism in the province. These areas embody the spirit of recreation and health that underpins the relationship between people and parks. There are currently 204 provincial recreation area sites established under the *Parks Act* totalling 218,938.03 acres of land. Section 7 is used for the interim management of lands that have either been acquired but not yet designated as parks or that require activity management until the activity is completed and the land is designated.

The *Parks Act* begins by setting out five purposes, two of which relate to the relationship between people and parks. Section 3 states,

3 Parks are established, and are to be maintained,

(a) for the preservation of Alberta's natural heritage,

(b) for the conservation and management of flora and fauna,

(c) for the preservation of specified areas, landscapes, and natural features and objects in them that are of geological, cultural, historical, archeological, anthropological, paleontological, ethnological, ecological, or other scientific interest or importance,

(d) to facilitate their use and enjoyment for outdoor recreation, education, and the appreciation and experiencing of Alberta's natural heritage, and

(e) to ensure their lasting protection for the benefit of present and future generations.

Sections 3(d) continues the tradition of maintaining parks partly for human recreation. Section 3(e) furthers the enumerated purposes by extending the benefits of parks to future generations. The purpose established in s 3(e) aligns with the *Stockholm Declaration* principles focusing on environmental protection as a responsibility to future generations.

The community-based foundation upon which parks legislation was initially built remains intact within Albertan society. Albertans feel a connection to nature that anchors their identity. The 2017 Alberta Recreation Survey showed that 84% of households and 82% of individuals had participated in activities connecting them to nature within the past year. Additionally, enjoyment of nature ranked as a top motivator for people participating in activities in the province, especially when it came to engaging in hiking. The survey found that a majority (over 50%) of Albertans "believe one of the very important benefits of recreation is that parks and open spaces provide opportunities for the preservation of Alberta's landscapes, plants, and animals".

Albertan's commitment to park protection is further reflected in a recent poll conducted by Abacus. 74% of Albertans surveyed supported the federal goal of protecting 30% of Canada's land and sea areas by 2030. In addition, the poll found that a majority of Canadians were spending more time in nature since the COVID-19 pandemic began, with 97% of Canadians maintaining or increasing their support for nature conservation as compared to before COVID-19.

Provided they represent a diverse population, these statistics show that the Canadian and Albertan commitment and connection to nature transcends political boundaries. Regardless of

diverse identities, the large majority of Canadians and Albertans both value and make use of the parkland surrounding them.[1]

Actions by the Alberta Government

In early 2020, the Alberta United Conservative Party (UCP) released the *Optimizing Alberta Parks* plan, which targeted 164 sites currently designated as parks for removal from the parks system and another 20 sites for full or partial closures.[2] Currently, under the *Parks Act,* the Minister of Environment and Parks has broad powers by way of Orders in Council to designate, restrict and close provincial parks.[3] The UCP claimed these actions would save the Government upwards of 5 million dollars annually by transferring the management of the sites targeted for removal to private partnerships with municipalities, first nations communities, or non for profits.[4] Failing to find partnerships for these sites would result in the land reverting back to Crown land under the *Public Lands Act*.[5] These proposed changes were made without any public consultation, and opposition to the proposal was significant.[6] Throughout the year, the UCP retained its intention to delist park and recreation areas despite public backlash and criticism;

[1] This portion of the IRP was written by Francesca Gimson as part of her submission for the Statutory Public Trust see her paper for the applicable citations.

[2] CPAWS, "Changes to Alberta's Provincial Parks Under the 'Optimizing Alberta Parks' Plan A timeline" (2020) online (pdf): https://defendabparks.ca/wp-content/uploads/2020/11/CPAWSNAB_DAPTimeline_Nov2020_V03.pdf (*CPAWS Timeline*).

[3] *Provincial Parks Act*, RSA 2000, c P-35, s 6 &13(1) [*Parks Act*]

[4] NationTalk, "Optimizing Alberta Parks" (Mar 02, 2020), Online: NationTalk <https://nationtalk.ca/story/optimizing-alberta-parks> & David Bell, "20 Alberta parks to be fully or partially closed, while dozens opened up for 'partnerships'" (Mar 03, 2020), Online: CBC News <https://www.cbc.ca/news/canada/calgary/alberta-park-funding-slashed-1.5484095>

[5] *Public Lands Act,* R.S.A. 2000, c. P-40

[6] Leger, "Alberta Omnibus Survey, Questions related to changes to Alberta Provincial Parks" (2020) online (pdf): *Leger* <https://cpawsnab.org/wp-content/uploads/2020/03/CPAWS-OMNI.pdf>

vowing that the parks would remain protected and would not be sold off to private interests.[7] In December, the government announced that parks originally designated for delisting would retain their protected status under the *Park's Act* even if partnerships could not be found.[8] Questions still exist surrounding the future of the natural heritage protected in Alberta's parks; however, for the time being, it appears that existing parks will retain protected status.

Controversy and the visceral reaction to losing treasured park and recreation areas aside, why exactly were Albertans and conservation groups seemingly universally opposed to the proposed changes? From a legal vantage point, it would result in lessened regulatory requirements and restrictions, additional disposition activities, and the possibility of a sale to private entities.[9] Future retroactive decisions to revert these lands back into protected spaces may be at odds with their current use; therefore, the UCP's policy may be the last opportunity to question the efficacy and rationale for such a decision. Revocation of park status and reversion of once protected land to publicly administered Crown land would have lasting implications for the area's management and could likely result in these natural areas being lost forever.

The statutory regime fostered by the *Parks Act* and *Wilderness Areas, Ecological Reserves, Natural Areas and Heritage Rangelands Act* (*Wilderness Areas Act*) provide heightened and

---

[7] CPAWS Timeline, supra note 2; Environmental Law Centre, "Optimizing Alberta Parks?? Without Public Consultation, The Government Has Announced Removal Of 175 Sites From The Parks System" (Aug 10, 2020), online (blog): https://elc.ab.ca/optimizing-alberta-parks-without-public-consultation-the-government-has-announced-removal-of-175-sites-from-the-parks-system/ & Robson Fletcher, "Alberta said it was removing 'underutilized' parks from its system. This data suggests otherwise" (Dec 03, 2020), Online: CBC News <https://www.cbc.ca/news/canada/calgary/alberta-parks-delisting-campground-usage-data-1.5819906>

[8] Andrew Jeffery, "Alberta Government Won't Close or Delist Provincial Parks"(Dec 22, 2020) Online: CBC News <https://www.cbc.ca/news/canada/edmonton/alberta-government-won-t-close-or-delist-provincial-parks-1.5852504#:~:text=In%20February%2C%20the%20province%20announced,revert%20to%20general%20Crown%20land>

[9] Sale is made possible under *Public Lands Act,* supra note 5 at s 18.

comprehensive coverage to Alberta's designated parks and natural areas compared to the *Public Lands Act*. The *Parks Act* holds the minister directly accountable to manage, protect, plan, and control parks and recreation in keeping with the public purposes for which they are designated. These public purposes are rooted in Section 3, which provides that parks are to be held for numerous conservation, protection, and recreational goals. While industrial activity and dispositions of land are potentially allowable under the *Parks Act* the government is ultimately responsible to manage them within the confines created by these purposes.[10] No such impediments are found in the *Public Lands Act,* and historically, this legislation has functioned as a means of disposal for developmental and other industrial purposes.[11] Additionally, many recreational activities permissible under the *Parks Act* which have potentially detrimental consequences to the purposes found in Section 3 such as camping, hunting, and off-roading are highly regulated when compared to public land.[12] For example, discharging a firearm is outright banned in ecological reserves, wilderness areas, and over half of the provincially managed parks and recreation areas. Additionally, further permits and considerations are required when hunting in the limited number of authorized parks.[13] The designation of permissible hunting areas does not meet the same level of scrutiny when compared to public Crown land. The legal and practical implications for land managed under these statutes can vary dramatically. As such, one would expect that any potential divestiture of Alberta's natural heritage, which has the potential for such wide-ranging and irreversible consequences would be properly transparent, publicly

[10] *Parks Act*, *supra* note 3 at s 8.
[11] Adam Driedzic, "Managing Recreation On Public Land: How Does Alberta Compare?" (2015) Environmental Law Centre https://elc.ab.ca/media/105057/Managing-recreation-on-public-land-Final-December-10-2015.pdf
[12] *Parks Act, supra* note 3 at s 12, & Environmental Law Centre, *supra* note 7.
[13] Alberta Parks, "Hunting" (2020), Online: Alberta Parks: <https://albertaparks.ca/hunting/#na>

defensible, and ultimately accountable to the guiding purposes of Alberta's parks system. The UCP's approach fell short of these thresholds.

The internal UCP government documents acquired under Freedom of Information and Privacy (FOIP) request cast doubt on the UCP's economic and motivation for proposing delisting. Our review of these internal documents evidence that the government was made aware of numerous risks associated with divesting parks including insufficient data to ascertain cost savings, the impact on First Nations treaties rights, and serious public concerns regarding park closures.[14] There was an acknowledgment that the divestment of park and recreation areas also "did not make sense or align with the greater outcomes" of other management initiatives such as the increasing fishing opportunities under the Park's Fishery Program.[15] Further, the sale or reversion of parks to Crown land is explicitly mentioned numerous times throughout the documents despite being publicly denied.[16] If a cause of action were available for a plaintiff to challenge the UCP's decision for failing to be in the public interest, many procedural aspects of the process may be ripe for review.

Perhaps most antithetical to the UCP's campaign to modernize Alberta's parks were several procedural and transparency issues surrounding the UCPs proposed park delisting. As mentioned above, the Minister is empowered by executive order under the *Parks Act* to both create, and by implication, delist provincial parks and recreation areas. These orders which can vary from minor regulatory changes to major decisions (like delisting parks) are generally not

[14] Rightsizing Alberta's Parks FOIP Documents, 2020, 76, online (pdf): <https://cpawsnab.org/wp-content/uploads/2020/08/Parks_FOIP_compressed.pdf>.
[15] *Ibid* at 22 & 83,
[16] *Ibid* at 51 & 55.

subject to legislative debate or public consultation. While the minister's decision-making powers as conferred by legislation are technically subject to judicial review as a final resort, it would take an egregious case to warrant such action.[17] Policy decisions and matters of public convenience such as this will not usually be subject to review.[18] Due to the high impact on the public interest, a review of the Minister's decision-making process would be expected to be grounded in the statutory power and mandate under the *Parks Act*. While the public does not generally have a cause of action to question ministerial policy discretion which they are at odds with, establishing a public trust either statutorily or in common law may give an avenue to scrutinize decisions that dispose of these public trust resources. Under this approach, the judiciary may review a legislative or executive decision to ensure that it was made with adequate consideration of the public trust interest at stake and with any concern for less harmful alternatives.[19] As will become evident this seems the most likely direction, given the wide discretion under the Parks Act to the Minister for their management, it appears that only the most blatant of abuses would give cause to challenge the decision on substantive grounds. The public trust doctrine is a suitable area for Canadian environmental litigation to explore further.

The Public Trust Doctrine: What is it?

The notion that the Crown holds certain lands or resources in trust for the public is a concept that dates back as far as Roman Law.[20] Traditionally, the Doctrine establishes "a trustee relationship of government to hold and manage wildlife, fish, and waterways for the benefit of

---

[17] *R v Thorne's Hardware Ltd*, [1983] 1 S.C.R. 106, 1983 CarswellNat 530 at para 9.
[18] *Inuit Tapirisat of Canada v. Canada (Attorney General***)**, 1980 CarswellNat 633, [1980] 2 S.C.R. 735, at para 21.
[19] Anna Lund, "Canadian Approaches to America's Public Trust Doctrine: Classic Trusts, Fiduciary Duties & Substantive Review" (2012) 23 JELP 105 at 153.
[20] *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38 at para 74 (*Canfor*).

the resources and the public. Fundamental to the concept is the notion that natural resources are deemed universally import to the lives of the public" and should not be subject to exclusive exploitation.[21] What began as ancient public rights to access property common to all has since expanded around the world to cover a plethora of environmental resources.[22] Despite this long history, academics and litigants have a very expansive and inconsistent understanding of how the public trust doctrine is to be applied and what uses or rights it confers onto the public. In Canada, it has been argued as a classic or statutorily imposed trust, a parens patrie, an unwritten constitutional principle, an easement, public rights, a fiduciary duty, a sui generis doctrine, and an equitable principle. Equally disjointed, are the resources said to be protected under the trust. Recently, the slew of environmental resources argued to fall within the public trust doctrine has exponentially exploded compared to the modest historical public right underpinnings. As will become evident the public trust doctrine while adaptable suffers from vagueness which invites a considerable degree of judicial lawmaking.[23] In Canada, this continues to be a source of confusion for litigants and courts alike. Finding an origin for doctrine in Canada's case law and a review of how the doctrine is commonly applied in neighbouring jurisdictions should be illuminative of its potential applications in Canada's environmental context.

[21] Batcheller et al, "The Public Trust Doctrine Implications for Wildlife Management and Conservation in the United States and Canada" (Bethesda, MD: The Wildlife Society, 2010) at 9.
[22] Vladislav Mukhomedzyanov, "Canadian Public Trust Doctrine at Common Law: Requirements and Effectiveness" (2019) 32 J. Env. L. & Prac. 317 at 6.
[23] Thomas W Merrill, "The Public Trust Doctrine: Some Jurisprudential Variations and Their Implications" (2016) 38:2 U Haw L Rev 261 at 262.

Public Rights: The Foundation for the Public Trust

At common law, the judiciary has recognized the public trust doctrine in certain limited circumstances already. There exists a well-established acknowledgment of public rights in fishing, navigation, and highways.[24] The public trust was originally used as a means of preventing substantial impairment of public rights in these resources.[25] However, this historical espousal on public trusts and public rights tended to use the terms synonymously; without the broadened distinction that exists today.[26] The consequences attached to such rights depend upon the "specific public use for which the land has been dedicated, but generally prevent a property owner", be it Crown or private, from using their property in a way that "infringes upon the public use (thereby creating a public nuisance)."[27] Pre-confederation Courts have accepted the public trust in relation to these rights; finding that the Crown "is nothing more than a trustee of the public" having no authority to obstruct the free enjoyment of them without clear legislative intent.[28] Early Canadian common law also imported affirmative duties on the Crown to protect the public's rights in navigation and fishing by removing impediments to their use.[29]

This espousal of trust-like responsibilities is even repeated in modern cases involving highways. In the case of *McDonald v North Norfolk* the Manitoba Court of Appeal held that a municipality's jurisdiction and authority over highways was not absolute but constrained by the

[24] Kate Smallwood, "Coming out of Hibernation: The Canadian Public Trust Doctrine", (Vancouver: University of British Columbia, 1993) at 78.
[25] Scott Kidd, "Keeping Public Resources in Public Hands: Advancing the Public Trust Doctrine in Canada" (Fredericton, NB: Conservation Council of New Brunswick Inc, 2006) at 8.
[26] Mukhomedzyanov, *supra* note 22 at 7.
[27] Andrew Gage, "Highways, Parks and the Public Trust Doctrine" (2007) 18 J Env L & Prac 1 at 1.
[28] Smallwood, *supra* note 24 at 80 citing R. v. Meyers (1852), 3 UCCP 305, [1853] OJ No 204 (Meyers).
[29] *Meyers*

"public trust interest of those who require use of the highway."[30] These trusts act as "limitations on the statutory rights and powers which have been conferred on the municipality in lieu of ownership."[31] Similarly in, *Goudreau v Chandos* the Court found that road allowances are held in "trust for the public and, in particular, those using the road allowance for access to their property." [32] The case of *Scarborough v REF Homes Ltd* goes as far as to declare a municipality as a "trustee of the environment" for the benefit of the residents around a road allowance and the greater citizens at large.[33] Thus, it appears, there exist modern cases which recognize trust-like responsibilities flowing from these sets of public rights.

While it is true that the common resources necessary for the exercise of these public rights are considerably narrow compared to what the public trust has attempted to expand towards, there still exists a recognition at common law. Perhaps the judiciary has been less hesitant to use trustee-like language when confined to conferring upon the public a right of way or an easement and the incidental rights which accompany such rights. If the common law would restrict the public trust to a right to access certain real estate, then this public right may just as easily be expanded to include parks. These foundational qualities found in public rights are exactly what spawned the public trust doctrine in other common law jurisdictions. Canada has a juridical basis for expanding the public trust doctrine outside of its traditional uses, the American jurisprudence is informative of how that may be developed regarding parks.

---

[30] McDonald v. North Norfolk (Rural Municipality) 1992 CarswellMan 156, [1992] MJ No 567 at para 23.
[31] *Ibid* at para 26.
[32] Goudreau v. Chandos (Township) 1993 CarswellOnt 59, 14 O.R. (2d) 636 at para 3.
[33] Scarborough (Borough) v. R.E.F. Homes Ltd**,** 1979 CarswellOnt 1588, [1979] 1 ACWS 391 at para 5.

American Public Trust Doctrine and Parks

In the United States, the public trust doctrine has a long firmly rooted history in both statutory and case law. Any comprehensive overview of the American application would be far beyond the scope of this paper as the doctrine is widely held to be a matter of state law. Each state can modify and extend the scope and content of the doctrine through state court rulings, statutes, and constitutional amendments.[34] However, unlike Canada, nearly every state recognizes some form of the public trust doctrine in its common law.[35] Regardless of how the state conceptualizes the origin and source of its form of the doctrine the functional significance remains the same, it allows for judicial review of decisions that dispose of public resources.[36] This section will focus on the establishment of the doctrine in American jurisprudence and how it has since evolved to include protections for parks. As will become clear, statutory, or constitutional law is the main instrument for recognizing the extension of the doctrine outside of its traditional scope. The seminal case *Illinois Central Railroad Company v Illinois* will illuminate how the doctrine established its roots early on in American history.[37]

The most celebrated U.S Supreme Court decision involving the public trust is *Illinois Central Railroad Company v. Illinois* in which the Court firmly established navigable waters as a resource held in trust for the people of the state. In 1869, the Illinois legislature made a grant of submerged lands under Lake Michigan to a railway company. Several years later, the legislature sought to invalidate its earlier grant because of the rather egregious transfer of more than 1000

[34] Lund, *supra* note 19 at 138.
[35] Batcheller, *supra* note 21 at 23.
[36] Merrill, *supra* note 23 at 285.
[37] *Illinois Central Railroad Company v Illinois (1892)* 146 U.S. 387 (*Illinois Central*)

acres of land underlying Lake Michigan extending one mile along the central business district of Chicago and one mile along the shoreline.[38] The Court articulated that the conveyance of land may be beyond the power of the legislature when such lands are held in trust for the public.[39] As Joseph Sax indicates, when a state "holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties."[40] The Court did not outright prohibit the disposition of land subject to the public trust but more narrowly confined the application to the divestiture of authority to govern an area in which it has a responsibility to exercise its police power.[41] The legislature still had the obligation to prevent the impairment of the public rights to access the land for navigation, fishing, and other public purposes. Due to the potential alienability of the land, the public trust doctrine's applicability was reserved as a tool for procedural review of governmental conduct, and in severely egregious circumstances, such as this, a substantive one.[42] It is from this vantage the public trust has expanded.

The doctrine largely laid undeveloped in the case law for some 80 years before Joseph Sax revitalized the topic with his influential publication, prompting a new era of debate dealing with the doctrine.[43] From the 1970s onwards, an explosion of cases has expanded the application of the public trust doctrine across the United States. Parks are one amongst many novel resources

[38] Joseph Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1970) 68:12 Mich L Rev 471 at 489.
[39] *Illinois Central at 452.*
[40] Sax, *supra* note 38 at 490.
[41] *Ibid* at 489.
[42] Mukhomedzyanov, *supra* note 22 at 9.
[43] Kidd, *supra* note 25 at 15.

to gain recognition as a public trust in many states. At the federal level, a tripartite set of cases known as the Redwood National Park litigation affirmed the application of the public trust to national parks.

In these cases, a conservation organization questioned whether the Secretary of the Interior had taken reasonable steps to protect the resources of the Redwood Park from nearby logging activities on peripheral privately owned lands, and if not, whether his failure to do so was arbitrary, capricious, or an abuse of discretion.[44] In the first case, *Sierra Club v Department of the Interior (1974),* the Court found that under the Redwood National Park Act the Department of the Interior has a judicially enforceable duty to exercise powers to prevent or mitigate actual or potential damage to the park. It was held that the statute conferred fiduciary duties and public trust obligations on the Secretary. These duties were found to be analogous to the Secretary's trust-like relationship towards aboriginals and imparted onto him the paramount legal duty to protect the park.[45] However, not having all the evidence before it, the Court was constrained on what orders it could effectively make against the Department.

In the next case, *Sierra Club v Department of Interior (1975)* having the evidentiary record before it, the Court reaffirmed the earlier finding.[46] The Court held that the Department of the Interior had failed to uphold its statutory duties under the Redwood National Park Act in addition to the general trust obligations imposed under the National Parks System Act. The section imparting this general trust obligation holds the Department responsible "to conserve scenery

[44] Sierra Club v Department of Interior (1974) 376 F.Supp 90 (*Sierra Club 1974*)
[45] *Ibid* at para 25 and 29.
[46] *Sierra Club v Department of Interior (1975)* 398 F.Supp 284 at 285 (*Sierra Club 1975*).

and natural and historic objects and wildlife (in the National Parks, Monuments and reservations)…leaving them unimpaired for the enjoyment of future generations" [47] Interestingly, for this papers application, the section referenced imposing a general trust obligation on the government mirrors Section 3 of Alberta's *Parks Act*. As Smallwood points out, the application of the public trust to parks nationally has been somewhat inconsistent as some Courts have reached diametrically opposed conclusions moving forward.[48]

Despite some recognition of the doctrine at common law, the prevalence of cases point to the public trust doctrine expanding its protections to public parks via statutory enactment. In the State of New York, dedicated park areas are "impressed with a public trust and their use for other than park purposes, either for a period of years or permanently, requires the direct and specific approval of the Legislature, plainly conferred."[49] This protection extends not only to the park as a natural resource but also to the recreational use attributed to them. Municipalities have been held to not have the power to reconvey parkland which has been dedicated for recreational use unless subject to specific legislation.[50] This is equally applicable even if the impugned action might promote another competing public purpose with laudable goals.[51] Similarly, in Illinois, when land has been dedicated for park purposes, agencies hold properties in trust for uses and purposes specified and for the benefit of the public.[52] Members of the public, or at least taxpayers, even have a right of standing to enforce the public trust doctrine and are not required

---

[47] *Ibid* at 287.
[48] Smallwood, *supra* note 24 at 66-67 citing *Sierra Club v Andrus* (1980) 487 F.Supp. 443
[49] Grayson v Town of Hunington (1990) 160 A.D.2d 835, 554 N.Y.S.2d 269 at para 4.
[50] Ellington Const. Corp. v. Zoning Bd. of Appeals of Incorporated Village of New Hempstead (1989) 549 N.Y.S.2d 405
[51] *Matter of Avella v City of New York* (2017) 29 NY3d 425 (*Avella*)
[52] *Paepcke v. Public Bldg. Commission of Chicago*, (1970) 46 Ill.2d 330, 263 N.E.2d 11 at 15 (Paepcke).

to wait upon governmental action.[53] While less applicable in Canada, Hawaii's constitution has also been held to recognize the public trust in parkland.[54]

While Courts have established the presence of the public trust in parks, the government's ability to dispose of public trust resources is not wholly constrained, competing public interests as conferred by legislation, can alienate the public trust if they are specifically authorized.[55] Once the legislative authority is plainly conferred, the courts are remiss to address the substantive ability of disposal for a public purpose and instead will focus on procedural elements. As Lund summarizes, the judiciary will consider the effect of such derogation of the public trust interest and attempt, to avoid or minimize any harm to those interests, and only in the most flagrant of cases deny the substantive actions taken by the decision-maker.[56] While some jurisdictions strongly disfavour any attempt by the state to surrender "valuable public resources to private entities, benefit a private interest, or relinquish the State's power over a public resource" it is not beyond their ability to do so.[57] As such parks are not inalienable under the American public trust doctrine but constrained by adequate procedural processes and legislative authority.

Canadian Jurisprudence

A) Case law

The presence of a public trust doctrine in Canadian jurisprudence has largely remained in abeyance since its earliest origins within the concept of public rights. The modern conception of the public trust doctrine in Canada has only been successfully argued in relation to these

[53] *Ibid* at 18.
[54] *Hawaiian Constitution*, art 11, s 1.
[55] See *Avella.*
[56] Lund, *supra* note 19 at 153.
[57] Merrill, *supra* note 23 at 269.

recognized public rights, as discussed earlier.[58] The extent to which this doctrine presently produces rights in Canadian common law are rights of access,[59] and incidental uses. In property law terms, this would be access to the equitable title held in trust for the public. While there has been a considerable emphasis from academics on the promise of the public trust doctrines protection, 50 years of Canadian judicial history has been hesitant to expand upon the musings of Justice Binnie in *British Columbia v Canadian Forest Products Ltd* (*Canfor).*[60] The limited cases that explicitly reference the public trust doctrine have significantly retreated from *Canfor's* highpoint recognition for the existence of public trust in Canadian law.[61] Most recently, cases have cast wide dispersions on the viability of the public trust doctrine use as a tool for environmental protection. An analysis of this jurisprudence offers insight into the doctrinal effectiveness of securing public parks for future generations. Particularly, it highlights a public trust requires an amenable factual matrix, strong evidentiary support and a properly plead case. As will become relevant a common thread runs between all the jurisprudence, there is clear hesitancy to acknowledge the doctrine without indeterminant liability being addressed. Without such, the judiciary is unlikely to allow this kind of doctrinal creep to pervade environmental litigation. The aim of analyzing this case law is to ascertain whether government alienation of public parks may be a ripe area for the establishment of the public trust.

---

[58] Kidd, *supra* note 25 at 20.
[59] Nestlé Canada Inc. v. Director, Ministry of the Environment, 2013 CarswellOnt 11509, [2013] O.E.R.T.D. No. 5 at para 48.
[60] *Canfor, supra* note 20 at paras 74-83.
[61] Mukhomedzyanov, *supra* note 22 at 20.

In 1972, the modern introduction of the public trust doctrine in Canadian law began with the case of *Green v Ontario*.[62] In this case, the presiding Justice Lerner explicitly and unemphatically dismissed the notion of the public trust residing in a provincial park, labeling the action as "frivolous, vexatious" and disclosing no reasonable cause of action.[63] The plaintiff, in this case, a concerned academic at the University of Toronto, brought an injunctive action against the Province of Ontario and a commercial lessee (Lake Ontario Cement) for the granting of a 75-year lease of 16 acres of land adjoining West Lake and land which two years later would become the Sandbanks Provincial Park.[64] The lessee was granted a right under the lease to excavate sand from the lands for their cementing activities.

The statement of claim alleged that leased land was made up entirely of towering sand dunes that presented a "unique ecological, geological and recreational resource" and that the subsequent removal by the defendant company introduced several determinantal harms on the adjoining parkland.[65] The harms alleged were that the aesthetic appeal of the park was destroyed by the excavation; it furthered the production of swampland which impaired users of the park; motorized recreational users were not being prevented from entering the leasehold along the newly established roadway, which was causing pollution and destruction in previously inaccessible areas of the land; the excavation itself created safety risks and excessive noise pollution to the users of the park.[66] Lastly, Green alleged the company's lease was originally

[62] *Green v Ontario*, 1972 CarswellOnt 438, 34 DLR (3d) 20 (*Green*).
[63] *Ibid* at para 31.
[64] *Ibid* at para 21.
[65] *Ibid* at para 15.
[66] *Ibid.*

intended to form a portion of the park.[67] Mr. Green grounded his argument on the basis that a trust was created in section 2 of the *Ontario Provincial Parks Act* and subsequently infringed upon by the defendants' harmful conduct. The Act read:

> "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."[68]

Justice Lerner went on to strike the plaintiff's action based on standing as the plaintiff had no status to bring forward an action.[69] In obiter, he went on to make comments on the availability of a statutory trust to ground the plaintiff's action without comment on the common law basis. Using the application of classical trust concepts, he held that there was not a creation of a trust under section 2 because the subject matter of trust was uncertain due to the lack of restrictions on the Province's management of the park or on their discretion to alienate the park. As such, he found no trustee-beneficiary relationship existed between the Province and the public under the *Act*.

Commentary since this decision has been unfavorable of Justice Lerner's classical trust application to the public trust as it appears too rigid and significantly blurred the lines between the two doctrines.[70] *Green* is extremely divergent from American sources as it narrowly confides the public trust doctrine within the confines of private trust law. Furthermore, with the

---

[67] *Ibid,* at para 13.
[68] Provincial Parks Act, R.S.O. 1970 c. 371, s. 2.
[69] Green, *supra* note 62 at para 14.
[70] Lund, *supra* note 19 at 158

environmental movement in its infancy, the Court was not willing to see a more broadened view of the public trust doctrine beyond the more narrowed classical sense.[71] Lastly, Justice Lerner's focus on the government's ability to extinguish a park as evidence for a non-existing trust is questionable, as it is always open for the legislature to remove a trust or right subject to constitutional considerations provided it uses clear statutory language; the power to extinguish does not invalidate a trust unless actually exercised.[72] While *Green* stands as a hurdle to plaintiffs trying to establish a public trust, the lack of engagement of Green's reasoning in subsequent Canadian case law coupled with persuasive American influences on the divergence of classical trust law from the public sphere offers hope.

Canfor exemplifies the potential aspirations for the public trust doctrine in Canadian law. This case involved determining appropriate compensation for the Province of B.C after Canfor's negligence resulted in a forest fire that claimed 1491 hectares of forest.[73] Canfor's controlled burn set the previous season reignited after winter and burned over numerous stretches of forest. The areas destroyed were permissible logging areas subject to tenure, uneconomic areas, immature undeveloped forest, and environmentally sensitive areas unfit for logging activities.[74] At the time, Canfor held a provincial license under the Forest Act to which it was entitled to cut timber for twenty years in exchange for a stumpage compensation fee including forest management services for each cubic meter of harvested timber.[75] The B.C Government at trial claimed three categories of loss (1) Expenditures for fire suppression and restoration of burned-

[71] Kidd, *supra* note 25 at 22.
[72] Gage, *supra* note 27 at 17.
[73] *Canfor, supra* note 20 at para 1.
[74] *Ibid* at para 2.
[75] *Ibid* at para 15.

over areas; (2) Loss of stumpage revenue from harvestable trees and, (3) Loss of trees set aside for various environmental reasons (non-harvestable or protected trees).[76] The Supreme Court of Canada ruled to reinstate the trial judges award for the first category of damages while dismissing the other two categories due to deficient evidentiary exploration at trial.[77] Despite B.C suing in its capacity as a private landowner and on behalf of the public the Court reasoned that it was the B.C's private loss that gave rise to damages.

Most notable for the public trust doctrine is the commentary by the Court concerning the B.C. Government's ability to bring forward a claim for the public. Justice Binnie reviewed the early public rights commentary and American environmental jurisprudence, noting that there appeared to be "no legal barrier to the Crown suing for compensation as well as injunctive relief in a proper case" on account of public nuisance, negligent damage to public lands, and trespass but qualified these actions brought novel policy questions.[78] Such claim would have to address:

> "the Crown's potential liability for *inactivity* in the face of threats to the environment, the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown in that regard, the limits to the role and function and remedies available to governments taking action on account of activity harmful to public enjoyment of public resources, and the specter of imposing on private interests an indeterminate liability for an indeterminate amount of money for ecological or environmental damage."[79]

Since the Crown did not explore these issues within the evidentiary record at trial, the Court was unwilling to espouse on their merits further.

---

[76] *Ibid* at para 3.
[77] *Ibid* at paras 153-155.
[78] *Ibid* at paras 76-81
[79] *Ibid* at para 81.

One can draw positive implications for the public trust doctrine from the lengths at which the Court was willing to entertain this public aspect of the case despite no parties canvassing the U.S. case law during arguments.[80] However, as the Court suggests, any argument for its merits in Canada will have to be made with the proper evidentiary foundation and will have to grapple with the significant policy issues it raises.

The case of *Burns Bog Conservation Society v. Canada (Attorney General)* retreats significantly from the promising sentiments made in *Canfor* about the public trust doctrine.[81] The case began with the corporation of Delta, a municipality, and the Province of British Columbia purchasing a portion of Burns Bog, one of the largest peat bogs in the world, with the help of a contribution grant from the Federal Government.[82] The Contribution Agreement required that these parties ensure at least five thousand acres of the bog would be maintained for conservation purposes. The federal government was then granted a conservation covenant over Burns Bog which set out the activities permissible on the land. It is on these agreements that a long-term management plan was created as a policy directive to maintain the integrity of the bog.[83] The provincial and federal government subsequently agreed to build the South Fraser Perimeter Road which was to run parallel to the land. Environmental assessments were completed as required under the *Canadian Environmental Assessment Act*, concluding that no significant damage would befall the bog if certain mitigation strategies were taken. The Burns Bog Conservation Society, a non for profit, brought forward a claim seeking injunctive relief asserting the Federal Government

[80] Kidd, *supra* note 25 at 23.
[81] Burns Bog Conservation Society v. Canada (Attorney General), 2012 FC 1024 [*Burns Bog*].
[82] Ibid at para 4.
[83] *Ibid* at para 6.

was bound to protect the Bog based on various federal statutes and in the alternative public trust and fiduciary law.

In deciding whether the statement of claim gave rise to any genuine issues at trial, the judge found that Canada was not bound under a trust created by statute, any of the contractual arrangements made about the bog, nor were there any fiduciary or public trust duties imposed on them under common law.[84] The determining issue ultimately came down to ownership. The Court's review of the agreements specifically refers to classical trust obligations finding that the three certainties of trust law: (i) The Certainty of Intention; (ii) Subject Matter; and (iii) Objects, were not present. At no point did Canada ever own title to Burns Bogg[85]and so a classical trust could not have existed. Turning to the principal argument made on the public trust doctrine, the Court explicitly distinguished the facts before them from those of *Canfor*. In *Canfor*, the province owned the land, while in these circumstances Canada retained no title and so the public trust could not exist upon such land.[86] Having eliminated the public trust argument which grounded a fiduciary duty there was little chance that an ad hoc fiduciary duty existed at large to the public or to Burns Bog itself. [87] The Court found there were no further recognized categories of fiduciary relationship upon which the plaintiffs could rely upon.

The general fiduciary principles as set out by the Supreme Court are a high burden to overcome because the traditional fiduciary law does not align itself neatly with government responsibilities over citizens and resources. Without facts or precedent to ground the public trust

[84] *Ibid* at para 77.
[85] *Ibid* at para 96-100
[86] *Ibid* at para 111.
[87] *Ibid* at para 114.

doctrine, the Court was limited to rejecting the fiduciary duty argument because "imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance."[88] The Conservation Society's appeal was not entertained by the Federal Court of Appeal largely for the same fundamental reasons found at trial.[89] In line with *Green*, this provides another example of Canadian courts unwilling to provide substantive remedies without express legislative or precedential support. An adequate evidentiary basis will also be required if a public trust is going to be found.

The case of *La Rose v Canada* is the most recent and perhaps most critical judicial consideration of the public trust doctrine in Canada. In this case, 15 youths from across Canada brought an action against the Crown, alleging conduct that allowed for the continuation of harmful levels of GHG emissions, failing to meet climate change targets, and supporting industries that contribute directly to an unsustainable climate.[90] The plaintiffs supported their cause of action on the grounds that the harm unjustifiably infringed their rights under sections 7 and 15 of the *Charter.* Of note for this paper, the plaintiffs also alleged that Canada had failed to discharge their public trust obligations concerning public resources, arguing that the public trust doctrine exists under the common law or should be acknowledged as an unwritten constitutional principle.[91] In the statement of claim, each plaintiff exhibited how climate change had negatively affected their physical, mental, and social welfare as well as their aspirations for the future. The

[88] *Ibid* at para 121 citing Elder Advocates of Alberta Society v. Alberta 2011 SCC 24.
[89] Burns Bog Conservatory Society v. Canada (Attorney General) 2014 CAF 170.
[90] La Rose v Canada, 2020 FC 1008 at para 8.
[91] *Ibid* at para 7.

relief sought would have the government develop and implement an enforceable climate recovery plan consistent with suitable global targets, the protection of public trust resources, and the plaintiffs' constitutional rights.[92]

The Court was left grappling with the justiciability of the claims put forward under the *Charter* and ultimately ruled they did not satisfy the test, owing to the wide and diffuse nature of the claims made by the plaintiffs.[93] However, the Court did find the question as it related to the public trust doctrine existence in Canada to be a justiciable issue worth exploring at length in their decision. Following prior case law, Justice Manson found that a cause of action brought under the public trust has no reasonable prospect of success as Canadian law has not recognized the doctrine.[94] Citing *Elder Advocates,* Justice Manson reiterated fiduciary duties of the government cannot extend to the Canadian public at large. Acknowledging *Canfor*, the decision did give regard for the possibility of the doctrine to be extended but not in such far-reaching circumstances.[95] He went on to critique the plaintiff's pleadings for the all-encompassing substantive review they would have the Court undertake:

> "The breadth of the claim under the alleged public trust doctrine and the lack of material facts to support any legal basis suggests this claim is reflective of an "outcome" in search of a "cause of action". The scope of the obligations proposed by the Plaintiffs is both extensive and without definable limits."[96]

Erroring on the side of caution and unwilling to stray into the realm of judicial policymaking, the Court was disinclined to find the public trust had any merit worth arguing at trial. Having found

[92] *Ibid* at para 12.
[93] *Ibid* at para 41.
[94] *Ibid* at paras 87-88.
[95] *Ibid* at para 89.
[96] *Ibid* at paras 88.

no cause of action under the public trust in common law or constitutional principles, the defendant's motion to strike was granted. [97]

A broad public trust founded within the large scope of climate change would be antithetical to the incremental evolution of the common law. As the Court remarked, climate change involves vast policy decisions with numerous stakeholders to which the government must take into account including federalism issues, economic growth, and the evolution of scientific consensus. The plaintiff's inability to ground their cause of action in anything more than academic ether was detrimental to proving the public trust doctrines applicability to climate change.[98] Canadian Courts are unwilling to entertain public trust arguments that impose far-reaching policy consequences, especially without material facts to justify its imposition. Following decades of limited case law, it should be unsurprising hurdles to applying the doctrine remain.

B) Barriers to Recognition

a. Material Facts are Required to Support the Public Trust.

Supportive material facts will be needed to ground the public trust doctrine in Canadian law; as the judiciary is unwilling to entertain well-meaning but unsubstantiated claims. For a claim to be successful at common law, the factual matrix will have to support the government holding the title or resource in trust for the public. Academic principles that attempt to push the boundaries of recognized public rights into holding the government accountable for every environmental concern will not be validated. Broad arguments favoring an application of the doctrine beyond the confines of state-administered lands and resources, when no 'jus publicum'

[97] *Ibid* at paras 87-88.
[98] *Ibid* at para 98.

or equitable title has previously been recognized, will not be favored. The most recent case law is indicative of a need for factual circumstances which evidence a public trust.

b. Indeterminate liability and Issues with Common Property

The judiciary is hesitant to find resources subject to the public trust when the scope proposed would result in extensive obligations without concrete conceptual boundaries.[99] The traditional application of public rights in navigation and fishing is easily delineated while comprehensive environmental claims do not have such clear boundaries where the Crown's duties begin and end. The Supreme Court specifically articulated in the *Canfor* case that imposing on a defendant an indeterminate liability for an indeterminate amount of money for ecological or environmental damage was a factor that would need to be addressed if the public trust doctrine were to be recognized.[100] Therefore, it stands to reason, that the broader the resource or use to which the public trust doctrine is said to protect the more likely the Courts will be reticent to apply the doctrine in such a novel fashion. The La Rose case exemplifies an untenably wide claim for the protection of the entire atmosphere. While protection of the atmosphere would result in the protection of other public trust resources due to the scientific ecological interconnection between our natural public resources, this is not a leap the courts are ready to make. The common law is unwilling to extend protections to resources that are so far-reaching and uncertain that plaintiffs would be wise to draft their pleadings narrowly to only encompass clearly defined boundaries around the public resource and use attached to the trust. This will

[99] *Ibid* at paras 88.
[100] *Canfor, supra* note 20 at para 81.

limit the potential liability for an infringement of the public trust and provide for a greater probability of recognition for the public trust resource.

c. Policymaking

In keeping with this theme, the Courts have also demonstrated an unwillingness to render decisions that are better reserved for the executive or legislature. The more a plaintiff's argument addresses public policy that engages multifaceted concerns with competing groups or evaluation of conflicting social research, the less likely the Court will recognize their competence to rule on these arguments.[101] Within the environmental context, the Government has established functioning legislative regimes to address these concerns, the creation of a conflicting public trust doctrine would invite judges to become unelected policymakers.[102] The creation of parallel environmental laws which question the substantive actions of decisions made within the existing statutory regimes invites such conclusions.[103] In Canada, it has been demonstrated repeatedly that a challenge to statutory authority or ministerial discretion based on the common law public trust will be unsuccessful. Litigants may be looked on more favorably if they question the procedural considerations used to reach a statutorily imposed decision than the actual decision itself.

d. Establishing the Doctrine in Fiduciary Law

Recently there have been increased arguments that frame the public trust doctrine under fiduciary law in line with duties tantamount to the relationship between the Crown and

[101] Lund, *supra* note 19 at 168.
[102] Mukhomedzyanov, *supra* note 22 at 19.
[103] *Ibid.*

Aboriginals. The academic literature has argued this as a hopeful trajectory to advance the doctrine.[104] The Supreme Court's consideration of fiduciary duty owed by the government in *Canfor* may act as the proverbial red herring. [105] Both Burns Bog and La Rose cite the Supreme Court's *Elder Advocates* decision for the premise that the Crown does not owe a fiduciary duty to the public. Chief Justice McLachlan (as she was then) writes "The Crown's broad responsibility to act in the public interest means that situations where it is shown to owe a duty of loyalty to a particular person or group, will be rare."[106] While engaged with a different question of law this case casts serious dispersions on the public trust using fiduciary law as a vehicle to impose duties on the government.

Is Protection for Parks the Proper Avenue to Expand the Common Law Public Trust Doctrine?

Parks have the classic attributes and uses of a public trust resource, the res communis, as "they are open to everyone, belonging to everyone, and incapable of appropriation."[107] As demonstrated the public trust acts as a shield against government or private encroachment which would endanger the resources access and use for benefit of the public. This public purpose is mirrored within the Alberta *Parks Act.*[108] As case law of neighbouring jurisdictions illustrates, parkland is not beyond the ambit of protection by the public trust's doctrine and was one of the first expansions of the doctrine. The public trust doctrines application to parks has many features which may make it suitable for its inclusion within the common law. However, despite the

[104] Smallwood, *supra* note 24 at 123; Lund, *supra* note 19 at 164; Kidd, *supra* note 25 at 37.
[105] *Canfor*, *supra* note 20 at para 81.
[106] *Elder Advocates*, supra note 88 at para 44.
[107] Hope Babcock, "Is Using the Public Trust Doctrine to Protect Public Parkland from Visual Pollution Justifiable Doctrinal Creep" (2015) 42:1 Ecology LQ 1 at 31.
[108] *Parks Act, supra* note 3 at s 3(d)(e)

benefits of recognizing the public trust in parks at common law, the judiciary is unlikely to do so without statutory signaling.

Parks as a trust resource may avoid many of the pitfalls observed in other environmental resources argued to make up the public trust. Parks as a resource are clearly definable, observable and the scope of the government's duties with them can be easily quantified. The title remains vested under the discretion of the provincial government. Unlike the atmosphere, it is easily ascertainable and definable to what extent a potential tortfeasor has damaged and infringed on the public's use of the parkland. Due to their explicit and delineated physical limits, it would not be difficult for a court to rule on the potential damages to a provincial park. Besides, the *Parks Act* already substantively outlines what duties the government fosters in relation to parks.[109] Due to their clear physical nature and statutory dedication, concerns surrounding indeterminate liability associated with expanding the doctrine can be mitigated. The provincial government as the trustee of parks would only, "according to equity, manage the public space in order to ensure that the public use for which the property was dedicated can continue"[110]; something these are already held to do under the *Parks Act*. The resulting impact of expanding the doctrine would be rather limited; it would simply empower private actors to challenge any deficiencies in protecting the public trust. In the context of delisting parks, it would hold the government accountable to begin the delisting process with transparent, accountable, and procedural steps in mind; something which was undoubtedly lacking during the last attempted

[109] *Ibid* at s 4.1.
[110] Gage, *supra* note 27 at 24.

divestiture. Finally, it would also give the government an additional tool to hold tortfeasors accountable for environmental damage to the public trust.

Within the context of the actions taken by the Alberta government, or any future governments wishing to replicate similar outcomes, the public trust doctrine would operate as one final procedural check. The lack of clear guiding policy taking into account the greater aims of the *Park's Act* and the numerous procedural and transparency issues associated with the UCP's delisting campaign it would be arguable under the public trusts doctrine whether the actions were in keeping with the government's duty to maintain the trust. Were this a viable cause of action in Alberta it is likely a successful challenge could be upheld based on these circumstances. Whether the public trust would operate to prevent delisting completely is not entirely certain but more than likely it would at least ensure the government's responsibility to maintain the trust land with the best interests of the public in mind.

Despite the limited scope of additional obligations placed on the government for parks, the public trust doctrine is still unlikely to see its expansion into the common law. As mentioned above, the policy and doctrinal obstacles surrounding the doctrine are likely to be a substantial hurdle to overcome in obtaining recognition for parks. Jurisprudence favours the incremental expansion of the common law and while the impact would be lessened concerning parks the overwhelming course has been to reject the existence of the public trust doctrine in Canadian law. Without clear legislative intent to impress upon parks a public trust the jurisprudence will likely lead to similar outcomes for environmental litigants. A legislative response that explicitly incorporates a public trust into the *Parks Act* is a more tenable route to having the public trust doctrine acknowledged in Canadian law.

Bibliography

PRIMARY SOURCES:

Statute

Public Lands Act, R.S.A. 2000, c. P-40

Provincial Parks Act, R.S.O. 1970 c. 371

Provincial Parks Act, RSA 2000, c P-35

Jurisprudence of Committees and Tribunals

Nestlé Canada Inc v Director, Ministry of the Environment, 2013 CarswellOnt 11509, [2013] O.E.R.T.D. No. 5.

Jurisprudence of Canadian Courts

British Columbia v Canadian Forest Products Ltd, 2004 SCC 38.

Burns Bog Conservation Society v. Canada (Attorney General), 2012 FC 1024.

Burns Bog Conservatory Society v. Canada (Attorney General), 2014 CAF 170.

Canada (Minister of Citizenship and Immigration) v. Vavilov 2019 SCC 65

Elder Advocates of Alberta Society v. Alberta 2011 SCC 24.

Green v Ontario, 1972 CarswellOnt 438, 34 D.L.R. (3d) 20.

La Rose v Canada, 2020 FC 1008

Mikisew Cree First Nation v. Canada (Governor General in Council) 2018 SCC 40

R. v. Meyers (1852), 3 U.C.C.P. 305, [1853] O.J. No. 204

McDonald v. North Norfolk (Rural Municipality) 1992 CarswellMan 156, [1992] M.J. No. 567

Goudreau v. Chandos (Township) 1993 CarswellOnt 59, 14 O.R. (2d) 636

Scarborough (Borough) v. R.E.F. Homes Ltd. 1979 CarswellOnt 1588, [1979] 1 A.C.W.S. 391

Jurisprudence of American Courts

Ellington Const. Corp. v. Zoning Bd. of Appeals of Incorporated Village of New Hempstead (1989) 549 N.Y.S.2d 405, 152 A.D.2d 365

Grayson v Town of Hunington (1990) 160 A.D.2d 835, 554 N.Y.S.2d 269

Illinois Central Railroad Company v Illinois (1892) 146 U.S. 387

Matter of Avella v City of New York (2017) 29 NY3d 425

Sierra Club v Department of Interior (1974) 376 F.Supp 90

Sierra Club v Department of Interior (1975) 398 F.Supp 284

Paepcke v. Public Bldg. Commission of Chicago, (1970) 46 Ill.2d 330, 263 N.E.2d 11

Reports and Other Government Documents

Rightsizing Alberta's Parks FOIP Documents, 2020, online (pdf): <https://cpawsnab.org/wp-content/uploads/2020/08/Parks_FOIP_compressed.pdf>.

SECONDARY SOURCES

Books

Journal Articles

Andrew Gage, "Highways, Parks and the Public Trust Doctrine" (2007) 18 J. Env. L. & Prac. 1

Anna Lund, "Canadian Approaches to America's Public Trust Doctrine: Classic Trusts, Fiduciary Duties & Substantive Review" (2012) 23 JELP 105

Batcheller et al, "The Public Trust Doctrine: Implications for Wildlife Management and Conservation in the United States and Canada" (2010) The Wildlife Society: Bethesda MD.

Joseph Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" (1970) 68:12 Mich L Rev 471.

Kate Smallwood, "Coming out of Hibernation: The Canadian Public Trust Doctrine", (Vancouver: University of British Columbia, 1993)

Hope Babcock, "Is Using the Public Trust Doctrine to Protect Public Parkland from Visual Pollution Justifiable Doctrinal Creep" (2015) 42:1 Ecology LQ 1

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

Thomas W Merrill, "The Public Trust Doctrine: Some Jurisprudential Variations and Their Implications" (2016) 38:2 U Haw L Rev 261

Academic Reports

Adam Driedzic, "Managing Recreation On Public Land: How Does Alberta Compare?" (2015) Environmental Law Centre, online pdf: https://elc.ab.ca/media/105057/Managing-recreation-on-public-land-Final-December-10-2015.pdf

Scott Kidd, “Keeping Public Resources in Public Hands: Advancing the Public Trust Doctrine in Canada” (Fredericton, NB: Conservation Council of New Brunswick Inc, 2006)

Leger, “Alberta Omnibus Survey, Questions related to changes to Alberta Provincial Parks” (2020) online (pdf): *Leger* <https://cpawsnab.org/wp-content/uploads/2020/03/CPAWS-OMNI.pdf>

Media Sources

Alberta Parks, “Hunting” (2020), Online: Alberta Parks: <https://albertaparks.ca/hunting/#na>

Andrew Jeffery, “Alberta Government Won't Close or Delist Provincial Parks”(Dec 22, 2020) Online: CBC News <https://www.cbc.ca/news/canada/edmonton/alberta-government-won-t-close-or-delist-provincial-parks 1.5852504#:~:text=In%20February%2C%20the%20province%20announced,revert%20to%20general%20Crown%20land>

David Bell, “20 Alberta Parks to be Fully or Partially Closed, While Dozens Opened up for 'Partnerships'” (Mar 03, 2020), Online: CBC News <https://www.cbc.ca/news/canada/calgary/alberta-park-funding-slashed-1.5484095>

NationTalk, “Optimizing Alberta Parks” (Mar 02, 2020), Online: NationTalk <https://nationtalk.ca/story/optimizing-alberta-parks>

Robson Fletcher, “Alberta said it was Removing 'Underutilized' Parks from its System. This Data Suggests Otherwise” (Dec 03, 2020), Online: CBC News <https://www.cbc.ca/news/canada/calgary/alberta-parks-delisting-campground-usage-data-1.5819906>

Blogposts

Environmental Law Centre, “Optimizing Alberta Parks?? Without Public Consultation, The Government has Announced Removal Of 175 Sites from the Parks System” (Aug 10, 2020), online (blog): https://elc.ab.ca/optimizing-alberta-parks-without-public-consultation-the-government-has-announced-removal-of-175-sites-from-the-parks-system/