

Keeping Public Resources in Public Hands:

Advancing the Public Trust in Canada



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Advancing the Public Trust Doctrine in Canada

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Preface

As one reads this report, it will become apparent the public trust doctrine as described has the potential to provide Canadians with a means of compelling governments to manage public resources in a manner that is more beneficial to all. This would include managing public resources, such as forests, to protect their health and the health of the environment in general. Beneficial resource management also means providing opportunities for more people to share more equitably in the economic benefits created by the harvesting and utilization of natural resources rather than seeing resource companies' profits rise while workers sit under- and unemployed.

However, before public-minded people and groups start instructing their lawyers to launch court actions to remedy government breaches of the public trust, a note of caution needs to be interjected. As the title states this report is about “advancing” the public trust doctrine in Canada, not “using” the public trust doctrine. This is because the public trust doctrine is a fairly unknown legal commodity in Canada. Even in the United States where the doctrine developed, public trust law is in flux. As such, much of this report cannot say definitively what the law is regarding the public trust in Canada, only what it might be or could be. Despite this, it is hoped this report will get groups and individuals thinking about the public trust doctrine and how it might be used, but should not replace legal research and case development based on specific facts.

This report has been written with both lay and legal audiences in mind. As such, it is bound to not completely satisfy both. For some there might be too much information on or exploration of a topic, for others not enough. I could have written much more on this fascinating legal doctrine and its implications, but all reports have a due date, and this one's passed some time ago.

Finally, this report has been written in support of the Conservation Council's goal of furthering education about the conservation of our natural resources, air, land and water. It is hoped it will play an important role in furthering the many efforts now underway to protect the health of our environment and of the communities whose social well-being is dependent on the harvesting of local resources.

Scott Kidd



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Executive Summary

Over the past two decades, private interests have been granted increased control over Canadian natural resources, particularly public forests through exclusive long term Crown forest licences, and public fisheries through sector or individual fish quotas. These licences and quotas have effectively created private property rights in public resources. Accompanying this “privatization” has been the significant ecological diminishment of these resources, such as changes in natural biodiversity because of industrial logging practices, and wide-scale over-fishing under federal management plans. Other results include the removal of wealth from rural communities, the loss of forest jobs to mechanization, and the decimation of small boat inshore fisheries.

In response to the increasing corporate control over natural resources and the ecological ills and social instability that currently accompany this control, there is now a growing movement among woodworkers, fishermen and local governments to revive their rural communities through community-based management. The objectives of community-based management are the creation of local wealth from local resources, and the management of those resources to restore natural biological diversity and abundance. The confounding factor in this effort, however, is the lack of access to common resources, whether forestry or fishery, because of their increasingly exclusive allocation to private parties. Unless access is gained, there can be no meaningful opportunity for rural communities to rebuild.

In the U.S., the public trust doctrine has been used since the 1800's to protect and restore public control over, and access to, resources that have been conveyed to private interests. Over the years the scope of the doctrine has been

expanded to preserve the public interest in a variety of resources, including waters, dunes, tidelands, underwater lands, fisheries, shellfish beds, parks and commons, and wildlife. The doctrine captures the responsibility of U.S. state and federal governments to act as “trustees” of these common resources, holding them “on behalf of the public as beneficiaries.”

The idea that the public trust doctrine can be used to promote environmental protection and careful stewardship of common resources in Canada is being increasingly supported by Canadian legal academics. At the same time, many of these authors also note that the term “public trust” or the notion of the public trust doctrine is virtually non-existent in contemporary Canadian case law dealing with public natural resources. As a result, how the public trust doctrine might be used by rural communities in New Brunswick to re-establish rights of access to common resources is unclear. To address this uncertainty and other important questions including how the public trust, public rights, and native rights may co-exist, the Conservation Council of New Brunswick (CCNB) conducted a legal research project in which it sought to answer the following questions:

1. Does the common law public trust doctrine establish a basis for action a) against the federal government in relation to inference or conferral of private property rights through the granting of individual transferable quotas and licenses in fisheries, or b) against a provincial government in relation to licenses in Crown forests?
2. If the answer to question 1 is yes, a) what are the rights conferred by the public trust doctrine; b) who owns the rights; c) what are the grounds of a claim in common law against a government for not fulfilling their public trust



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obligations; d) what test would have to be met to establish standing in any legal action to assert such public rights?

3. How might common law public trust rights co-exist with native rights to allow for rural livelihoods to be sustained through access to public resources?¹

This report presents some of the main conclusions of this research.

Organization of this report:

Part I describes in greater detail the purpose of this report and provides background to CCNB's reasons for conducting this legal research project. Part II of the report introduces the reader to the public trust doctrine by reviewing what are public rights and their relationship to the public trust doctrine, the history and evolution of the doctrine in the U.S., and concludes with a discussion of the doctrine's status and potential for development in Canada. Part III begins by outlining why and how Canadian fiduciary law should be used as a basis for the principled development of the public trust doctrine in Canada. It then looks at the specific issue of using the public trust doctrine to further protection of the environment. Part III concludes by reviewing how some of the fiduciary duties recognized in the context of aboriginal law might be used to place obligations and limits on governments in their care and management of public resources. How public rights might be used to promote community-based management is addressed in Part IV. Part V is a discussion of the interplay between aboriginal and treaty rights and use of the public trust doctrine to advance the community-based management movement in New Brunswick. Part VI concludes the report by using its findings to answer the three questions set out by CCNB.

Answering CCNB's three questions:

Question 1:

The public right of fishing precludes governments from granting exclusive fisheries in tidal waters. At the same time, there is no apparent corresponding public right of logging. In Part II it is argued that the present Canadian "public trust" that protects historic public rights, such as fishing and navigation, does not encompass the same broad functions filled by the U.S. public trust doctrine. The public trust doctrine captures the fiduciary obligation of governments to care for and manage public resources for the benefit of the public. The Canadian public trust appears to only protect a very limited range of uses in specific resources from a small number of potential interferences. Therefore, before the public trust doctrine can be used as a basis of action in Canada, there needs to be recognition that governments have fiduciary duties with respect to public resources. An exception to this is the public right of fishing which stands on its own.

In Part III, arguments are presented that the evolution of Canadian fiduciary law provides a foundation for the development of the public trust doctrine. For example, aboriginal peoples' unique *sui generis* legal interest in their lands places fiduciary duties on the federal government in certain instances when it deals with aboriginal lands. Public rights are a comparable legal interest and for this reason and matters of public policy, governmental fiduciary duties with respect to the resources that underlie these rights should be recognized. Defining the "public trust" as a fiduciary relationship paves the way for the further development of the doctrine in Canada, including its use as an instrument of environmental protection. This development would allow for: 1) the identification and protection of new uses of traditional

¹ The original focus of this question were the decisions in *R. v. Marshall*, [1999] 3 SCR 456 [Marshall No. 1]; and *R. v. Bernard* (2003), 262 N.B.R. (2d) 1 (NBCA).



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trust resources; 2) the protection of traditional public rights from interferences other than the granting of the trust resource to a private party; and 3) new trust resources to be identified and hence protected by the public trust doctrine.

The public trust imposes limits and obligations on governments in their care and management of public resources that are subject to the trust, ie. trust resources. Included in this is the duty of governments not to impair the public's beneficial use of a particular resource, such as the fishery. This impairment can occur in several ways, including typically by granting away or permitting the degradation of the trust resource in question.

There is a strong case to be made that Canadian governments already have fiduciary duties with respect to the traditional trust resources of public fisheries, navigable waters and highways. Recognition of governmental fiduciary duties in one public resource suggests that the public's interests in other resources is deserving of equal protection. There is nothing that makes a fishery more important to the public than a forest. Therefore, both fisheries and forests can be trust resources protected by the public trust doctrine. If the creation of private property rights in these resources is a breach of one of the fiduciary duties encompassed by the public trust doctrine, then theoretically, the doctrine does establish a basis for action to remedy this breach. However, as the answer to question 2(c) shows, there are significant challenges facing those who wish to launch such an action. Foremost among these is getting Canadian courts to make the public trust doctrine part of Canadian law.

Question 2(a):

Using aboriginal case law that discuss the fiduciary duties of

governments as a guide, it is determined that the public trust doctrine captures four fiduciary obligations owed by governments in their management of trust resources to the public, being: 1) to act loyally, 2) to act in good faith, 3) to make full disclosure of the matter at hand, and 4) to act like a person of ordinary prudence in managing their affairs (preserve the capital and plan for the future). Being synonymous with an equitable obligation, the public trust doctrine provides the public with a right to bring court actions to remedy breaches of the public trust by governments.

Question 2(b):

Public trust rights are "owned" by the public but are vested in the Crown. This vesting gives governments the right, and perhaps a corresponding duty, to seek the abatement of interferences with public rights through public nuisance actions.

Question 2(c):

The grounds of a claim in common law against a government for not fulfilling their public trust obligations requires establishing that a governmental fiduciary duty exists with respect to a particular public right or resource, and that a government's actions violate the trust. Part III of the report (see question 1) discusses why and how such duties can come to be recognized in Canada. Part IV argues how the establishment of systems of individual transferable quotas for fisheries and Crown timber licences for New Brunswick's forests are a breach of governments' public trust obligations.

It is argued the policies and actions of Fisheries and Oceans Canada are in practice creating private, or exclusive, fisheries. This is a breach of the longstanding public right of fishing. Because of an apparent lack of a public right of forestry, the



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argument that Crown timber licenses are a breach of the public trust, although presented, is much less strong than the fisheries example.

The main difficulty with searching for the existence of private property rights in public resources is there is a strong line of case law which holds that licences, because they lack durability of title, do not create private property rights. As such, the “law” on the nature of licences does not reflect the political reality of licensing systems. The existence of this law would seem to insulate government licensing systems for fisheries and forests from challenges based on breaches of the public trust. While this may still be true, it is also arguable that the recent Supreme Court decision regarding the provision of health care services in *Chaoulli v. Quebec (Attorney General)* (2005), may signal a willingness of Canadian courts to look behind the mask of legislation and into the heart of government action.

Given the uncertainty about whether in fact present systems of licensing access to public resources create private property rights, those seeking to challenge the present allocations of fisheries and forests would be wise not to rely simply on the possible existence of exclusive fisheries or rights of forestry. Instead, claims for breach of trust could focus on interferences with public rights in the environment generally or how the harvesting activities of virtual private rights holders cause a decline in the health of trust resources. For example, fish dumping by ITQ licensees and large-scale clear-cutting by forest licensees, cause harm to the environment and the resource itself. Government actions or inactions that allow for this harm are arguably a breach of government public trust duties. To remedy this breach, governments may be required to limit or prohibit ecologically destructive harvesting activities. Destructive harvesting practices seem to go hand-in-hand with the “profitability” of resource-dependent large-scale commercial

enterprises. Limit these activities and the drive for the privatization of public resources should be lessened.

Question 2(d):

Development of the public trust doctrine should not affect the rules for determining public interest standing as set out in *Finlay v. Canada (Minister of Finance)* in cases where a public interest litigant challenges a government’s statutory authority, or lack thereof, for a particular action or decision. The public trust may be important in providing standing in other cases where there is no issue of absence of governmental authority to rely on, such as government decisions not to proceed with a public nuisance action.

Question 3:

It is clear the fulfillment of the aboriginal and treaty rights of New Brunswick’s aboriginal peoples will require a reordering of resource allocations in the province. However, this reordering should result in little or no conflict between the use of the public trust doctrine by rural communities to re-establish access to common resources and the implementation of aboriginal and treaty rights in respect of these same resources. Two areas of conflict may arise in the exercise of aboriginal title rights, which will require a politically negotiated solution, and perhaps the exercise of aboriginal harvesting rights to resources such as fisheries that are created by statutes.



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PART I.

Introduction



The well-being of many rural communities in Canada is linked to the ability of their members to obtain a livelihood from direct access to these resources or employment in the activities necessary for their utilization. This is particularly true for New Brunswick, which continues to rely heavily upon natural resource exploitation, particularly forestry, to generate economic wealth.



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PART I. Introduction

1.1 Purpose of this report

Canadians believe themselves to be the owners of Canada's natural resources, such as its forests and fisheries. In turn, Canadian governments have been entrusted with the care and management of these resources. As the owner of these resources, it is natural Canadians want them to be managed prudently and with an eye to the future, and in the best interests of all Canadians.

These two ideas, that there are things or resources (in the broadest sense of the word) that are or should be common to all, such as air and the seas, and that the government manages these things on our behalf for our benefit, have found expression in two common law concepts. The first of these is there are “public rights” in the environment. Public rights that have historically been recognized and protected by Canadian courts include the right of navigation on navigable waters and the right to fish in tidal waters.

The other legal concept is the “public trust doctrine”. Although there are several formulations of the public trust doctrine, at its core it holds that the government has an obligation to care for those things or resources the public has rights in or are common to all and as such should hold and manage these “trust resources” for the benefit of the public and not private interests. The doctrine is well established in the U.S. and a “public trust” is regularly cited in American cases dealing with environmental law. While it is uncertain whether Canadian judges philosophically agree with the premise of the doctrine, it is clear there is scant reference to the doctrine in Canadian case law.

It is also becoming more and more apparent the actions or inactions of Canadian governments are causing the diminishment of the ecological health of common resources and are permitting these resources to be appropriated for private benefit, often at the expense of resource-dependant rural communities. The ecological diminishment of common resources is sadly illustrated by the precipitous decline in Atlantic cod stocks. Examples of the increasing “privatizing” of common resources that has occurred over the past two-and-half decades include the long-term licensing of Crown forests, the granting of aquaculture leases over submerged Crown land, and the issuing of individual transferable quotas to harvest groundfish and other sea life. Unlike in the U.S., the public trust doctrine has historically rarely been used in Canada in legal actions initiated to defend the ecological health of common natural resources or beneficial public access to them. However, the ever increasing recognition by Canadian courts of the need for and benefit of environmental protection has opened a window of opportunity for public interest litigants to successfully argue a public trust doctrine case.

To investigate how the public trust doctrine might be used by rural communities, with an emphasis on New Brunswick, to re-establish access to and promote ecologically sustainable use of fisheries and Crown forests, the Conservation Council of New Brunswick conducted a legal research project in which it sought to answer the following questions:

1. Does the common law public trust doctrine establish a basis for action a) against the federal government in relation to inference or conferral of private property rights through the granting of individual transferable quotas and licenses in fisheries, or b) against a provincial government in relation to licenses in Crown forests?



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2. If the answer to question 1 is yes, a) what are the rights conferred by the public trust doctrine; b) who owns the rights; c) what are the grounds of a claim in common law against a government for not fulfilling their public trust obligations; d) what test would have to be met to establish standing in any legal action to assert such public rights?
3. How might common law public trust rights co-exist with native rights (*R. v. Marshall*, [1999] 3 SCR 456; *Bernard v. R.*, [2003] NBCA 55) to allow for rural livelihoods to be sustained through access to public resources?

The purpose of this report is to detail the findings of this research.

1.2 Background to the legal research questions and this report

Elaborating on the above, it is important to remember that Canada, including the Province of New Brunswick, was founded on the exploitation of natural resources. Fish and fur were a driving force behind the initial colonization of Canada by Europeans. New Brunswick's forests came to prominence during the Napoleonic Wars after Britain's Scandinavian wood supply was cut off and it sought timber from its colonies.¹ Much of the "opening up" of northern Canada has resulted from the development of mines and the processing of metals and minerals. The opportunity to own arable land coupled with an escape from religious persecution brought many people to central and southern Canada. The utilization of these and other more recently important natural resources, such as oil and natural gas, continues to be one of the main drivers of the Canadian economy.

In turn, communities have grown around the harvesting, processing and shipping activities necessary for the use of these natural resources. One often hears about Canada's "fishing villages", "farming communities", "logging towns", and "mining towns". The well-being of many rural communities in Canada is linked to the ability of their members to obtain a livelihood from direct access to these resources or employment in the activities necessary for their utilization. This is particularly true for New Brunswick, which continues to rely heavily upon natural resource exploitation, particularly forestry, to generate economic wealth.² As Justice Robertson of the New Brunswick Court of Appeal recently noted, "It is trite to acknowledge that the linchpin of New Brunswick's economy is tied to two of its natural resources: fish and timber."³ As an example, after British Columbia, New Brunswick has the greatest percentage of its population heavily reliant upon the forest products sector and has 40 communities with 50% and greater of their economic base tied to forestry.⁴

However, while many New Brunswick rural communities continue to be reliant upon forestry and fishing, they are also experiencing a decrease in control over and access to these resources. A main cause of this is the increase of private property rights in and corporate control over public resources. As an example, for the purposes of forestry, New Brunswick is divided into ten timber license areas. The 48% of New Brunswick forests that are on Crown land⁵ are all located within these ten timber license areas. Only those who own or operate a "wood processing facility", e.g. a pulp and paper mill, can receive a timber license,⁶ and one company can hold multiple licences. This has resulted in all of New Brunswick's public forests being licensed to only a handful of forest product companies.

¹ Graeme Wynn, *Timber Colony: An Historical Geography of Early Nineteenth Century New Brunswick* (Toronto: University of Toronto Press, 1981) at 4.

² Atlantic Provinces Economic Council, *The New Brunswick Forest Industry: The Potential Economic Impact of Proposals to Increase the Wood Supply* (2003) at 12.

³ *R. v. Bernard* (2003), 262 N.B.R. (2d) (N.B.C.A.) at para. 353.

⁴ Tim Williamson and Shailaja Annamraju, *Analysis of the Contribution of the Forest Industry to the Economic Base of Rural Communities in Canada* (Ottawa: Natural Resources Canada – Canadian Forest Service - Industry, Economics and Programs Branch, 1996).

⁵ Canadian Forest Service, *The State of Canada's Forests* (Ottawa: Natural Resources Canada, 2001) at 26.

⁶ *Crown Lands and Forests Act*, S.N.B. 1980, c. C-38.1 at s. 28.



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Access to significant portions of the historical common fishery is now controlled by individual transferable quotas (ITQs). Although issued annually, Department of Fisheries and Oceans policy has resulted in a system where it is usually only those who previously received an ITQ that get an ITQ the following year. These quotas can also be transferred (sold or rented). As a result, ITQs have obtained many of the characteristics of private property and have become increasingly valuable.⁷ The cost and exclusivity of ITQs is shutting smaller fisherman out of the industry and resulting in the corporatization of the industry.⁸

Even the sea bottom is not immune from the forces of privatization in New Brunswick. Aquaculture leases and licenses convey the right to the exclusive use of the sea-bottom covered by these government approvals.⁹ Aquaculture leases can be granted for up to twenty years. Aquaculture sites, particularly salmon farms, are often located in bays that are rich and historic fishing grounds. The negative effect of salmon aquaculture on these fisheries has led fishermen to believe the aquaculture industry has damaged their livelihoods.¹⁰

1.2.1 Some social and ecological consequences of the mismanagement and private appropriation of common resources

A number of Conservation Council of New Brunswick reports have accurately and more fully described some of the negative socio-economic and ecological effects that have accompanied

the increase in private control over and poor stewardship of common resources such as the sea floor,¹¹ fisheries,¹² and forests.¹³ However, a brief review of these effects is necessary to more fully appreciate the need for the legal exercise of public rights and the public trust doctrine.

1.2.1(A) Socio-economic

From 1965 to 1993, the number of employed loggers in New Brunswick declined by 55%, from 4611 to 2057 workers. In that same time, total harvest levels nearly doubled from 2.5 to 4.4 million cubic metres. As well, in terms of real dollars, from 1963 to 1997 there has been an increasing level of disparity between the gross revenue earned by New Brunswick forest companies and the wages they pay.¹⁴ Much of this has occurred because forest industry workers have little control over industry decisions or how the forest is utilized. As a result, the forests are being managed to secure corporate profits rather than community well-being. As L. Anders Sandberg writes:

Corporations now dominate the forest. With the sanction and active enthusiasm of the client states, they determine the strategies for development, **with all their immense implications for the environment and Maritime communities.** Alternative approaches become almost “unthinkable”. Critics are few and quickly marginalized. [Emphasis added]¹⁵

⁷ Claude Emery, *Quota Licensing in Canada's Fishing Industry* (Ottawa: Research Branch of the Library of Parliament, 1993).

⁸ Janice Harvey and David Coon, *Beyond Crisis in the Fisheries: A Proposal for Community-based Ecological Fisheries Management* (Fredericton: Conservation Council of New Brunswick, 1997) at 42.

⁹ *Aquaculture Act*, S.N.B. 1988, c. A-9.2, s.25(2) Subject to subsections (6) and (7), an aquaculture lease conveys the right to the exclusive use of the land covered by the lease.

¹⁰ Inka Milewski, Janice Harvey, and Beth Buerckle, *After the Gold Rush: The Status and Future of Salmon Aquaculture in New Brunswick* (Fredericton: Conservation Council of New Brunswick, 1997) at pp.30-34.

¹¹ See for example: Milewski, Harvey, and Buerckle, *supra* note 10; and Inka Milewski and Annelise S. Chapman, *Oysters in New Brunswick: More than a Harvestable Resource* (Fredericton: Conservation Council of New Brunswick, 2002).

¹² See for example: Harvey and Coon, *supra* note 8; and David Coon, *An Ecological Sketch of some Fundy Fisheries* (Fredericton: Conservation Council of New Brunswick, 1999).

¹³ See for example: Matt Betts and David Coon, *Working with the Woods: Restoring Forests and Community in New Brunswick* (Fredericton: Conservation Council of New Brunswick, 1996); and David Coon, Karen DeWolfe, and Inuk Simard, *Our Acadian Forest in Danger: The State of Forest Diversity and Wildlife Habitat in New Brunswick* (Fredericton: Conservation Council of New Brunswick, 2005).

¹⁴ The Crown Lands Network (N.B.), *Unlocking the Economic Potential of New Brunswick Crown Lands* (Undated) at 10.

¹⁵ L. Anders Sandberg, “Dependent Development and Client States: Forest Policy and Social Conflict in Nova Scotia and New Brunswick” (at 1-22), in L. Anders Sandberg, ed., *Trouble in the Woods: Forest Policy and Social Conflict in Nova Scotia and New Brunswick* (Fredericton: Acadiensis Press, 1992) at 21.



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Returning to the collapse of Atlantic cod stocks, many people can remember the shock that accompanied the announced moratorium of the fishery for northern cod in July 1992 and the subsequent closing of the remainder of the Atlantic cod fishery (other than that off south-western Nova Scotia and New Brunswick) in January 1994.¹⁶ These closures put thirty-five thousand people out of work¹⁷ and devastated many coastal communities. The cause of the collapse of cod and other groundfish stocks resulted from treating the fishery and fish as simply an economic commodity rather than as a common resource to be managed for the *benefit* of all, including future generations. As Kent Blades notes, blame for the state of Atlantic Canada's troubled fishery can be laid at the feet of all parties involved in the fishery.¹⁸

1.2.1(B) Ecological

Perhaps better known to many people is the ecological damage that has accompanied the mismanagement and increasing private control of public resources in Canada, which includes:

• Fisheries:

- The government promotion of and support for the single-minded pursuit of individual and corporate economic gain has resulted in many species being over-fished and in habitat destruction.

- ITQs are furthering the decline of certain fish species because of dumping and highgrading.¹⁹
- Aquaculture poses a threat to fishery resources for reasons such as the polluting of historically productive fisheries, loss of habitat, and the spread of disease to wild fish.
- Clear-cutting is the usual harvesting practice for large forest companies because it is believed to be the most economically efficient. Frequent, large-scale clear-cutting can cause, among other things, loss of natural biodiversity, habitat loss and fragmentation, and soil compaction.

1.3 One suggested solution – community-based ecological management

There is evidence that the present state of affairs regarding the management and allocation of common resources is becoming increasingly unacceptable to more people. For example, government plans to open the old growth forests of Temagami in Ontario and Clayoquot Sound in British Columbia to intensive logging resulted in long-term citizen actions designed to protect these forests that are considered sacred by many Canadians. Citizens of Penn Island, New Brunswick and others launched a court action in an attempt to prevent a salmon aquaculture farm from being built and operated in the coastal waters near the island.²⁰ Recently, the Province of Prince Edward Island initiated a court action against the federal government, alleging among other things that the federal

¹⁶ Kent Blades, *Net Destruction: The Death of Atlantic Canada's Fishery* (Halifax: Nimbus Publishing Ltd., 1995) at 16.

¹⁷ *Ibid.* at 16.

¹⁸ *Ibid.* at 16.

¹⁹ Highgrading is the keeping of the most valuable fish and dumping lower value fish such as juvenile fish. See for example: Heather Breeze, *Conservation Lost at Sea: Discarding and Highgrading in the Scotia-Fundy Ground Fishery in 1998* (Ecology Action Centre and Conservation Council of New Brunswick, 1998); and Ecotrust Canada, *Catch-22 – Conservation, Communities and the Privatization of B.C. Fisheries: An Economic, Social and Ecological Impact Study* (Vancouver: Ecotrust, 2004) at iii.

²⁰ *Fundy North Fishermen's Assoc. v. N.B. (Minister of Agriculture, Fisheries and Aquaculture)*, 2000 CanLII 3066 (N.B.Q.B.). Although unsuccessful at the time, the salmon farm was required to move two years later.



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government's allocation and management of East Coast fisheries have been in breach of its public trust obligations.²¹

Another response to this appropriation and degradation of common resources has been the emergence of a movement for the advancement and development of community-based ecological management of natural resources. The central tenet of community-based management is that historically-dependent communities should have access to adjacent resources for their livelihoods, and that such access confers stewardship responsibilities to ensure the ecological sustainability of those resources in perpetuity. Community-based management initiatives involve geographically-based (rather than sectoral) fisherman organizations, woodworkers, rural municipal councils, First Nations, labour unions, and conservation organizations.

A recent example of support for community-based management comes from the Maritime Fisherman's Union:

In fact, the theme of our Convention, which emphasizes a community based approach in the fisheries over an individualistic one, is a choice we must make as a society to ensure the sustainability of the resource and the economic survival of our coastal communities. However, this economic survival is only guaranteed through the conservation of the resource which, if it is well managed, leads eventually to the viability of our fleets. For these reasons, our fishermen after many months of reflection and public meetings have come to the conclusion that the viability of our fleet can only be achieved through more direct control over the management and development of this resource.

More direct control also means more local and community control by our fleet. That is why you have chosen to move forward with the concept of community of interest over the individualistic approach.²²

However, while the community-based management movement is a positive initiative, its potential as a tool for ecological and community revival is constrained by the increasing entrenchment of private property rights in Crown resources and the unwillingness of governments to discuss the broadening of access to these resources. Until communities gain renewed access to local natural resources, the community-based management movement will founder.

It is the Conservation Council of New Brunswick's belief that the public trust doctrine can be used by rural communities to gain access to and protect common resources. Consequently, the Conservation Council of New Brunswick undertook its public trust research project to investigate and report upon this possibility and to help further the increasing interest in the public trust doctrine in Canada.

²¹ *The Province of Prince Edward Island, et al. v. Canada, et al.*, Supreme Court of Prince Edward Island (Trial Division) Court File No. S1-GS-20819. Filed: February 23, 2005.

²² Ron Cormier, "President's Report: 27th Annual Convention of the Maritime Fisherman's Union" (2004). Available at: <<http://www.mfu-upm.com/english/index.cfm?id=106>>.



PART II.

The Public Trust Doctrine



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

Gerard La Forest, 1973



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PART II. The Public Trust Doctrine

The idea that the public trust doctrine can be used to promote environmental protection and careful stewardship of common resources in Canada is being increasingly supported by legal academics.¹ At the same time, the public trust doctrine is a legal concept that many lawyers and lay people are unfamiliar with. The purpose of Part II of this report is to introduce the reader to the doctrine by outlining the origins of the public trust doctrine, by examining its development in the U.S., and by discussing the present status of the doctrine in Canada.

2.1 Public Rights

Any discussion of the public trust doctrine needs to begin with an understanding of public rights. This is because originally, “the public trust doctrine [prevented] the substantial impairment of public rights in navigable waterways.”² Two public rights that have long been recognized by British and later American and Canadian courts are the public right of navigation and the public right of fishing in tidal waters.³

A good description of public rights is as follows:

By public rights is not meant rights owned by the government, whether federal, provincial or municipal. These bodies may own land and water rights, including riparian rights and rights associated with the ownership of the beds of watercourses, in the same way as private individuals, in which case they are, in a manner of speaking, public rights. But what is here called public rights are those vested in the public generally, rights that any member of the public may enjoy.⁴

It is generally accepted that the Romans were the first to formally articulate the legal theory of public rights: “By the law of nature these things are common to mankind – the air, running water, the sea⁵ and consequently the shores of the sea.” This theory was later incorporated into the English common law, where Bracton wrote:

By natural law, these are common to all: running water, the air, the sea, and the shores of the sea. No one is forbidden access to the foreshore ... [A]ll rivers and ports are public. **Hence the right of fishing in a port or in rivers is common.** By the laws of nations, the use of the banks also is as public as the rivers; therefore all persons are at equal liberty to land their vessels, unload them, and fasten their

¹ See for example: Jerry V. DeMarco, Marcia Valiente, and Marie-Ann Bowden, “Opening the Door for Common Law Environmental Protection in Canada: The Decision in *British Columbia v. Canadian Forest Products Ltd.*,” (2004) 15 J.E.L.P. 233; Constance D. Hunt, “The Public Trust Doctrine in Canada,” in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1981) at c. 3; John C. Maguire, “Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized,” (1997) 7 J.E.L.P. 1; Kate P. Smallwood, *Coming Out of Hibernation: The Canadian Public Trust Doctrine* (Unpublished Masters Thesis, U.B.C., 1993); David VanderZwaag, *Canada and Marine Environmental Protection: Charting a Legal Course Toward Sustainable Development* (London: Kluwer Law International, 1995) at 409-423; and Barbara von Tigerstrom, “The Public Trust Doctrine in Canada,” (1997) 7 J.E.L.P. 379.

² Charles 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 459 (note 138). See also: Jack H. Archer and Terrance W. Stone, “The Interaction of the Public Trust and the “Takings” Doctrines: Protecting Wetlands and Critical Coastal Areas,” (1985) *Vt. L.R.* 81 at 83 (note 8).

³ This is not to say that other public rights in the environment, such as the right to clean air, do not exist in Canadian law. It is simply that they are not as judicially well-established as the two rights noted above. Other public rights that are important for the growth of the public trust doctrine in Canada will be discussed later in this report. For a thorough discussion of public rights in the environment, see: Andrew Gage, “Public Rights and the Lost Principle of Statutory Interpretation,” (2004) 15 J.E.L.P. 107.

⁴ Gerard La Forest, *Water law in Canada – The Atlantic Provinces* (Ottawa: Information Canada, 1973) at 178. In discussing Mr. La Forest’s definition, Andrew Gage notes, “That although written in the context of public rights arising from navigable rivers, the definition is more generally applicable.” Gage, *supra* note 3 at 109 (note 1).

⁵ Jan S. Stevens, “The Public Trust: A sovereign’s ancient prerogative becomes the people’s environmental right,” (1980) 14 *U.C. Davis L. Rev.* 195 at 196-197, quoting: The Institutes of Justinian 2.1.1. (T. Cooper trans. & ed. 1841). This statement is quoted extensively in public trust doctrine literature and case law, including recently in *obiter* by the Supreme Court of Canada in *British Columbia v. Canadian Forest Products*, [2004] 2 S.C.R. 74 at para. 66.



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cable to the trees upon the banks, as to navigate the river itself. [Emphasis added]⁶

The difficulty was that at the same time English common law required all real property to be owned by someone, which in turn resulted in the King becoming the *de facto* owner of the foreshore and beds of navigable waters.⁷ How then could the public exercise its rights to navigate and fish over the property of the King or a private subject? This problem was overcome by the English common law being able to recognize two property interests in the foreshore and beds of navigable waters:

[T]he 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.⁸

Coinciding with the development of a *jus publicum* (the public right of use) and a *jus privatum* (the private rights of ownership) in tidal waters and the nearshore⁹ was the judicial interpretation of the *Magna Charta* (1215) to stand for the premise that the King could not grant new exclusive fisheries in tidal waters. As a result, the public's right to use the sea

and seashore continued.

What follows is a brief discussion regarding the two public rights noted above.

2.1.1 Right of navigation

Since the time of Bracton and continuing on through today, in England, the public has had a right to use all tidal waters that are navigable in fact for the purposes of navigation.¹⁰ For rivers, this means the right extends to the point on the river that stops being influenced by the ebb and flow of the tide. Since colonial times, this same public right, with some modification, has existed in Canada. The major difference between the two countries is that in Canada, other than perhaps in New Brunswick and Nova Scotia,¹¹ both fresh and tidal waters can be navigable in fact.¹² What is navigable in fact depends on the circumstances. However, as Mr. La Forest states, for a Canadian body of water to be considered navigable, "it must be generally and commonly useful for some purpose of trade or agriculture, either in fact or potentially."¹³ The reason for the difference between the rule in England versus Canada (and the U.S.) was that many of our large waterbodies, such as the Great Lakes and the Winnipeg River, while important for commerce and transportation, were not influenced by the ebb and flow of the tide.¹⁴ To protect public uses of these important non-tidal waterways required a change in the existing common law rule.¹⁵

⁶ Ibid. at 197 quoting: 2 H. Bracton, *On the Laws and Customs of England* 39-40 (S. Thorne trans. 1968).

⁷ Ibid. at 198.

⁸ Smallwood, *supra* note 1 at 17, quoting: Sir Matthew Hale, *De Jure Maris*, in Stuart A. Moore, *A History of the Foreshore and the Law Relating Thereto* (3rd ed.) (London: Stevens & Haynes, Law Publishers, 1888) at 404-405.

⁹ The land lying between the normal high and low tide marks.

¹⁰ La Forest, *supra* note 4 at 178-181.

¹¹ It is believed the rule in these provinces is the same as in England, La Forest, *supra* note 4 at 178. A reason for this may be the fact that case law on navigability in these provinces was settled before the issue of whether Canada's Great Lakes and large inland rivers were "navigable-in-fact" arose.

¹² For modern confirmation of the rule, see *Friends of the Oldman River*, [1992] 1 S.C.R. 3 at 54.

¹³ La Forest, *supra* note 4 at 180.

¹⁴ For a good discussion of this difference and the issue of navigable in fact, see: *International Minerals & Chemicals Corp. (Canada) Ltd. v. Canada (Minister of Transport) (T.D.)*, [1993] 1 F.C. 559.

¹⁵ La Forest, *supra* note 4 at 179.



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In his text, Mr. La Forest details several distinctive features of the public right of navigation¹⁶ that, as will be discussed later in this report, have played an important role in the development of the public trust doctrine.

- The public right of navigation is paramount to the rights of those who own the soil, for example the sea or river bed, beneath navigable waters, be it the Crown or private owners.¹⁷ This means that the owner of the bed cannot, without proper legislative authority, erect or place things in the waters above his soil that interferes with public navigation to a substantial enough degree that it amounts to a public nuisance.
- Specific legislation, such as the *Navigable Waters Protection Act*,¹⁸ is required to extinguish the public right of navigation.
- The public right of navigation also includes incidental rights that are necessary for the public to make full use of the right. For example, the public right of navigation includes the right to moor and anchor on soil that is privately owned.
- The right of navigation does not include rights to participate in activities that are not necessary for the enjoyment of the right of navigation, such as bathing or shooting wildfowl.

The case of *Woods v. Esson*¹⁹ provides an example of the

effect of these distinctive features. In *Woods*, both parties owned wharves in Halifax Harbour. The plaintiff, Esson, sued Woods in trespass after Woods pulled up piles driven into the harbour bed below the low water mark by Esson. Esson was going to use the piles to support an extension of his wharf. Esson had been granted title by the Government of Nova Scotia in 1861 to the area of the harbour bed where his wharf lay and where he had driven in the piles. Woods defended his actions by saying the piles interfered with his right to access his wharf from the harbour and therefore was at liberty to remove them.

The Supreme Court dismissed Esson's court action, noting:

The title to the soil did not authorize the plaintiffs to, extend their wharf so as to be a public nuisance, which upon the evidence, such an obstruction of the harbour amounted to, for the Crown cannot grant the right to obstruct navigable waters; nothing short of legislative sanction can take from anything which hinders [the right of] navigation the character of a nuisance.²⁰

In other words, although Mr. Esson may have had title to the harbour bed (the *jus privatum*), Mr. Woods still had a right to navigate or travel unimpeded on the water that lay above Mr. Esson's property.

The more recent case of *Friends of the Oldman River Society v. Canada (Minister of Transport)*,²¹ provides evidence of the continuing vitality of the public right of navigation. Mr. Justice

¹⁶ *Ibid.* at 183-191.

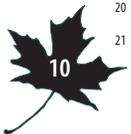
¹⁷ See as an example, *Donnelly v. Vroom (1907)*, 40 N.S.R. 585 at 592; "The right of navigation, as well as that of fishing, is paramount to the rights of a mere owner of the soil."

¹⁸ R.S., 1985, c. N-22.

¹⁹ (1884), 9 S.C.R. 239.

²⁰ *Ibid.* at 243 per Strong, J.

²¹ *Supra* note 12.



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La Forest, in discussing the history of the *Navigable Waters Protection Act*, stated:

The common law of England has long been that the public has a right to navigate in tidal waters ... in Canada the distinction between tidal and non-tidal waters was abandoned long ago ...

The nature of the public right of navigation has been the subject of considerable judicial comment over time, but certain principles have held fast. First, the right of navigation is not a property right, but simply a public right of way. [Citation omitted] It is not an absolute right, but must be exercised reasonably so as not to interfere with the equal rights of others. Of particular significance for this case is that the right of navigation is paramount to the rights of the owner of the bed, even when the owner is the Crown ...

[The public right of navigation] can only be modified or extinguished by an authorizing statute, and as such a Crown grant of land of itself does not and cannot confer a right to interfere with navigation. [Citations omitted]²²

2.1.2 Right of fishing

The public right of fishing has also long existed in the English common law and is very similar to the public right of navigation. In Canada, the public has the right to fish in all tidal waters.²³ For rivers, this means the right extends to the

point on the river that stops being influenced by the ebb and flow of the tide. Like the right of navigation, it is a paramount right.²⁴ What is interesting about this is that the owner of the bed of a fresh water body has the exclusive right of fishing in the waters over the land he owns, while the owner of the bed of a tidal waterway does not. Exclusive fisheries can exist in tidal waters, but since *Magna Charta* it has been held that exclusive fisheries in tidal waters cannot be created except by valid and specific legislation.²⁵ As stated by the Privy Council in *A.G. for British Columbia v. A.G. for Canada*,²⁶ “[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,”²⁷ and “[S]ince 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.”²⁸ This ruling of the Privy Council was recently quoted with approval by the Supreme Court in *R. v. Gladstone*.²⁹

The legal history of Canada’s public fishery is a storied one.³⁰ As will be discussed later in this report, originally the public fishery in Canada was unlicensed. Anyone who wanted to and had the means to, could fish. Today, one requires a licence to partake in most commercial fisheries, such as groundfish and salmon fisheries. The difficulty in obtaining licenses has restricted entry into these fisheries. One of the questions addressed later in this report is whether this has amounted to the creation of exclusive fisheries without the necessary specific legislation.³¹

²² *Ibid.* at 54-55.

²³ La Forest, *supra* note 4 at 195-196.

²⁴ The right of navigation is superior to the right of fishing, La Forest at 197.

²⁵ *Ibid.* at 196.

²⁶ [1914] AC 153 (PC).

²⁷ *Ibid.* at 169.

²⁸ *Ibid.* at 169-170, per Viscount Haldane.

²⁹ [1996] 2 S.C.R. 723.

³⁰ A readable synopsis of this history can be found in *R. v. Kapp*, 2003 BCPC 279 (CanLII) at para’s. 7-24.

³¹ See Part 4.2.



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Although the public right of fishing has long been held by the courts as being important, the case of *Hickey v. Electric Reduction Co. of Canada Ltd.*³² illustrates a particular problem surrounding public rights. Although a public right may exist, it can be difficult for an individual member of the public to enforce it. In *Hickey*, a group of fishermen were seeking damages after pollution released from the defendant's plant killed fish in neighbouring waters. Their claim was denied after Furlong, C.J. of the Newfoundland Supreme Court reasoned that the right to fish is held by all of the public. As it was a public right, the defendant's interference with that right amounted to a public nuisance. In most provinces, the present common law rule regarding public nuisance claims is that unless the plaintiff can prove "special" damages, only the Attorney General can sue in public nuisance.³³ In *Hickey*, the judge held the fishermen only suffered more damages, not ones that were "peculiar" or different in kind from the rest of the public.³⁴ As such, the ability to remedy or prevent interferences with public rights in a court of law is often not in the hands of the general public.

2.2 Origins of the Public Trust

The roots of the public trust doctrine lie in the writings of Justinian, Bracton, and Sir Matthew Hale. After Bracton wrote that the right to use the sea and seashore was common to all, the question became whether the right of fishing "is enjoyed directly

by members of the public or is vested in the Crown on behalf of the public."³⁵ Following the publishing of Sir Matthew Hale's influential *De Jure Maris* it became settled law that the latter view was correct, that the public right of fishing actually derived from the Crown.³⁶ This resulted from the King having the prerogative, or exclusive right of privilege, of the primary right of fishing in these waters. At the same time though, "the common people of England have regularly a liberty of fishing in the sea ... as a public common of piscary, and may not without injury to their right be restrained of it ..."³⁷ Therefore, although the King had a prerogative over the fishery, the public had at the same time the right to fish, which in turn effectively "sterilized" the Crown's prerogative.³⁸ However, this prerogative placed fisheries, and the public's use of them, under the King's care, supervision and protection.³⁹ Accordingly, "following the publication of *De Jure Maris* in 1787, Hale's interpretation of the Crown prerogative over fish as **some form of public trust** became firmly established."⁴⁰ [Emphasis added]⁴⁰

The important point to be taken from the above, and which will be followed up later in this report, is the public right of fishing, and other public rights, are vested in the Crown. In other words, the Crown holds these rights on behalf of the public.⁴¹ However, this vesting does not mean public rights are dependent upon the Crown for their existence. As Joseph Chitty wrote, the public right of fishing "never was vested in the Crown exclusively, and of

³² (1970), 21 D.L.R. (3d) 368 (Nfld.S.C.).

³³ One exception to this is the Province of Ontario. See: *Environmental Bill of Rights, 1993*, S.O. 1993, c.28, s.103.

³⁴ *Supra* note 32 at 372. Following the decision in *Hickey*, the Fisheries Act was amended (25-26 Eliz. II, 1976-77, c. 35) and s.33(10.1) and (10.2) were added. These sections created a cause of action that allows commercial fishermen to recover damages for losses caused by the release of contaminants.

³⁵ Tim Bonyhady, *The Law of the Countryside and the Rights of the Public* (Milton Park Estate, Bingham: Professional Books, 1987) at 251.

³⁶ *A.G. for British Columbia, supra* note 26 at 168-9. Regarding the foreshore, Joseph Sax writes, "[T]he ownership of the shore, as between the public and the King, has been settled in favour of the King; but ... this ownership is, and had been immemorially, liable to certain general rights of egress and regress, for fishing, trading, and other uses claimed and used by his subjects." in Joseph Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: Alfred A. Knopf, 1970) at 164; quoting R.H. Hall (citation omitted in original).

³⁷ Bonyhady, *supra* note 35 at 252, quoting: Hale, *De Jure Maris* at 11. (See also *De Jure Maris* in Moore, *supra* note 8 at 377).

³⁸ *Ibid.* at 252.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *British Columbia v. Canadian Forest Products*, [2004] 2 S.C.R. 74 [Canfor] at para. at 76.



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course is not to be considered as a legal franchise; as a public right belonging to the people, it prima facie vests in the Crown; but such legal investment does not diminish the right of the subject, and is merely reposed in the Crown for the sake of regulation and government.”⁴²

The following ideas; that the public had a right to navigate and fish in all tidal waters (unless an exclusive fishery could be proven to have been created before the *Magna Charta*), that the King could not create a new exclusive fishery, and that the fishery (and navigable waters) was under the King’s care and protection, are the source of the position that the King or Crown held these resources – the fishery and unobstructed tidal waters – in trust for the public so that its members could exercise their rights of navigation and fishing. If these common or “trust resources” came to be held by private persons, they could have excluded the public from their use, which in turn would have interfered with or impaired public rights. To prevent this, the Crown was to hold these common resources in trust for the benefit of the public for specific uses.

Finally, for future reference throughout this report, following from the above discussion a **trust resource** can be defined as a common resource, such as a fishery, that is necessary for the exercise of a public right, and that is owned or controlled by the state and such ownership is for the benefit of the public.

⁴² Joseph Chitty, *A Treatise on the Game Laws, and on the Fisheries* (London: W. Clarke and Sons, 1812) at 243-244.

⁴³ Hunt, *supra* note 1 at 158.

⁴⁴ More detailed reviews of the historical development of the public trust doctrine can be found in Wilkinson, *supra* note 2; Archer and Stone, *supra* note 2; Stevens, *supra* note 5; Patrick Deveney, “Title, Jus Publicum and the Public Trust: An Historical Analysis,” (1976) 1 Sea Grant L.J. 13; Note, “The Public Trust in Tidal Areas: A Sometimes Submerged Judicial Doctrine,” (1970) 79 Yale L.J. 762; Various authors, “The Public Trust Doctrine in Natural Resources Law and Management: A Symposium,” (1980) 14 U.C. Davis L. Rev. 181; and Various authors, “Symposium on the Public Trust and the Waters of the American West: Yesterday, Today, and Tomorrow,” (1989) 19 Env’tl. L. 425.

⁴⁵ See for example: *Arnold v. Mundy*, 6 N.J.L. 1 (1821) (N.J.S.C.); (Court ruled that the state could not deed away title to oyster beds lying under navigable waters): [B]y the law of nature, which is the only true foundation of all social rights . . . by the civil law, which formerly governed almost all the civilized world . . . [and] by the common law of England . . . the navigable rivers where the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purposes of passing and repassing, navigation, fishing, fowling sustenance, and all other uses of the water . . . are common to all the people. (at 78) and *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842) at 413.

⁴⁶ (1892) 146 U.S. 387 [*Illinois Central*].

⁴⁷ With regard to the area covered by the grant, the U.S. Supreme Court stated, “It is as large as that embraced by all the merchandise docks along the Thames . . . and nearly if not quite equal to the pier area along the water front of the city of New York” (at 454).

They are the resources “which are considered subject to the public trust.”⁴³

2.3 The American Public Trust Doctrine

As discussed earlier, there are few references in Canadian case law to the concept that the Crown holds navigable waterways and public fisheries in trust for the public. American jurisprudence on the other hand is replete with references to a public trust, and the public trust doctrine and its development have been extensively discussed in American legal literature.⁴⁴ It is for this reason that Canadian authors usually begin their discussion of the public trust doctrine with a review of the doctrine’s history in the U.S.

Since the early 1800’s, American courts have held that there is a public trust with regard to trust resources.⁴⁵ The most important early public trust case, and from which much of the modern U.S. public trust doctrine has grown, is *Illinois Central Railroad v. Illinois*.⁴⁶ In 1869, the Illinois legislature granted to the Illinois Central Railroad in fee simple a huge tract of the lake bottom of Lake Michigan bordering the City of Chicago.⁴⁷ Included in the grant was all of the outer harbour of Chicago. Four years later the legislature repealed the 1869 act which permitted the grant. In 1883 it brought a suit seeking revocation of the grant itself. The case made its way to the



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U.S. Supreme Court where the court upheld the Illinois legislature's revocation of the grant.

Justice Field, writing for the court, made several statements that laid the groundwork for the present day formulations of the public trust doctrine in the U.S.:

[The bed of Chicago Harbour] 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 freed from the obstruction or interference of private parties.⁴⁸

It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks ... which being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the navigable waters of an entire harbour or bay, or of sea or lake. **Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such water for the use of the public.**⁴⁹

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 the interests of the public therein, or can be disposed of without a substantial impairment of the public interest in the lands and waters remaining.⁵⁰

So with trusts connected with public property, **or property of a special character**, like lands under navigable waters; they cannot be placed entirely beyond the direction and control of the State. [Emphasis added throughout]⁵¹

In the end, it has been argued that the “central substantive thought” of the U.S. Supreme Court in *Illinois Central* was:

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.⁵²

Despite the importance of the decision, particularly with regard to how it allows potentially substantial interference with constitutionally protected private property rights, the public trust doctrine lay fairly dormant for almost 80 years.⁵³ Then, in 1970, Joseph Sax published his influential journal article, “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention”.⁵⁴ This article has been credited with marking the dawning of the new public trust era.⁵⁵ In his article, Joseph Sax, in support of the public trust doctrine, built upon the decision in *Illinois Central* and wrote that the public trust concept protects three important public interests:

⁴⁸ *Ibid.* at 452.

⁴⁹ *Ibid.* at 452-453.

⁵⁰ *Ibid.* at 453.

⁵¹ *Ibid.* at 454.

⁵² Sax, *infra* note 54 at 490.

⁵³ Harry R. 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; “After World War Two, the public trust doctrine lapsed into relative disuse as a judicial tool until the classic article by Joseph L. Sax . . .” (at 753).

⁵⁴ Joseph L. Sax, “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,” (1970) 68 Mich. L. Rev. 471.

⁵⁵ Erin Ryan, “Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management,” (2001) 31 Env'tl. L. 477 at 478; and Michael 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 at 574.



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1. "... [T]hat certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than serfs. It is thought that, to protect those rights, it is necessary to be especially wary lest any particular individual or group acquire the power to control them. The historic public rights of fishery and navigation reflect this feeling ..."
2. "... [T]hat certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace."
3. "... [T]hat certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate. The best known example is found in the rule of water law that one does not own a property right in water in the same way he owns his watch or his shoes, but that he owns only an usufruct – an interest that incorporates the needs of others. It is thus thought to be incumbent upon the government to regulate water uses for the general benefit of the community and to take account thereby of the public nature and the interdependency which the physical quality of the resource implies."⁵⁶

The main purpose of his article was to outline how and why the American judiciary should adapt and apply the concept of the public trust set out in *Illinois Central* to protect the environment. To be a satisfactory tool for citizens working for environmental protection, Joseph Sax argued the public trust doctrine needed to achieve three things:

⁵⁶ Sax, *supra* note 54 at 484-485.

⁵⁷ *Ibid.* at 474.

⁵⁸ Richard J. Lazarus, "Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine," (1986) 71 Iowa L. Rev. 631 at 644. At footnote 76, Professor Lazarus lists many of these 100 cases.

⁵⁹ Fred R. Shapiro, "The Most-Cited Law Review Articles," (1985) 73 Cal. L. Rev. 1540.

⁶⁰ Ryan, *supra* note 55 at 480.

⁶¹ Lazarus, *supra* note 58.

⁶² See Lazarus, *supra* note 58; Deveney, *supra* note 44; and James L. Huffman, "A Fish Out of Water: The Public Trust Doctrine in a Constitutional Democracy," (1989) 19 *Envtl. L.J.* 527.

⁶³ Huffman, *supra* note 62. As the Canadian *Charter of Rights and Freedoms* does not provide for protection of property, versus the U.S. Constitution which does, this issue is of less importance in Canada.

It must contain some concept of a legal right in the general public; it must be enforceable against the government; and it must be capable of an interpretation consistent with contemporary concerns for environmental quality.⁵⁷

Given the explosion in the number of U.S. cases dealing with the public trust doctrine since 1970, it is clear the conservation community heard Joseph Sax's message. Professor Richard Lazarus notes that from 1970, when Joseph Sax' article was published, until 1985, approximately one hundred cases in the U.S. had dealt with the application of the public trust doctrine.⁵⁸ Further evidence of the appeal of the public trust doctrine can be seen in the fact that Joseph Sax' article ranked 31st out of the 50 most cited American law review articles from the period of 1947 to 1985.⁵⁹ Joseph Sax' efforts have been described as a "resounding success".⁶⁰

This is not to say the public trust doctrine or its formulation by Joseph Sax or its interpretation and use by state courts has met with universal support in the United States. Examples of some of the criticisms of the doctrine include:

- Because of advancements in environmental legislation, the doctrine is not needed and in fact limits discourse on the issue of environmental protection.⁶¹
- The source of law for the doctrine is unclear or its present formulation is not what the doctrine was about.⁶²
- Use of the doctrine improperly interferes with private property rights by allowing expropriation without compensation.⁶³



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- As there are as many formulations of the public trust doctrine as there are U.S. states,⁶⁴ the doctrine and how it can be used lacks clarity and predictability.⁶⁵

Despite these criticisms, the public trust doctrine has expanded significantly in the U.S. since the decision of the Supreme Court in *Illinois Central*. Professor Charles Wilkinson outlines four major developments:⁶⁶

1. Some states have extended the public trust doctrine to include all waters in the state, not those simply navigable (tidal waters) or navigable in fact, such as large rivers.
2. Public interests in public waters that are protected by the trust include more than the traditional purposes of the trust – the protection of commerce, navigation and fishing.
3. The coverage of the doctrine has moved beyond public waters to incorporate previously unidentified trust resources such as dry sand beaches, parks, and wildlife.
4. The public trust doctrine has been used in the western U.S. to limit water rights obtained through appropriation.

How this expansion allows the public trust doctrine to be used for the protection of “environmental” trust resources can be seen in the California case of *National Audubon Society v. Superior Court of Alpine County* (the “Mono Lake” case).⁶⁷

Mono Lake is the second largest lake in California. The lake is saline and contains no fish, but is very important to

migratory birds because of the large numbers of brine shrimp that live in the lake and to nesting birds because of protection from predators afforded by islands in the lake. Most of the water for the lake comes from snowmelt through five streams. In 1940, the City of Los Angeles was given a permit to appropriate virtually all the flow of four of the streams.⁶⁸ By 1970, virtually all of the flow of the streams had been taken.

By the time the case was brought in 1979, the area of the lake had decreased by a third, exposing one of the islands to predation. The National Audubon Society argued the shores, beds and waters of Mono Lake were protected by a public trust and that the water diversions were in breach of the public trust doctrine because they harmed a trust resource. The California Supreme Court agreed, stating, “[T]he 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 state and the lands underlying those waters. This authority applies to the waters tributary to Mono Lake ...”⁶⁹ In reaching this decision the Court noted:

This case brings together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine, which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes. ... [The two schools of thought] meet in a unique and dramatic setting which highlights the clash of values. Mono Lake is a scenic and ecological treasure of national significance, imperilled by

⁶⁴ Wilkinson, *supra* note 2 at 425.

⁶⁵ Sanford N. Berland, “Toward the True Meaning of the Public Trust,” (1976) 1 *Sea Grant Law L. J.* 83; Timothy P. Brady, ““But Most of it Belongs to Those Yet to be Born:” The Public Trust Doctrine, NEPA, and the Stewardship Ethic,” (1990) 17 *B.C. Envtl. Aff. L. Rev.* 621; and Steven M. Jawetz, “The Public Trust Totem in Public Land Law: Ineffective – and Undesirable – Judicial Intervention,” (1982) 10 *Ecol. L. Q.* 397.

⁶⁶ Wilkinson, *supra* note 2 at 465-466.

⁶⁷ 658 P.2d 709 (Cal. 1983). The Mono Lake case is frequently cited in U.S. public trust articles.

⁶⁸ *Ibid.* at 711.

⁶⁹ *Ibid.* at 712.



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continued diversions of water; yet, the need of Los Angeles for water is apparent, its reliance on rights granted by the board evident, the cost of curtailing diversions substantial.⁷⁰

What is most important about the Mono Lake decision is that the California court recognized the public trust doctrine not only protects access to trust resources, but that it can be extended to protect the ecological health of ecosystems, writing:

The objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways. ...⁷¹

And:

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.⁷²

Therefore, in California the public trust doctrine applies to protect public rights in state waters for many purposes, including ecological needs.⁷³ However, for non-traditional trust resources, like un-navigable streams, the doctrine does not prevent the

alienation of the trust resource. When deciding whether to alienate this type of trust resource, care must be taken to minimize harm to the trust resource.⁷⁴

Further indication that an ecological perspective is now influencing the evolution of the doctrine is the decision of the U.S. Supreme Court in *Phillips Petroleum Co. v. Mississippi*.⁷⁵ Phillips Petroleum held record title to 42 acres of bayous and streams that were influenced by the tide but were not navigable. The State of Mississippi later granted oil and gas leases to another company covering this same land. It claimed that at the time of statehood it acquired title to all land in the state influenced by the tide, and that pursuant to the public trust doctrine it still held these lands in the public trust.⁷⁶ Phillips Petroleum brought a quiet title suit to refute the State's claim, arguing that the public trust doctrine only extended to those tidelands that were navigable, rather than those influenced by the ebb and flow of the tide, which was the position of the State. Both Mississippi State courts and the Supreme Court rejected Phillip's argument. As David Hunter notes:

Although the Phillips Petroleum Court relied on historical arguments to conclude that tidal influence [ebb and flow] defined the extent of the public's interest, it adopted ecological concepts to determine which lands can be considered tidelands.⁷⁷

⁷⁰ Ibid. at 712.

⁷¹ Ibid. at 719.

⁷² Ibid. at 719.

⁷³ For an early case indicating the public trust doctrine protects more than commercial interests, see *Lamprey v. State* (Metcalf) (Minn.1893), 53 N.W. 1139 at 1143:

Many, if not the most, of the meandered lakes of this state, are not adapted to, and probably will never be used to any great extent for, commercial navigation; but they are used—and as population increases, and towns and cities are built up in their vicinity, will be still more used—by the people for sailing, rowing, fishing, fowling, bathing, skating, taking water for domestic, agricultural, and even city purposes, cutting ice, and other public purposes **which cannot now be enumerated or even anticipated**. To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated ... [Emphasis added]

⁷⁴ As an aside, in 1994, after other court cases and lobbying of the California government, the State Water Resources Control Board (SWRCB) of California held that the City of Los Angeles must lessen the amount of water it is withdrawing from the lake. See <<http://www.monobasinresearch.org/timelines/polchr.htm>>. (accessed May 14, 2005)

⁷⁵ 108 S. Ct. 791 (1988).

⁷⁶ David B. Hunter, "An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources," (1988) 12 Harv. Envtl. L. Rev. 311 at 374.

⁷⁷ Ibid. at 375.



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Admittedly, there is a difference in degree between the waters in this case, and non-navigable waters on the seashore that are affected by the tide. But there is no difference in kind. For in the end, all tide waters are connected to the sea: the waters in this case, for example, by a navigable, tidal river. Perhaps the lands at issue here differ in some ways from tidelands directly adjacent to the sea; nonetheless, they still share those “geographical, chemical and environmental” qualities that make lands beneath tidal waters unique.⁷⁸

To conclude this review of U.S. case law and academic commentary on the public trust doctrine, it is important to understand that at its heart the term “public trust” describes the state’s original (now expanded) “fiduciary obligation to ensure that public lands that constitute the coastline of the bays of the seas, the rivers both as to their estuaries and courses, or the beds of those waters and rivers, are made continuously available for the members of the public at large.”⁷⁹ This continuous availability is necessary for the preservation of the public’s ability to exercise its rights in these resources. The public trust “doctrine” is the set of principles that have grown from the interpretation and enforcement of this fiduciary obligation.⁸⁰

24 The Public Trust in Canadian Law

In her thorough review of the development of the public trust doctrine in Canada, Kate Smallwood discusses three Canadian cases which described the Crown as being a trustee for the common resources of fisheries and unobstructed tidal waters.⁸¹ In *R. v. Meyers* (1853), the court held the Great Lakes and the navigable waters that flow into them are “vested in the crown in trust for the public uses for which nature intended them...”⁸² At issue in *R. v. Lord* (1864),⁸³ was whether a weir built on the foreshore was a nuisance. In discussing the public rights of fishing and navigation, the court noted, “With respect to these public rights, viz. navigation and fishery, the King is, in fact, nothing more than a trustee of the public ...”⁸⁴ The strongest indication for the existence of a public trust in Canada comes from the Supreme Court’s decision in *R. v. Robertson* (1882).⁸⁵ In determining that the federal government could not grant leases of fishery on non-navigable portions of the Miramichi River above Price’s Bend (as the non-navigable portions were the domain of the province), several Supreme Court judges made statements regarding a public trust. Chief Justice Ritchie stated, “[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 ...”⁸⁶ After these three early cases, references to a public trust in Canadian navigable waters just drifted away.

⁷⁸ *Phillips Petroleum*, *supra* note 75 at 797; quoting: *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) at 183.

⁷⁹ Donovan W.M. Waters, “The Role of the Trust in Environmental Protection Law” in Donovan W.M. Waters, ed., *Equity, Fiduciaries, and Trusts* (Toronto: Carswell, 1993) at 384.

⁸⁰ This fiduciary obligation will be discussed further in Parts III and IV.

⁸¹ Smallwood, *supra* note 1 at 79-83.

⁸² 3 U.C.C.P. 305 at 357.

⁸³ 1 P.E.I. 245.

⁸⁴ *Ibid.* at 257.

⁸⁵ 6 S.C.R. 52.

⁸⁶ *Ibid.* at 126. See also the opinion of Justice Strong at 138.



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However, there is precedent in Canada for the continuing existence of the concept of a public trust over public resources, namely public highways.⁸⁷ Members of the public have a right of passage on highways – “the right to pass and repass over a defined route.”⁸⁸ To protect this right, it has long been held in Canada that when a public highway becomes vested in, or granted to, a municipality, the municipality’s state of ownership is a “qualified” one, in that it may own the freehold, “but then only as trustees for the public.”⁸⁹ The Supreme Court has also expressed support for this view. In *Vancouver v. Burchill*, Rinfret J. wrote:

[Municipalities] are not, however, owners in the full sense of the word, and certainly not to the extent that a proprietor owns his land. The land-owner enjoys the absolute right to exclude anyone and to do as 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. The streets remain subject to the right of the public to “pass and repass”.⁹⁰

The public right of passage over a highway is also similar to the rights of navigation and fishing in that it is a paramount right.⁹¹ As such, the government cannot interfere or extinguish the right without specific legislation.⁹²

Present day courts continue to hold that municipalities’ ownership of highways is subject to a public trust. One

example is the case of *McDonald v. North Suffolk (Rural Municipality)* (1992), 98 D.L.R. (4th) 436 (MB.C.A.). In this case, the applicant was seeking an order of *mandamus* to compel the municipality to reconsider its decision not to grant him permission to locate a water pipe under a highway. The municipality had denied his application on the basis it did not want him drawing water from a local lake, not on whether placing the water pipe under the highway interfered with the public’s use of the highway. The Manitoba Court of Appeal allowed the application on the basis that the municipality’s concern about the lake’s water level was an irrelevant matter. Instead, on such an application, it should only consider those things that are relevant to the proper maintenance and regulation of the highway, such as safety and the quality of proposed construction. In reaching its decision, the court noted that the “jurisdiction and authority [over highways] are conferred as public trusts to be exercised with regard to the interests of those who require the highway, or the airspace or subsoil, as well as the interests of the community.”⁹³

Another present-day example of the recognition of this public trust is the case of *Goudreau v. Chandos (Township)* (1993), 16 M.P.L.R. (2d) 224 (Ont.C.J.). In *Goudreau*, the applicants sought a declaration that they were permitted to improve an unopened road allowance, by removing trees and filling in low areas, without the express permission of the municipality.⁹⁴ They argued that part of the public trust over highways requires municipalities to make unopened road allowances

⁸⁷ Smallwood, *supra* note 1 at 93.

⁸⁸ Bonyhady, *supra* note 35 at 27.

⁸⁹ *Town of Sarnia v. Great Western Railway Company* (1861), 21 U.C.R. 59 (Q.B.) at 62. See also: *Big Point Club v. Lauzon*, [1943] O.R. 491 (Ont.H.C.) at 495.

⁹⁰ [1932] S.C.R. 620, [1932] 4 D.L.R. 200 at 205.

⁹¹ *Re J.F. Brown Company and City of Toronto* (1916), 36 O.L.R. 189 (C.A.) at 227, affirmed (1917), 55 S.C.R. 153.

⁹² *Ibid.* See also: *Hislop v. McGillivray (Township)* (1888), 15 O.A.R. 687, affirmed (1889) 17 S.C.R. 479, and *Hydro-Electric Power Commission of Ontario v. Grey (County of)* (1924), 55 O.L.R. 339 (Ont. C.A.) at 344.

⁹³ At 441.

⁹⁴ From headnote.



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passable for members of the public to reach their property. Failing this, the public had the implied right to undertake this improvement without the municipality's approval.⁹⁵ While the court agreed that there is a public trust over highways, it also held that municipal approval is required for the clearing or improvement of unopened road allowances. What is interesting is the court's statement that protection of the environment is an important reason for maintaining this municipal control.

There is a sound policy basis for coming to the conclusion that municipal consent is required to improve an unopened road allowance. ... To rule that consent is not required would make available all of these road allowances for unregulated development. ... Protection of wetlands and other areas of natural significance would be difficult, if not impossible, to ensure. With the consent of the municipality being required, there will be the control essential to ensure that proper environmental standards are adhered to, and that the opening of such road allowances is done after consideration is given to the greater public interest.⁹⁶

24.1 The difference between the Canadian public trust and the U.S. public trust doctrine

The above cases indicate that Canadian courts do recognize a public trust exists with regard to certain resources. What the above cases do not do however, is show explicit acceptance, or rejection, of the public trust doctrine as it has come to be known and used in the U.S. This is important because it has been argued there is a fundamental difference between the

Canadian and English concept of the public trust and the U.S. public trust doctrine: "The American courts have utilized the Roman and English notions of public rights to develop a doctrine known as the public trust" versus "Since both American and Canadian common law originated from English common law, it is curious that the concept of public trust has not developed in our system."⁹⁷ In Canada and England, it appears the "public trust" has historically only protected recognized public rights. "[The] ownership of the Crown, or the Crown's grantees, can only ... be considered to be limited by well known and clearly defined rights on the part of the public."⁹⁸ Under this formulation of the public trust, these resources are only accessible to the public for specific historic purposes, not general usage. The leading authority for this version of the public trust is the House of Lords decision in *Blundell v. Catterall*.⁹⁹

In *Blundell*, the plaintiff, who was a lord, was the owner of sea shore property. He brought an action in trespass against the defendant who operated a business in which he transported people over the plaintiff's sea shore property to the sea so they could bathe. In his defence, he argued the public had a right to bathe in the sea and as such had an incidental right to pass over privately owned sea shore to gain access to the sea. The majority of the House of Lords disagreed, holding that the public's use of the foreshore could only be for the historically recognized rights of navigation and fishing, and not bathing, the right of which was not mentioned in books of law, "ancient or modern."¹⁰¹ In contrast is the dissent of Best,

⁹⁵ *Ibid.* at 225-226.

⁹⁶ *Ibid.* at 228.

⁹⁷ Hunt, *supra* note 1 at 155 and 163.

⁹⁸ *Lord Fitzhardinge v. Purcell*, [1908] 2 Ch. 139 at 166.

⁹⁹ (1821), 106 E.R. 1190.

¹⁰⁰ *Ibid.* at 1202-1203.

¹⁰¹ *Ibid.* at 1205.



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J., who would have found in favour of the defendant on the basis that the foreshore, as common property, should be open to use by the public for many beneficial purposes, including bathing.¹⁰²

Justice Best's vision of the public trust is much more in keeping with the public trust doctrine as it has evolved in the U.S., where the nature of the resource, in addition to pre-existing public rights, can also create a public trust.¹⁰³ The U.S. public trust doctrine better reflects the idea that there are resources that are common to all, and the government as owner or guardian of these resources, has a duty to maintain these resources for a variety of evolving beneficial public uses, such as ecological needs.¹⁰⁴ This public trust gives the public, via the courts, the right to oversee how the government is executing this duty. The dominant tenor of Canadian and English public trust law has been the view that there are rights rather than resources that are common to all. Consequently, the public trust duties imposed on governments in their care of these resources has predominantly been to simply not grant away the portion that supports recognized public rights. In other words, the "public trust" in Canadian law has not been identified as fulfilling the same functions the public trust doctrine, as outlined by Professor Sax, has evolved to provide for in the U.S.:

It must contain some concept of a legal right in the general public; it must be enforceable against the government; and it must be capable of an interpretation consistent with contemporary concerns for environmental quality.¹⁰⁵

¹⁰² *Ibid.* at 1196.

¹⁰³ See Sax's three interests protected by the public trust at note 56 above.

¹⁰⁴ Bader, *supra* note 53 note at 751, "The central preoccupation of the American public trust doctrine has been to maintain the broadest possible access to certain natural resources for public use."

¹⁰⁵ Sax, *supra* note 54 at 474.

¹⁰⁶ (1972), 34 D.L.R. (3d) 20 (Ont.H.C.).

¹⁰⁷ *Ibid.* at 29.

¹⁰⁸ R.S.O. 1970, c. 371.

¹⁰⁹ *Green, supra* note 106 at 24.

2.42 The Canadian public trust case of *Green v. Ontario*

Any report on the public trust doctrine in Canada requires a discussion of the case of *Green v. Ontario*,¹⁰⁶ as it is the only case to expressly reject the idea of the public trust doctrine. In 1968, the Government of Ontario leased lands along the shores of West Lake to Lake Ontario Cement Limited. The company used sand from the shore in its cement operations. In their excavations, the company levelled two large sand dunes contained in their leasehold. Two years later, the Ontario Government established Sandbanks Provincial Park on the shores of West Lake. The boundaries of the leased land abutted the park's boundaries. Mr. Green believed the activities of Lake Ontario Cement had destroyed the aesthetics of the dune area of the provincial park and continued to negatively impact the recreational and ecological qualities of the park. To address this issue, Mr. Green sought an injunction preventing the company from removing more sand and an order that it restore the lease lands to their natural state. In support of his position, he argued:

In authorizing the removal by the defendant Lake Ontario Cement Limited of the aforesaid sand dunes the Province acted without legal authority and committed a breach of trust in that a grant of public lands was made to a private company for the personal gain and advancement of that company and not in the public interest.¹⁰⁷

He argued that s. 2 of the *Provincial Parks Act*¹⁰⁸, which read, "All provincial parks are dedicated to the people of the Province of Ontario... [and] shall be maintained for the benefit of future generations...",¹⁰⁹ created a statutory public trust.



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To put it plainly, Mr. Justice Lerner was not enthused with Mr. Green's case. He described it as "pretentious" and "frivolous". More importantly for the public trust doctrine in Canada, he denied that the Act created a statutory trust. He viewed the trust alleged by Mr. Green as a classic trust, rather than being a term of art as is suggested by American treatment of the public trust doctrine. Applying classic trust law, he held that the subject-matter of the trust was not certain because the statute did not compel the Province to hold the lands as park lands for a specific period of time or in perpetuity, and that there were no restrictions upon the actions of the Province in how it managed the park.¹¹⁰ Accordingly, the *Provincial Parks Act* did not make the Province of Ontario a trustee of the park.

The reasoning of Mr. Justice Lerner has been ably questioned by author Professor Constance Hunt and will not be addressed further. She argues that given changes in public trust law and trust law in general, the case could well be decided differently today.¹¹¹ However, those who advocate using the courts to develop the public trust doctrine in Canada should pay heed to another statement of Mr. Justice Lerner:

No one can be critical of resort to the Courts to remedy social wrongs or injustices by way of interpretation of law, either statutory or by precedent. This is desirable in our rapidly changing society ... Nevertheless, if resort to the Courts is to be had, care must be taken that such steps are from a sound base in law otherwise ill-founded actions for the sake of using the Courts as a vehicle for expounding philosophy are to be discouraged.¹¹²

2.4.3 The Supreme Court of Canada decision in *British Columbia v. Canadian Forest Products*

From a reading of *Green*, the timing and facts of the case were not amenable to the judicial recognition of the public trust doctrine. The environmental movement was still in its infancy in Canada in 1972. Second, Mr. Green was asking the court to apply the public trust doctrine to a novel situation—the protection of aesthetics, recreation, and ecological integrity—rather than to navigable waters. Also, it would have interfered with private property rights that had been established before the park had been created.¹¹³ Finally, it is the decision of a lower court. All of these facts diminish the significance of *Green* as the final word on the public trust doctrine in Canada.

Today the situation is much different. As will be discussed further in Part III, the Supreme Court of Canada has recently and repeatedly recognized the importance and need for environmental protection in Canada, including in its 2004 decision in *British Columbia v. Canadian Forest Products Ltd [Canfor]*.¹¹⁴ In *Canfor*, a forest fire caused by Canadian Forest Products burned 1491 hectares of forest in the interior of British Columbia. The burned area contained lands set aside for harvesting and lands unsuitable for or protected from logging, such as steep slopes and an Environmentally Sensitive Area along a creek. The B.C. government claimed damages for three categories of loss:

1. Expenditures for suppression of the fire and restoration of the burned-over areas;

¹¹⁰ *Ibid.* at 31.

¹¹¹ Hunt, *supra* note 1 at 175-176. She argues that Mr. Justice Lerner used tests to determine the certainty of the subject-matter of the trust that were too restrictive.

¹¹² *Green*, *supra* note 106 at 32.

¹¹³ Mr. Justice Lerner seems to have been particularly vexed by this (see *Ibid.* at 24).

¹¹⁴ [2004] 2 S.C.R. 74 [*Canfor*]. The Supreme Court's reasons for judgment in *Canfor* and their implications are extensively discussed by DeMarco, Valiente, and Bowden, *supra* note 1.



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2. Loss of stumpage revenue from trees that would have been harvested in the ordinary course (harvestable trees); and,
3. Loss of trees set aside for environmental reasons (non-harvestable or protected trees).¹¹⁵

In the end, the majority of the Supreme Court affirmed the trial judge's award of \$3.75 million to British Columbia for its first category of loss and dismissed B.C.'s damage claims for its category 2 and 3 losses. They dismissed the B.C. Government's claims for recovery of damages for environmental losses because its pleadings were deficient, not because of a rejection of the idea that damages can be awarded for environmental losses.¹¹⁶

Most importantly for this report, the Supreme Court of Canada, in *obiter*, made reference to the U.S. public trust doctrine and also discussed the possibility there may be *enforceable fiduciary duties* owed to the public by the Crown with respect to protection of public lands and the environment.¹¹⁷ As Jerry DeMarco, Marcia Valiente, and Marie-Ann Bowden write:

[G]iven that the court made the effort to discuss the issue in some depth despite the fact that no party or intervener had canvassed U.S. public trust law in their arguments, it suggests a positive or sympathetic attitude that may manifest itself more fully in a future case (if pleaded properly and supported by evidence at trial).¹¹⁸

Accordingly, the emergence of the public trust doctrine in Canada can be envisioned. That there is a desire for this emergence is evidenced by the growing number of recent Canadian cases in which the public trust is raised as a basis for the court action.¹¹⁹ Finally, the acceptance of the doctrine would help end Canadian lawyers' and members of the public seeking to protect the environment need to "cast an envious eye south of the border."¹²⁰

2.5 Summary

The above review has shown that, including in Canada, the specific public rights of navigation and fishing have long been recognized and protected by the common law concept that governments are to hold the resources that support these rights in trust for the public. In the U.S., this idea has evolved to become the public trust doctrine, with the leading historical case being the U.S. Supreme Court's decision in *Illinois Central Railroad v. Illinois*. Since 1970, the doctrine has undergone a substantial evolution in the U.S. such that it now protects ecological values as well as access to or use of trust resources. In Canada there has been little judicial reference to a "public trust" with regard to navigation and public fisheries since the late 1800's. However, the ongoing recognition of a public trust in public highways is evidence of the continuing vitality of the principle of a public trust over public resources in Canada. The one difficulty is that the Canadian public trust has not been recognized as encompassing the same broad

¹¹⁵ *Canfor*, *ibid.* at para. 3.

¹¹⁶ *Ibid.* at para. 153.

¹¹⁷ *Ibid.* at para's. 80-81. The Court makes no final pronouncement on these issues because the B.C. Government did not properly plead or fully argue this issue in the lower courts. (at para's. 82-83)

¹¹⁸ *Supra* note 1 at 252.

¹¹⁹ In addition to *Canfor*, see for example: *Walpole Island First Nation et al. v. Canada (Attorney General)*, [2004] 3 C.N.L.R. 351; *Mann v. Canada*, 1991 CanLII 1962 (BC S.C.); and *PEI et al. v. Canada (Fisheries & Oceans)*, 2005 PESCTD 57. No decision regarding whether the public trust doctrine should be adopted into Canadian law was reached in these cases.

¹²⁰ *Hunt*, *supra* note 1 at 151.



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functions filled by the U.S. public trust doctrine. This difference may soon be ending, as the precedent of an ongoing public trust and our shared common law legal history with the U.S. combined with the Supreme Court of Canada's recent discussion of the doctrine in the case of *British Columbia v. Canadian Forest Products Ltd.* has created an opportunity for the advancement of the public trust doctrine in Canada.



PART III.

The Public Trust as a Fiduciary Responsibility



A fiduciary is someone who has a responsibility, because of the special characteristics of a relationship, to act honestly and in the best interests of the beneficiary, who is often vulnerable to the misuse of power by the fiduciary.

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PART III. The Public Trust as a Fiduciary Responsibility

3.1 Introduction

Like other authors who have written about the public trust doctrine in Canada, Part II of this report showed that judicial precedent does exist in Canada that would support the development of the doctrine.¹ That there are obligations with regard to certain resources that place limits on governments' powers over these resources. Now, as John Maguire writes, "the focus must ... shift towards finding a way to encourage our courts and legislatures to dust off the foundation and begin to build on the doctrine."² In an effort to address this issue, Part III of this report looks at what is the present-day legal rationale for the further development of the doctrine in Canada. This legal rationale is needed because the Canadian judiciary is generally conservative when it comes to making changes to the common law, believing "the public interest is best served by cautious, incremental case-by-case adaptation of the law to current circumstances."³ This cautious approach was continued by the majority of the Supreme Court in *British Columbia v. Canadian Forest Products Ltd.*, [*Canfor*]⁴ who noted that the common law, if developed in a "principled" way, can be used to promote environmental protection.⁵ As such, it is necessary to show there are principled reasons why and how the public trust doctrine should be formally recognized in Canadian law.

American case law on the public trust doctrine may not be the best place to search for this principled approach. The reason for this, as three Canadian authors on the public trust doctrine have recently noted,⁶ is there is no single definition of the public trust doctrine; there may be as many versions of the doctrine as there are U.S. states.⁷ All of this has led to discourse in the U.S. about how to legally classify the public trust, i.e. is it a public property right, a servitude, a formal trust, a fiduciary relationship, or something else. While this classification is particularly the object of academic debate, it is also important for the development of the doctrine in Canada. For example, Mr. Justice Lerner's analysis of Mr. Green's claims in *Green v. Ontario*⁸ on the basis of formal trust law certainly limited Mr. Green's chances for success.

In contrast to the U.S., there is little discord between recent Canadian commentators on what the public trust doctrine is. John Maguire, Kate Smallwood, and Professor Donovan Waters all identify the public trust doctrine as being a term to describe the government's fiduciary obligations in caring for public trust resources.⁹

[T]he relationship between the state (Sovereign) and the public, as it relates to public resources, is unique. While it nonetheless raises a fiduciary duty it is not premised on the existence of a classical trust but only on a relationship of "confidence"; i.e., a trusting relationship.¹⁰

¹ See for example Constance D. Hunt, "The Public Trust Doctrine in Canada," in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1981) at c.3 at 163 who notes that Canadian and U.S. common law both originated from English common law.

² John C. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized," (1997) 7 J.E.L.P. 1 at 41.

³ Beverley McLachlin (Chief Justice of Canada), "The Supreme Court and the Public Interest," (2001) 64 Sask. L. Rev. 309 at 319.

⁴ [2004] 2 S.C.R. 74 [*Canfor*].

⁵ *Ibid.* at para. 155.

⁶ Maguire, *supra* note 2 at 2; Kate P. Smallwood, *Coming Out of Hibernation: The Canadian Public Trust Doctrine* (Unpublished Masters Thesis, U.B.C., 1993) at 104; and Barbara von Tigerstrom, "The Public Trust Doctrine in Canada," (1997) 7 J.E.L.P. 379 at 381.

⁷ Charles 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 425.

⁸ This case was discussed in Part II, notes 106-113.

⁹ Maguire, *supra* note 2 at 25-32; Smallwood, *supra* note 6 at 119-125; and Donovan W.M. Waters, "The Role of the Trust in Environmental Protection Law" in Donovan W.M. Waters, ed., *Equity, Fiduciaries, and Trusts* (Toronto: Carswell, 1993) at 384.

¹⁰ Maguire, *ibid.* at 26.

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A fiduciary is someone who has a responsibility, because of the special characteristics of a relationship, to act honestly and in the best interests of the beneficiary, who is often vulnerable to the misuse of power by the fiduciary. Once a fiduciary relationship comes to be between a fiduciary and a beneficiary, “Equity (via the courts) will then supervise the relationship by holding [the fiduciary] to the fiduciary’s strict standard of conduct.”¹¹ This is what the public trust doctrine has evolved into in the U.S.: “The heart of the public trust doctrine, however it may be articulated, is that it imposes limits and obligations on government.”¹² The government as the *de facto* owner of common resources has an obligation to maintain these resources for the beneficial use of the public. This ownership provides the government with prerogative and discretionary powers of ownership. American courts have been used to scrutinize government actions to determine whether this discretion has been exercised in the best interests of the public. It has been suggested that why there is not universal identification of the public trust doctrine as a fiduciary relationship in the U.S. is because American fiduciary law is developing slowly and what has developed is not unified.¹³

An example of a U.S. case that highlights the idea of the public trust as a fiduciary obligation is *New Jersey, Department of Environmental Protection v. Jersey Central Power and Light Co.*¹⁴ Jersey Central Power operated a nuclear generating plant on Oyster Creek, New Jersey. In January 1972, the plant was required to be shutdown. This shutdown caused cold water used for cooling purposes in the plant to enter Oyster Creek. This led to a rapid decline in the water temperature of the creek, which in turn caused the death of 500,000 menhaden,

an important commercial fish species.¹⁵ Jersey Central Power was charged and convicted of permitting a deleterious substance to enter a state waterway. In addition to a fine, the State also sought compensatory damages for the loss of a public resource, the menhaden. Jersey Central Power argued the State did not have a sufficient property interest in the fish to ground such a claim. The trial judge and Court of Appeal disagreed, holding that because the menhaden are a tidal resource they are protected by the public trust doctrine. The Court of Appeal further supported the State’s claim for compensatory damages, stating:

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 in that [public] trust corpus. [Emphasis added]¹⁶

3.2 Moving Canadian Public Trust Law from Public Rights to a Fiduciary Obligation

3.2.1 The government as a fiduciary for the traditional trust resources of fisheries, navigable waters and public highways

Canadian fiduciary law, particularly since the Supreme Court’s decision in *Guerin v. R.*,¹⁷ provides for a cohesive and principled means for the further development of the doctrine in Canada. In *Guerin* the Supreme Court recognized that fiduciary relationships are not simply confined to the commercial relationships, i.e. client-solicitor, beneficiary-trustee, that

¹¹ *Guerin v. R.*, [1984] 2 S.C.R. 335 at 384.

¹² Charles F. Wilkinson, “The Public Trust Doctrine in Public Land Law,” (1980) 14 U. C. Davis L. Rev. 269 at 284. See also: Harry R. 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 at 751.

¹³ Maguire, *supra* note 2 at 25-26.

¹⁴ 336 A. 2d. 750 (N.J. Super. Ct. App. Div. 1975). *Jersey Central Power* was cited by the Supreme Court of Canada in *Canfor*, *supra* note 4.

¹⁵ *Jersey Central Power*, *ibid.* at 753.

¹⁶ *Ibid.* at 759.

¹⁷ *Supra* note 11.



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traditionally give rise to a fiduciary duty. Rather, Dickson J. stated, “It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed.”¹⁸ This recognition allowed the Supreme Court to find that the federal government typically has fiduciary responsibilities in its dealings with aboriginal reserve lands. Since *Guerin*, the Court has used the following characteristics to identify new or previously unrecognized fiduciary relationships:

1. The fiduciary has scope for the exercise of some discretion or power.
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.¹⁹

At the same time, it is important to note that it is possible for “a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship.”²⁰ However, the one characteristic which is considered “indispensable” for the existence of a fiduciary relationship is that one party must be vulnerable²¹ or at “the mercy of the other’s discretion.”²² How this vulnerability is the essence of a fiduciary relationship has been described as follows:

Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second “peculiarly vulnerable” person. [citations omitted] The vulnerable party is in the power of the party possessing the power or discretion, who is in turn obligated to exercise that power or discretion solely for the benefit of the vulnerable party. A person cedes (or more often finds himself in the situation where someone else has ceded for him) his power over a matter to another person. The person who has ceded power **trusts** the person to whom power is ceded to exercise the power with loyalty and care. This is the notion at the heart of the fiduciary obligation. [Emphasis in original]²³

Bearing these characteristics in mind, it would not be improper to describe the relationship between the Crown and the public with regard to resources the public has recognized rights in as one of fiduciary and beneficiary. Returning to the origins of the public trust doctrine discussed in Part II, public rights, such as those of fishing and navigation, are legal rights that exist independently of the Crown. They are not royal franchises. At the same time, the public’s ability to enjoy or exercise these rights is entirely dependent upon the resources that underlie the rights. The public right of fishing is meaningless if there are no fish. However, by the common law it is the Crown who has become the “owner” of resources that were previously subject to common ownership, such as the running water, the air, the sea, and the shores of the sea. As owner, the Crown can exercise its prerogative powers of ownership over them. The public is vulnerable because it does not have power over the resources that support public rights.

¹⁸ *Ibid.* at 384-5. “It is the nature of the relationship, not the specific category of actor involved that gives rise to the fiduciary duty,” as per Dickson, J. (as he then was).

¹⁹ *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 [*Lac Minerals*] at 599 and 646, citing *Frame v. Smith*, [1987] 2 S.C.R. 99 at 136.

²⁰ *Ibid.* at 599 (per Sopinka J.).

²¹ *Ibid.* at 600.

²² Ernest Weinrib, “The Fiduciary Obligation,” (1975), 25 U.T.L.J. 1 at 7, quoted in: *Guerin*, *supra* note 11 at 384.

²³ *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344 at para. 38.



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The public is therefore in the power of the Crown. What creates the obligation for the Crown to exercise its discretion over trust resources for the benefit of the public is the public's independent legal interest in once common resources that the Crown has since acquired ownership of.

Further evidence of this vulnerability is that with public rights being vested in the Crown, it is the Crown and not the general public who can initiate legal actions to remedy interferences with public rights. These interferences are the result of actions that cause the degradation or destruction of the public resource. If the Crown chooses not to enforce public rights, then the interference can continue. Support for this argument can be found in the decision of Justice Campbell of the Prince Edward Island Supreme Court in *PEI et al v. Canada (Fisheries & Oceans)*.²⁴ In this ongoing court action, the P.E.I. government alleges, among other things, that the federal government's management of various Atlantic fisheries has been conducted in a manner that is in breach of its public trust fiduciary obligations. At issue in the present decision was whether the P.E.I. Government's statement of claim could be struck for disclosing no reasonable cause of action. In allowing the P.E.I. Government's claim for breach of public trust to proceed, Justice Campbell after referring to the Supreme Court of Canada's decision in *Canfor*,²⁵ stated:

If a government can exert its right, as guardian of the public interest, to claim against a party causing damage to that public interest, then it would seem that in another case, a beneficiary of the public interest ought to be able to claim against the government for a failure to properly protect the public interest. A right gives rise to a corresponding duty.²⁶

The ability of the government to expand or limit public rights by the passing of valid legislation also places them at the mercy of the Crown. Typically, one government cannot bind a future government. Therefore, if the public is displeased with the decisions of a Canadian government, it can at some point elect a new government to reverse those decisions. What makes public rights vulnerable is that decisions regarding public resources often cannot be reversed. For example, once a forest is cut it is gone for a significant period of time. Government decisions that permit the over-harvesting of fish to the point of commercial extinction cannot be undone. Hospitals can be re-opened, new tax dollars can be collected – extinction is forever.

Perhaps the strongest argument that the government has fiduciary responsibilities in its care and management of resources the public has rights in comes from the Supreme Court's decision in *Guerin*²⁷ mentioned above. At issue in *Guerin* was the responsibility and liability of the Canadian government for its leasing of 162 acres of Musqueam reserve land to a golf course on terms less favourable than those approved by the band upon its surrender of the reserve land to the government. The band alleged that s. 18(1) of the *Indian Act*²⁸ imposed a trust on the federal government in its dealings with reserve lands. The Supreme Court disagreed, holding that because Indians do not own reserve lands, the government's obligations could not be defined as a trust. At the same time, the Court noted that Canada's First Nations peoples have a *sui generis* independent legal interest in their land separate from that of the Crown's underlying title.²⁹ This interest combined with the facts that Indians can only divest their interest in land to the government, not third parties, and it is only the

²⁴ 2005 PESCTD 57 Date: 2005-11-02 [PEI et al].

²⁵ *Supra* note 4.

²⁶ *PEI et al, supra* note 24 at 37.

²⁷ *Supra* note 11.

²⁸ R.S.C. 1952, c. 149.

²⁹ *Ibid.* at 382.



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government who can interfere with this legal interest, places fiduciary duties on the government in its dealings with reserve lands.

[T]he nature of Indian title and the framework of the statutory scheme established for disposing of Indian lands **places upon the Crown an equitable obligation, enforceable by the courts**, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If, however, **the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.** [Emphasis added]³⁰

The situation with regard to public rights is analogous. As discussed earlier, the Crown is the owner of public resources, but the public has long-standing independent legal rights in these resources. Public rights are inalienable and they can only be interfered with by the passing of explicit legislation. This naturally leads to the conclusion that if it walks like a fiduciary duty, and talks like a fiduciary duty, there must be a fiduciary duty. Therefore, extending the reasoning in *Guerin* to the issue of public rights supports the idea that the state has fiduciary obligations in its management of public resources.³¹

There are several public policy reasons why this fiduciary obligation with respect to traditional public rights should be recognized. It would place a duty on governments to act in the best interests of the public in its management of public resources. One such duty would be to remedy all interferences with public rights, such as by prosecuting all public nuisances.

Right now the government does not always take action to prevent or abate public nuisances.³² The identification of this duty would also reflect the reality that governments can interfere with public rights in more ways than just granting title to the resources that support public rights. For example, allowing activities that decimate fish stocks interferes with the public right of fishing just as effectively as does granting an exclusive fishery. Recognition of the fiduciary relationship would also allow citizens to use the courts to supervise the government's conduct with respect to trust resources.

3.2.2 Reasons for making the public trust doctrine part of Canadian law

One difficulty with the above is its continued reliance on historic public rights as the basis for the fiduciary duty. In comparison, the U.S. public trust doctrine has been described as protecting three important public interests:

1. "... [T]hat certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of citizens rather than serfs. It is thought that, to protect those rights, it is necessary to be especially wary lest any particular individual or group acquire the power to control them. The historic public rights of fishery and navigation reflect this feeling ..."
2. "... [T]hat certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace."

³⁰ *Guerin*, *supra* note 11 at 376 (per Dickson, J.). See also Wilson, J. at 349-350, "[W]hile the Crown does not hold reserve land under s. 18 of the Act in trust for the Bands because the Bands' interests are limited by the nature of Indian title, it does hold the lands subject to a fiduciary obligation to protect and preserve the Bands' interests from invasion or destruction."

³¹ For a thorough discussion of some of the difficulties in trying to extend the decision in *Guerin* to relationships other than Aboriginal-Government, see: Lorne Sossin, "Public Fiduciary Obligations, Political Trusts and the Equitable Duty of Reasonableness in Administrative Law," (2003) 66 Sask. L. Rev. 129 at 136-148.

³² See: John P.S. McLaren, "The Common Law Nuisance Actions and the Environmental Battle – Well-Tempered Swords or Broken Reeds?" (1972) 10 Osgoode Hall L.J. 505 at 512. This is also in apparent contradiction to Justice McLachlin's (as she then was) statement in *Stein v. Gonzales* (1984), 14 D.L.R. (4th) 263 (B.C.S.C.) at 268, that it is the "Attorney-General who is entrusted and charged with the duty of enforcing public rights." This statement was quoted with approval in *Canfor*, *supra* note 4 at para. 67.



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3. "... [T]hat certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate. The best known example is found in the rule of water law that one does not own a property right in water in the same way he owns his watch or his shoes, but that he owns only an usufruct – an interest that incorporates the needs of others. It is thus thought to be incumbent upon the government to regulate water uses for the general benefit of the community and to take account thereby of the public nature and the interdependency which the physical quality of the resource implies."³³

A public trust that protects the three interests described by Professor Sax more accurately reflects the idea that there are resources that are or should be common to all. This provides for several things. It allows for new public rights in or beneficial uses of resources to be recognized, such as the preservation of ecological quality. It also allows private property to be subject to this expanded array of public uses, rather than such ownership is simply not to interfere with the public rights of fishing and navigation. An example of these two features of the U.S. public trust doctrine is the California case of *Marks v. Whitney*,³⁴ a precedent relied on by the *Mono Lake* court. Marks was the owner of tidelands that abutted Whitney's upland property. Marks wanted to fill and develop the tidelands. Whitney raised the public trust doctrine in support of his objections to the development. The trial judge found in favour of Marks, which would have allowed the fill and development to proceed. The Supreme Court of California reversed the trial judge's decision on the basis that neither the State of California nor the federal government had modified or

extinguished the public's rights in that parcel of tidelands. As such, Marks' proposed actions would have interfered with protected public uses of tidelands. In reaching its decision, the court noted, "The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs."³⁵ As to what one of these expanded uses might be, the court wrote:

[O]ne 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 favorably affect the scenery and climate of the area.³⁶

That private lands could be subject to these expanded uses was not an issue to the court.

The public trust doctrine also allows for different resources to be protected – that more than fisheries, highways and navigable waters are "gifts of nature's bounty". This expansion can be seen in the U.S., where the public trust doctrine has now been applied to resources other than navigable waters, such as a national park,³⁷ an inland wetland area,³⁸ and beaches above the high tide mark.³⁹ In direct contrast is the case of *Green v. Ontario*.⁴⁰

There is nothing to prevent the existing Canadian public trust from expanding to encompass the public trust doctrine. As societal needs and values change, so to should the common law to reflect those changes. As well, it would not introduce a

³³ Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," (1970) 68 Mich. L. Rev. 471 at 484-485.

³⁴ 491 P.2d.374 (Cal. 1971).

³⁵ *Ibid.* at 380.

³⁶ *Ibid.* at 380.

³⁷ *Sierra Club v. Department of the Interior*, 398 F.Supp.284 (N.D. Cal. 1975).

³⁸ *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972).

³⁹ *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47 (N.J. 1972).

⁴⁰ (1972), 34 D.L.R. (3d) 20 (Ont.H.C.) at Part II, note 106.



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radical change to Canadian law. Governmental fiduciary duties in certain resources already exist. That all public resources in Canada should be managed with the same care expected of fiduciaries is only sensible. Fish and forests each have their own intrinsic value and importance.

A reason why Canadian public trust law should be expanded to protect the three interests identified by Professor Sax via governmental fiduciary obligations is because it would be in keeping with the proper role of the Crown as the protector of the realm. The prerogative of Crown ownership was not meant to be used for the diminishment of public rights in public resources. As Chief Justice Ritchie stated:

[P]rerogatives of the Crown must not be treated as personal to the sovereign; they are great constitutional rights, conferred on the sovereign, upon principles of public policy, for the benefit of the people, and not as it is said, “for the private gratification of the sovereign” ...⁴¹

The principle that Crown prerogatives over public resources are subordinate to public uses of those same resources is inherent in the writings of Sir Matthew Hale. As Tim Bonyhady writes, “The prerogative over fish was simply a vehicle through which the public right was expressed.”⁴²

Another reason for the adoption of the public trust doctrine into Canadian law is that the doctrine may already have taken root here. As such, formal recognition of governments’ fiduciary duties with respect to public resources would make explicit what is already implicit. Expanded interpretations of the public trust in Canada that are in keeping with

developments of the public trust doctrine in the U.S. can be found in the two recent highway cases discussed earlier, *McDonald v. North Suffolk (Rural Municipality)*⁴³ and *Goudreau v. Chandos (Township)*.⁴⁴ In *McDonald*, the Manitoba Court of Appeal enlarged the scope of the trust resource from the highway surface to include the subsoil beneath and airspace above the highway. It also expanded the uses which the trust resource can be used for, from being simply for passage and repassage to a place for the laying of pipes.

The obligation or duty to consider an application for use of a highway’s subsoil for the passage of a pipe arises from the trust reposed in the municipality and from the correlative right of a local resident to have his application for such use properly considered.⁴⁵

That highways as trust resources are for more than the accommodation of the right of passage can also be seen in the *Goudreau* decision. There it was held that proper management of the trust resource should be done in consideration of the greater public interest which includes environmental protection.⁴⁶

From the above discussion, it is clear Canadian fiduciary law is broad enough to support the principled development of the public trust doctrine in Canada and that there are policy reasons why this development should happen. Recognition that governments have extended fiduciary responsibilities in their care and management of public resources would allow for Joseph Sax’s vision of the public trust doctrine; that it must it

⁴¹ *R. v. McLeod* (1883), 8 S.C.R. 1 at 26; quoted in Paul Lordon, *Crown Law* (Toronto: Butterworths, 1991) at 61.

⁴² Tim Bonyhady, *The Law of the Countryside and the Rights of the Public* (Milton Park Estate, Bingdon: Professional Books, 1987) at 252. Tim Bonyhady also discusses how the restricted English view of the public trust came to be. He writes that in medieval England the public had significant public rights in the countryside. Over the centuries, and particularly in the 1800’s, the courts diminished these rights to the benefit of wealthy property owners. These same restrictions spilled over to Crown resources and property, although it was expected the Crown would allow greater uses of these resources, such as for bathing. (at 1-12).

⁴³ (1992), 98 D.L.R. (4th) 436 (M.B.C.A.) at note 93 in Part II.

⁴⁴ (1993), 16 M.P.L.R. (2d) 224 (Ont.C.J.) at notes 94 -96 in Part II.

⁴⁵ *McDonald*, *supra* note 43 at 442.

⁴⁶ *Goudreau*, *supra* note 44 at 228.



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must contain some concept of a legal right in the general public; it must be enforceable against the government; and it must be capable of an interpretation consistent with contemporary concerns for environmental quality,⁴⁷ to be fulfilled in Canada.

3.2.3 The government is not normally a fiduciary

Despite the above, it can be expected that if an individual or group brings a legal action in which breach of the public trust is alleged, the government will likely deny that it owes a fiduciary duty to the public in its management of public resources. The reason for this is that “the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function.”⁴⁸ However, as the Supreme Court made clear in *Guerin*, this principle is applicable when the legal interest at issue is created by statute, ordinance or treaty. When the interest at issue is a pre-existing legal right, such as aboriginal title⁴⁹ or public rights, fiduciary obligations can be imposed on governments.

3.3 Protecting the Environment in Canada with the Public Trust

Much of the recent focus on the public trust doctrine in the U.S. has centered on the doctrine’s use as a tool for the protection of the environment.⁵⁰ This is reflected in Canada, where although fisheries and unobstructed navigation continue to be important resources, they have been subsumed by the growing demand to protect the environment as a whole. Use of

the doctrine in Canada as a means of promoting environmental protection requires returning to the roots of the doctrine; the public trust prevents non-legislative government interference with public rights, and places fiduciary duties on governments to care for resources that support recognized public rights. To expand public trust duties to resources beyond fisheries and navigable waters to the environment in general, requires the recognition of public rights in the environment (Joseph Sax’s first protected interest), or that the environment and its components are truly common property that ought to be managed and protected for the whole of the populace (Sax’s second protected interest). In light of the above discussion regarding the decision in *Guerin* and the “peculiarly vulnerable” test it is clear the existing Canadian public trust as a fiduciary obligation can protect Sax’s first identified interest. At the same time, it does not appear Canadian trust law as yet encompasses Sax’s second interest. As such, the focus of the following discussion will be on public rights in the environment being the basis for finding that Canadian governments have fiduciary responsibilities in their care and management of public resources.

3.3.1 Expansion of public rights: Finding a public right to a safe environment

The public trust prevents government interference with public rights by placing fiduciary duties on government in its care of the resources that support the public rights. Therefore, what makes the resource subject to the public trust is the existence of public rights in that resource. One way to expand

⁴⁷ Sax, *supra* note 33 at 474.

⁴⁸ *Guerin*, *supra* note 11 at 385.

⁴⁹ *Ibid.* at 352 and 379.

⁵⁰ See for example, Sax, *supra* note 30; Bader, *supra* note 12; Timothy P. Brady, ““But Most of it Belongs to Those Yet to be Born:” The Public Trust Doctrine, NEPA, and the Stewardship Ethic,” (1990) 17 B.C. Env’tl. Aff. L. Rev. 621; David B. Hunter, “An Ecological Perspective on Property: A Call for Judicial Protection of the Public’s Interest in Environmentally Critical Resources,” (1988) 12 Harv. Env’tl. L. Rev. 311; Steven M. Jawetz, “The Public Trust Totem in Public Land Law: Ineffective—and Undesirable—Judicial Intervention,” (1982) 10 Ecol. L. Q. 397; Richard J. Lazarus, “Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine,” (1986) 71 Iowa L. Rev. 631; Erin Ryan, “Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management,” (2001) 31 Env’tl. L. 477; Allison Rieser, “Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory,” (1991) 15 Harv. Env’tl. L. Rev. 393; Various authors, “The Public Trust Doctrine in Natural Resources Law and Management: A Symposium,” (1980) 14 U.C. Davis L. Rev. 181; and Various authors, “Symposium on the Public Trust and the Waters of the American West: Yesterday, Today, and Tomorrow,” (1989) 19 Env’tl. L. 425.



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public trust duties to resources beyond fisheries and navigable waters to the environment in general requires the establishment, or more correctly the recognition, of public rights in the environment. Fortunately, there is strong evidence the Canadian judiciary has made this recognition.

In a number of recent decisions, the Supreme Court of Canada has discussed and recognized the importance of and need for protection of the environment.⁵¹ More particularly, in *Canadian Pacific*, the Court recognized a right to a safe environment, stating:

It is clear that over the past two decades, citizens have become acutely aware of the importance of environmental protection ... Recent environmental disasters, such as the Love Canal, the Mississauga train derailment, the chemical spill at Bhopal, the Chernobyl nuclear accident, and the *Exxon Valdez* oil spill, have served as lightning rods for public attention and concern. Acid rain, ozone depletion, global warming and air quality have been highly publicized as more general environmental issues. ... Everyone is aware that individually and collectively, we are responsible for preserving the natural environment. **I would agree** with the Law Reform Commission of Canada, *Crimes Against the Environment, supra*, which concluded at p. 8 that:

... a fundamental and widely shared value is indeed seriously contravened by some environmental pollution, a value which we will refer to as the **right to a safe environment**.

To some extent, this right and value appears to be new and emerging, but in part because it is an extension of exist-

ing and very traditional rights and values already protected by criminal law, its presence and shape even now are largely discernible. Among the new strands of this fundamental value are, it may be argued, those such as *quality of life*, and *stewardship* of the natural environment. At the same time, traditional values as well have simply expanded and evolved to include the environment now as an area and interest of direct and primary concern. Among these values fundamental to the purposes and protections of criminal law are the *sanctity of life*, the *inviolability and integrity of persons*, and the *protection of human life and health*. It is increasingly understood that certain forms and degrees of environmental pollution can directly or indirectly, sooner or later, seriously harm or endanger human life and human health. [Emphasis in original text.] [Emphasis underlined added.]⁵²

As the public has a right to a safe environment, it follows that the government has fiduciary duties with respect to its care and management of the common resources that support that right.

It may also be that rather than a general public right to a safe environment, the public has rights in specific components of the environment as is suggested by Canadian public nuisance law.⁵³ The Supreme Court recently described a public nuisance as being, “any activity which unreasonably interferes with the public’s interest in questions of health, safety, morality, comfort or convenience.”⁵⁴ Public interests are synonymous with public rights. Interferences with clean air and water have been held to be public nuisances in Canada.⁵⁵

⁵¹ *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 [*Friends of the Oldman River*] at 16; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 [*Canadian Pacific*] at 1075-1076; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 [*Hydro-Québec*] at 266, 293-295; 114957 *Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 [*Spraytech*] at 248-249; *Imperial Oil v. Quebec*, [2003] 2 S.C.R. 624 [*Imperial Oil*] at 639-40; *Canfor* at paras. 74, 81, and 155. This list of cases was taken from the factum of the interveners: Friends of the Earth, Georgia Strait Alliance, and West Coast Environmental Law Association drafted by Sierra Legal Defence Fund, in *British Columbia Hydro and Power Authority v. British Columbia (Environmental Appeal Board)*, (S.C.C. File No. 29971).

⁵² *Canadian Pacific, supra* note 51 at para. 55.

⁵³ For a more complete discussion on existing public rights in the environment, see: Mario D. Faieta, *et al.*, *Environmental Harm: Civil Actions and Compensation* (Markham, ON: Butterworths, 1996) at 46-50; and Andrew Gage, “Public rights and the lost principle of statutory interpretation,” (2004) 15 J.E.L.P. 107.

⁵⁴ *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 52.

⁵⁵ See Faieta and Gage, both at *supra* note 53 for a listing of some of these cases.



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In *Canfor*, the burning down of an area of public forest was considered capable of constituting a public nuisance.⁵⁶ It is easy to understand why this approach would be favourable to Canadian courts. What constitutes clean air or water is likely more easy to define than a safe environment. Finally, it needs to be noted that public rights in the environment are not as well recognized or defined as the public rights of fishing, navigation and passage on highways. As such, the path their development will take is somewhat clouded.

3.3.2 Why fiduciary duties for environmental protection should be recognized

It is axiomatic to say that the common law is not static, that it changes with time.

“The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off.”⁵⁷

As the public trust doctrine is a creature of the common law, a legal construct,⁵⁸ there is nothing to prevent it, and public rights, from expanding in a principled manner to fill new needs and situations, such as protection of the environment.

As discussed earlier, this expansion has already taken place in the U.S. First, the public trust doctrine has been applied to resources other than navigable waters, such as a national park, an inland wetland area, and beaches above the high tide mark. As well, U.S. writers make strong cases why the public trust doctrine extends to federal public lands⁵⁹ and wildlife.⁶⁰ The public trust doctrine has also evolved to protect ecological quality, such as in the cases of *Marks v. Whitney*⁶¹ and the *Mono Lake* decision.⁶²

Canadian judges will likely to continue to be more conservative than their American counterparts. However, judicial recognition of the government’s fiduciary obligations in its care of the environment would be in keeping with the general increase in judicial scrutiny of government decisions in Canada. While much of this increase in judicial scrutiny is the result of the enactment of the Charter in 1982, as Chief Justice McLachlin notes, “Absolute faith in pure majoritarian democracy died with the second World War.” Although she was talking about atrocities committed by the Nazi regime, there is an underlying message that applies to democratic governments in general, which is they are not perfect. They sometimes make bad decisions for the wrong reasons.

This need for this scrutiny is particularly true with regard to Canadian governments’ management of the environment. As David Boyd notes, “While it is encouraging to recognize that

⁵⁶ *Canfor*, *supra* note 4 at para. 66.

⁵⁷ Oliver W. Holmes, *The Common Law* (51st printing) (Boston: Little, Brown and Company, 1881) at 36.

⁵⁸ David VanderZwaag, *Canada and Marine Environmental Protection: Charting a Legal Course Toward Sustainable Development* (London: Kluwer Law International, 1995) at 412.

⁵⁹ Wilkinson, *supra* note 12.

⁶⁰ Gary D. Meyers, “Variation on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife,” (1989) 19 *Envtl. L.* 723; and Ralph W. Johnson and William C. Galloway, “Protection of Biodiversity under the Public Trust Doctrine,” (1994) 8 *Tul. Env’tl. L.J.* 28

⁶¹ 491 P.2d. 374 (Cal. 1971).

⁶² *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d. 709 (Cal. 1983), discussed in Part II at notes 67-74.

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Canada has made progress in some aspects of environmental protection, **the reality is that on most environmental issues Canada is performing poorly.** [Emphasis added.]⁶⁴ He attributes this failure to six systemic weaknesses: missing environmental laws, excessive ministerial discretion in decision-making, not reflecting contemporary science, inadequate implementation and enforcement of existing environmental legislation, a lack of meaningful opportunities for public participation in environmental legislation issues, and that Canada has typically employed a narrow approach to solving environmental problems.⁶⁵ This failure of the federal and provincial governments to respect a fundamental value of Canadians, environmental protection, leaves the public little alternative but to turn to the courts for a remedy. For the reasons outlined throughout this report, the public trust doctrine provides Canadian courts with a means of supplying this remedy.

Finally, several decisions of the Supreme Court of Canada indicate the existence of fiduciary duties owed by the Crown in its care and management of public resources may soon be recognized. One example is the Court's decision in *Committee for the Commonwealth of Canada v. Canada*.⁶⁶ At issue in the *Commonwealth Committee* case was whether the prohibition on the dissemination of political propaganda in airports was inconsistent with s. 2(b) of the *Canadian Charter of Rights and Freedoms* – guarantee of freedom of expression. As there were six separate judgements provided in the case, the ultimate decision of the court is difficult to discern. However, for the purposes of advancing the public trust doctrine in Canada, a useful principle regarding public property was set out, being the Court recognized that the government does not have the

same rights as private owners with respect to its property, particularly with regard to exclusivity. As Lamer, C.J.C. (as he then was) states:

In my opinion, this analytical approach [that government ownership has the same rights as other property owners] contains inherent dangers. First, it ignores the special nature of government property. The very nature of the relationship existing between citizens and the elected government provides that the latter will own places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns. **The "quasi-fiduciary" nature of the government's right of ownership** was indeed clearly set out by the U.S. Supreme Court in *Hague v. Committee for Industrial Organization*... [Emphasis added]⁶⁷

What is interesting about this decision is that the government ownership of "places" creates quasi-fiduciary duties. Governments, like private persons, can own private places, i.e. airports, office buildings, etc. But what about resources, such as land, air, water, fish, etc.? They are part of a living Earth, they exist; they were not created or built by governments or the people they serve. Therefore, although "ownership" of these common resources may rest with the state, it is a different kind of ownership. If the government has "quasi-fiduciary" duties with respect to edifices – private places, its duties with respect to common places and resources, like clean air and water which are necessary for the well-being of all inhabitants of Earth, should at least be the same, if not greater.

In *Canfor*, the Supreme Court discusses the idea that the Crown may have fiduciary duties in its care of the

⁶⁴ David R. Boyd, *Unnatural Law: Rethinking Canadian Environmental Law and Policy* (Vancouver: UBC Press, 2003) at 228.

⁶⁵ *Ibid.* at 228-250.

⁶⁶ [1991] 1 S.C.R. 139 [*Commonwealth Committee*].

⁶⁷ *Ibid.* at 154. Although the various judges disagreed in whether and how there was a violation of s. 2(b), there was agreement that state ownership of property is different than that of private ownership.



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environment.⁶⁸ While this discussion was *obiter*, it suggests that the idea is not outside the realm of judicial thinking. It is also in keeping with the decision of the Supreme Court in *Spraytech*.⁶⁹ In *Spraytech*, L'Heureaux-Dubé, J. writing for the majority, quoted with approval but without elaboration, the judgment of the Ontario Court of Appeal in *Scarborough v. R.E.F. Homes Ltd.*⁷⁰ where it stated that the municipality is a “trustee of the environment”.⁷¹ If a municipality, which only has the powers granted to it by a province, is a trustee of the environment, it follows that so should provincial governments.⁷²

34 Fiduciary Duties Imposed by the Public Trust Doctrine

As discussed earlier, a review of U.S. case law and academic commentary on the public trust doctrine leads to the conclusion that at its heart the “public trust” is the duty of the state to care for public resources so that such resources remain available to the public. What is not settled is the “exact nature of the equitable duties which are said to be imposed on government,”⁷³ or the rights of the public encompassed, by the trust. Arguably, if the public trust connotes a fiduciary relationship between government and the public then the rights conferred by the public trust doctrine should be synonymous with those found in other fiduciary relationships.

To begin, the idea that public rights in public resources are analogous with aboriginal interests in land suggests the government’s fiduciary obligations in dealing with such lands be used as a guide in determining the government’s public

trust duties. In *Wewaykum Indian Band v. Canada*,⁷⁴ the Supreme Court lists four general obligations the Crown-Aboriginal fiduciary relationship places upon the government in its dealings with Indian lands:

1. loyalty,
2. good faith,
3. full disclosure appropriate to the matter at hand, and
4. acting in what it reasonably and with diligence regards as the best interest of the beneficiary.⁷⁵ This last duty has also been described as “[t]he duty on the Crown as fiduciary [is] that of a man of ordinary prudence in managing his own affairs”.⁷⁶

American public trust case law outlines fiduciary obligations owed by governments in their management of trust resources that are similar to the four Crown-Aboriginal fiduciary duties described above.

Loyalty: In a fiduciary relationship, the fiduciary is to be loyal to the beneficiary. The primary concern of the fiduciary should be the well-being of the beneficiary. With regard to public trust resources, the well-being of the public is best served by being able to continuously enjoy its public rights in those resources. In U.S. public doctrine cases, this obligation of loyalty is captured by Joseph Sax’ statement:

When a state holds a resource which is available for the free use of the general public, a court will look with con-

⁶⁸ *Supra* note 4 at para. 81.

⁶⁹ *Spraytech*, *supra* note 51 at para. 27.

⁷⁰ (1979), 9 M.P.L.R. 255.

⁷¹ *Ibid.* at 257.

⁷² If a municipal government can be the trustee for one use of land (a highway), then it follows that it (and other levels of government) can also be trustees for other more environmentally-friendly uses of land such as parks.

⁷³ Maguire, *supra* note 2 at 2.

⁷⁴ [2002] 4 S.C.R. 245.

⁷⁵ *Ibid.* at para. 94.

⁷⁶ *Blueberry River*, *supra* note 26 at para. 104.



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siderable 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.⁷⁷

Loyalty demands that public resources not be alienated to private parties.

*Illinois Central Railroad v. Illinois*⁷⁸ is still the leading authority on the alienation of public trust resources. The U.S. Supreme Court upheld a revocation of a grant of the entirety of Chicago Harbor to the Illinois Central Railroad (an alienation of the trust resource) and set out the criteria under which alienation can occur:

The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used [1] in promoting the interests of the public therein, or [2] can be disposed of without a substantial impairment of the public interest in the lands and waters remaining.⁷⁹

As a result, the obligation of loyalty placed upon the government regarding public trust resources would give the public the right to challenge government decisions that allocate that resource to a private party.

Good faith: In the context of Canadian aboriginal law, the concept of good faith has centred on the idea that negotiations or dealings between the Crown and aboriginal peoples should be viewed as cooperative, not adversarial. With regard to public resources, because the government does not enter into negotiations with the public, the concept of good faith is manifested in a different manner, being that public rights cannot be extinguished without explicit legislative language.

The actions of governments are expressed through legislation, policy and policy documents, and public notice. Good faith or honesty requires that the public know when government actions are going to interfere with public rights so that it can, if it wishes, express approval or disapproval with the intended interference. Good faith does not condone sharp dealing or subterfuge.

In the U.S., this requirement has been carried over to public trust resources. For example, in *People v. California Fish Co.*, 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.⁸⁰

Another example is the case of *Gould v. Greylock Reservation Commission*.⁸¹ In *Gould*, the Massachusetts State government wanted an aerial tramway built on Mount Greylock, a state park. It created by statute a tramway authority and authorized the Reservation Commission to lease to the authority “any portion of the Mount Greylock Reservation.”⁸² Over time the tramway authority entered into a deal to lease 4,000 acres of the park to a management corporation for the building of a ski development, a part of which was the aerial tramway. Some citizens challenged the lease of the 4,000 acres. The court declared the lease to be invalid, stating:

⁷⁷ Sax, *supra* note 33 at 490.

⁷⁸ (1892) 146 U.S. 387 [*Illinois Central*].

⁷⁹ *Ibid.* at 453.

⁸⁰ 138 P.79 (1913) at 88; cited in Kate P. Smallwood, *supra* note 6 at 104.

⁸¹ 215 N.E.2d 114 (Mass., 1966).

⁸² *Ibid.* at 119.



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The profit sharing feature and some aspects of the project itself strongly suggest a commercial enterprise. **In addition to the absence of any clear or express statutory authorization** of as broad a delegation of responsibility by the authority as is given by the management agreement, 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. [Emphasis added]⁸³

As the discussion of the public rights of fishing, navigation, and to pass and repass on a highway in Part II showed, the principle that clear statutory language is required before the Crown can interfere with public rights is well established in the Canadian common law. In his thorough review of the subject, Andrew Gage notes four types of cases in which Canadian courts have used the principle that legislation and government actions that purport to interfere with public rights are to be strictly construed – cases dealing with: Crown interference with public rights; statutes interfering with public rights; procedural protections intended to ensure public rights; and statutes affirming public rights.⁸⁴ This rule of statutory interpretation, although not widely used,⁸⁵ provides further evidence that Canadian governments already have fiduciary obligations with respect to existing public rights. As discussed, fiduciaries are held to a “strict standard of conduct” to act in the best interest of beneficiaries, which includes acting with honesty. As public rights are independent legal interests entrusted to governments, it is only right that courts require governments be honest, ie. to use clear and specific legislative language in how they are managing these interests.

Full disclosure to the matter at hand: In her thesis, Kate

Smallwood writes, “... [I]t appears from some recent American cases that the public trust doctrine imposes what may be best described as an “administrative decision-making process” on government.”⁸⁶ This is in keeping with the ruling of the California Supreme Court in the case of *National Audubon Society v. Superior Court of Alpine County (Mono Lake)*, where it stated “[w]e believe that before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.”⁸⁷ What Kate Smallwood and the *Mono Lake* decision suggest is a decision-making process for public resources that is akin to an environmental assessment.

Environmental assessment is a planning tool that allows decision-makers to understand the predicted impacts a decision, development or action may have on the environment, community, and economy before the decision is made so that significant impacts can be avoided. Valid environmental assessment requires public participation in the process and the gathering and weighing of all pertinent information in a transparent decision-making process. To achieve these two things requires full disclosure of all information important to the public. The full disclosure obligation as outlined in the *Mono Lake* decision results in a corresponding right to challenge government decisions regarding public resources that have been made in a manner that is not transparent. This transparency is necessary because it allows the public (and courts) to determine whether proper weight has been given to all of the issues and facts that should form the basis of the final decision.

The P.E.I. government picked up on this duty of full

⁸³ Ibid. at 126.

⁸⁴ Gage, *supra* note 53 at 119 and 119-134.

⁸⁵ Ibid. at 139.

⁸⁶ Smallwood, *supra* note 6 at 134.

⁸⁷ 658 P.2d 709 (Cal. 1983) at 712 and 728-9.



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disclosure in its lawsuit against the federal government over its management of the various Atlantic fisheries.⁸⁸ At paragraph 35, it writes:

35. The Minister, by failing to establish and adhere to an open, transparent, accountable, fair, and even-handed process, and to provide reasons, in making fishery decisions with respect to expanding and other fisheries, has: ...

(4) violated the Minister's Public Trust Obligations ...

The public trust right of full disclosure regarding decisions affecting public trust resources raises the question of whether the provisions of provincial or federal environmental assessment legislation have subsumed or codified all government obligations regarding the assessment of projects or activities that may impact public trust resources and consequently public rights.⁸⁹ However, most provincial environmental assessment legislation and the federal *Canadian Environmental Assessment Act*⁹⁰ are explicit about what is and is not to be assessed. If a piece of environmental assessment legislation specifically excludes the assessment of any developments that may negatively impact fish habitat and consequently fish populations is that the end of the matter, or can the public trust doctrine still be invoked in an effort to review the decision regarding the development? What if the environmental assessment legislation is silent with regards to an activity that impacts a particular trust resource? As well, Canadian environmental assessment legislation tends to assess the impacts of activities and developments, and not

government policy. For example, a government policy that favours the lax enforcement of environmental protection legislation could have a huge impact on that trust resource. If a public interest litigant challenges this government action as a breach of the public trust, is the public trust doctrine displaced if the environmental assessment legislation addresses the potential impact of developments, but not government policy, on the trust resource?

This is a complex subject and the above are preliminary observations.⁹¹ However, if it is successfully argued that environmental assessment legislation is a codification of Canadian government's public trust duties, it is submitted the public trust doctrine can still be used to shape the scope of government decisions regarding public trust resources. First, as Andrew Gage has written, public rights should be used to guide the interpretation of legislation.⁹² Another possible use of the public trust doctrine is that it could be used to obtain a declaration from a court that the environmental assessment legislation is itself a breach of the public trust. One reason could be that it excludes the assessment of all projects that may impact upon a particular trust resource when there is no legislation that explicitly extinguishes public rights in that resource. It should be noted that using the public trust doctrine to challenge an entire act would be a big stretch.

It can also be argued that public trust rights have not been subsumed or displaced by provincial or federal environmental assessment legislation. A case that is often cited in support of this proposition is *United Plainsmen v. North Dakota State*

⁸⁸ *The Province of Prince Edward Island, et al. v. Canada, et al.*, Supreme Court of Prince Edward Island (Trial Division) Court File No. S1-GS-20819. Filed: February 23, 2005.

⁸⁹ Since the time Joseph Sax published his seminal article in 1970 and the Mono Lake decision was rendered in 1983 all of Canada's federal and provincial governments have enacted environmental assessment legislation.

⁹⁰ S.C. 1992, c. 37.

⁹¹ An equally complex subject is whether in Canada statutory provisions impose trust obligations on governments. For a discussion of the topic, see: Hunt, *supra* note 1 at 168-171. The Canada National Parks Act, S.C. 2000, c.32, s. 4 states: The national parks of Canada are hereby dedicated to the people of Canada . . . and the parks shall be maintained and made use of so as to leave them unimpaired for the enjoyment of future generations. For an example of the ineffectiveness of the Act to promote sound environmental assessment in Canada's national parks, see: *Canadian Parks and Wilderness Society v. Canada (Minister of Canadian Heritage)*, [2003] 4 F.C. 672 (F.C.A.).

⁹² Gage, *supra* note 53.



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*Water Conservation Comm'n.*⁹³ In this case, United Plainsmen, a non-profit corporation, sought an injunction barring the State Engineer from issuing future water permits for a coal-energy power project until a short and long-term plan had been created for the conservation and development of the state's resources, including fresh water.⁹⁴ The plaintiff argued the duty to create these plans was established by section 61-01-26 of the North Dakota Century Code (NDCC) and the public trust doctrine. Part 4 of section 61-01-26 NDCC read as follows:

4. Accruing benefits from these resources can best be achieved for the people of the state through the development, execution and periodic updating of comprehensive, coordinated and well-balanced short- and long-term plans and programs for the conservation and development of such resources by the departments and agencies of the state having responsibilities therefore; ...

The North Dakota Supreme Court held that the language of this part, which is similar in tone to the laudable but often disregarded purpose sections in Canadian environmental legislation, did not create a mandatory duty on the State Engineer to prepare such plans before issuing water permits. This did not end the matter. Rather, the Court went on to hold that the common law public trust doctrine imposed a duty on the State Engineer to conduct some planning before allocating trust resources.⁹⁵

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 "without detriment to the public interest in the lands and waters remaining."⁹⁶

In other words, the government's public trust duties were not displaced by discretionary legislation and policy even though it is clear the state legislature had put its mind to public trust resources and chose not to act. This same reasoning could be applied to Canadian environmental assessment legislation.

Finally, the idea that "environmental assessment" should take place outside formal environmental assessment legislation is not novel in Canada. For example, the Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals provides that "[c]onsistent with the government's strong commitment to sustainable development, ministers expect that policy, plan and program proposals of departments and agencies will consider, when appropriate, potential environmental effects."⁹⁷ As well, aboriginal case law supports the idea that decisions regarding trust resources should be based on a number of factors and not simply economic efficiency:

The duty imposed upon the Crown by the terms of surrender [of reserve land] ... was broad. It extended not only to the monetary aspects of the transaction, but to whether the arrangement would be conducive to the welfare of the Indians **in the broader sense**. [Emphasis added]⁹⁸

Act like a person of ordinary prudence in managing their own affairs: This obligation begs the question, "How does a person of ordinary prudence manage their resources?" In keeping with

⁹³ 247 N.W.2d 457 (N.D. 1976).

⁹⁴ *Ibid.* at 459.

⁹⁵ *Ibid.* at 460.

⁹⁶ *Ibid.* at 462.

⁹⁷ Available at http://www.ceaa-acee.gc.ca/016/directive_e.htm#2-5.

⁹⁸ *Blueberry River*, *supra* note 26 at para. 46.



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the decision in *Blueberry River*,⁹⁹ below are two suggested ways with regard to public resources:

1. Preserve the capital, or don't give up what is important: Prudent people recognize what is important to them and take steps to protect it, i.e. purchase fire insurance for their home. This same idea runs throughout the history of public rights and the public trust. People may acquire private property rights in tidal waters, but unless explicit legislation provides otherwise, these property rights are subject to the public right of navigation and fishing. These things are important to the public and the courts have ensured that governments do not lightly give them away.

Prudent managers also work to live off of the interest generated by property rather than denude the capital. In a public rights setting, the public right of fishing is lost if there are no fish. However, if we look at the environment as a whole as common property then it is clear it is that it has been mismanaged. Excessive rates of extinction are one example of this. We are providing a diminished legacy for future generations and this is a fact we have known for some time. A prudent person takes steps to address losing investments. The public trust doctrine allows citizens to address government actions that imperil our ecological capital.

2. Plan for the future: Prudent people recognize their future needs may be different than today's needs and keep their options open. This management philosophy is very prevalent in U.S. public trust case law. As discussed in Part 2.3.1, the public trust doctrine has expanded throughout the U.S. to include more than just protection of navigation and fishing in navigable waters. Different public resources,

such as wetlands, are being protected by use of the doctrine as are different uses of these resources, such as recreation and the provision of ecological services. Like the case with the right of navigation, these public trust rights are often recognized long after the property subject to the trust has passed into private hands.

Finally, prudent management suggests monetary investments. While the proper stewardship of trust resources does require financial investment from governments, this should not be taken as the entire point of the above discussion. The focus should be on the prudent management of one's "affairs", being one's life and not simply his or her finances. Many people manage their lives with an eye to many different "bottom lines", most of which have little to do with maximizing financial gain. People organize their lives to maximize time with family, to leave time for individual pursuits, for community involvement, etc. As discussed earlier, the pursuit of economic efficiency in the utilization of public resources has often resulted in the loss of that which is more important to many people, individual and community well-being.

In addition to the above duties, fiduciary relationships give the beneficiary **the right** to bring an action in court (standing) to enforce the duty of the fiduciary to act loyally to and in the best interests of the beneficiary.¹⁰⁰ While the issue of standing will be discussed later in this part, it is important to note the public trust provides citizens with the legal right to challenge government actions dealing with public resources.

To conclude this section, there is a close fit between the responsibilities placed upon governments by the American public trust doctrine and those placed by the courts upon Canadian governments in Crown-aboriginal fiduciary

⁹⁹ *Supra* note 26 at para. 104; "A reasonable person does not inadvertently give away a potentially valuable asset which has already demonstrated earning potential. Nor does a reasonable person give away for no consideration what it will cost him nothing to keep and which may one day possess value, however remote the possibility. The Crown managing its own affairs reserve[s] out its minerals."

¹⁰⁰ John Swaigen and Richard E. Woods, "A Substantive Right to Environmental Quality," in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1981) at 209.

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relationships. The adoption of these same government fiduciary responsibilities into Canadian public trust law would also be consistent with Joseph Sax' three purposes for the public trust doctrine: 1) to create some concept of a legal right in the general public; 2) to be enforceable against the government; and 3) be capable of an interpretation consistent with contemporary concerns for environmental quality.¹⁰¹

3.5 Obtaining Standing in Public Trust Actions

As discussed in Parts 2.1 and 3.3.1, interference with a public right constitutes a public nuisance. On its face, this would suggest that any member of the public should be able to bring a court action, or have standing,¹⁰² to seek redress for this nuisance. However, the courts have developed a rule that once a public nuisance is created it is only the Attorney-General, as the representative of the public interest, who may bring an action “to enjoin the continuance of the public nuisance”.¹⁰³

There are two exceptions to this rule. Private individuals may participate in the action brought by the Attorney-General as a relator.¹⁰⁴ They may also have standing to sue in private nuisance if the plaintiff can show he or she has suffered some type of damage or interference that is different than what the public at large has suffered.¹⁰⁵ Whether the damage has to be different in the kind or in the degree suffered remains uncertain. In *Hickey v. Electric Reduction Co. of Canada Ltd.*,¹⁰⁶ commercial fisherman were denied standing after fish

were killed by pollution because they did not suffer a loss that was different in kind. Their and the remainder of the public's right of fishing was interfered with by the pollution. In contrast are a series of older Ontario cases that permitted public nuisance actions dealing with interference with the public right of navigation to proceed on the basis that the plaintiff's suffered a greater degree of damages.¹⁰⁷

A case that highlights the difficulty of obtaining standing under this exception whether the “difference in kind” or “difference in degree” test is applied is *Gleneagles Concerned Parents Committee Society v. British Columbia Ferry Corp. [Gleneagles]*.¹⁰⁸ In *Gleneagles*, the plaintiff was a society of concerned parents of children who attended *Gleneagles School* in B.C. They were seeking an injunction to stop the expansion of a ferry terminal in *Horseshoe Bay* and its accompanying road infrastructure for the reason that the “construction phase and the finished product of the project would result in harmful pollution to the residents of *Horseshoe Bay* and especially the children who attend school at *Gleneagles Elementary School*.”¹⁰⁹ One of the society's bases for its unsuccessful action was that the construction was a public nuisance and that the society, or more the children, would suffer damage that was either different in kind or degree than the rest of the public. The plaintiff was denied standing to sue in public nuisance because it did not demonstrate that the harm the children might suffer was different in either degree or kind than that to be suffered by the entire *Horseshoe Bay* community.¹¹⁰

¹⁰¹ Sax, *supra* note 33 at 474.

¹⁰² Also known as *locus standi*. Essentially, standing is the right to appear as a party in a court proceeding. See Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986).

¹⁰³ Allen M. Linden, *Canadian Tort Law* (5th edition) (Toronto: Butterworths, 1993) at 250-251.

¹⁰⁴ Beth Bilson, *The Canadian Law of Nuisance* (Toronto: Butterworths, 1991) at 50.

¹⁰⁵ Cromwell, *supra* note 102 at 15.

¹⁰⁶ (1970), 21 D.L.R. (3d) 368 (Nfld.S.C.). See Part 2.1.

¹⁰⁷ *Crandell v. Mooney* (1878) 23 U.C.C.P.212; *Rainy River Navigation Co. v. Ontario and Minnesota Power Co.* (1914) 26 O.W.R. 752; and *Rainy River Navigation Co. v. Watrous Island Boom Co.* (1914) 26 O.W.R. 456; cited with approval in *Gagnier v. Canadian Forest Products Ltd.*, 1990 CanLII 538 (BC S.C.).

¹⁰⁸ 2001 BCSC 512 (CanLII).

¹⁰⁹ *Ibid.* at para. 27.

¹¹⁰ *Ibid.* at para's. 80 and 83.



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The inability of the public to generally bring claims in public nuisance would not be that troubling if Canadian governments were diligent in instituting their own public nuisance claims. However, the problem is that “action by the Attorney-General is discretionary, there is no guarantee that he will respond affirmatively to complaints and pleas for action by concerned citizens.”¹¹¹ In fact, it could be argued that Canadian governments by authorizing the contamination of air and water and permitting other environmental damages are complicit in the commission of these public nuisances. Accordingly, the tort of public nuisance has become virtually meaningless to the public interest litigant. As Ted Schrecker notes:

Judicial deference to the political executive in the area of public nuisance is one of the key reasons that in the early 1970s, when environmental concerns intruded themselves inescapably on public policy, many of the handful of lawyers directly involved with such issues felt that the traditional common law doctrines, although theoretically promising, were practically irrelevant to most situations in which citizens might seek protection from environmental damage.¹¹²

The impact of the public nuisance standing rule did not end there. The other important aspect of the public nuisance rule is that standing in public interest cases where the plaintiff wanted to challenge either the constitutional validity of a piece of legislation or the administrative action of a government was for many years dictated by the standing rules of public nuisance. For example, for fifty years, the decision in *Smith v. Attorney General of Ontario*¹¹³ was the authority which was followed by Canadian courts when the standing of an individual

or group wanting to obtain a declaration regarding the constitutional validity of a government act or regulation was to be determined. In *Smith*, the Supreme Court applied the public nuisance standing rule and held that individuals did not have the standing to challenge the constitutionality of government legislation by way of a declaratory order unless the legislation directly affected their private rights, or that it affected them in a manner different from the rest of general public.

The facts of *Smith* are straight-forward. The Ontario Legislature has passed a law which prohibited the importation of intoxicating liquor into Ontario. Mr. Smith ordered liquor from a distributor in Montreal. The distributor refused to fill the order, saying that to do so would result in a violation of the *Ontario Temperance Act*. Mr. Smith then sought a declaration that the legislation, which contained provisions for prosecution for the importation of liquor, was *ultra vires* the province, as the field of inter-provincial liquor transportation had already been occupied by the federal government’s *Canada Temperance Act*. His reason for seeking the declaration was that it was the only way to challenge the legislation other than to first break the law and then face prosecution and its “humiliating incidents”.¹¹⁴

The Supreme Court unanimously dismissed Mr. Smith’s appeal, holding that he did not have standing to bring the proceedings. The Court gave two reasons for denying standing to Mr. Smith. First, because he was not being prosecuted, the issue Smith raised was “merely speculative”.¹¹⁵ The other line of reasoning was that, “[a]n individual, for example, has no status to maintain an action restraining a wrongful violation of

¹¹¹ McLaren, *supra* note 32 at 512.

¹¹² Ted Schrecker, “Of Invisible Beasts and the Public Interest,” in Robert Boardman (ed.), *Canadian Environmental Policy: Ecosystems, Politics, and Process* (Toronto: Oxford University Press, 1992) at 87.

¹¹³ [1924] S.C.R. 331, [1924] 3 D.L.R. 189 (subsequent references are to [1924] 3 D.L.R.).

¹¹⁴ *Ibid.* at 191.

¹¹⁵ *Ibid.* at 190.



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a public right unless he is exceptionally prejudiced by the wrongful act”.¹¹⁶ The Court used the public interest standing rule out of the fear that granting standing to Mr. Smith would result in “the consequence that virtually every resident of Ontario could maintain a similar action”¹¹⁷ and create a grave inconvenience to government. Fear of a flood of actions was also used as a justification for the establishment of the standing rule in public nuisance.¹¹⁸

As Kate Smallwood discusses, the U.S. had similar standing rules, and for this reason “early promoters of the public trust doctrine in the United States were concerned primarily with empowering citizens to enforce the trust.”¹¹⁹ The first of Joseph Sax’ three functions for the public trust doctrine is that it “contain some concept of a legal right [standing] in the general public.”¹²⁰ As used in the U.S., the public trust doctrine provides public interest litigants with standing to challenge government actions that are in breach of the government’s fiduciary duties with respect to trust resources.

As discussed, fiduciary relationships give the beneficiary standing to enforce the duty of the fiduciary to act loyally. However, in Canada the need to use the public trust doctrine to challenge government actions that affect trust resources that are contrary to legislative authority has been overtaken by the Supreme Court’s decision in *Finlay v. Canada (Minister of Finance)*.¹²¹ *Finlay* followed a series of decisions in which the Supreme Court redefined the test for public interest standing in cases in which citizens challenged the constitutional validity of a particular piece of legislation.¹²² At issue in *Finlay* was

whether the courts had the discretion to grant standing in a non-constitutional challenge of an administrative action of the Government. The Court held that standing could be granted in such cases if the plaintiff could meet the following criteria:

1. the issue had to be justiciable;
2. the issue must be serious and raised by a person with a genuine interest in the issue; and
3. there must be no other reasonable and effective manner in which the issue may be brought before a court – is there a more appropriate applicant.¹²³

The importance of this test to public interest litigants seeking to challenge government administrative actions regarding trust resources is that since *Finlay*:

[E]nvironmental groups and other plaintiffs who did not meet the test for direct standing may still be able to bring an action under the “public interest standing” test. The public interest standing doctrine acknowledges that there are some government actions that adversely affect a number of citizens, but none in a distinct way. In such instances, where government illegality is otherwise unlikely to be brought before the courts, a representative member of the affected public may bring the case.¹²⁴

Therefore, those who allege that a government action based on legislative authority breaches one of governments’ public trust fiduciary duties, once such duties are established, would

¹¹⁶ *Ibid.* at 193-194.

¹¹⁷ *Ibid.* at 193.

¹¹⁸ Cromwell, *supra* note 102 at 73.

¹¹⁹ Smallwood, *supra* note 6 at 128.

¹²⁰ Sax, *supra* note 33 at 474.

¹²¹ [1986] 2 S.C.R. 607.

¹²² *Thorson v. A.G. for Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeill*, [1976] 2 S.C.R. 265; and *Minister of Finance v. Borowski*, [1981] 2 S.C.R. 575.

¹²³ *Finlay*, *supra* note 121 at 340-341.

¹²⁴ Stewart A. Elgie, “Injunctions, Ancient Forests, and Irreparable Harm: A Comment on *Western Canada Wilderness Committee v. A.G. British Columbia*,” (1991) 25 U.B.C. Law Review 387 at 390. For a thorough application of the *Finlay* test, see: *Sierra Club of Canada v. Canada (1998)*, 157 F.T.R. 121.



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have to meet the *Finlay* test to obtain standing. In such cases the public interest litigant argues the action is contrary to or without legislative authority. As an example, assume the adoption of the public trust doctrine into Canadian law results in the federal government having a fiduciary duty to preserve viable fish stocks for future generations. Government action then threatens this viability without clear legislative authority that permits this. The government's action would be contrary to the law. To challenge this government action, which in reality is the seeking of redress for the government's breach of its fiduciary duty, a public interest litigant would have to make an application to a court. To pursue its action the applicant must have standing. This is the same type of scenario addressed by *Finlay* and as such the test to determine the applicant's standing would be the same. Therefore, while the public trust doctrine and the fiduciary duties it encompasses may create new reasons for challenging government actions based on statutory authority, it does not create a new means of obtaining standing.

Despite the above, the public trust doctrine does have a role to play in providing standing to public interest litigants seeking to challenge actions governments can take without the need to pass legislation. An example would be a government's decision not to take action to abate a public nuisance. Here the situation in *Finlay* does not arise, but it still could be argued the government is using its prerogative powers contrary to its fiduciary duties for trust resources. Again, these equitable obligations are enforceable by the courts.¹²⁵ The presence of this obligation in turn provides the public the standing to use the courts to enforce them. To complete the public nuisance example, the plaintiff does not argue the government is committing a public nuisance, for which the rules of obtaining standing have not changed with *Finlay*. Instead, where a public nuisance is being committed or may be committed, it is

suggested a request be made to the Attorney-General to remedy the public nuisance. If the Attorney-General refuses to act, then a declaration from a court could be sought that such refusal is a breach of the government's duty to protect the public right interfered with. Although this is a round-about way of addressing public nuisances, it is necessary until the public interest standing rule in *Finlay* is extended to actions for the abatement of public nuisances.

As well, it is important not to equate government interference with a public right with a public nuisance. Governments interfere with public rights when they purport to grant the resources that support those rights to private parties. Like private parties, governments can cause public nuisances—they can commit acts that kill fish or block navigable waterways, but this is different than using its prerogative powers to interfere with public rights. Lord Hale's "public trust" and the *Magna Charta* placed limits on these powers, such as preventing the Crown from granting exclusive fisheries without valid legislative authority. There is nothing in the cases that interpret these writings to suggest that a particular member of the public had to suffer some peculiar harm to invoke these limitations. As such, a fisherman who alleges that the present system of individual transferable quota licensing has created an unauthorized exclusive fishery has to argue that this is contrary to a long-standing public right, not that he has suffered peculiar damages.

The reasoning from above can be combined and applied to situations where new public rights are being asserted, such as was the case in *Marks v. Whitney*.¹²⁶ In a case where a landowner wanted to fill in tidelands, one could argue that the landowner does not have the right to use his land in this way because the government could not grant away the public's right in a key component of the environment. The public's right



¹²⁵ *Guerin*, *supra* note 11 at 376.

¹²⁶ *Supra* note 34.

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would be paramount to the landowner's. Proceeding with the fill would then be a public nuisance, and if the government did not take steps to abate this nuisance, it would in breach of its duties under the public trust.

Finally, the *Finlay* test may also have an impact on the determination of who has standing where breaches of the public trust are alleged. Although public trust rights belong to the public at large, courts may view certain members or groups of the public as being the more appropriate party to initiate court actions to remedy breaches of the public trust. The reason for this is part 2 of the *Finlay* test—the plaintiff must have a genuine interest in the issue. Courts do not like “busybodies”. For this reason, a court may look more favourably on an action brought to address improper forest management by an individual or group from a rural-forest community than a large urban centre. The court can see the rural group's interest in the matter – they live in the forest. The urban group's connection may not be so clear.

3.6 Summary

At the beginning of Part III, it was argued that because of the generally conservative nature of Canadian judges a strong legal foundation is needed to underpin the development of the public trust doctrine in Canada. Canadian judges do not make “new” law; they adapt existing law to fit new societal needs and circumstances.¹²⁷ The evolution of Canadian fiduciary law now provides this legal foundation. For example, aboriginal peoples' unique *sui generis* legal interest in their lands places fiduciary duties on the federal government in certain instances when it deals with aboriginal lands. Public rights are a comparable legal interest and for this reason and matters of public policy, governmental fiduciary duties with respect to the resources that underlie these rights should be recognized. As

such, the continued exercise of these rights is vulnerable to the mismanagement of trust resources by Canadian governments. Canadian fiduciary law also protects the rights of those who are “peculiarly vulnerable” to the misuse of discretion by a person in power. Several factors make the public with respect to public rights vulnerable to the mismanagement of trust resources by Canadian governments. This is another reason why there is a fiduciary relationship between Canadian governments and the public with respect to trust resources. Defining the “public trust” as a fiduciary relationship paves the way for the further development of the doctrine in Canada. Recognition of fiduciary duties in these resources to protect recognized public rights opens the door for the evolution of the Canadian public trust to the public trust doctrine.

The discussion of fiduciary duties and public resources was used to build a case for how the public trust can further the protection of the environment in Canada. Central to this was the recognition that Canadians have “environmental rights”. As is the case with the public rights of fishing and navigation, the public trust should place fiduciary duties on governments in their management of the resources that support public environmental rights. Acceptance by the courts of the existence of these fiduciary duties is important because it would give the public another means of addressing Canadian governments' generally poor track record on environmental protection.

Part III next addresses some of governments' fiduciary duties that are encompassed by the public trust. Using aboriginal case law that discuss the fiduciary duties of governments as a guide, it is determined that the public trust doctrine captures four obligations owed by governments in their management of trust resources to the public, being: 1) to act loyally, 2) to act

¹²⁷ McLachlin (C.J.C.), *supra* note 3 at 311-312.



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in good faith, 3) to make full disclosure of the matter at hand, and 4) to act like a person of ordinary prudence in managing their affairs (preserve the capital and plan for the future). Support for these duties is found in American public trust doctrine case law.

Finally, the issue of the doctrine's impact on the ability of public interest litigants to obtain standing to institute court actions to remedy breaches of the public trust by governments is addressed. The report first suggests that the need to use the public trust doctrine to challenge government actions that affect trust resources that are contrary to legislative authority has been overtaken by the Supreme Court's decision in *Finlay v. Canada* (Minister of Finance). To obtain standing in such cases, public interest litigants have to meet the test set out in *Finlay* and refined in later cases: the issue had to be justiciable; the issue must be serious and raised by a person with a genuine interest in the issue; and there is not a more appropriate applicant. The public trust may be important in providing standing in other cases where there is no issue of absence of governmental authority to rely on, such as government decisions not to proceed with a public nuisance action.



PART IV.

Fishing, Logging and the Public Trust



For New Brunswick's Crown forests, timber licences are only available to the handful of companies who own or operate a wood processing facility. Accompanying this concentration of rights has been the increasing under- and unemployment of those who traditionally earned their living harvesting trees and fish. This period of rights' concentration has also seen the ecological diminishment of forest and ocean ecosystems.

Justice Daigle (N.B.), 2003

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PART IV. Fishing, Logging, and the Public Trust

4.1 Introduction

Canadian governments have recently been fixated on the budgetary bottom line, cutting costs (such as decreasing the resources available for environmental monitoring and enforcement) and increasing revenues (also known as “stimulating the economy”). Included in this has been a trend of privatization of government services and management responsibilities, and a drive for economic efficiency. When combined, these factors have resulted in a political climate that is receptive to the demands of private enterprise, one of which is the “guaranteed” allocation of public resources. The fulfillment of this demand has resulted in the rights to harvest public resources becoming increasingly concentrated in the hands of fewer people. In the case of public fisheries, the establishment of a system of individual transferable quotas (ITQs) has placed restrictions on who can access the fishery. For New Brunswick’s Crown forests, timber licences are only available to the handful of companies who own or operate a wood processing facility. Accompanying this concentration of rights has been the increasing under- and unemployment of those who traditionally earned their living harvesting trees and fish. This period of rights’ concentration has also seen the ecological diminishment of forest and ocean ecosystems.

One response to these social and ecological problems has been the increasing number of calls for the establishment of community-based ecological management of natural resources. However, virtual private property rights in fisheries and forests make it difficult for community-based management efforts to get off the ground. The purpose of this report was to

investigate whether the public trust can be used by those seeking to establish community-based management as a means of regaining access to public resources.

In answer, this report has shown how the enforcement of public rights and the public trust doctrine may be used to protect trust resources from private appropriation so that they can continue to be accessed for use by the public. For example, the public right of fishing has historically precluded the government from granting exclusive fisheries without legislative authority. The recognition of fiduciary duties with respect to trust resources would impose further obligations and limits on government management of these resources. Joseph Sax’s “central substantive thought” of public trust litigation is that “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”¹ is likely a breach of these obligations. In enunciating this thought, Sax built on the decision of the *U.S. Supreme Court in Illinois Central Railroad Co. v. Illinois*,² wherein Justice Field wrote, “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 the interests of the public therein, or can be disposed of without a substantial impairment of the public interest in the lands and waters remaining.”³ Therefore, the question that needs to be addressed is has there been a reallocation or subjection of trust resources to private uses that has resulted in the substantial impairment of the public interest in trust resources? The first section of Part IV argues this has transpired because the licensing systems in place for Canada’s public fisheries and forests have created virtual private property rights in these resources. The next section looks at the law’s treatment of such licences as private property. The final section suggests how the protection of environmental rights may provide supporters of community-



¹ Joseph L. Sax, “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,” (1970) 68 Mich. L. Rev. 471 at 490.

² (1892) 146 U.S. 387 [*Illinois Central*].

³ *Ibid.* at 453.

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based management with a better argument to address inequities in resource allocations than is available in the “private property” line of reasoning.

4.2 The Loss of Public Resources to Private Property Rights

4.2.1 Impairment of the public interest in fishing

Until recently, the management of Canada’s salt-water fisheries has been guided by the principle of a public right of fishing. For example, in *R. v. Nikal*, the Supreme Court of Canada cites examples of government officials around the time of Confederation stating the fisheries in all the tidal waters of Canada belong to the public.⁴ As a result, the management of Canada’s fisheries from Confederation to 1965 “was characterized by a biological emphasis. Responses to fisheries problems and pressures were primarily reactive and ad hoc.”⁵ During this same time, access to or the licensing of Canada’s Atlantic fishery has been described as follows:

Prior to the mid-1960’s, most fisheries were open to anyone who wished to fish and applied for a fishing license. Although licenses were required in some fisheries, there were no restrictions on who could hold licenses or how many license holders could operate in a given fishery. In addition, there were no direct or significant restrictions on catch levels or fishing capacity. The main control on fish-

ing was through seasons, minimum fish sizes, mesh or other gear constraints, and special restricted gear areas.⁶

Limited entry licensing in Atlantic Canada began in 1967-68 with the lobster fishery. Most other Atlantic fisheries had a system of limited entry licensing implemented in 1973.⁷ These changes coincided with the publication of Garrett Hardin’s 1968 paper, “The Tragedy of the Commons.”⁸ He wrote that “open access” resources, which Hardin believed ocean fisheries to be, would be depleted by the self-interest of individual resource users and be economically inefficient. Because of buy-in by the federal government to the “common-property perspective”,⁹ starting in 1965 economics became entrenched as one of the main drivers of fisheries management policy.¹⁰

In 1977, Canada established its 200 mile limit. To take advantage of the supposed riches of fish this establishment portended, the period from 1977 to 1989 was based primarily upon the industrialization of the fishery to create offshore capacity. Up until the establishment of the 200 mile limit, Canada’s east-coast fishery was primarily conducted by inshore owner/operators. With the help of government assistance, the number of registered fishermen grew from 43,500 in 1978, to 59,000 in 1988, to 64,000 in 1990.¹¹

It was also during this period that the creation of private property rights in the east-coast fishery began. Because of the financial difficulties of east-coast fish processing companies in

⁴ [1996] 1 S.C.R. 1013 at para’s. 27-43.

⁵ Dianne Draper, “Ocean Exploitation: Efficiency and Equity in Fisheries Management,” at 109-150, in Bruce Mitchell and W.R. Derrick Sewell, eds., *Canadian Resource Policies: Problems and Prospects* (Toronto: Methuen, 1981) at 111; quoted in David Ralph Matthews, *Controlling Common Property: Regulating Canada’s East Coast Fishery* (Toronto: University of Toronto Press, 1993) at 40.

⁶ Fisheries and Oceans Canada, *Fisheries Management Policies on Canada’s Atlantic Coast: A Summary of Policies, Acts, and Agreements in Effect on September 30, 2001 that Pertain to the Management of the Fisheries on Canada’s Atlantic Coast* (Ottawa, Undated) at 8.

⁷ *Ibid.* at 8.

⁸ *Science* 162: 1243-8.

⁹ Matthews, *supra* note 5. Matthews effectively refutes the fallacy of the fishery as being an open-access resource throughout his book, but particularly at pp. 66-94.

¹⁰ Fisheries and Oceans Canada, *supra* note 6 at 8; and Draper in Matthews, *supra* note 5 at 40. See also Matthews, *ibid.* at 42:

With the acceptance of common-property theory, economists came to play a major role in developing Canadian fishery policy. Moreover, fishery biologists (who had until that time been the main players in formulating government fishery policy) quickly adopted the common-property perspective and made it the basis of their own management policies.

¹¹ Kent Blades, *Net Destruction: The Death of Atlantic Canada’s Fishery* (Halifax: Nimbus Publishing Ltd., 1995) at 14.



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the early 1980's, the Canadian Government in 1982 stepped in, wrote off the debt of the companies, and promoted the creation of two large fish processing companies – Fishery Products International (FPI) in Newfoundland, and National Sea Products (NSP) in Nova Scotia. At the same time, a new quota system called “enterprise allocations” was created for the offshore fishing sector. FPI and NSP each received an enterprise allocation that was an annual quota of groundfish that could be taken when and as the companies wanted.¹²

1989 to the present can best be described as a period of “rationalization” of the fishing industry. While the collapse of cod and other groundfish stocks called for drastic measures, it has also been used as an opportunity by the government to make fishing in Atlantic Canada more “economically efficient”. It has been since 1989 that a licensing system of enterprise allocations and individual transferable quotas (ITQs) has been established for most fisheries in Atlantic Canada.¹³ ITQs divide the total allowable catch for each fishery as determined by the Department of Fisheries and Oceans amongst all the license holders in that fishery. A fisherman’s percentage of the total allowable catch (their ITQ) is supposed to remain the same from year to year. The objective of quota management is “To promote economic efficiency in the fishery and a more orderly method of harvesting.”¹⁴

Throughout this period of transformation in the focus of fisheries management policy, the main licensing provisions of the *Fisheries Act*¹⁵ have remained virtually unchanged. In the *Fisheries Act* (1868),¹⁶ s. 2 read:

2. The Minister of Marine and Fisheries may, where the exclusive right of fishing does not already exist by law, issue

or authorize to be issued fishery leases and licenses for fisheries and fishing wheresoever situated or carried on ...

While s. 19 dealing with the Minister’s regulation-making authority read:

19. The Governor in Council may from time to time make ... Regulation or Regulations as shall be found necessary ... for the better management and regulation of the sea-coast and inland fisheries, to prevent or remedy the obstruction and pollution of streams, to regulate and prevent fishing, to prohibit the destruction of fish and to forbid fishing except under authority of leases or licenses ...

Today, s. 7 reads:

7. (1) Subject to subsection (2), the Minister may, in his absolute discretion, wherever the exclusive right of fishing does not already exist by law, issue or authorize to be issued leases and licenses for fisheries or fishing, wherever situated or carried on...¹⁷ [Emphasis added]

And s. 43 states:

43. The Governor in Council may make regulations for carrying out the purposes and provisions of this Act and in particular, but without restricting the generality of the foregoing, may make regulations

(a) for the proper management and control of the sea-coast and inland fisheries;

Therefore, on its face, the present *Fisheries Act* does not displace the public right of fishing (everyone has a right to fish). Instead, it is fisheries licensing regulations passed

¹² *Ibid.* at 13.

¹³ In Atlantic Canada, there are Individual Transferable Quotas programs in place for a number of fisheries, including the herring seine fishery, offshore lobster, scallop, clam and northern shrimp fisheries, the snow crab fishery, and for cod, haddock, pollock, and many flatfish.

¹⁴ Fisheries and Oceans Canada, *supra* note 6 at 40.

¹⁵ R.S. 1985, c. F-14.

¹⁶ S.C. 31 Vict. 1868, c. 60.

¹⁷ “in his absolute discretion” was added in 1929, S.C. 19-20 George V. c. 42.



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pursuant to the Act in the last 30 years that have been used to limit the public's right to fish by controlling who can access the fishery. For example, the *Atlantic Fishing Registration and Licensing Regulations*¹⁸ enacted in 1976 prohibited the use of any fishing vessel in a limited fishery. The groundfish fishery for any sized vessel in New Brunswick, Nova Scotia and Prince Edward Island was designated as a limited fishery.¹⁹ Today, licensing of the fishery is controlled by the *Atlantic Fishery Regulations*, 1985 (much amended), and the *Fishery (General) Regulations*.²⁰ Section 14(1) of the *Atlantic Fishery Regulations, 1985* prohibits fishermen from fishing for any fish unless they have a license for that fish. However, like the *Fisheries Act* itself, there is nothing in the regulations which explicitly displace the public right of fishing. While licenses are now required, there is nothing which says that not everyone is entitled to a license.

Instead, access to the “public” fishery is now determined by the Minister on the basis of the Commercial Fishing Licensing Policy for Eastern Canada (1996),²¹ which is not legally binding. Regarding access, the main point of the policy is new fishermen will only receive licenses if they replace an existing fishing enterprise.²² The issuing of this replacement license is subject to the Minister's discretion, but if issued, the replacement license goes to the person recommended by the original license holder.²³ As a result, existing license holders have a lot of power over who gets to access the fishery. The influence of economic efficiency can be seen in the Introduction to the Policy:

1. Introduction

The objectives of the Licensing Policy adopted December 20, 1995 are to reduce capacity, improve the economic viability of participants in commercial fishing operations and prevent future growth of capacity in the commercial fishery.²⁴

The Department of Fisheries and Oceans' approach to licensing favours limiting access to the fishery as much as is necessary to provide for an orderly harvesting of the fishery resource, to promote viable and profitable operations for the average participant ...²⁵

Finally, the system of individual quotas attached to fishing licenses is prescribed by section 22(1) of the *Fishery (General) Regulations*:

22. (1) For the proper management and control of fisheries and the conservation and protection of fish, the Minister may specify in a license any condition that is not inconsistent with these Regulations or any of the Regulations listed in subsection 3(4) and in particular, but not restricting the generality of the foregoing, may specify conditions respecting any of the following matters:

(a) the species of fish and quantities thereof that are permitted to be taken or transported; ...

The above review shows there have been changes in the way access to public fisheries is granted or licensed. However, to be considered an interference with the historical right of

¹⁸ SOR/76-211, as amended SOR/76-671. This regulation was later revoked by the *Atlantic Fishery Regulations, 1985*, SOR/86-21.

¹⁹ *Ibid.* at s.10.

²⁰ SOR/93-53.

²¹ Fisheries and Oceans Canada. Available at: <http://www.dfo-mpo.gc.ca/communic/lic_pol/index_e.htm>. (accessed May 18, 2005).

²² *Ibid.* at s.10.

²³ *Ibid.* at s. 16(1) and (2).

²⁴ *Ibid.* at s. 1.

²⁵ *Ibid.* at s. 1.



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fishing requires the granting of exclusive fisheries which the above changes do not appear to do. Also, changes in how governments allocate trust resources are in of themselves not a breach of the public trust. Invocation of the test set out in *Illinois Central* requires that there be a **disposition** or granting of the trust resource to private parties that in turn results in a substantial impairment of the public's interest or rights in the resource. Therefore, have the changes in the way the public can access and use Canada's fisheries created exclusive fisheries, ie. have they become private property?

As will be discussed below, there is a strong argument that legally licenses are not private property, and as such, individual transferable quota (ITQ) fishing licenses do not create private property rights in public fisheries. The reality though is much different. The way Fisheries and Oceans Canada administers its licensing system has turned the licenses and the right to catch fish conferred by licenses, practically speaking, into private property.²⁶ Support for this position comes first from the proponents of ITQ systems themselves.²⁷ As one author states, “[Q]uota licenses provide fishermen or enterprises with a “quasi-property right” to a certain amount of the common property resource – a sort of “swimming inventory”.²⁸ Further support for the idea that ITQs amount to a privatization of a public resource comes from an investigation of legal theory surrounding property itself.

Bruce Ziff notes that private property is sometimes referred to as a bundle of rights.²⁹ In his text, Ziff quotes Professor A.M. Honeré, who wrote:

Ownership comprises the right to possess, the right to use,

the right to manage, the right to income from the thing, the right to the capital, the right to security, the rights and incidents of transmissibility and absence of term, the duty to prevent harm, liability to execution, and the incident of residuary.

Reviewing Honoré's list and Ziff's treatment of it, three basic rights or bundles can be discerned, being the right of exclusivity (which includes the ability to manage the property), the right of transferability, and the right to the income from the property. Another important issue is the durability of one's title to the property. How long can I own the property? Comparing ITQ licenses to this list shows why they are commonly viewed as creating private property rights.

- **Exclusivity:** This is probably the weakest bundle of property rights ITQ holders have. While they can manage how they use their ITQ, they have little control over the management of the fishery itself. As well, given the political lobbying surrounding the management of Canada's fisheries and the necessary fluctuations in Total Allowable Catches, the quota percentage and the amount of fish a quota holder may be entitled to in a certain year is not set in stone.³⁰ However, ITQs are designed to be exclusive. Only those with ITQ licenses can fish, so the resource is theirs alone.
- **Transferability:** As discussed earlier, ITQs are transferable. It does require the approval of the Minister and there are some restrictions on whom ITQs can be transferred to, so the right is not absolute.³¹

²⁶ For a general review of ITQs and increasing private property rights in Canada's fisheries, see: Report of the Standing Senate Committee on Fisheries, *Privatization and Quota Licensing in Canada's Fisheries* (Ottawa, 1998). Available at: <<http://www.parl.gc.ca/36/1/parlbus/commbus/senate/com-e/fish-e/rep-e/rep03dec98-e.htm#TABLE%20F%20CONTENTS>>.

²⁷ See for example books such as: Brian L. Crowley, *Taking Ownership: Property Rights and Fishery Management on the Atlantic Coast* (Halifax: Atlantic Institute for Market Studies, 1996); and Phillip A. Neher, Ragnar Arnason, and Nina Mollet, *Rights Based Fishing* (London: Kluwer Academic Publishers, 1988).

²⁸ Claude Emery, *Quota Licensing in Canada's Fishing Industry* (Ottawa: Library of Parliament – Research Branch, 1993) at 9.

²⁹ Bruce Ziff, *Principles of Property Law* (2nd ed.) (Toronto: Carswell, 1996) at 2.

³⁰ For examples see: *Conseil de Crabe des Neiges Inc. et al. v. Canada (Minister of Fisheries and Oceans)* (1996), 116 F.T.R. 8 (F.C.T.D.) (Applicants challenged Minister's decision to reallocate a share of the snow crab TAC to non-crab fisherman. The Minister's decision was upheld.); and *Gulf Trollers Assn. v. Canada*, [1987] 2 F.C. 93 (F.C.A.).

³¹ See Commercial Fisheries Licensing Policy, *supra* note 21 at s. 16(1).



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- **Income:** While it is never guaranteed a fisherman will catch his or her quota, the only people who receive income from the catching of fish itself are ITQ holders. As well, one of the main purposes of ITQs is to make fisherman more economically efficient, i.e. produce the maximum return for effort expended. As a result, income that was available to all is now concentrated in the hands of the fortunate few who have an ITQ in a system that is meant to produce more wealth.³²
- **Duration of ITQ license:** As the Supreme Court confirmed, a fisherman is not entitled to a yearly license, which would suggest ITQs have low durability. However, as one Federal Task Force noted, **“When a license is issued, it confers, in effect, a perpetual benefit, because annual renewal of the license is usually automatic.** In theory, the license reverts to the Crown when a fisherman leaves the industry, but in practice the government agrees, in fisheries where license transfer is permitted, to issue the license to the fisherman who is buying the assets of another fisherman. This usually means that the fisher is buying the license as well.” [Emphasis added]³³

In the end, the implementation of a system of individual transferable quotas and enterprise allocations has had the practical effect of privatizing many of Canada’s ocean fisheries. However, as discussed earlier, there is no express language in the *Fisheries Act* permitting this privatization. As Lamer, C.J. stated in *R. v. Nikal*, after reviewing the provisions of the *Fisheries Act*, S.C. 1868, c. 60, “The Act gave the government the right to grant exclusive leases and licences to fishing grounds, but there was no provision in the Act for the

permanent alienation of fishing rights to private parties.”³⁴ [Emphasis added.] This continues to be the case. By fostering the creation of private property rights in public fisheries, the government is interfering with the historical public right of fishing, which precluded the granting of exclusive fisheries without express legislation otherwise. Also, because ITQs and enterprise allocations systems leave little to no fish available to support a public fishery (one outside the ITQ system), it can be said there has been a substantial impairment of the public interest in the remaining fishery.

4.2.2 Impairment of the public interest in the forests of New Brunswick

Turning to forestry in New Brunswick the situation regarding the public trust is not as straight-forward, mostly because there is no apparent public right of logging. At the same time, it is important to note that New Brunswick’s forestry legislation does show evidence of public use of the forest, and perhaps therefore a public right of subsistence forestry does exist. The unlicensed cutting of timber on Crown Lands has long been considered a trespass.³⁵ However, it is not until 1952 that the requirement of a permit to cut firewood is first mentioned.³⁶ Rural New Brunswick homes have traditionally been heated by wood. It is hard to imagine that every rural homeowner prior to 1952 who cut firewood would have been guilty of a trespass. As well, nothing in the legislation suggests that the number of available fuelwood permits is limited. Why permits are now required for the cutting of fuelwood is uncertain, although it is likely the change centres on the fact that the cutting of firewood has become much more of a commercial enterprise versus a household activity.

³² Anthony Davis and Victor Thiessen, “Public Policy and Social Control in the Atlantic Fisheries,” (1988) 14(1) *Canadian Public Policy* (1998) 66.

³³ Task Force on Atlantic Fisheries, *Navigating Troubled Waters: A New Policy for the Atlantic Fisheries* (Ottawa, 1982) at 214.

³⁴ *Nikal*, *supra* note 4 at para. 33.

³⁵ *An Act to provide for the more effectual prevention of Trespasses and protection of Timber growing on Crown lands with this Province*, 3 Victoria, Cap. LXXVII.

³⁶ *Crown Lands Act*, R.S.N.B. 1952, c. 53, s.11(13), today s. 56(1)(c).

³⁷ Angela Sydenham-Conners, “Volume 6: Commons,” in Lord Mackay of Chashfern (ed. in chief) *Halsbury’s Laws of England* (4th ed.) 2003 Reissue (London: LexisNexis UK, 2003). “A right of common has been defined as a right, which one or more persons may have, to take or use some portion of that which another man’s soil naturally produces.” (at para. 404) A discussion of rights in common is well beyond the scope of this report.



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In addition to the above, the use of forests by rural people who did not have a freehold interest in a forest also has a long tradition in England. *Halsbury's Laws of England* describes several rights of common³⁷ in woodlands, including:

1. common of pasture, or the right of feeding cattle, horses, sheep, or other animals on the land of another;³⁸
2. common of turbary, or the right of digging turves or peat out of another's soil;³⁹
3. pannage, or the right to turn out swine during a limited period to feed on beech mast and acorns;⁴⁰ and
4. common of estover, or the right of taking from another's land the wood necessary for the sustenance of the commoner's house or agriculture.⁴¹

That a public right of subsistence forestry does exist, based on the two possible sources discussed above, is very far from certain. Both arguments are subject to their own difficulties that are beyond the scope of this report. For example, turning the lack of a trespass into a public right may require some form of dedication and acceptance. Also, rights of common grew out of a system of land ownership different than that of New Brunswick and belong to a community, not the public at large.⁴²

For the purposes of this report, the following discussion will proceed as though the public does have a long-standing right to support themselves from the products of the forest. As will be discussed, government policy and actions that have led to

the increase in private property rights in New Brunswick's public forests has made the continuation of this right difficult. This interference may be a breach of the government's public trust duties, although the argument is less strong than in the fisheries example above.

Unlike Canada's fisheries, it is difficult to find reference to a central guiding philosophy behind the New Brunswick Government's management of Crown lands and forests. Historically, it is unclear why 48% of New Brunswick forests remained public lands and who was to benefit from their ownership and management by the provincial government.

To begin, "It is not altogether clear why Canadian governments turned away from the English tradition of private ownership and chose instead to maintain public ownership of land and resources."⁴³ In answer to this, Peter Pearse offers two possible reasons. One, governments thought they would generate more revenue by acting as a landlord and leasing land rather than selling it outright. The other reason is that a populist conservation movement arose in the late 1800's and early 1900's that called on governments to not let certain resources fall into private hands.⁴⁴ Bittermann and McCallum offer another possible reason.⁴⁵ In the late 1700's, large portions of present day New Brunswick were granted to politically connected people who in turn were to promote the settling of their lands. However, because much of these lands were not well-suited to agriculture, settlement was difficult. These "extensive tracts of unsettled land – "waste" land –

³⁸ Ibid. at para's. 442-464.

³⁹ Ibid. at para's. 471-473.

⁴⁰ Ibid. at para. 415.

⁴¹ Ibid. at para's. 474-475.

⁴² Andrew Gage, personal communication.

⁴³ Peter H. Pearse, "Property Rights and the Development of Natural Resource Policies in Canada," (1988) 14(3) Canadian Public Policy 307 at 310.

⁴⁴ Ibid. at 310.

⁴⁵ R. Bittermann and M. McCallum, "When Private Rights Become Public Wrongs: Property and the State in Prince Edward Island in the 1830s," at 144-168, in J. McLaren, A.R. Buck, and N.E. Wright, eds., *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005). See also: Graeme Wynn, *Timber Colony: An Historical Geography of Early Nineteenth Century New Brunswick* (Toronto: University of Toronto Press, 1981).

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suggested problems [to Lord Durham in the late 1830's] and perhaps the need for state intervention to redress this squandering of economic resources."⁴⁶ These "waste" lands were a problem throughout British North America at that time. To prevent this, Lord Durham put a moratorium on further Crown grants of land and efforts were made to escheat (return) unsettled lands to the Crown, after which they would be used by the Crown to generate revenue and promote development of the colony.⁴⁷ Whatever the reason, a significant portion of New Brunswick forests remain public lands.

Despite belonging to the public, it appears that decisions regarding access to New Brunswick's Crown forests have always been focused on promoting the growth of the forest industry. Since the early 1800's, New Brunswick governments have sought large capital investments by logging companies in exchange for guaranteed access to New Brunswick forests. As L. Anders Sandberg writes, "During the colonial period, both New Brunswick and Nova Scotia were dependent upon merchant capital in the development of various resource sectors."⁴⁸ This dependence turned the colonial state into a "client state", which Sandberg defines as a state whose revenues are over-dependent on a few key, often externally based companies.⁴⁹ New Brunswick has remained a client state ever since, pursuing large, often foreign, capital "for resource extraction and export in return for rent, jobs and electoral support."⁵⁰

⁴⁶ *Ibid.* at 145.

⁴⁷ *Ibid.* at 145.

⁴⁸ L. Anders Sandberg, "Dependent Development and Client States: Forest Policy and Social Conflict in Nova Scotia and New Brunswick" (at 1-22), in L. Anders Sandberg, ed., *Trouble in the Woods: Forest Policy and Social Conflict in Nova Scotia and New Brunswick* (Fredericton: Acadiensis Press, 1992) at 2.

⁴⁹ *Ibid.* at 3.

⁵¹ Graeme Wynn, *Timber Colony: An Historical Geography of Early Nineteenth Century New Brunswick* (Toronto: University of Toronto Press, 1981) at 145.

⁵² For a detailed history of the rise of the pulp and paper industry in New Brunswick, see: William M. Parenteau, *Forest Society in New Brunswick: The Political Economy of the Forest Industries, 1918-1939* (Thesis (Phd.), University of New Brunswick, 1994).

⁵³ *An Act relating to the Crown Timber Lands of the Province*, S.N.B 2 Edward VII, 1902, c. 7.

⁵⁴ Province of New Brunswick, *Report of the Forest Resources Study* (Fredericton: Govt. of New Brunswick, 1974).

Graeme Wynn in his book "Timber Colony" traces the history of early New Brunswick which provides evidence for the continued development of the client state. He notes that in the 1830's, the Commissioner of Crown Lands and Forests in New Brunswick was convinced that "large-scale investment in the timber trade would benefit the province."⁵¹ At the beginning of the 20th Century, large investments by the pulp and paper industry, at the expense of the milled lumber industry, were promoted.⁵² One of the province's early pieces of legislation dealing with forestry leases provides evidence of the continuance of New Brunswick as a client state.

Whereas proposals have been made to the Government by foreign capitalists for the establishment of pulp and paper mills within the Province;

And whereas it has been made a condition of the establishment of such industries upon a large scale, that the applicants shall be able to obtain timber lands of the Crown under more permanent holding that as at present allowable...⁵³

The possible discontinuance of New Brunswick as a client state seemed to be on the horizon in 1974 with the release of the Report of the Forest Resources Study (the Tweeddale Report),⁵⁴ which had been commissioned by the Richard Hatfield government. The objective of the study was to find "improved methods of resource allocation which would allow



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the economic potential of the New Brunswick forest to be more fully realized.”⁵⁵ This objective was subject to several recognized and enunciated constraints, one of which was that the ecological health of the forest be maintained.⁵⁶ The impetus for the study was that New Brunswick’s forests were increasingly being utilized for pulp, resulting in the closure of sawmills and loss of opportunities for the growth of value-added manufacturing.⁵⁷ In order for the study’s objectives to be fulfilled, the Tweeddale Report emphasized:

... the need to remove Crown lands from the *de facto* control of individuals and firms. We are convinced that only thus can the forests of New Brunswick make their maximum contribution to the welfare of the Province.⁵⁸

This did not occur, and instead, after “close consultation with the [forest] industry” a new forest policy was put in place in 1980,⁵⁹ all while Richard Hatfield was still Premier. As will be discussed further below, this policy and resulting legislation, the *Crown Lands and Forests Act*,⁶⁰ actually gave the handful of largest forestry companies operating in New Brunswick more rather than less control over the management of Crown forests. One of the main underlying philosophies of the new policy was “the need to consider security of supply to industry so that investment by industry was not discouraged.”⁶¹ The client state continues.

This continuing evolution in the private control over public forests has resulted in many small license holders being forced out and forest workers becoming continually more reliant upon large forest companies for their employment. Historically, corporate control did permit New Brunswickers to participate in the forest economy.⁶² As Wynn noted, during the 1800’s a large part of the New Brunswick community was dependent upon employment in the lumber industry.⁶³ Despite increasing control of New Brunswick’s forests by the pulp and paper industry, Bill Parenteau noted that tens of thousands of people in New Brunswick’s communities were still dependent upon the industry in the 1970’s.⁶⁴ Today, only about 4,800 people work directly in forestry and logging;⁶⁵ 13,000 more people have jobs with industrial support services such as trucking.⁶⁶ As can be seen, New Brunswickers have long participated in the forest economy and become dependent upon access to New Brunswick’s public forests.⁶⁷ There is an expectation in forest communities that local people should benefit from the exploitation of public forests near the community. However, as time passes, the corporate dominance over New Brunswick’s forests and accompanying mechanization is resulting in fewer and fewer people earning a livelihood from this trust resource.

Changes to New Brunswick’s forestry legislation have accompanied its continued progression as a forest client state. To begin, although New Brunswick’s forests had been

⁵⁵ *Ibid.* at 1.

⁵⁶ *Ibid.* at 2.

⁵⁷ *Ibid.* at 1.

⁵⁸ *Ibid.* at 154.

⁵⁹ New Brunswick Department of Natural Resources and Energy, *New Brunswick Crown Lands and Forests Act: The First Five Years* (Fredericton: NB Natural Resources, Undated) at 5.

⁶⁰ S.N.B. 1980, c. C-38.1. The Act did not come into affect until 1982.

⁶¹ *Supra* note 59 at 4.

⁶² This is not to suggest that the benefits of this participation were shared equitably between owners and workers.

⁶³ Wynn, *supra* note 51 at 150-167.

⁶⁴ Bill Parenteau, in L. Anders Sandberg, ed., *Trouble in the Woods: Forest Policy and Social Conflict in Nova Scotia and New Brunswick* (Fredericton: Acadiensis Press, 1992) at 127.

⁶⁵ Atlantic Provinces Economic Council, *The New Brunswick Forest Industry: The Potential Economic Impact of Proposals to Increase the Wood Supply* (2003) at 15.

⁶⁶ G. Martin (New Brunswick Department of Natural Resources), *Management of New Brunswick’s Crown Forest* (Fredericton: Department of Natural Resources, 2003) at 3.

⁶⁷ *Ibid.* at 3: “Forestry is a traditional part of New Brunswick’s social fabric.”

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commercially logged since the early 1800's, it was not until 1883 that cutting methods began to be regulated.⁶⁸ Since the turn of the century, much of New Brunswick's Crown lands legislation has revolved around different systems of regulating access to public forests. What follows is a brief synopsis of forest leasing and licensing in New Brunswick since 1897.

1902 *An Act relating to the Crown Timber Lands of the Province*⁶⁹ – s. 1 provided that with an investment of two million dollars, a forestry company could receive a 999 year lease of Crown Lands.

1913 *Act re Timber Lands of the Province*⁷⁰ – The Preamble to the Act outlined the desire of the province to establish pulp and paper mills in New Brunswick in exchange for tenure to Crown lands.

Section 1 of the Act provided that existing licenses could be renewed as either a “Pulp and Paper License” with a 30 year term and renewable for an additional 20 years, or a “Saw Mill License” with a 20 year term and renewable for an additional 10 years.

1927 *An Act Relating to Timber Licenses*⁷¹ - s. 5 of the Act provided that those companies holding leases issued pursuant to the 1913 Act could surrender those licenses and receive a new Pulp and Paper Mill License renewable yearly for up to 50 years (s.2) or a new Saw Mill License renewable yearly for up to 30 years (s.3). Section 7 provided for the conversion of Saw Mill Licenses to Pulp and Paper Mill Licenses. There was no reciprocal section for Pulp and Paper Mill Licenses.

Although changes were made in the intervening years to

New Brunswick's forestry licensing legislation, the most significant transformation regarding access and control over management of Crown forests occurred in 1980.

1980 *Crown Lands and Forests Act*⁷² - s. 27 cancelled all existing licenses on March 31, 1982 and replaced them with just ten new Crown Timber Licenses, plus Crown Timber Sub-Licenses, or Crown Timber Permits. Only persons who owned or operated a wood processing facility were entitled to receive one of these approvals. Crown Timber Licenses have a 25 year term with the licensee's activities being subject to review every five years. If the Minister is satisfied with the licensee's performance, he may extend the term of the license for another five years beyond the existing term of the license, in effect making the leases “ever-green” or perpetual.

As a result of the *Act*, ten large industrial wood processing facilities each received a Crown Timber License. Some of the facilities are owned by the same company, so today six companies control all ten licenses. These licenses are area-based and in total cover the entire province. Licensee and sub-licensees receive wood allocations from one of the ten license areas.

Section 29(4) requires licensees to submit a 25-year management plan describing **how the licensee will manage the Crown Lands** under his license. These plans are to be reviewed every 5 years.

From this examination of New Brunswick forestry legislation it can be seen that licensing has long been a means of controlling access to the forest, but that control over this access has now been consolidated in the hands of large

⁶⁸ H.H. Hoyt, *Forests and Forestry in New Brunswick: Special Report to the British Empire Forestry Conference London, England 1947* (Fredericton: Department of Lands and Mines, 1947) at 11.

⁶⁹ S.N.B. 1902, 2 Edward VII., c. 7.

⁷⁰ S.N.B. 1913, 3 George V., c. 11.

⁷¹ S.N.B. 1927, 17 George V., c. 27.

⁷² S.N.B. 1980, c. C-38.1. The Act did not come into affect until 1982.



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corporations. As a result, the main outcomes of the present *Crown Lands and Forests Act* have been perpetual access to wood for large, industrial forest companies and the off-loading of government forest management responsibilities to these same companies.

As is the case with fishing licences, it can be argued that legally forestry licenses are not private property. But if one leaves behind what the legislation might say and instead turns to the policy of forest licensing in New Brunswick and compares Crown Timber Licenses to the bundle of property rights outlined earlier, it is easy to understand how some argue our forests are being privatized.⁷³

- **Exclusivity:** Various parties may have the authority to harvest wood from the license area of a Crown Timber Licensee, such as sub-licensees, Crown Timber Permit holders, and aboriginal communities. In this sense, the trees in a license area do not belong exclusively to the licensee. However, given the fact that 87% of the total softwood cut in New Brunswick is used by large forestry companies,⁷⁴ it is fair to say that most harvesting done is for the exclusive use of the forest industry as a whole. They are the tail that wags the dog of forestry in New Brunswick. Further evidence of this is that although management objectives are set by the government, Crown Timber Licensees have been given extensive control over the management of Crown lands under their licenses.⁷⁵
- **Transferability:** Like ITQs, Crown Timber Licenses are transferable with the consent of the Minister.⁷⁶ The practice has been that if the owner of a wood processing facility sells that facility, the Minister consents to the transfer of the existing license to the new owner. Armed

with this knowledge, the seller has an “asset” it can include in the sale.⁷⁷

- **Income:** Other than the royalties paid for timber cut by the licensee, the potential income for New Brunswick’s trees lies in the hands of the license holders. How they use or manage this income is their choice. For example, the St. Anne Nackiwac Pulp Company Ltd. had a Crown Timber License since 1982. For over twenty years it used public forests to run its mill until in 2004 it shutdown the mill. Clearly the income was not managed for the long-term benefit of the community.
- **Duration of Crown Timber License:** Although set for a 25-year term, the Act presently provides for perpetual five year extensions. It is important to note that the terms of the extended license may not be the same as the original. Section 31 of the current Act permits changes to the area and boundaries of license areas. It has been the experience of the Conservation Council of New Brunswick that the licenses are perpetual.

Adding to the argument that Crown Timber Licences confer private property rights upon the licensee is the Supreme Court of Canada’s decision in *The Queen v. Tener*.⁷⁸ Briefly, *Tener* and several subsequent cases have dealt with the issue of whether changes in legislation that prevent a holder of mineral rights from developing a mineral claim amounts to an expropriation. An example of this change in legislation would be establishing a park where the mineral claim is and the park legislation also prohibiting mining within the park. In *Tener*, the Supreme Court held under the facts of that case the owners of the mineral claims were entitled to compensation because a property right had been expropriated. Although the

⁷³ Elizabeth May, *At the Cutting Edge: The Crisis in Canada’s Forests* (Toronto: Key Porter Books Ltd., 1998) at 3.

⁷⁴ New Brunswick Department of Natural Resources and Energy, *supra* note 59 at 3.

⁷⁵ *Crown Lands and Forests Act* (1982), *supra* note 72 at s. 29(4). Also, being a client state provides the forest industry access to the decision-making processes that set these objectives.

⁷⁶ *Ibid.* at s. 34(1).

⁷⁷ If a wood processing facility ceases operation without being sold (simply shuts down) the Crown Timber License reverts to the government.

⁷⁸ (1985), 17 D.L.R. (4th) 1.



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outcome in *Tener* has been criticized,⁷⁹ it can be seen how granting compensation in that case would support the argument that in similar circumstances a forestry company should also receive compensation for the expropriation of a supposed property right.

As is the case with the public right of fishing, the creation of private property rights in public forests that excludes other uses would result in the interference with a public right of forestry if such a right existed. As well, the current Crown timber licensing system in New Brunswick is a disposition of public lands that has substantially impacted the ability of the average New Brunswicker to participate in the new forest economy.

4.3 Are Licences Private Property?

As noted above, fishing licenses and the ITQs attached to them are granted on an annual basis while Crown timber licenses are granted for 25 year terms. As a result, in a strict legal sense these resources have not been privatized. Fishermen do not have a permanent right to the amount of fish they are allowed to catch as per the ITQs attached to their yearly licenses. Section 33 of the current New Brunswick *Crown Lands and Forests Act* states the Crown Timber License does not confer any right of possession of Crown lands and that timber does not become the property of the licensee until it is cut.⁸⁰ What follows below is a brief discussion of the law regarding the issue of licences as property with a particular focus is on fishing licences.

The Commercial Fisheries Licensing Policy for Eastern Canada, 1996, provides Fisheries and Oceans Canada's *stated* position on licensing:

⁷⁹ See: Gregory J. McDade, *Report on Compensation Issues Concerning Protected Areas: A draft discussion paper* (Vancouver: Sierra Legal Defence Fund, 1993). Mr. McDade forcefully argues that forest and mining tenures are contractual in nature and therefore do not create a right of property available for expropriation. As a result, he argues that providing compensation for changes to these tenures is a political decision, not a question of expropriation.

⁸⁰ This is often described as a *profit à prendre*: "... a right to enter on the land of another person and take some profit from the soil such as minerals, oil, stone, trees, turf, fish, or game, for the use of the owner of the right." (Daphne A. Dukelow and Betsy Nuse, *The Dictionary of Canadian Law* (2nd ed.) (Scarborough, Ont.: Carswell-Thomson Professional Publishing, 1995)).

⁸¹ *Supra* note 21.

⁸² [1986] 1 F.C.511 (T.D.).

5. What is a License?

(a) General

A "license" grants permission to do something which, without such permission, would be prohibited. As such, a license confers no property or other rights which can be legally sold, bartered or bequeathed. Essentially, it is a privilege to do something, subject to the terms and conditions of the license.

(b) Fishing License

A "fishing license" is an instrument by which the Minister of Fisheries and Oceans, pursuant to his discretionary authority under the *Fisheries Act*, grants permission to a person including an Aboriginal organization to harvest certain species of fish or marine plants subject to the conditions attached to the license. This is in no sense a permanent permission; it terminates upon expiry of the license. **The licensee is essentially given a limited fishing privilege rather than any kind of absolute or permanent "right or property"**. [Emphasis added]

(c) Future Commitment

As provided under the *Fishery (General) Regulations*, the issuance of a document of any type to any person does not imply or confer any future right or privilege for that person to be issued a document of the same type or any other type upon expiry of the document.⁸¹

This position is in agreement with decisions of various Canadian courts regarding the legal nature of fishing licenses. In the oft-cited case of *Joliffe v. The Queen*,⁸² the court held



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that because of the Minister's "absolute discretion" in s. 7 of the *Fisheries Act*, fishermen have no vested rights in a fishing license after its annual expiration. As per Strayer J. (later J.A.):

While there is a good deal of force in the contention of the plaintiffs that licenses, because they have a recognized commercial value and are frequently bought and sold, should be regarded as vesting in their holders a right which is indefeasible except (as contemplated by section 9 of the Act) where there has been a breach of the conditions of the license, I am unable to find support for that conception of licenses in the Act or Regulations. First, it must be underlined that no matter what the popular belief on the subject, by sections 34 and 37 of the Regulations no license is valid for more than one year and expires as of March 31 in any given year. It is true that by section 9 of the Act the Minister's power to cancel licenses is restricted to situations where there has been a breach of a condition of the license, and no doubt in exercising that power of cancellation the Minister or his representatives would have to act fairly: see *Lapointe v. Min. of Fisheries & Oceans* (1984), 9 Admin. L.R. 1 (F.C.T.D.). But licenses terminate each year and by section 7 the Minister has an "absolute discretion" in the issuance of new licenses. **I am therefore unable to find a legal underpinning for the "vesting" of a license beyond the rights which it gives for the year in which it was issued.** [Emphasis added]⁸³

Therefore, in the parlance of property law, licences lack durability of title.

Justice Strayer's decision was confirmed in *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*.⁸⁴ In *Comeau*, the Minister wrote the plaintiff in 1987 and told them he had authorized the issuing of four off-shore lobster

licenses to the company. Based on this authorization, the plaintiff, at considerable expense, converted a scallop dragger to a lobster fishing vessel. Later, because of political controversy surrounding the off-shore lobster fishery, the Minister decided no licenses would be issued for off-shore lobster fishing. This decision was confirmed to Comeau in a letter dated May 31, 1988. The previously authorized licenses to the appellant were never issued.

In upholding the Minister's decision, the Supreme Court stated:

[T]he Minister's discretion under s. 7 to authorize the issuance of licenses, like the Minister's discretion to issue licenses, is restricted only by the requirement of natural justice, no regulations currently being applicable. The Minister is bound to base his or her decision on relevant considerations, avoid arbitrariness and act in good faith. The result is an administrative scheme based primarily on the discretion of the Minister. [Citation omitted]⁸⁵

In light of the above, the difficulty facing those who want to use the public trust doctrine to address the inequities associated with the increase in private property rights in public fisheries (and public resources in general) is the discrepancies between the "law" and political reality. As exemplified by the decision in *Joliffe*, in dealing with issues regarding the rights attached to fisheries licenses, Canadian courts have used statute law as their guide, effectively allowing governments to talk about protecting the public interest while doing something else. However, the recent Supreme Court decision regarding the provision of health care services in *Chaoulli v. Quebec (Attorney General)* (2005),⁸⁶ may signal a willingness of Canadian courts to look behind the mask of legislation and into the heart of government action. In *Chaoulli*, the majority of the Supreme Court used the actions of

⁸³ Ibid. at 520.

⁸⁴ [1997] 1 S.C.R. 12.

⁸⁵ Ibid. at 25-26.

⁸⁶ 2005 SCC 35 (CanLII) [*Chaoulli*].



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the executive branch, along with the provisions of the pertinent legislation, **as evidence** that private medical coverage was prohibited in Quebec. The majority concluded that this prohibition combined with the failure of the Quebec Government to deliver health care in a reasonable manner, i.e. waiting lists for public health care being too long, interfered with the public's rights to life, liberty and security of the person as protected by s. 7 of the *Canadian Charter of Rights and Freedoms*.

Although there are, at first glance, **no provisions that prohibit the provision of services by an individual or a legal person established for a private interest, a number of constraints are readily apparent**. In addition to the restrictions relating to the remuneration of professionals, the requirement that a permit be obtained to provide hospital services creates a serious obstacle in practice. **This constraint would not be problematic if the prevailing approach favoured the provision of private services**. However, that is not the case. Not only are the restrictions real (Laverdière, at p. 170), but Mr. Chaoulli's situation shows clearly that they are. **Here again, the executive branch is implementing the intention of the Quebec legislature to limit the provision of private services outside the public plan**. That intention is evident in the preliminary texts tabled in the National Assembly, in the debate concerning those texts and, finally, in the written submissions filed by the Attorney General of Quebec in the instant case. [Emphasis added.]⁸⁷

Section 11 *HOIA* and s. 15 *HEIA* convey this intention clearly. They render any proposal to develop private professional services almost illusory. The prohibition on private insurance creates an obstacle that is practically insurmountable for people with average incomes. Only the very wealthy can reasonably afford to pay for entirely pri-

ivate services. Assuming that a permit were issued, the operation of an institution that is not under agreement is the exception in Quebec. In fact, the trial judge found that the effect of the prohibition was to "significantly" limit the private provision of services that are already available under the public plan ...⁸⁸

The *Canada Health Act*, the *Health Insurance Act*, and the *Hospital Insurance Act* **do not expressly prohibit private health services**. However, they limit access to private health services by removing the ability to contract for private health care insurance to cover the same services covered by public insurance. The result is a virtual monopoly for the public health scheme. The state has effectively limited access to private health care except for the very rich, who can afford private care without need of insurance. This virtual monopoly, on the evidence, results in delays in treatment that adversely affect the citizen's security of the person. Where a law adversely affects life, liberty or security of the person, it must conform to the principles of fundamental justice. This law, in our view, fails to do so. [Emphasis added].⁸⁹

The situation in *Chaoulli* mirrors the present state of affairs regarding the *Fisheries Act* and the privatization of public fisheries. The *Fisheries Act* does not expressly bring to an end the public right of fishing, but it prohibits commercial fishing without a licence. This would not be an issue if government policy favoured the issuing of licences to all who want to fish commercially. Instead, the will of the government, as expressed through the actions of the executive branch, is to place restrictions on the number of licences available and who may receive a licence,⁹⁰ and grant private property rights to license holders through a system of ITQs. In the case of public fisheries, the actions of the executive branch in its

⁸⁷ Ibid. at para. 54. (per Deschamps J.)

⁸⁸ Ibid. at para. 55.

⁸⁹ Ibid. at para. 106 (per McLachlin C.J. and Major J.)

⁹⁰ See again the Commercial Fishing Licensing Policy for Eastern Canada, *supra* note 21.



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implementation of the *Fisheries Act* are resulting in the privatization of the fishery. In the *Chaoulli* case, the actions of the executive branch in its implementation of the pertinent health care acts effectively prevented private health care. In *Chaoulli*, this executive action contributed to the breaching of the public's s. 7 *Charter* rights. With regard to public fisheries, executive actions are resulting in the infringement of the public's right to fish.

Canadian fisheries managers (and their counterparts abroad, notably in New Zealand and Iceland) began to implement "property rights-based management" in the form of "individual quota" fisheries. **Very much a bureaucratic initiative within the Department ...** [emphasis added]⁹¹

Applying *Chaoulli* to the issue of *Fisheries Act* licenses provides a means of dealing with the decision in *Joliffe* and other like cases. It should no longer simply be about what the Act says – no permanent fisheries – but what in reality the government, as carried out by the executive branch, being the Department of Fisheries and Oceans, is doing – creating permanent exclusive fisheries. This is a breach of a long-standing government public trust duty.

Certainly the differences between *Chaoulli* and the interference with public rights need to be underscored. *Chaoulli* dealt with a right protected by the Charter of Rights and Freedoms, which affords the courts with a greater opportunity to scrutinize government actions than is normally available. Regarding the issue of licensing access to natural resources, governments may argue that such questions are matters of public policy which in the past have usually been held to be outside the purview of Canadian courts.⁹² However, as Campbell J. in *PEI et al* stated when discussing whether the federal government fisheries management decisions could be challenged as a breach of the public trust, "It appears to me that the *Chaoulli* decision signals

a fundamental shift in the balance between the legislative or executive branch of government and the judicial branch."⁹³ As such, it may be that such government policy is now open to expanded judicial scrutiny.

4.4 Accessing Public Resources through the Public Trust Doctrine and Environmental Rights

There is uncertainty about whether in fact present systems of licensing access to public resources create private property rights. This in turn raises questions about the suitability of traditionally recognized public rights or a public trust that only protects these rights as tools for the community-based management movement to gain renewed access to fisheries and forests. In addition to the licensing issue, the community-based management movement may face another difficulty in trying to use the public trust to remedy interference with traditional public rights. These rights provided the public with access to a resource, such as the fishery, so that it could *use* the resource, often as a means of securing sustenance. Today, sustenance is usually derived through the purchase of goods and services. As such, the need for public rights to access resources may not resonate with today's judiciary, particularly if it is viewed as simply pitting competing enterprises, community-based management and private business, against one another to determine use. It should also be recognized that there is not even a *Charter* right to employment in one's chosen profession or to earn a particular livelihood.⁹⁴ Accordingly, Canadian courts may not be receptive to modern use of the public trust doctrine as a means of ensuring **direct** access to a particular resource.

Much of these problems are overcome by the recognition that governments have fiduciary duties in trust resources that go beyond simply not granting the resource to private parties. For

⁹¹ *Interim Report on Canada's New and Evolving Policy Framework for Managing Fisheries and Oceans*, *supra* note 5.

⁹² See for example: *Gulf Trollers Assn.*, *supra* note 30; and *Carpenter Fishing Corp. v. Canada* (C.A.), [1998] 2 F.C. 548 (F.C.A.).

⁹³ *PEI et al. v. Canada (Fisheries & Oceans)*, *supra* note 8 at para. 41.

⁹⁴ *A and L Investments Ltd. v. Ontario* (1997), 152 D.L.R. (4th) 692 at para. 34; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1179 (as per Lamer, J).



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example, if it is determined that permanent exclusive fisheries have not been created, it still could be argued that the present decline in the Atlantic fishery is the result of mismanagement by the federal government; or more particularly, government policies, including the granting of ITQs and enterprise allocations in that they promote dumping and high-grading, have caused this decline. One of the federal government's fiduciary obligations with regard to the fishery is to manage it as a prudent person would, which includes preserving the capital. This has clearly not been done, thereby interfering with the public right of fishing by taking away the resource itself. As a result, the granting of ITQs and enterprise allocations is a breach of the public trust. As such, increased access for community-based management will more likely result from rulings that employ the public trust doctrine to limit ecologically destructive activities, such as the over-harvesting of fish stocks, rather than from attacking the problem as an issue of exclusive fisheries. Destructive harvesting practices seem to go hand-in-hand with the "profitability" of resource-dependent large-scale commercial enterprises. Limit these activities and the drive for the privatization of public fisheries should be lessened.

Adoption of the U.S. public trust doctrine into Canadian law may also open public forests to use by community-based management groups. At present, the apparent lack of a historic public right of forestry forecloses use by analogy of the law surrounding the public rights of fishing and navigation. However, as enunciated by Joseph Sax, the public trust doctrine protects those interests that are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace.⁹⁵ It certainly can be argued that public forests are one such gift of nature's bounty. That public forests should be seen in this new light is in keeping with the changing attitude about the purpose of governments'

⁹⁵ Sax, *supra* note 1 at 484-485.

⁹⁶ Charles F. Wilkinson, "The Public Trust Doctrine in Public Land Law," (1980) 14 U.C. Davis L. Rev. 269 at 296.

⁹⁷ *Ibid.* at 302-303.

⁹⁸ *Crown Lands and Forests Act*, *supra* note 72, s. 3(1)(c) habitat for the maintenance of fish and wildlife populations.

ownership of such forests. As Charles Wilkinson writes, in the past, the U.S. federal government was viewed simply as a proprietor of public lands and that "trust notions were antithetical" to such a view.⁹⁶ Now the federal role is governmental rather than proprietary, which in turn focuses the government's duties as being to the public.⁹⁷ In contrast to the U.S., in New Brunswick the government has long had a policy of not selling Crown forests and as such was not a "proprietor" of these lands. However, as a client state, its duties were certainly focussed on meeting the demands of the forest industry. And while the management of New Brunswick's forests is still primarily focussed on supplying timber to industrial forest companies, there is at some recognition that public forests have more value than simply being a source of trees.⁹⁸ Recognition of public forests as a trust resource could provide supporters of community-based management with an expanded number of reasons to argue the current licensing system results in breaches of the government's fiduciary duties.

Finally, recognition of public rights in the environment and the accompanying government public trust duties should not only help promote environmental protection but also provide opportunities for community-based management groups to gain renewed access to resources. As a case in point, forests are a storehouse of natural biodiversity. They are important for providing clean air and water. They are also part of nature's cycle or the interconnectedness of all living things. Forestry operations can affect salmon spawning, thereby impacting the public right of fishing. As was also discussed in Part I, large scale clear-cut logging leads to other negative environmental impacts such as habitat loss and fragmentation, and soil compaction. These impacts in turn interfere with many public rights in the environment. Permitting this interference is a breach of a provincial government's trust obligations to



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properly care for the environment. A finding that permitting large scale clear-cut logging is a breach of the public trust may result by necessity in other logging methods being used, such as selective logging. This could in turn result in more employment in logging activities. Also, as was the case with destructive fish harvesting practices, it could make the industrial forest model less attractive to both governments and the forest industry, creating an opportunity for the re-ordering of forest allocations and management.

At the end of the day, what it boils down to is whether Canadian courts are willing to use and adapt the law to protect the values that are inherent in the concept of community-based management, the development and protection of healthy communities and a healthy environment. If the Supreme Court is willing, as it did in *Chaoulli*, to wade into issues surrounding what is “reasonable” public health care, one of the most charged and value-laden public policy issues in Canada, why not also policy issues dealing with protection of the environment and community well-being.

4.5 Summary

Part IV looked at whether this report’s previous findings with regard to public rights, the Canadian public trust and the public trust doctrine could be used by supporters of community-based management to gain renewed access to public fisheries and forests. First, it addressed whether public fisheries and Crown forests have been “privatized”. This was done by comparing the present rights of fishing and forestry license holders that have been created not by legislation, but by government policy and executive action, to the hallmarks of private property. This comparison revealed that private interests have seemingly gained private property rights in these public resources. This privatization can be seen as a breach of the

traditional public rights and the public trust doctrine as set out in *Illinois Central*. However, a significant challenge faces those who wish to argue that public fisheries and forests have become private property. More particularly, there is a strong line of authority that holds that licences, because of their lack of durability of title, are not private property. For those seeking to challenge the granting of Crown timber licenses as a breach of the public trust, the difficulties are compounded by the fact that the existence of a public right of forestry is tenuous.

Given these difficulties, it was suggested that supporters of community-based management may have better success in securing renewed access to fisheries and forests by arguing that the harvesting methods of private rights holders, such as fish dumping by ITQ licensees, and large-scale clear-cutting by forest licensees, cause harm to the environment. This harm in turn results in interferences with public rights in the environment. Government actions or inactions that allow for this harm are a breach of government public trust duties. A finding, for example, that permitting large scale clear-cut logging is a breach of the public trust may result by necessity in other logging methods being used, such as selective logging. This could in turn result in more employment in logging activities. It could also make the industrial forest model less attractive to both governments and the forest industry, creating an opportunity for the re-ordering of forest allocations and management, and the development of community-based management. However, in keeping with the discussion in Part III, it is important to remember that public rights in the environment are not well defined. This lack of definition is another hurdle that proponents of community-based management will face in their use of the public trust doctrine.



PART V.

The Public Trust & Aboriginal Rights in New Brunswick



The Mi'kmaq occupied the eastern and northeastern shore of the province from Gaspé to Nova Scotia. The Maliseet occupied the valley of the St. John River and the Passamaquoddy region. The division of the Maliseet tribe, or a sub-group, that inhabited the Passamaquoddy region became known as the Passamaquoddy. By early accounts, each tribe was considered to possess the entire river system on which it lived, with the limits or boundaries coming onto the watersheds between the principal rivers.

Justice Daigle (N.B.), 2003

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PART V. The Public Trust and Aboriginal Rights in New Brunswick

5.1 Introduction

Whether changes to the rules for the allocation of natural resources in New Brunswick result from legislative amendment, judicial intervention, or other means, recent court decisions have made it clear any such allocations, both present and future, need to be reconciled with the constitutionally protected rights of the Mi'kmaq, Maliseet and Passamaquoddy peoples of New Brunswick.¹ In *R. v. Marshall*,² the Supreme Court of Canada held that the Mi'kmaq and all other beneficiaries of the treaty in question have a treaty right to catch and sell eels and other fish to obtain the necessaries for a moderate livelihood. In *R. v. Bernard*,³ the New Brunswick Court of Appeal ruled 2-1 that Mr. Bernard, a Mi'kmaq living on the Eel Ground reserve, had a treaty right to cut timber on Crown land in the Little Sevole River region of New Brunswick. One of the two majority judges also held that Mr. Bernard had an aboriginal right to cut timber on Crown lands in the same area of New Brunswick because of Mi'kmaq aboriginal title. The Supreme Court of Canada has overturned the Court of Appeal's decision in *Bernard*.⁴ However, its ruling does not foreclose the possibility that with the proper evidence aboriginal title, and the harvesting rights that accompany it, can be affirmed in New Brunswick. Given this possibility and the treaty rights affirmed in *Marshall No.1*, plus the fairness of simply respecting the pre-existence of aboriginal societies in New Brunswick, the Conservation Council of New Brunswick believes any re-ordering of access to trust resources via the

public trust doctrine must be done in a manner that respects and is in concert with aboriginal and treaty rights. As a result, it posed the following question:

3. How might common law public trust rights co-exist with native rights (*R. v. Marshall*, and *R. v. Bernard*), to allow for rural livelihoods to be sustained through access to public resources?⁵

The brief answer to this question is there should be little or no conflict between the use of the public trust doctrine by rural communities to re-establish access to common resources and the implementation of aboriginal and treaty rights in respect of these same resources. The exceptions to this are the exercise of aboriginal title rights, which will require a politically negotiated solution, and perhaps the exercise of aboriginal harvesting rights to resources such as fisheries that are created by statutes.

The remainder of this part of the report discusses:

- Aboriginal rights and important Maritime case law; and,
- The possible impact these rights may have on the allocation of trust resources in New Brunswick.

5.2 Aboriginal and Treaty Rights in New Brunswick

To ground this discussion of how public trust rights may co-exist with aboriginal and treaty rights, a description of the geographical area in New Brunswick occupied by the Mi'kmaq, Maliseet, and Passamaquoddy nations at the time of contact with Europeans is necessary. In *Bernard – CA*, Daigle, J.A. provides a succinct overview of this geography, stating:

¹ Section 35(1) of the *Constitution Act, 1982* states, "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

² [1999] 3 SCR 456 [*Marshall No.1*].

³ (2003), 262 N.B.R. (2d) 1 (NBCA) [*Bernard – CA*].

⁴ *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43 (CanLII) [*Bernard – SCC*]. The Supreme Court rendered a joint decision for the two appeals – *R. v. Bernard* and *R. v. Marshall* (2003), 218 N.S.R. (2d) 78. The facts in *R. v. Marshall*, a Nova Scotia case, were similar to ones that gave rise to the charges in *Bernard*.

⁵ The focus of this question and subsequent research was the decisions in *Marshall No.1* and *Bernard – CA*. Additions to the original report have been made to incorporate the Supreme Court's reasons in *Bernard – SCC*.

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The evidence reveals that it is generally recognized by historians that at contact the Mi'kmaq inhabited a broad geographical area that encompassed the present-day provinces of Nova Scotia and Prince Edward Island, the eastern coast of New Brunswick, Gaspé, Saint-Pierre and Miquelon, and the Magdelaine Islands. It is equally well recognized in historical writings that at contact the area now forming New Brunswick was occupied by two distinct Indian tribes distributed within its principal rivers and inlets. The Mi'kmaq occupied the eastern and northeastern shore of the province from Gaspé to Nova Scotia. The Maliseet occupied the valley of the St. John River and the Passamaquoddy region. The division of the Maliseet tribe, or a sub-group, that inhabited the Passamaquoddy region became known as the Passamaquoddy. By early accounts, each tribe was considered to possess the entire river system on which it lived, with the limits or boundaries coming onto the watersheds between the principal rivers. These limits between the separate tribal territories were well understood by each tribe and each mainly kept to its own hunting grounds. According to W.F. Ganong, a well-known New Brunswick geographer and cartographer, the two distinct tribal territories of the Maliseet and the Mi'kmaq could be roughly delineated by running a line diagonally through the province from the northwest to the southeast along the areas drained by the St. John River and its tributaries to the south and by the Miramichi River and its tributaries to the north and east.⁶

It is within these historic territories that the Mi'kmaq, Maliseet and Passamaquoddy peoples seek to exercise their aboriginal rights and title, and treaty rights. Before discussing the interplay between these rights and the public trust, it will

be helpful to review some case law dealing with those rights. This discussion will begin with a review of treaty rights as many people are familiar with the concept of a treaty.⁷

5.2.1 Treaty rights in New Brunswick

In Canada, the Supreme Court has defined treaties between the Crown and Indians as being, "...unique; it is an agreement *sui generis* [one of a kind] which is neither created nor terminated according to the rules of international law."⁸ The interpretation of treaties is guided by the principle that the "honour of the Crown is always at stake in its dealings with Indian Peoples."⁹ As a result it is "always assumed that the Crown intends to fulfill its promises. No appearance of "sharp dealing" will be sanctioned."¹⁰

In the case of *Claxton v. Saanichton Marina Ltd.*,¹¹ the British Columbia Court of Appeal provided a summary of the principles for interpreting Indian treaties in Canada.

- a. The treaty should be given a fair, large and liberal construction in favour of the Indians;
- b. Treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians;
- c. As the honour of the Crown is always involved, no appearance of "sharp dealing" should be sanctioned;
- d. Any ambiguity in wording should be interpreted as against the drafters and should not be interpreted to the prejudice of the Indians if another construction is reasonably possible; and

⁶ *Bernard – CA*, *supra* note 3 at para. 71; citing W.F. Ganong - *Historic Sites in the Province of New Brunswick*.

⁷ Being a contract in writing between two political authorities (as states or sovereigns). Webster's Third New International Dictionary. 1966. G. & C. Merriam Company: Massachusetts.

⁸ *Simon v. The Queen*, [1985] 2 SCR 387 at 404, per Dickson, C.J.

⁹ *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41, per Cory, J.

¹⁰ *Ibid.*

¹¹ [1989] 3 C.N.L.R. 46 (BCCA).



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e. Evidence by conduct or otherwise as to how the parties understood the treaty is of assistance in giving it content.¹²

These principles guided the Supreme Court of Canada in *Marshall No.1 and Bernard – SCC*. What follows is a brief review of these cases.

5.2.1(A) *R. v. Marshall (D.J.), (Marshall No.1)*¹³

On August 24, 1993, Mr. Marshall and a friend caught 463 pounds of eels in Pomquet Harbour near Antigonish, Nova Scotia. He then sold the eels for \$787.10. He was subsequently charged with three offences pursuant to several regulations passed under the *Fisheries Act*: fishing for eels without a licence, fishing for eels with a net during the closed season, and selling eels without having a commercial fishing licence.

At trial, Mr. Marshall, who was a registered member of the Membertou Indian Band, admitted to committing all of the three offences. However, he argued he could not be found guilty of these offences because pursuant to a series of Peace and Friendship treaties entered into by the Mi'kmaq and the British Crown in 1760 and 1761, he had a continuing treaty right to harvest and trade fish, including eels. Justice Embree of the Nova Scotia Provincial Court disagreed and found Mr. Marshall guilty. Before reaching this decision though, Justice Embree held “the terms of a Treaty of Peace and Friendship signed on March 10, 1760 in Halifax”¹⁴ were applicable to Mr. Marshall’s defence, and “that the Treaties of 1760-61 between the governor of the British Colony of Nova Scotia and the Mi'kmaq were valid treaties and that these treaties currently apply to all Mi'kmaq in Nova Scotia.”¹⁵ He also held:

I accept as inherent in these treaties that the British recognized and accepted the existing Mi'kmaq way of life. Moreover, it's my conclusion that the British would have wanted the Mi'kmaq to continue their hunting, fishing and gathering lifestyle. The British did not want the Mi'kmaq to become a long-term burden on the public treasury although they did seem prepared to tolerate certain losses in their trade with the Mi'kmaq for the purpose of securing and maintaining their friendship and discouraging their future trade with the French. **I am satisfied that this trade clause in the 1760-61 Treaties gave the Mi'kmaq the right to bring the products of their hunting, fishing and gathering to a truckhouse¹⁶ to trade.** [Emphasis added in original]¹⁷

However, he also found that the “truckhouse clause”¹⁸ contained in the Treaties of 1760-61 did not create a general treaty right to trade. As such, once the system of truckhouses ended, so to did the Mi'kmaq’s truckhouse treaty right (including Mr. Marshall’s).

The Nova Scotia Court of Appeal unanimously dismissed Mr. Marshall’s appeal. Like the trial judge, it found the terms of the March 10, 1760 treaty were clear on its face and that the treaty did not grant the Mi'kmaq a free-standing right to trade.

In a 5-2 decision, the Supreme Court of Canada allowed Mr. Marshall’s appeal. After reviewing the historical evidence presented at Mr. Marshall’s trial, the majority of the court held that both the trial judge and the Court of Appeal “erred in concluding that the only enforceable treaty obligations were those set out in the [treaty] ...”¹⁹ The position of the majority was that at the time the treaty was signed the Mi'kmaq had

¹² *Ibid.* at 50. (citations omitted)

¹³ *Marshall No.1, supra* note 2.

¹⁴ *Ibid.* at para. 3.

¹⁵ Thomas Isaac, *Aboriginal and Treaty Rights in the Maritimes – The Marshall Decision and Beyond* (Saskatoon: Purich Publishing Ltd., 2001) at 105.

¹⁶ Essentially a trading post.

¹⁷ From *Marshall No.1, supra* note 2 at para. 19.

¹⁸ “And I do further engage that we will not traffick, barter or Exchange any Commodities in any manner but with such persons or the managers of such Truck houses as shall be appointed or Established by His Majesty’s Governor at Lunenburg or Elsewhere in Nova Scotia or Accadia.” *Marshall No.1, supra* note 2 at para. 5.



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become dependent upon trade to obtain guns, shot and powder. Accordingly, the insertion of the truckhouse clause was the result of the Mi'kmaq's demands for secure trading rights to obtain these items and other necessities.²⁰ Therefore, the “key point” of the treaty was “the promise of access to “necessaries” through trade in wildlife.”²¹ The ending of the system of truckhouses did not extinguish this treaty right. To capture these findings, the majority stated:

... the surviving substance of the treaty is not the literal promise of a truckhouse, **but a treaty right to continue to obtain necessities through hunting and fishing by trading the products of those traditional activities** subject to the restrictions that can be justified under the Badger test. [Emphasis added]²²

In addition, the *Fisheries Act* and applicable regulations created a *prima facie* infringement of Mr. Marshall's treaty rights.²³ Because the Crown had denied the existence of the treaty rights throughout the proceedings it chose not to try and justify the need for Mr. Marshall to have a commercial licence to catch and trade eels, or the restriction the close season placed upon the method and timing of his exercising of his constitutionally protected treaty right. Hence, his acquittal.

For the purposes of this report, other important conclusions reached by the majority of the Supreme Court include:

- “The subtext of the Mi'kmaq treaties [of peace and

¹⁹ *Ibid.* at para's. 19 and 40.

²⁰ *Ibid.* at para. 52.

²¹ *Ibid.* at para. 54.

²² *Ibid.* at para. 56.

²³ *Ibid.* at para. 64.

²⁴ *Ibid.* at para. 3.

²⁵ *Ibid.* at para. 5.

²⁶ “A moderate livelihood includes such basics as “food, clothing and housing, supplemented by a few amenities,” but not the accumulation of wealth.” *Ibid.* at para. 59; citing *R. v. Gladstone*, [1996] 2 S.C.R. 723 at para. 165.

²⁷ *Ibid.* at para's. 7 and 59.

²⁸ *Ibid.* at para. 61.

²⁹ *Ibid.* at para. 21.

friendship] was reconciliation and mutual advantage”²⁴ following a series of “British-Mi'kmaq wars” throughout the 1750's.

- “... [t]he British signed a series of agreements with individual Mi'kmaq communities in 1760 and 1761 intending to have them consolidated into a comprehensive Mi'kmaq treaty that was never in fact brought into existence.”²⁵
- “... [t]he treaty rights are limited to securing “necessaries” (Which I construe in the modern context, as equivalent to a moderate livelihood),²⁶ and do not extend to the open-ended accumulation of wealth.”²⁷
- “Catch limits that could reasonably be expected to produce a moderate livelihood for individual Mi'kmaq families at present-day standards can be established by regulation and enforced without violating the treaty right.”²⁸
- The Peace and Friendship treaties did not cede land to the British.²⁹

Unfortunately, the initial aftermath of *Marshall No.1* was conflict rather than reconciliation. Many people in New Brunswick can remember the confrontations that took place between a small group of non-aboriginal fishermen and lobster fishermen from the Burnt Church reserve in October 1999 shortly after the release of the Supreme Court's decision on



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September 17. While this was taking place, the West Nova Fishermen's Coalition (the "Coalition"), an intervener at the Supreme Court in *Marshall No. 1*, applied to the Court for a rehearing of Mr. Marshall's appeal. It wanted the Supreme Court to reconsider its decision with respect to Fisheries and Oceans Canada's general authority to regulate aboriginal fisheries. If the rehearing was granted, the Coalition also wanted a stay of the original Marshall decision until a decision on the rehearing was rendered. The Coalition also sought a new trial to determine whether interference with the questioned Mi'kmaq treaty right by fisheries regulations, such as close times and licensing, could be justified for conservation purposes or on other grounds. The heart of the Coalition's application was not the regulation of the aboriginal eel fishing, but concern over aboriginal participation in the valuable lobster fishery. On November 17, 1999, the Supreme Court, in *Marshall No. 2* rendered its decision on the Coalition's rehearing application.

5.2.1(B) *R. v. Marshall (D.J.), (Marshall No. 2)*³⁰

The Supreme Court unanimously rejected the Coalition's application. In making its decision the Court stated, "While it would only be in exceptional circumstances that the Court would entertain an intervener's application for a rehearing ... there [are] no such exceptional circumstances here ..." ³¹ In rendering this decision, the Court also took an opportunity to reiterate some of the points it made in *Marshall No. 1* regarding the Crown's ability to regulate aboriginal treaty rights. One can only surmise it did so in response to the angst and turmoil its original decision engendered.

To summarize, the Supreme Court held that the decision in *Marshall No. 1* did not change the law as was enunciated in *R. v. Sparrow*,³² and in *R. v. Badger*,³³ being aboriginal rights and treaty rights can be regulated for conservation and other valid purposes provided the regulation can be justified. The Supreme Court also noted that the decision in *Marshall No. 1* contained other limitations on the treaty right, including: the right extended to catching and selling only enough fish to obtain the necessities of life,³⁴ the treaty rights can only be exercised in limited local areas, the treaty rights belong to the community and not individual Mi'kmaq, and the decision only dealt with hunting and fishing resources and as such, decisions regarding other resources such as timber and natural gas would be for another day.³⁵

After the decision in *Marshall No. 1*, it is not surprising that the focus of a subsequent important New Brunswick aboriginal law case turned from one linchpin of New Brunswick's economy, fish, to the other, timber.

5.2.1(C) *R. v. Bernard*

In *R. v. Bernard*, the New Brunswick Court of Appeal held in a 2-1 decision that Mr. Bernard had the right to cut logs on Crown land and subsequently set aside Mr. Bernard's earlier conviction. Justice Daigle was of the opinion this right flowed from the aboriginal title possessed by the Miramichi Mi'kmaq to the Crown lands in question. In the alternative, he agreed with Justice Robertson who held that pursuant to *Marshall No. 1*, Mr. Bernard had a treaty right to cut timber to earn a moderate livelihood on the Crown lands in question. On the

³⁰ *R. v. Marshall*, [1999] 3 S.C.R. 533 [*Marshall No. 2*].

³¹ *Ibid.* at para. 9.

³² *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

³³ *Supra* note 9.

³⁴ *Marshall No. 2*, *supra* note 30 at para. 36.

³⁵ *Ibid.* at para. 38.



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issue of aboriginal title, Justice Roberson would have ordered a new trial. Justice Deschênes agreed with the trial judge's finding of fact that Mr. Bernard did not have an aboriginal or treaty right to cut timber on Crown land. On appeal, the Supreme Court of Canada overturned the New Brunswick Court of Appeal and restored Mr. Bernard's conviction. The reasons of the Supreme Court regarding Mr. Bernard's treaty rights will be discussed below, while their reasons regarding aboriginal title will be taken up in section 5.2.2 of this report.

Facts:

On May 29, 1998, Mr. Bernard, a Mi'kmaq Indian living on the Eel Ground Reserve in New Brunswick was found in possession of 23 spruce logs cut by another member of the reserve. The cutting site was on Crown land located close to the Little Sevogle River that is a tributary of the Northwest Miramichi River. Mr. Bernard was apprehended hauling the logs to a local sawmill and subsequently charged with unlawful possession of Crown timber under s. 67(1)(c) of the *Crown Lands and Forests Act*.³⁶ At trial, Mr. Bernard defended his actions by claiming he had a right to harvest and sell timber. He argued this right stemmed from either the Miramichi Mi'kmaq's aboriginal title to the cutting area or a treaty right. The provincial court judge rejected Mr. Bernard's defences and convicted him on April 13, 2000. The Summary Conviction Appeal Court judge upheld Mr. Bernard's conviction.

Treaty rights:

In the Supreme Court, Mr. Bernard argued that the *Marshall No.1 and Marshall No.2* interpretation of the truckhouse

clause gave the beneficiaries of the 1760-61 Peace and Friendship treaties the right to earn a moderate livelihood from whatever resources were traditionally gathered at that time.³⁷ As wood was used for a variety of purposes in 1760, then "modern Mi'kmaq have the right to log, subject only to such limits as the government can justify in the greater public good."³⁸ The Supreme Court disagreed, holding that what was guaranteed by the truckhouse clause was the right to trade traditionally traded products, not the right to gather all things traditionally used by the Mi'kmaq.³⁹ Today, this means that "what the treaty protects is not the right to harvest and dispose of particular commodities, but the right to practice a traditional 1760 trading activity in the modern way and modern context."⁴⁰

At trial, the judge found there was no evidence that the Mi'kmaq traded raw logs in 1760 or that such an activity was contemplated by either party to the treaty. The Supreme Court agreed with this conclusion and the trial judge's view that commercial logging is not a logical evolution of any traditional Mi'kmaq trading activity, such as of canoes and snowshoes.⁴¹ In comparison, Mr. Marshall (*Marshall No.1*) used modern means to catch eels and sold them for money, which today is the usual means of obtaining the necessities of life versus trade or barter. This was a logical evolution of the traditional trade in fish that existed between the Mi'kmaq and the British in 1760. Consequently, the Peace and Friendship Treaties of 1760-61 do not provide their beneficiaries with a treaty right to engage in unlicensed commercial logging activities.

³⁶ S.N.B. 1980, c.C-38.1.

³⁷ *Bernard – SCC*, *supra* note 4 at para's. 15-16.

³⁸ *Ibid.* at para. 16.

³⁹ *Ibid.* at para. 19.

⁴⁰ *Ibid.* at para. 26.

⁴¹ *Ibid.* at para's. 33-35.



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5.2.2 Aboriginal rights and Aboriginal title in New Brunswick

Aboriginal rights and title are different than treaty rights because they stem not from a binding agreement, but rather from the fact that at the time of European contact the aboriginal people of North America were already living on the land in distinct, organized communities.⁴² Thomas Isaac describes aboriginal rights as being “the legal embodiment of aboriginal peoples’ claims to their traditional lands and their ability to engage in traditional activities and customs.”⁴³ Aboriginal title “is a sub-category of aboriginal rights which deals solely with claims of rights to land,”⁴⁴ and “is a right in land ... [that] confers the right to use land for a variety of activities ...”⁴⁵

An aboriginal right can be exercised on land over which aboriginal title does not exist.⁴⁶ In other words, it can be site specific, such as the practice of fishing in a particular, small stretch of river. Aboriginal title instead confers the right to use the land for a variety of activities,⁴⁷ provided those activities “are not irreconcilable with the nature of the group’s attachment to the land.”⁴⁸

Aboriginal rights and title are a “burden” upon the Crown’s underlying title to land in Canada. This is because colonial policy of the British was that when the British acquired sovereignty over land, the customs of aboriginal peoples and their occupation of land would continue. Evidence of this policy is reflected in the *Royal Proclamation of 1763* which states that “the several Nations or Tribes of Indians ... should

not be molested or disturbed in the possession of such parts of our Dominions and Territories as, not having been ceded to, or purchased by us, are reserved to them ...”⁴⁹ This principle of aboriginal rights passed from British imperial law into the Canadian common law,⁵⁰ which in turn provided that aboriginal rights and title (and treaty rights) could be extinguished by unilateral action of the Crown and after Confederation, the federal government. This state of affairs continued until the enactment of s. 35(1) the *Constitution Act, 1982*. Aboriginal rights and title and treaty rights that had not been extinguished by 1982 cannot now be extinguished by the unilateral action of the federal government.

To establish aboriginal title an aboriginal group, or a person who belongs to that group, must prove it had title to the lands in question at the time the Crown acquired sovereignty. Once aboriginal title is established, the party who opposes the existence of the aboriginal title, usually the Crown, must prove that the title has been extinguished. Summarizing the decision of the Supreme Court in *Delgamuukw*, Brian Slattery writes:

... that in order to establish aboriginal title an aboriginal group must satisfy three criteria:

- The land must have been occupied prior to Crown sovereignty.
- That occupation must have been exclusive.
- If present occupation is relied on as proof of occupation prior to Crown sovereignty, there must be continuity between present and pre-sovereignty occupation.⁵¹

⁴² *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 30.

⁴³ Thomas Isaac, *Aboriginal law: Commentary, cases and materials* (3rd ed.) (Saskatoon: Purich Publishing Ltd., 2004) at 2.

⁴⁴ *Van der Peet*, *supra* note 42 at para. 74.

⁴⁵ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 111.

⁴⁶ *R. v. Adams*, [1996] 3 S.C.R. 101 at para’s. 26-30. “A site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish on the tract of land in question.” [as per Lamer, C.J. at para. 30]

⁴⁷ *Bernard – CA*, *supra* note 3 at para. 36.

⁴⁸ *Delgamuukw*, *supra* note 45 at para. 117.

⁴⁹ Quoted from *Bernard – CA*, *supra* note 3 at para. 26.

⁵⁰ Brian Slattery, “Making Sense of Aboriginal and Treaty Rights,” (2000) 79 Can. Bar Rev. 196 at 201-202.

⁵¹ Brian Slattery, “Some Thoughts on Aboriginal Title,” (1999) 48 UNB LJ 19 at 23.



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He then goes on to write that exclusive occupation has three distinct elements: (a) occupation; (b) the date of Crown sovereignty; and (c) exclusivity.⁵² Occupation does not require permanently settled areas, but instead can be established by regular use of definite tracts of land for hunting, fishing or exploitation of resources.⁵³ Exclusivity requires that the aboriginal group prove it had the “intention and capacity to retain exclusive control.”⁵⁴ Such a test allows for other aboriginal groups to use or pass over the land on occasion. Finally, Brian Slattery reiterates the point that the Crown’s acquisition of sovereignty does not itself extinguish aboriginal title.⁵⁵

5.2.2(A) *R. v. Bernard, re: Aboriginal title*

Mr. Bernard sought to establish aboriginal title of the traditional Mi’kmaq territory, “the Northwest Miramichi watershed, encompassing therein the Sevogle area.”⁵⁶ He wanted to do so because aboriginal title confers exclusive use of the land for a variety of purposes, and as such Mr. Bernard would not have had to prove specifically that the Mi’kmaq traditionally harvested timber where the cutting took place, which would be the case if he wanted to establish a site-specific aboriginal right.

At the original trial, Lordon, Prov. Ct. J. rejected Mr. Bernard’s claim that the Mi’kmaq displayed the requisite level of occupancy of the Little Sevogle River area to ground a claim for aboriginal title. On appeal, Daigle J.A. held the trial judge erred in reaching

this conclusion for three reasons.⁵⁷ The first reason was the trial judge required specific acts of occupation and regular use of the Sevogle area. Second, the trial judge did not properly consider, from an aboriginal perspective, uncontradicted evidence of the Mi’kmaq’s historical use and occupancy of the Northwest Miramichi watershed, including the Sevogle area. Finally, the trial judge placed too high an evidentiary burden upon Mr. Bernard and by doing so, “he failed to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims...”⁵⁸ In the end, Daigle J.A. held:

On the evidence relating to the Mi’kmaq occupation of their traditional territory, it is possible to delineate with some specificity the boundaries of the territory on which title is asserted except for the northerly or upstream boundary in the headwaters of the Northwest Miramichi river. The general boundary at the southern tip of the area is the mouth of the Northwest Miramichi river at the confluence of the Southwest and Northwest Miramichi rivers. From there the territory extends northerly or upstream throughout the watershed encompassing the area at the confluence of the Little Southwest and Northwest Miramichi rivers and the Sevogle area to the northerly boundaries to be delineated at some point agreed upon in the headwaters of the Northwest Miramichi watershed.⁵⁹

Proof of aboriginal title also required that Mr. Bernard show

⁵² *Ibid.*

⁵³ *Delgamuukw*, *supra* note 45 at para. 149.

⁵⁴ *Ibid.* at para. 156; quoting K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 204.

⁵⁵ Slattery, “Some Thoughts on Aboriginal Title,” *supra* note 51 at 33-34.

⁵⁶ *Bernard – CA*, *supra* note 3 para. 85.

⁵⁷ *Ibid.* at para. 124.

⁵⁸ *Ibid.*



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the Miramichi Mi'kmaq had exclusive possession of the occupied territory. Did they have the capacity and intent to exercise exclusive control to the claimed area? The trial judge held that the Miramichi Mi'kmaq did not have the capacity or intent to retain exclusive occupation of the area in question.⁶⁰ Justice Daigle, taking an enlightened approach in finding the Miramichi Mi'kmaq had exclusive occupation of the claimed territory, disagreed. He did not require evidence of violent confrontations. Rather, he relied on the fact that the boundaries of the territories of the First Nations occupying New Brunswick were recognized and respected by each other and as a result, violent exclusion was not necessary.

Following this, Justice Daigle at paragraph 179 came to the conclusion that aboriginal title over the claimed area had not been extinguished. He then relied on the reasoning of Robertson, J.A. to find that the *Crown Lands and Forests Act* constituted an infringement of Mr. Bernard's aboriginal rights, i.e. to use aboriginal title lands for the purpose of cutting logs. As Robertson, J.A. noted, "In the present case the evidence establishes that all of the cutting licenses on Crown lands had been allocated to ten licensees. Consequently, there is no room under the discretionary authorization scheme for aboriginal harvesters."⁶¹ Finally, Daigle, J.A. held that the Crown had not justified this infringement.⁶²

As noted earlier, the Supreme Court in restoring the trial judge's conviction of Mr. Bernard disagreed with Daigle, J.A.'s conclusions regarding the Miramichi Mi'kmaq's aboriginal title. It did so for two reasons. First, it disagreed with his

interpretation and application of the legal test for aboriginal title set out in *Delgamuukw*. Second, the Supreme Court did not believe the trial judge had erred in his assessment of the evidence presented at trial to determine whether the Miramichi Mi'kmaq had aboriginal title to the Little Sevgle River area.

After reviewing the law regarding aboriginal title, the majority of the Court strongly reiterated the specific requirements for aboriginal title set out in *Delgamuukw*, being, "To establish title, documents must prove "exclusive" pre-sovereignty "occupation" of the land by their forebears: *per* Lamer C.J., at para. 143."⁶³ Semi-nomadic people such as the Mi'kmaq could establish aboriginal title if their use of an area for hunting, fishing, or other activities was "sufficiently regular" and exclusive.⁶⁴ In contrast:

Daigle J.A. in *Bernard* ...concluded that it was not necessary to prove specific acts of occupation and regular use of the logged area in order to ground aboriginal title. It was enough to show that the Mi'kmaq had used and occupied an area near the cutting site at the confluence of the Northwest Miramichi and the Little Southwest Miramichi. This proximity permitted the inference that the cutting site would have been within the range of seasonal use and occupation by the Mi'kmaq.⁶⁵

This argument was at odds with the findings of fact of the trial judge, whom the Supreme Court noted, had "applied the correct test to determine whether the respondents' claim to aboriginal title was established."⁶⁶ Lordon, Prov. Ct. J. had found the Miramichi Mi'kmaq only made occasional, not

⁵⁹ *Ibid.* at para. 130.

⁶⁰ *Bernard – SCC*, *supra* note 4 at 81.

⁶¹ *Bernard – CA*, *supra* note 3 at para. 350.

⁶² *Ibid.* at para. 183.

⁶³ *Bernard – SCC*, *supra* note 4 at para. 55.

⁶⁴ *Ibid.* at para. 58.

⁶⁵ *Ibid.* at para. 43.



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regular, use of the area in question, and nor did they have the intent or capacity to maintain exclusive control of it.⁶⁷ Finally, it is important to note that Mr. Bernard's claim of aboriginal title ultimately failed for deficiencies in the evidence presented and that the Supreme Court did not hold that aboriginal title does not exist in New Brunswick. As Grand Chief of the Assembly of First Nations – Phil Fontaine stated following the decision:

This Supreme Court decision is disappointing for First Nations but it is not the final word on Treaty rights and Aboriginal rights and title in Canada, or even in the Atlantic ... The decision has local application only and does not set national precedent. The Supreme Court upheld the rulings of the trial judges that Aboriginal title had not been proven in these cases and points out that these judgments are not necessarily the final judicial word. It remains open for First Nations to assert their title in future cases. The struggle for First Nations to re-build and re-vitalize our economies is moving ahead on many fronts. We will continue to assert our moral, political and legal right to re-build our economies.⁶⁸

Therefore, although overturned by the Supreme Court, the potential significance of Daigle, J.A.'s view that the Miramichi Mi'kmaq had unextinguished aboriginal title in the Northwest Miramichi watershed cannot be overstated. As both he and Justice Robertson note, such title would have placed into question the validity of the granting of forest licenses and fee simple title on this land without the consent of the Miramichi Mi'kmaq. As well, changes to the present system of forest

allocations would need to be made in order to fulfill aboriginal title rights.

5.3 Aboriginal Rights and the Public Trust Doctrine

What is ironic is there is more certainty regarding aboriginal rights, particularly aboriginal title, with regard to terrestrial land than there is to the nearshore or seabed, while on the other hand, there is more certainty regarding the public trust and public rights in tidal waters than there is in dry land. This makes providing a definitive answer to the question of how aboriginal and treaty rights and the public trust doctrine will co-exist difficult. However, Supreme Court decisions such as *R. v. Gladstone*⁶⁹ do provide some direction. What follows below is a brief discussion of how these decisions may impact the use of the public trust doctrine by non-aboriginals seeking to implement community-based management of local resources.

5.3.1 Public waters

Aboriginal peoples can access different natural resources many ways; including through an aboriginal right not connected to aboriginal title,⁷⁰ through aboriginal title,⁷¹ through the exercise of a treaty right,⁷² through harvesting rights created by statute and government policy,⁷³ and through other means available to all Canadians. An aboriginal right of fishing and currently recognized treaty rights should have little impact on the advancement of the public trust doctrine to

⁶⁶ *Ibid.* at para. 72.

⁶⁷ *Ibid.* at para. 81.

⁶⁸ Assembly of First Nations – News Release, “Assembly of First Nations National Chief Expresses Disappointment about Supreme Court of Canada Decisions in Marshall-Bernard Cases: Decision is Not “the Final Word” on First Nations Rights and Title,” (Assembly of First Nations: Ottawa, July 20, 2005). Available at < <http://www.afn.ca/article.asp?id=1605>>.

⁶⁹ [1996] 2 S.C.R. 723.

⁷⁰ *R. v. Van der Peet*, *supra* note 42 at para. 48, “[A]boriginal rights lie in the practices, customs and traditions integral to the distinctive cultures of aboriginal peoples ...” If fishing is an integral practice of an aboriginal society, it follows its members have an aboriginal right to access the fishery resource.

⁷¹ *Delgamuukw v. British Columbia*, *supra* note 45 at para. 117, “[A]boriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes ...”



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promote ecologically and socially sustainably fishing in New Brunswick's tidal waters. Aboriginal title on the other hand provides "ownership" of the land to the aboriginal group and the right to *exclusively* exploit its resources.⁷⁴ Therefore, recognition of aboriginal title could have a significant impact on the allocation and management of trust resources.

To begin, given the Mi'kmaq, Maliseet and Passamaquoddy peoples' historical reliance upon the fishery as a means of sustenance, it is certain they have an aboriginal right to fish to meet this need.⁷⁵ As well, *Marshall No.1* established that the First Nations peoples of New Brunswick have a treaty right to trade or sell fish to secure necessities for a moderate livelihood. However, neither of these rights provides for a "genuinely commercial"⁷⁶ aboriginal fishery. With regard to the aboriginal right of fishing, "The food, social and ceremonial needs for fish of any given band of aboriginal people are internally limited – at a certain point the band will have sufficient fish to meet these needs."⁷⁷ As for the treaty right identified in *Marshall No.1*, although it provides for an aboriginal fishery, it is again a limited one because the treaty right cannot be used to pursue the open-ended accumulation of wealth. In contrast, an aboriginal right to fish on a genuinely commercial basis has no internal limitations.⁷⁸

As set out in *R. v. Sparrow*,⁷⁹ and elaborated upon in *Gladstone*,⁸⁰ after conservation goals have been met, aboriginal people are to be given priority to the fishery to satisfy their aboriginal and treaty rights that have internal limits.⁸¹ At first blush this aboriginal priority appears to conflict with those who desire to use the public trust doctrine to re-order access to fisheries for the purposes of community-based management. However, it is submitted this conflict is more imagined than real. As Lamer, C.J. (as he then was) points out in *Gladstone*:

... in an **exceptional** year, when conservation concerns are severe, it will be possible for aboriginal rights holders to be alone allowed to participate in the fishery, **while in more ordinary years other users will be allowed to participate in the fishery after the aboriginal rights to fish for food, social and ceremonial purposes have been met.** [Emphasis added; "exceptional" emphasized in original]⁸²

While the above quote applies to fishing for food, social and ceremonial purposes, as was discussed in *Marshall No.1*, the right to catch fish to obtain the necessities for a "moderate livelihood" also places limits on the overall amount of fish that aboriginal people can catch. As such, the limited amount of fish required to satisfy these rights means there should be fish and shellfish left over for allocation to communities wanting to

⁷² To access a fishery resource for example, *Marshall No.1*, *supra* note 2.

⁷³ See for example: *Aboriginal Communal Fishing Licences Regulations*, SOR/93-332.

⁷⁴ Slattery, "Making sense of aboriginal and treaty rights," *supra* note 50 at 219. It is important to remember that the Crown still retains the underlying or radical title to the land.

⁷⁵ See *R. v. Denny*, [1990] 2 C.N.L.R. 115 (N.S.C.A.).

⁷⁶ *Gladstone*, *supra* note 69 at para. 57.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.* An example of how an aboriginal right to fish on a genuinely commercial basis is provided in *Gladstone*, where Lamer C.J. at para. 29 noted: "[F]or the Heiltsuk Band trading in herring spawn on kelp was not an activity taking place as an incident to the social and ceremonial activities of the community; rather, trading in herring spawn on kelp was, **in itself**, a central and significant feature of Heiltsuk society." [Emphasis in original]

⁷⁹ *Supra* note 32.

⁸⁰ *Supra* note 69 at para. 59.

⁸¹ In situations when the aboriginal right has not internal limitation, Lamer, C.J. at para. 62 wrote, "[T]he doctrine of priority does not require that, after conservation goals have been met, the government allocate the fishery so that those holding an aboriginal right to exploit that fishery on a commercial basis are given an exclusive right to do so. Instead, the doctrine of priority requires that the government demonstrate that, in allocating the resource, it has taken account of the existence of aboriginal rights and allocated the resource in a manner respectful of the fact that those rights have priority over the exploitation of the fishery by other users."

⁸² *Ibid.* at para. 58.



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pursue the community-based management of fisheries. Does this mean these communities will get all the fish they want, probably not? But given the poor health of many Atlantic fisheries, these communities would likely still not get all the fish they want, even if aboriginal and treaty fishing rights did not have to be fulfilled.

The Supreme Court has also provided a means for governments to address those instances when aboriginal priority may result in an inequitable sharing of the fishery.⁸³ Legislation can be passed that places limitations on the right to sell fish to obtain a moderate livelihood. In *Marshall No.2* the Supreme Court noted, “Only those regulatory limits that take the Mi’kmaq catch *below* the quantities reasonably expected to produce a moderate livelihood or other limitations that are not inherent in the limited nature of the treaty right itself have to be justified according to the *Badger* test.”⁸⁴ Returning to *Gladstone*, Chief Justice Lamer discussed why these limitations may be required, stating:

Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, **equally** a necessary part of that reconciliation.⁸⁵

He then suggested economic and regional fairness and the historical non-aboriginal participation in a fishery may be valid reasons for placing limitations upon aboriginal and treaty

fishing rights.⁸⁶

As the above discussion has shown, community-based management of a fishery and aboriginal rights in that same fishery can co-exist. Therefore, if done respectfully, use of the public trust doctrine to re-allocate access to the fishery should not interfere with the efforts of New Brunswick Indians to exercise their aboriginal and treaty rights to fish.

On the other hand, aboriginal title over portions of the foreshore and seabed could have an effect on the use of the public trust doctrine to re-allocate fishery resources because such title could arguably create exclusive native fisheries. Before this can happen though, actual aboriginal title in tidal waters needs to be established.

It is submitted that aboriginal title in tidal waters can be established in the same manner it is established on dry land. Returning to Brian Slattery’s summarization of *Delgamuukw*, two issues need to be addressed, occupation and exclusivity. With regard to occupation, which requires proof of regular use but not of permanently settled areas, in *Bernard - CA*, Robertson J.A. noted:

At contact, the Mi’kmaq were found to be a hunting and fishing people, who migrated seasonally from their inland hunting grounds **to the coast for summer fishing**. Although it is uncertain whether they had a sparse and dispersed population with a loose band structure or if a more ordered society was present, it is known that, by the mid-

⁸³ The irony of this statement is appreciated by the author.

⁸⁴ *Marshall No. 2*, *supra* note 30 at para. 39.

⁸⁵ *Gladstone*, *supra* note 69 at para. 73.

⁸⁶ *Ibid.* at para. 75.



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dle of the 18th century, **indigenous communities were still being identified by the island, river, bay or inlet they occupied.** A Sakamow or chief headed each community without there being an overall authority to direct the affairs of the collectivity. [Emphasis added]⁸⁷

This statement is in keeping with other historical reflections upon the occupation of tidal waters by the Mi'kmaq.

From the sea they harvested oysters, clams, and lobsters. Using weirs and spears or bone hooks and lines, they fished for cod, plaice, and striped bass and speared porpoises and even small whales. As much as 90% of their food may have come from the sea. [Citation omitted]⁸⁸

As discussed above, exclusivity requires that the aboriginal group prove it had the “intention and capacity to retain exclusive control.” That the Mi'kmaq had the capacity to do so is evident from the following quotes:

It should be pointed out that the Mi'kmaq were a considerable fighting force in the 18th century. Not only were their raiding parties effective on land, Mi'kmaq were accomplished sailors. Dr. William Wicken, for the defence, spoke of “the Maritime coastal adaptation of the Micmac”:

There are fishing people who live along the coastline who encounter countless fishermen, traders, on a regular basis off their coastline.

The Mi'kmaq, according to the evidence, had seized in the order of 100 European sailing vessels

in the years prior to 1760. There are recorded Mi'kmaq sailings in the 18th century between Nova Scotia, St. Pierre and Miquelon and Newfoundland. They were not people to be trifled with.⁸⁹

And:

From working the sea, Mi'kmaq warriors developed exceptional skills in seamanship. In fact their sailing abilities were such that many of their British and French peers recognized them as being among the greatest sailors on Mother Earth. During their wars with the British, they routinely commandeered European war and merchant ships ...

...sea canoes were routinely used by the Mi'kmaq to cross the Bay of Fundy, the Northumberland Strait, and the North Atlantic between Nova Scotia and Newfoundland....⁹⁰

If the Mi'kmaq could adduce evidence that they also had the requisite intent to retain exclusive occupation of for example, certain bays or inlets, then it is clear from the above the Mi'kmaq could make a strong claim for aboriginal title to portions of the tidal waters of New Brunswick. Other aboriginal groups have made similar claims. For example, in British Columbia, the Haida people claim they have aboriginal title over the seabed around the Queen Charlotte Islands.⁹¹ Also in B.C., the Homalco Band claim aboriginal title and rights to an area on the central coast of British Columbia that includes Bute Inlet.⁹² Finally, in New Zealand, a group of Maori have claimed the land below high water mark in the Marlborough Sounds is Maori customary land.⁹³ All of these cases dealt

⁸⁷ Bernard – CA, *supra* note 3 at para. 370.

⁸⁸ J.L. Steckley and B.D. Cummins, *Full Circle: Canada's First Nations* (Toronto: Prentice Hall, 2001) at 52. See also: J.W. Friesen, *Rediscovering the First Nations of Canada* (Calgary: Detselig Enterprises Ltd., 1997) at 57; and D.P. Paul, *We were not the Savages: A Mi'kmaq Perspective on the Collision between Europeans and Native American Civilization* (Halifax: Fernwood Publishing, 2000).

⁸⁹ *Marshall No. 1*, *supra* note 2 at para. 17. (per Binnie, J.)

⁹⁰ Paul, *supra* note 88 at 26-27.

⁹¹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para. 66.

⁹² *Blaney et al v. British Columbia (The Minister of Agriculture Food and Fisheries) et al*, 2005 BCSC 283 (CanLII) at para. 8.

⁹³ *Ngati Apa, Ngati Koata, & Ors v. Ki Te Tau Ihu Trust & Ors*, [2003] NZCA 117 (19 June 2003).



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with matters preliminary to the finding of aboriginal title in tidal waters. However, in no case did the court suggest aboriginal groups could not have title in tidal waters. As Elias, C.J.C.A.N.Z. notes:

Any prerogative of the Crown as to property in foreshore and seabed as a matter of English common law in 1840 cannot apply in New Zealand if displaced by local circumstances. Maori custom and usage recognising property in foreshore and seabed lands displaces any English Crown prerogative and is effective as a matter of New Zealand law, unless such property interests have been lawfully extinguished. ...⁹⁴

A finding of aboriginal title in the seabed raises another question—does this title create an exclusive fishery? At present, there seems to be a reticence among judges to acknowledge such exclusive fisheries. Returning to the Ngati Apa case from New Zealand:

It was also early established, **but again without prejudice to public (or common) rights especially of navigation (including anchoring)**, that the Crown could grant and did grant to subjects the soil below low water mark including areas outside ports and harbours. ... Those rights could also arise by prescription or usage. ... It might be mentioned here that the **public or common rights limiting the rights of ownership** could arise not just from national law but also from international law such as the customary international law relating to innocent passage by foreign vessels through the territorial sea or treaties such as those of 1884 and later regulating the laying of submarine cables.

... property in sea areas could be held by individuals and **would in general be subject to public rights such as rights of navigation.** [Emphasis added, citations omitted]⁹⁵

In *Gladstone*, Lamer, C.J. uses the existence of a public right of fishing to limit the Heiltsuk's **aboriginal right** to commercially harvest herring spawn on kelp.

While the elevation of common law aboriginal rights to constitutional status obviously has an impact on the public's common law rights to fish in tidal waters, it was surely not intended that, by the enactment of s. 35(1), those common law rights would be extinguished in cases where an aboriginal right to harvest fish commercially existed. ... [H]owever, it was not contemplated by *Sparrow* that the recognition and affirmation of aboriginal rights should result in the common law right of public access in the fishery ceasing to exist with respect to all those fisheries in respect of which exist an aboriginal right to sell fish commercially. **As a common law, not constitutional, right, the right of public access to the fishery must clearly be second in priority to aboriginal rights; however, the recognition of aboriginal rights should not be interpreted as extinguishing the right of public access to the fishery.** [Emphasis added]⁹⁶

Another case in which the Supreme Court used the public right of fishing to deny the existence of an exclusive native fishery is *R. v. Nikal*.⁹⁷ In *Nikal*, the accused was charged with fishing without a licence after he had gaffed salmon (without a licence) in the Bulkley River, B.C. where it passed through the reserve of the Moricetown Band. At issue in the

⁹⁴ *Ibid.* at para. 49.

⁹⁵ *Ibid.* at para's. 133 to 135 (per Keith and Anderson JJ).

⁹⁶ *Gladstone*, *supra* note 69 at para. 67.

⁹⁷ *R. v. Nikal*, [1996] 1 S.C.R. 1013.



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Supreme Court was whether an exclusive fishery was granted to the Band when the reserve was created. If so, Mr. Nikal would not need a licence. As discussed earlier, the Supreme Court found that it was the policy of the Crown not to grant exclusive fishing rights in perpetuity.⁹⁸ Accordingly, a grant of a perpetual, exclusive fishery did not accompany the creation of the reserve.⁹⁹

Gladstone or *Nikal* did not deal with the issue of aboriginal title and the public right of fishing and therefore the question of their co-existence is not yet answered. However, it is submitted that if aboriginal exclusive fisheries existed prior to British sovereignty over New Brunswick, then they should, unless extinguished, continue to exist. As Mark Walters states:

At common law, the Crown acquired ultimate or radical title to Indian territories upon the assertion of British sovereignty over North America, but this title remained burdened by the aboriginal title: settlers could not acquire any property interest in such lands until the aboriginal title was surrendered to the Crown by the relevant aboriginal nation. There was no general right of public access to unsundered aboriginal title territories: in law (though not always in fact) the pace of settlement was controlled by the Crown's monopoly over Indian land surrenders. In short, it may be argued that as long as aboriginal title remained unceded and unextinguished – and upon the assumption that aboriginal title extended to lands covered by waters – any public rights of access to waters in which exclusive aboriginal fisheries were located and, *a fortiori*, any public right of fishing were at best inchoate.¹⁰⁰

One reason exclusive fisheries should be recognized today is that permitting public fishing where an exclusive fishery is claimed fails to protect the aboriginal right to use the area claimed for whatever purposes an aboriginal group wishes to use it. Perhaps the aboriginal group wants the area to be a marine protected or conservation area in which no fishing takes place—a use incompatible with the public right of fishing. Perhaps another use of the area is to only harvest fish and shellfish every second or third year to allow stocks to recover. Again, a public right of fishing does not fit with this particular use.

This situation is different then when treaties were signed. In such a case, an exclusive fishery would have to been granted, or in essence created. It is also different then when an aboriginal right to an exclusive, full-scale commercial fishery is claimed. First, what is the extent of the geographic area covered by the claimed fishery? Second, as Lamer, C.J. noted in *Gladstone*, such a right cannot exist because it would be at odds with other aboriginal groups' right to fish.¹⁰¹ With aboriginal title, it is not an entire fishery for which exclusivity is being claimed, but rather a precise, local geographic area in which the exclusive fishery would take place.

The finding of aboriginal title in tidal waters, and corresponding exclusive fisheries, could have a significant impact on the use of the public trust doctrine to further the community-based management movement. This is because community-based management seeks to establish geographic, not sectoral, fisheries which in turn may overlap or be subsumed by existing aboriginal title to the same geographic area. Two results could flow from this. This first is the adjacent

⁹⁸ *Ibid.* at para. 28.

⁹⁹ It should be noted that some authors have suggested the Supreme Courts analysis was flawed and that the Crown did create exclusive aboriginal fisheries in the Great Lakes. See: Peggy J. Blair, "Settling the fisheries: Pre-Confederation Crown policy in Upper Canada and the Supreme Court's decisions in *R. v. Nikal and Lewis*," (2001) 31 R.G.D. 87; and Mark D. Walters, "Aboriginal Rights, *Magna Carta* and Exclusive Rights to Fisheries in the Waters of Upper Canada," (1997) 23 Queen's L.J. 301.

¹⁰⁰ *Ibid.* at 344. Also, returning to *Attorney-General of British Columbia v. Attorney-General of Canada*, [1914] A.C. 153 (J.C.P.C.) at 169-170: "[I]t has been unquestioned since *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." [Emphasis added]

¹⁰¹ *Gladstone*, *supra* note 69 at para. 68.



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aboriginal community has exclusive use to the geographic area. The other may be that the geographic area can be allocated to non-aboriginals but only after consultation with the adjacent aboriginal community.

The idea that an aboriginal community can have future exclusive use of a particular geographic area of tidal waters where non-aboriginals have now established fisheries would probably not be entertained by governments and perhaps aboriginal communities themselves. As the backlash from trying to promote aboriginal fishing in existing fisheries, such as lobster, has shown, such a move would not be politically expedient.¹⁰² As well, like aboriginal and treaty fishing rights, aboriginal title can, if justified, be infringed to meet valid legislative objectives.

The general principles governing justification laid down in *Sparrow*, and embellished by *Gladstone*, operate with respect to infringements of aboriginal title. In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the **reconciliation** of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that "distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community" (at para. 73). **In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered**

species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis. [Emphasis added; "reconciliation" emphasized in original]¹⁰³

However, simply because the government is pursuing a valid legislative objective does not mean aboriginal involvement in decision-making over the use of the title area ends. "There is always a duty of consultation."¹⁰⁴ In the event that a non-aboriginal community receives a community-based management fishery area or zone, its use of the zone may require on-going discussions with the aboriginal title holders. One example might be consultation regarding methods of fishing to ensure the method does not destroy the land (sea-bottom) underlying the title.

Finally, one other area of possible conflict between exclusive aboriginal fisheries and the public right of fishing centres around statutorily created aboriginal fishing rights. Following the *Sparrow* decision, the federal government developed the Aboriginal Fisheries Strategy (AFS)¹⁰⁵ in 1992 and the *Aboriginal Communal Fishing Licences Regulation* (ACFLR)¹⁰⁶ As the Department of Fisheries and Oceans Canada (DFO) notes, a main purpose of the AFS is to "To provide a framework for the management of fishing by Aboriginal groups

¹⁰² For discussions regarding some of the conflict following the decision in *Marshall No. 1*, see: Bruce Wildsmith, Q.C., "Vindicating Mi'kmaq Rights: The Struggle Before, During, and After Marshall," (2001) 19 Windsor Y.B Access J. 203 at 234-240; and CBC, "The Marshall Decision," (May 9, 2004). Available at <<http://www.cbc.ca/news/background/fishing/marshall.html>>.

¹⁰³ *Delgamuukw*, supra note 45 at para. 165.

¹⁰⁴ *Ibid.* at para. 168.

¹⁰⁵ For more information, see: <http://www.dfo-mpo.gc.ca/communic/fish_man/afs_e.htm>.

¹⁰⁶ *Supra* note 73.



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for food, social and ceremonial purposes.”¹⁰⁷ Under the AFS, DFO also created aboriginal pilot sales fisheries for salmon on the West Coast. These pilot sales fisheries allowed aboriginal communities that received communal fishing licences to catch and sell fish for commercial purposes in excess of what would be required to meet that communities’ food, social and ceremonial needs. The effect of the pilot sales fisheries programs was that they permitted aboriginal people designated under the various communal fishing licences to fish for commercial purposes at times when these fisheries were closed to non-aboriginal fishermen and aboriginal fishermen not designated under a communal fishing licence.

In the case of *R. v. Kapp*,¹⁰⁸ Mr. Kapp and several other non-aboriginal commercial fishermen were charged with unlawfully fishing in Salmon Area “E” of the Fraser River that was closed to all fishermen except those fishing pursuant to an Aboriginal Communal Fishing Licence. The accused sought a stay of the charges, claiming that the ACFLR was *ultra vires* because it denied the public right of fishing and was in breach of section 15 of the Charter of Rights and Freedoms – that the ACFLR promoted discrimination on the basis of race, ie. one had to be an aboriginal to have the right to fish. Kitchen, P.C.J. agreed with the defendants and held “that the pilot sales fishery is offensive as being analogous to racial discrimination.”¹⁰⁹ An appeal by the Crown was allowed by the British Columbia Supreme Court.¹¹⁰

While this decision has in turn been appealed to the British Columbia Court of Appeal,¹¹¹ the *Kapp* case raises several important points. First, the aboriginal right to a commercial fishery being questioned was a right created by the government, not one that arose from traditional activities and customs. It also demonstrates the continuing relevance of the public right to fish. Finally, from a reading of the *Kapp* decision, it appears that the pilot sales fishery in question divided the Fraser River Area “E” fishing community, which prior to this consisted of both aboriginal and non-aboriginal fishermen fishing together as one community, not two. From this it is suggested that future community-based management fishing efforts foster inclusiveness rather than exclusiveness.

5.3.2 Public forests

Much of the above discussion can also be applied to the possible interaction between aboriginal and treaty rights and the public trust doctrine in access to public forests.¹¹² To begin, aboriginal and treaty rights to commercially log to obtain necessities has an inherent limit in the amount of timber required. Although the fulfillment of these rights requires that priority to timber be given to aboriginal communities, this, like allocations for community-based management, really amounts to a new division of the existing timber pie. Aboriginal title on the other hand changes who has control over how the pie is divided.

¹⁰⁷ *Supra* note 105.

¹⁰⁸ 2003 BCPC 279 (CanLII).

¹⁰⁹ *Ibid.* at para. 234.

¹¹⁰ 2004 BCSC 958 (CanLII). It is hoped this appeal will also address the issue of the ACFLR and the public right to fish, which is unclear following the British Columbia Court of Appeal’s decision in *R. v. Houvinen* (2000), 188 D.L.R. (4th) 28.

¹¹¹ 2004 BCCA 568 (CanLII).

¹¹² For a thorough review of the status of aboriginal forestry rights in Canada, see: Deborah Curran and Michael M’Gonigle, “Aboriginal Forestry: Community Management as Opportunity and Imperative,” (1999) 37 Osgoode Hall L.J. 711.



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One significant difference between aboriginal title in portions of New Brunswick tidal waters versus public forests is that exclusive aboriginal use of tracts of forests is not as politically risky. The reason for this is that non-aboriginals have long standing access to use tidal waters for commercial fishing ventures. The same is not true for New Brunswick's forests which have long been under exclusive use arrangements. Returning exclusive use to aboriginal communities does not change non-aboriginals' opportunities to participate in the forest economy, only who would determine what those opportunities might be.

54 Conclusion

The discussion of the possible interaction between aboriginal and treaty rights and the public trust doctrine may leave the impression that the exercise of these rights will impede the use of the doctrine in New Brunswick. This however is not the message that should be taken from the above discussion. The need to address an aboriginal right to cut trees on Crown land and harvest seafood from public waters is entirely compatible with the need many New Brunswickers have expressed to put Crown land forest management and fisheries management on a more ecologically sustainable and equitable basis. While aboriginal title may limit the geographic area over which the doctrine can be applied, aboriginal rights and title and the public trust doctrine can be employed to achieve the same ends.

The first of these is conservation of the resource itself. The aboriginal right of fishing is of little value if there are no fish left. The same can be said for the public right of fishing. Aboriginal title itself has an underlying concept of stewardship, as use of the land cannot be irreconcilable with the aboriginal group's attachment to the land.

Aboriginal and treaty rights are also exercised for a reason that is in keeping with the heart of the public trust doctrine – to stem the loss of public control over public resources to private parties. As Daigle, J.A. pointed out in *Bernard*, Crown timber licences will have to be reconciled with underlying aboriginal title. Aboriginal title will permit aboriginal communities to share in the benefits in the harvesting of public resources, thereby spreading the wealth created from forestry activities. At the same time, recognition of aboriginal title to Crown forest lands requires changes in the present government/industry forest management complex. As “owners” of the land, along with government, aboriginal communities need to be part of the decision-making structure. It will also most likely require changes to the present allocation of timber rights in the province. These changes in the management and allocation of Crown forests create an opportunity to re-structure forestry in New Brunswick. Within this re-structuring should be room for the advancement of community-based management.

Finally, the exercise of aboriginal and treaty rights creates an opportunity for dialogue between government, aboriginal communities and the broader public. Aboriginal and treaty

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rights cannot be exercised in a vacuum. The clock cannot be turned back – aboriginal communities are part of the broader Canadian political community.¹¹³ However, no longer can aboriginal rights be run roughshod over. In the end, what is required is an equitable sharing of public resources. To be lasting in the long-term, this sharing needs to come through respectful discussions, for as Chief Justice Lamer poignantly concluded in *Delgamuukw*, “Let us face it, we are all here to stay.”¹¹⁴

¹¹³ *Ibid.* at para. 161.

¹¹⁴ *Ibid.* at para. 186. See also, Daigle, J.A. in *Bernard – CA*, *supra* note 3 at para. 210: “As suggested by several courts in Canada, only subsequent negotiations bringing together all the parties who have a stake in the resolution of these complex issues can truly be fruitful and lead to just settlements.”



PART VI.

Answering CCNB's Three Questions



*R*ecognition of governmental fiduciary duties in one public resource suggests that the public's interests in other resources is deserving of equal protection. There is nothing that makes a fishery more important to the public than a forest. Therefore, both fisheries and forests can be trust resources protected by the public trust doctrine.

(Vice-President Weeramantry (I.C.J.), 1997)

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PART VI. Answering CCNB's Three Questions

The purpose of this report was to document the findings of the Conservation Council of New Brunswick's research project on the public trust doctrine. More specifically, the research project was meant to address the following questions:

1. Does the common law public trust doctrine establish a basis for action a) against the federal government in relation to inference or conferral of private property rights through the granting of individual transferable quotas (ITQs) and licenses in fisheries, or b) against a provincial government in relation to licenses in Crown forests?
2. If the answer to question 1 is yes, a) what are the rights conferred by the public trust doctrine; b) who owns the rights; c) what are the grounds of a claim in common law against a government for not fulfilling their public trust obligations; d) what test would have to be met to establish standing in legal action to assert such public rights?
3. How might common law public trust rights co-exist with native rights to allow for rural livelihoods to be sustained through access to public resources?

What follows are answers to these questions.

Question 1:

The public right of fishing precludes governments from granting exclusive fisheries in tidal waters. At the same time, there is no apparent corresponding public right of logging. In Part II it is argued that the present Canadian "public trust" that protects historic public rights, such as fishing and navigation, does not encompass the same broad functions filled by the U.S. public trust doctrine. The public trust

doctrine captures the fiduciary obligation of governments to care for and manage public resources for the benefit of the public. The Canadian public trust appears to only protect a very limited range of uses in specific resources from a small number of potential interferences. Therefore, before the public trust doctrine can be used as a basis of action in Canada, there needs to be recognition that governments have fiduciary duties with respect to public resources. An exception to this is the public right of fishing which stands on its own.

In Part III, arguments are presented that the evolution of Canadian fiduciary law provides a foundation for the development of the public trust doctrine. For example, aboriginal peoples' unique *sui generis* legal interest in their lands places fiduciary duties on the federal government in certain instances when it deals with aboriginal lands. Public rights are a comparable legal interest and for this reason and matters of public policy, governmental fiduciary duties with respect to the resources that underlie these rights should be recognized. Defining the "public trust" as a fiduciary relationship paves the way for the further development of the doctrine in Canada, including its use as an instrument of environmental protection. This development would allow for: 1) the identification and protection of new uses of traditional trust resources; 2) the protection of traditional public rights from interferences other than the granting of the trust resource to a private party; and 3) new trust resources to be identified and hence protected by the public trust doctrine.

The public trust imposes limits and obligations on governments in their care and management of public resources that are subject to the trust, ie. trust resources. Included in this, is the duty of governments not to impair the public's beneficial use of a particular resource, such as the fishery. This impairment can occur in several ways, including typically



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by granting away or permitting the degradation of the trust resource in question.

Summing up the above, governments have fiduciary duties with respect to the traditional trust resources of public fisheries, navigable waters and highways. Recognition of governmental fiduciary duties in one public resource suggests that the public's interests in other resources is deserving of equal protection. There is nothing that makes a fishery more important to the public than a forest. Therefore, both fisheries and forests can be trust resources protected by the public trust doctrine. If the creation of private property rights in these resources is a breach of one of the fiduciary duties encompassed by the public trust doctrine, then theoretically, the doctrine does establish a basis for action to remedy this breach. However, as the answer to question 2(c) shows, there are significant challenges facing those who wish to launch such an action. Foremost among these is getting Canadian courts to make the public trust doctrine part of Canadian law.

Question 2(a):

In cases dealing with fiduciary relationships the focus is typically on the duties of the fiduciary rather than the rights of the beneficiary. The same is true for the public trust; most cases and commentators discuss the duties the public trust, being the fiduciary relationship, imposes on governments when dealing with public resources. However, rights and duties are joined at the hip—you cannot have one without the other. Therefore, a review of public trust duties will yield a listing of corresponding public trust rights.

Using aboriginal case law that discuss the fiduciary duties of governments as a guide, it is determined that the public trust doctrine captures four fiduciary obligations owed by governments in their management of trust resources to the public, being: 1) to act loyally, 2) to act in good faith, 3) to

make full disclosure of the matter at hand, and 4) to act like a person of ordinary prudence in managing their affairs (preserve the capital and plan for the future). As being synonymous with an equitable obligation, the public trust doctrine provides the public with a right to bring court actions to remedy breaches of the public trust by governments.

Question 2(b):

Public trust rights are “owned” by the public but are vested in the Crown. This vesting gives governments the right, and perhaps a corresponding duty, to seek the abatement of interferences with public rights through public nuisance actions. The report concludes that public trust rights rest solely with the public at large. In other words, a rural community has no different public trust rights in a fishery than does the urban public. However, as is the case with public interest standing, there may be differences between groups the courts will view as the appropriate defender of a particular public right.

Question 2(c):

The grounds of a claim in common law against a government for not fulfilling their public trust obligations requires establishing that a governmental fiduciary duty exists with respect to a particular public right or resource, and that a government's actions violate the trust. Part III of the report (see question 1) discusses why and how such duties can come to be recognized in Canada. Part IV sets out reasons why the establishment of systems of individual transferable quotas for fisheries and Crown timber licences for New Brunswick's forests are a breach of governments' public trust obligations.

To begin, it is argued the policies and actions of Fisheries and Oceans Canada are in practice creating private, or exclusive, fisheries. This is a breach of the longstanding public right of fishing. Government actions that have led to the

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increase in private property rights in public forests may be interfering with the possible public right of using forests for subsistence purposes, such as firewood gathering. The argument that this is a breach of the public trust is much less strong than the fisheries example.

The main difficulty with the above argument is the strong line of case law which holds that licences, because they lack durability of title, do not create private property rights. As such, the “law” on the nature of licences does not reflect the political reality of licensing systems. The existence of this law would seem to insulate government licensing systems for fisheries and forests from challenges based on breaches of the public trust. While this may still be true, it is also arguable that the recent Supreme Court decision regarding the provision of health care services in *Chaoulli v. Quebec (Attorney General)* (2005), may signal a willingness of Canadian courts to look behind the mask of legislation and into the heart of government action.

The uncertainty about whether in fact present systems of licensing access to public resources create private property rights raises questions about the suitability of traditionally recognized public rights, or a public trust that only protects these rights, as tools to question current allocations of fisheries and forests. Given these difficulties, it is suggested those seeking to challenge these licensing systems may have better success by arguing that the harvesting methods of private rights holders, such as fish dumping by ITQ licensees, and large-scale clear-cutting by forest licensees, cause harm to the environment. Government actions or inactions that allow for this harm are arguably a breach of government public trust duties. To remedy this breach, governments may be required to limit or prohibit ecologically destructive harvesting activities. Destructive harvesting practices seem to go hand-in-hand with the “profitability” of resource-dependent large-scale

commercial enterprises. Limit these activities and the drive for the privatization of public resources should be lessened. Therefore, the public trust doctrine provides other ways of addressing the increasing privatization of trust resources rather than having to depend on the existence of exclusive fisheries or rights of forestry.

Question 2(d):

Development of the public trust doctrine should not affect the rules for determining public interest standing as set out in *Finlay v. Canada (Minister of Finance)* in cases where a public interest litigant challenges a government’s statutory authority, or lack thereof, for a particular action or decision. The public trust may be important in providing standing in other cases where there is no issue of absence of governmental authority to rely on, such as government decisions not to proceed with a public nuisance action.

Question 3:

It is clear the fulfillment of the aboriginal and treaty rights of New Brunswick’s aboriginal peoples will require a reordering of resource allocations in the province. However, this reordering should result in little or no conflict between the use of the public trust doctrine by rural communities to re-establish access to common resources and the implementation of aboriginal and treaty rights in respect of these same resources. In fact, the need to address an aboriginal right to cut trees on Crown land and harvest seafood from public waters is entirely compatible with the need many New Brunswickers have expressed to put Crown land forest management and fisheries management on a more ecologically sustainable and equitable basis. Two areas of conflict may arise in the exercise of aboriginal title rights, which will require a politically negotiated solution, and perhaps the exercise of aboriginal harvesting rights to resources such as fisheries that are created by statutes.



PART VII.

Conclusion



The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

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PART VII. Conclusion

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.¹

The Conservation Council of New Brunswick's purpose in conducting its legal research project and in writing this report was to determine whether the public trust doctrine could be used by rural communities seeking to establish community-based management over local resources to address the increase in private property rights in public resources, and more particularly in public fisheries and New Brunswick Crown forests. This "privatization" of public resources is negatively impacting the health of natural resource-dependent communities and the environment. The answers to the three questions above show that although there are challenges under the current legal and policy framework, the public trust doctrine could be developed so that it can become of assistance to those promoting community-based management.

Concurrently, the allowing, and in many cases the promoting, of private property rights in public resources by Canadian governments is symptomatic of the abuse they are committing against the environment in general and are also allowing private owners of natural resources to commit. As Roy Vogt notes though, "More and more citizens are protesting such

abuse of resources, both in their own name and in the name of future generations."² Mirroring the community-based management movement discussed throughout this report, Roy Vogt also discusses a movement in Canada towards more citizen property, which he defines as:

... property rights sought or claimed by ordinary citizens, either as individuals or as groups, permitting them to ameliorate current and future negative effects of current resource use. It is made up of rights sought by private citizens for public purposes. In pursuit of their objectives citizens may often appeal to courts, and to governments, for legal and administrative assistance, but citizen property is not in and of itself a new form of government property...

The enlargement of citizen property therefore does not dilute private property rights in favour of greater state rights; it requires instead a wider distribution of rights, a greater sharing of rights between formal owners of property – both private and state – and the citizenry at large.³

Support for community-based management or citizen property over natural resources in Canada is coming from new sources. The Select Committee on Wood Supply in New Brunswick recently recommended that wood allocations be tied to local communities and that steps are taken to achieve this goal whenever a mill ceases to operate in a community (this would free up the wood allocated to that mill).⁴ As well, the Standing Committee on Fisheries and Oceans provides cogent arguments why fishing communities be better involved in decision-making regarding the allocation of fishing quotas.⁵

¹ Vice-President Weeramantry (International Court of Justice) in: *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997) (I.J.C.). Available at <http://www.icj-cij.org/ijcwww/idoCKET/ihs/ihsjudgement/ihs_ijudgment_970925_frame.htm>.

² Roy Vogt, *Whose Property? The Deepening Conflict between Private Property and Democracy in Canada* (Toronto: University of Toronto Press, 1999) at 110.

³ *Ibid.* at 110-111.

⁴ Legislative Assembly of New Brunswick, Select Committee on Wood Supply, *Final Report on Wood Supply in New Brunswick* (Fredericton: Fifty-fifth Legislature, New Brunswick, 2004) at 21 (Recommendation 17).

⁵ Parliament of Canada – Senate Standing Committee on Fisheries and Oceans, *Interim Report on Canada's New and Evolving Policy Framework for Managing Fisheries and Oceans*. Available at <<http://www.parl.gc.ca/38/1/parbus/commbus/senate/com-e/fish-e/rep-e/repintmay05-e.htm>>.



Keeping Public Resources in Public Hands:

Advancing the Public Trust Doctrine in Canada

It is to be hoped that Canadian governments will respond positively to these recommendations so that the public can play a greater role in the stewardship of the environment. Doing so would indicate governments' willingness to act in the public's best interest, thereby being worthy of the responsibility to care for the environment that has been entrusted to them by Canadians.

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About the Conservation Council of New Brunswick

The Conservation Council of New Brunswick (CCNB) is a membership-based charitable organization that has been at the forefront of environmental action in New Brunswick since 1969. CCNB's work is carried out by a small staff and volunteers under the direction of a 24-person Board of Directors drawn from all regions of the province.

The Conservation Council's campaigns to conserve our natural resources, air, land and water through education, networking, publishing, and collaboration with all sectors of civil society.

Our solutions-based approach to resource exploitation and pollution has been the catalyst for environmental clean-ups, innovative public policy, environmental enforcement and environmental legislation. Over the years, CCNB's work has led to the clean-up of the St. John River, the wholesale removal of leaking underground gasoline storage tanks, the environmental regulation of drinking water supplies and salmon aquaculture, the legal protection of salt marshes and action on environmental clean-ups, acid rain, climate change, energy efficiency and sustainable resource management.

In 1991, the Conservation Council was appointed to the Global 500 Honor Roll by the United Nations Environmental Programme.

CCNB depends on its members, supporters and private foundations to provide the independence necessary to work credibly and effectively on behalf of the environment.



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