The Public Trust Doctrine:

Ensuring the Public's Natural Right of (Perpetual) Access to Common Resources

By

Matthew Aragorn Park

B.A., University of Saskatchewan, 2002
L.L.B., University of Saskatchewan, 2005

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Supervisory Committee

Supervisor
Chris Tollefson (Faculty of Law)

Co-Supervisor
John McLaren (Faculty of Law)

Outside Member
Meinhard Doelle (Faculty of Law, University of Dalhousie)
Supervisory Committee

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Chris Tollefson (Faculty of Law)

Co-Supervisor
John McLaren (Faculty of Law)

Outside Member
Meinhard Doelle (Faculty of Law, University of Dalhousie)

ABSTRACT

In the 2004 Supreme Court of Canada case of British Columbia v. Canadian Forest Products Ltd. Justice Binnie spoke of "public rights in the environment that reside in the Crown." He then canvassed the public trust doctrine, a well developed concept in the United States, even though none of the parties argued as such. I argue that this signals a shift in Canada towards recognizing the public's right of access to common resources. A new reading of John Locke's natural law theories provides the theoretical basis for limiting property rights, for the common good. I argue the public trust doctrine, a forgotten aspect of the common law, is a fiduciary duty that the state to maintain the right of perpetual access to common resources. Understanding its historical foundations the public trust doctrine has the potential, if articulated from an ecological perspective, to provide for state supervised sustainability for future generations.
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I would also like to thank my beautiful wife Dani, for without the sacrifices she made this thesis would never have been possible. She may never understand how much I appreciated the hours of encouragement and support (both emotional and technical) she provided me. Finally, I extend a big thank you to my parents and brothers for putting up with my endless complaints as I worked through the research and writing processes.
Chapter 1 – An Introduction to the Public Trust Doctrine

Canada has a wealth of natural resources and amenities. It is important that Canadians use these natural resources and amenities in a wise and sustainable manner. While sustainable use of our natural resources and amenities is desired, the method by which we strive to achieve this is still a matter of some debate. There are innumerable theories about how we should set and implement policies in order to achieve a sustainable environment. One theory, which is the subject of this thesis, asserts that certain natural resources should be held in trust for the benefit of future generations. This theory was considered in a recent judgement of the Supreme Court of Canada, wherein the Court rejuvenated the public trust doctrine.

The case in question is the Supreme Court of Canada case of *British Columbia v. Canadian Forest Products Ltd. (Canfor).* The *Canfor* case was based on a negligence action in which the Canfor Corporation was found liable for damages arising out of forest fire in the interior of British Columbia. While making its way up to the Supreme Court of Canada, mainly over a dispute over the valuation of environmental damages to riparian areas, both the majority and the minority of the Supreme Court of Canada took the opportunity to discuss the existence of the common law public trust doctrine. The majority of the Court, led by Justice Ian Binnie, rejuvenated the idea that certain resources are so special in nature that they are worthy of judicial protection. While speaking in obiter dictum, Binnie J. affirmed that the public has certain rights in the environment that must be upheld by the state, when he proclaimed “that there are public

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rights in the environment that reside in the Crown." Later in the judgement he goes on to state that "...there is no reason to neglect the potential of the common law, if developed in a principled and incremental fashion, to assist in the realization of the fundamental value of environmental protection." Unfortunately, Binnie J. determined that the Canfor case was not the appropriate case to identify the precise nature of the public's right in the environment, nor how the public trust doctrine would encapsulate such rights. With this tentative recognition of the public trust doctrine in place, we are left on our own to determine the scope of the public's rights in the environment and how to enforce these rights.

Due to the lengthy discussion about the public trust doctrine in the Canfor decision, we are left to wonder if the rights in the environment that Binnie J. refers to are similar to the public trust doctrine as it is envisioned south of the border. Given our similar common law legacies it is reasonable to assume that if the public trust doctrine exists in Canada, it does so in a form similar to the public trust doctrine in the United States of America. While the public trust doctrine and its inherent right of access to common resources and amenities have not received the same level of attention here, as it has in America, I argue that the doctrine does exist in Canada. However, due to the lack of judicial attention, the public trust doctrine currently exists only in its ancient and undeveloped form, much as it did when Canada became a nation. Determining how the common law right of access to natural resources and amenities finds modern expression in Canada is the goal of this thesis.

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2 Ibid at para 74.
3 Ibid at para 155.
According to the traditional articulation of the public trust doctrine, the laws of nature keep certain resources, such as the air, running water, and the sea common to everyone. Thus, there are inalienable public rights in certain natural resources that must be maintained. Ultimately, the public trust reflects the fundamental belief that some resources are so integral to the well-being of the community that they must be protected by distinctive principles. The public trust doctrine is one such principle, as it seeks to “prevent the destabilizing disappointment of expectations held in common, but without formal recognition such as title.”

While the public trust doctrine has existed since classical Roman times, it is its modern American expression that has proven to be the most fascinating. Finding its roots in the English common law the public trust doctrine in the United States has provided a judicially backed remedy, by providing for access to, and protection of, common natural resources and amenities. Although receiving uneven articulation across the various states, the public trust doctrine has proven to be an effective tool for environmental protection in many instances.

While the public trust doctrine is a well established principle in the United States of America, it is still unrecognized by most individuals north of the forty-ninth parallel. In Canada there is a recognition of public rights to water resources and access to those water resources. While not recognized as the public trust doctrine by name, I argue that these rights were the first, although incomplete, articulation of the public trust doctrine in

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Canada. When we examine the foundation of the public trust doctrine consisting of the right of access to, and enjoyment of, common resources and amenities by the public, we see that public rights in the environment have existed at Canadian common law for some time.

In its modern expression the public trust doctrine has the potential to do more than simply ensure access to, and enjoyment of, common resources and amenities by the public. By taking a broad view of what constitutes the “public” and what the “access rights” of that public entail, the public trust doctrine can provide for environmental preservation in the name of future generations. “The public trust doctrine is the legal receptacle for the government’s long-term duty, supported by the judicial system, to manage and perpetuate the public enjoyment of natural resources and amenities.” ⁷ By prescribing a principled approach to environmental decision making, the public trust doctrine serves as a democratizing force by preventing the monopolizing of trust resources into private and unaccountable hands. ⁸

The state acting as trustee would be required to maintain common natural resources and amenities, in such a condition, so as to ensure their availability and quality to the public. As a legally binding fiduciary duty upon the state the public trust doctrine would serve the ends of both common ownership and access to necessary natural resources and amenities. Finding it’s most complete and broad expression as a fiduciary obligation incumbent upon the state, the public trust doctrine ensures that litigants and the judiciary have an effective tool to compel state action necessary to fulfill its duties to the public. The simple idea behind the public trust doctrine is that certain resources are

⁸ Ibid at 334.
needed by humankind for continued use and enjoyment, and as such it is important to modern Canadian society to hold the state accountable, in a legally binding manner, for its resource management choices.

I will argue in this thesis that the public trust doctrine exists at common law, although its interpretation by Canadian courts has been very narrow in scope up to this point. While never being labelled as the public trust doctrine per se, public rights in the environment have existed for centuries. Thus, the public trust doctrine is a common law tool that acknowledges the natural law backed right of perpetual access to natural resources and amenities for this, and future generations. The Supreme Court of Canada, by looking not only south of the border but back in Canadian history and articulating the public trust doctrine, may have acknowledged an ancient tool of environmental protection whose time has come once again.

Compared with other nations, the abundance of natural resources found within our borders is astounding.\(^9\) However, Canada’s record of environmental protection concerning its wealth of natural resources has been inadequate. To underscore Canada’s poor environmental record we can firstly note that the quality of Canada’s water resources are in serious decline.\(^10\) Human actions including over-fishing, habitat destruction and degradation, pollution, and introduction of exotic aquatic species, have

\(^9\) David R. Boyd, *Unnatural Law: Rethinking Canadian Environmental law and Policy*, (Vancouver: U.B.C. Press, 2003) at 111. Canada has 10 percent of the world’s forests, 25 percent of the world’s wetlands, 20 percent of the world’s freshwater, and 20 percent of the world’s remaining wilderness. As well, Canada has the most shoreline and the most lake area of any country.

\(^10\) Ministry of Health, *Drinking Water Quality in BC: The Public Health Perspective Annual Report*, (Victoria, B.C. 2001). As a result of acceptable levels of pollution in our water supply, in 2001 the British Columbia Provincial Heath Officer determined that there are hundreds of Canadian communities are under long-term or permanent boil-water advisories
challenged the health and viability of many fishery resources.\textsuperscript{11} Air pollution is also a contemporary matter of concern, as air pollution in Canada causes between five thousand and sixteen thousand premature deaths annually.\textsuperscript{12} Beyond pollution levels in Canada, publicly regulated industries such as the forestry industry currently operate at rates that both governments and professional foresters have acknowledged are higher than can be sustained in the long term.\textsuperscript{13} To sum up, Canada has yet to achieve sustainability with regard to its natural resource management.

The inability to achieve a level of sustainable resource management comes despite the fact that a majority of Canadians desire to leave a lasting natural heritage for future generations. One study has confirmed this desire by concluding that environmental protection is part of Canada’s “fundamental moral belief system.”\textsuperscript{14} The moral belief that the protection of our natural resources and environment is of fundamental importance has also found various articulations in Canada’s highest court. Starting fourteen years ago, the Supreme Court of Canada has made various proclamations regarding Canada’s environment, including that “the protection of the environment has become one of the major challenges of our time,”\textsuperscript{15} that “environmental protection ... measures relate to a

\textsuperscript{11} Jeffrey W. Henquinet and Tracy Dobson, The Public Trust Doctrine and Sustainable Ecosystems: A Great Lakes Fisheries Case Study, (2005-2006) 14 N.Y.U. Envtl. L.J. 322 at 363. Seventy percent of the world’s fisheries face serious difficulties due to over-fishing. This includes both the east coast and west coast fisheries of Canada.
\textsuperscript{12} Boyd supra note 9 at 66.
\textsuperscript{15} Opening line from \textit{Friends of the Oldman River Society v. Canada (Minister of Transport)}, [1992] 1 S.C.R. 3; S.C.J. No. 1.
public purpose of superordinate importance,”¹⁶ and that “... our common future, and that of every Canadian community, depends on a healthy environment, as ... Environmental protection [has] emerged as a fundamental value of Canadian society.”¹⁷ These statements show an acceptance on behalf of the Supreme Court of Canada that the protection of the environment is of prime importance to Canadians.

However, beyond broad statements of principle, Canadian courts have done little to achieve the effective management of our common natural resources and amenities. While it can be argued the judiciary should reflect the fundamental beliefs of society, I argue that judges have not been able to do so, in regard to environmental protection, as they have not felt themselves armed with an effective tool to promote society’s desire for environmental sustainability. It is my contention that the public trust doctrine is a tool that allows the judiciary to reflect society’s environmental values in its decisions.

The public trust doctrine received sparse attention in Canada prior to the Canfor judgement.¹⁸ However, the Canfor judgement has touched off an academic debate regarding the true nature of the public trust doctrine in Canada.¹⁹ With the public trust

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¹⁸ Before the Canfor decision there was only one reported Canadian case explicitly dealing with the public trust doctrine. See Green v. Ontario, (1972), 34 D.L.R. (3d) 20 (Ont. H.C.) and the discussion contained within Chapter 4.
doctrine at the forefront of discussions about Canadian environmental law this thesis
seeks to address some of the questions and concerns that the doctrine raises.

In Chapter two, I will deal with the natural limits to property ownership and
usage, having regard to the natural law scholarship of John Locke. The theories of John
Locke have often been used as a justification for the strict protection of private property.
However, I argue that a reinterpretation of Locke’s theory actually lends credence to the
public trust doctrine’s goals of maintaining access to common resources and amenities,
by asserting that there are natural limits to individual property ownership that must be
balanced against the needs of the community, as a whole. The natural limits to property
ownership and usage illustrate the legitimacy of the state’s role in ensuring the
maintenance of “enough and as good as” natural resources for the perpetual access of the
public at large.

In Chapter three, I will examine how the public trust doctrine has evolved in the
United States. There, the public trust doctrine is a well developed legal concept and by
undertaking a comparative analysis of the public trust doctrine’s various expressions in
that country, I seek to determine the potential pitfalls as well as successes that the
American expression has encountered. Determining how the United States have taken the
public trust doctrine from the British common law and adapted it to fit their
environmental needs will illustrate the possibilities inherent within the public trust
document for Canada.

Chapter four examines the historical expression of the public trust doctrine in
Canada. Although the public trust doctrine has yet to be explicitly affirmed in Canadian
law we can see that public rights in the environment have existed since before
Confederation. Establishing that public rights in navigable waters and fishing rights have always existed in Canada, we can see a conservative pronouncement of the public trust doctrine in Canadian common law, even if it has not been labelled as such. Moving beyond the limited articulation of the public trust doctrine we can see how the Canfor decision may have opened the door for the acceptance of a more robust articulation of the public trust doctrine in Canada. Examining how the public trust doctrine can be interpreted, what types of resources are entrusted to the state, and how an ecological perspective provides guidance to the judiciary in exercising effective natural resources management will also be examined in order to highlight the potential of the public trust doctrine as a tool of environmental protection.

In Chapter five, I will examine how the public trust doctrine can be expressed in modern Canadian legal terms. Although a trust in name, the public trust doctrine is more accurately characterized as an affirmative fiduciary obligation incumbent upon the state. The fiduciary obligation upon the state provides that the state take affirmative measure to ensure that there are the requisite natural resources and amenities needed for sustainability are currently available, while at the same time making provisions for future generations to have access to the common natural resources and amenities necessary to achieve their goals. Characterizing the public trust doctrine as a fiduciary obligation arms the judiciary, and the concerned citizen, with an effective tool to impose sustainable decision making processes upon the state.

Chapter six will deal with one of the most contentious issues in American public trust jurisprudence. The taking of land in the name of the public trust doctrine, is a contentious issue that challenges the current individualistic ideas about fee simple
property ownership. Understanding that the public trust doctrine is a "background principal" of property law allows us to see that takings in the name of the common good do not offend the 5th Amendment of the United States Constitution. In Canada, even though there is no constitutional provision requiring compensation for the taking of property, compensation is due when land is expropriated. However, where land is only encumbered with restrictions that are required for the common good, no compensation is forthcoming, as this amounts to an injurious affection simpliciter, which does not require compensation at Canadian common law.

Chapter seven will deal with a number of practical issues that the effective implementation of the public trust doctrine will face in Canada. In the first place understanding how the public trust doctrine will interact with existing law, is important to its effective and expedient implementation. How the constitutional division of powers in regard to the environment may be affected by the public trust doctrine is a second concern. As well, an understanding of how the law of standing will be affected by the implementation of the public trust doctrine, how the fiduciary obligation within the public trust doctrine compliments the fiduciary duty owed to Aboriginal peoples, and what types of remedies available under the public trust doctrine are further issues that will be canvassed.
Chapter 2 – The Natural Limits of Property Ownership and Usage

1. Introduction

According to the public trust doctrine, as articulated in the Institutes of Justinian, "the laws of nature provide certain resources as common to all mankind: the air, running water, the sea, and consequently the shores of the sea."¹ This chapter will examine the theoretical and historical underpinnings of the public trust doctrine, and how natural resources capable of individual capture, can still be recognized as common to all humankind.

I argue that viewed from the proper perspective, a natural law justification for common access to natural resources and amenities is valid. Natural resources and amenities are essential for our survival and therefore should be protected by distinctive principles. The interests of humankind are such that we should each be afforded the opportunity to achieve a healthy life. This opportunity requires access to natural resources and amenities, at a level of assured quality. When we understand that the laws of nature impose limits to individual property ownership and use, we see that the public trust doctrine is aligned with the laws of nature.²

While the term "natural law" has many different connotations, for clarity's sake it must be defined as neatly as possible at the outset of this chapter.³ Natural law is a philosophical system of both legal and moral principles originating from a source outside

³ It should also be noted here that the terms “natural law” and the “laws of nature” are used interchangeably throughout.
of human authority. Thus, for our purposes natural law can best be described as "a body of laws that derive their authority from nature and are binding on human actions apart from or in conjunction with laws established by human authority." This means that natural law stands in opposition to positive or legislatively created laws. Further, the source of authority for the laws of nature, in my usage, is derived from a higher power, most notably God. The laws of nature are binding upon humankind and there is no authority for humankind to disobey these laws.

Understanding what is meant by natural law, we must turn our attention towards discovering how natural law influences our rights to own real property. It is a common notion that private property represents the essence of individual autonomy. Private property is often believed to consist of a form of protection from governmental interference with our liberty. This view of our relationship to property not only assumes that all objects, including natural resources, can be, but that they should be privately owned. This chapter challenges that view, examining the roots of our modern conceptions of private property and stressing the need to recognize the natural limits of property ownership and usage.

It was during Fifth Century, of the Christian era, that the public trust doctrine was articulated in Roman law, in its most developed form. At the time it was believed that in order to best serve the common good, certain resources must be owned in common. Natural law was used to justify holding the air, running water, and the sea in common. Subsequent individualistic interpretations of natural law were used as a justification for the privatization of resources, as land left undeveloped, or in common, was seen as a

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5 See the discussion of the origins of the public trust doctrine in Chapter 3.
waste. For the purposes of this thesis it is important to rediscover the original “natural”
limits of property ownership and usage.

2. The Common (Mis)Interpretation of John Locke

Natural law matured in the Seventeenth Century, C.E. In Anglo-American
thought natural law is most closely associated with the writings of John Locke. Locke
wrote extensively on the rights and obligations present in property holding. In this thesis I
seek to subject Locke’s theory of natural law to a contemporary interpretation. This
contemporary interpretation is important because Locke’s writings have long represented
the justification for unlimited protection of private property in Anglo-American juristic
thought.

John Locke emphasised man’s natural right to hold property.6 This right to hold
private property has been subsequently used to justify the privatization of property,
without limits. However, we need to understand the meaning that Locke intended to
convey by reading his text in light of the conventions and assumptions available to him.7

Locke’s most poignant work on property rights is his Second Treatise of
Government.8 Understanding that Locke wrote his Second Treatise as a response to the
writings of Sir Robert Filmer,9 as an argument against Filmer’s defence of arbitrary and

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6 Locke, infra note 8 at para. 25.
7 James Tully, An Approach to Political Philosophy: Locke in Contexts (Cambridge: Cambridge University
8 John Locke, Second Treatise of Government, ed C.B. Macpherson (Indianapolis IN: Hackett Publishing
9 James Tully, A Discourse on Property: John Locke and his adversaries (Cambridge: Cambridge
University Press, 1980) at ix, & see Sir Robert Filmer, Patriarcha and Other Writings, ed. Johann P.
absolutist government\textsuperscript{10} helps us understand some of the motivation for his writings. By doing this, we can see that Locke wrote his Second Treatise to champion popular sovereignty and resist the absolute monarchy of the late Stuart period.

A popular, although incomplete, reading of John Locke regards private property as serving the common good, as it serves to draw boundaries around which an arbitrary government cannot infringe upon. It was commonly believed that Locke argued that property must not be taken, even for the sake of the general good, without the owners’ consent in civil society.\textsuperscript{11} Thus, a right in property, which can arise independent of political organization, is a right against the government. His rights-based theory holds that individual interests are sufficiently important to justify holding others (especially the government) to duties to create, secure, maintain, and respect the institution of private property.\textsuperscript{12}

While it is true that Locke resisted natural law as a justification for arbitrary infringement of private property at the hands of government, this does not equate, in his mind, to a complete prohibition of governmental interference. Thus, it can be argued, there has always existed a tension between private rights and communal obligations within the secularist and ostensibly individualistic natural law tradition, represented in the writings of John Locke. The state is in fact charged with the natural duty of upholding limitations on the use of private property. Locke is often misrepresented as an ardent, unrepentant individualist. Given a closer inspection, his position shows that there exists

\textsuperscript{10} Tully, supra note 7 at 100.
\textsuperscript{11} Locke, supra note 8 at para. 138.
an element of communal obligation within his labour model. This is represented by, what is commonly referred to as, the Lockean Proviso or the Sufficiency Limitation.\textsuperscript{13}

Those who interpret this strain of the natural law tradition have always been aware of “the frailty, the imperfection, and the blindness of human reason in the face of the task of discovering the dictates of the laws of nature.”\textsuperscript{14} Therefore, the strain of natural law I refer to in this thesis can be termed as “enlightenment natural law” as it is embodied in the writings of several 17\textsuperscript{th} Century authors.

Searching for ultimate truths is a task guided by reason and ever open to new interpretations, based upon new knowledge and new realities. Any claim to ultimate knowledge must take into account all the information available at this moment in time. As such, a current and most reasonable reading of John Locke will indicate how the ecological interests of future generations can be met, by the state upholding the natural limits of property ownership and usage.

3. Defining Property

Before I lay out a contemporary reading of John Locke’s ideas, we need to have an understanding of what we mean by “property.” At first glance, defining what property is seems like a straightforward task. However, closer inspection reveals how difficult an enterprise this actually is. The definition of property has changed over time and place, and in many respects is culturally specific.\textsuperscript{15} As well, the way we choose to define

\begin{itemize}
\item\textsuperscript{13} Ibid at 209. See the discussion contained in part C. Additional Conditions for Property Acquisition in the State of Nature found within this chapter.
\item\textsuperscript{15} James (Sake) Youngblood Henderson, Marjorie L. Benson, and Isobel M. Findlay, Aboriginal Tenure in the Constitution of Canada, (Toronto: Carswell, 2000) at 406-412. Aboriginal conceptions of property
\end{itemize}
property will affect the ways in which rights and obligations tied to that property may or may not be infringed upon. Property is best understood, both historically and legally, in terms of a balance struck between competing individual and collective claims that relate to land, resources and what is produced. In short it has both a private and public dimension.\textsuperscript{16}

As property rights and obligations vary over time and space any attempt at an overarching and comprehensive global definition would be futile. However, in Canadian society we can get a sense of how property rights are generally conceptualized.\textsuperscript{17} Current property rights terminology gives rise to an assumption of full ownership, over land and resources, which does not adequately characterize the complex relationships that ownership imports.\textsuperscript{18} When an individual or legal person asserts a property claim over an object it means that he, she, or it claims a right over that object that is enforceable against others. Thus, the legal relationship involved is one between persons, not between persons and things. At this basic level then, “property is a special interest that is enforceable both against society at large and its members, not just against particular persons, as a contract may be.”\textsuperscript{19} While an enforceable interest against society at large describes those against whom the interests are enforceable, it does not describe what the substance of those

\begin{footnotesize}
\begin{enumerate}
\item For ease of reference it should be noted that the term “property rights” refers to the right to possess, use, and enjoy a determinable thing, while “property” refers to the determinable thing which is capable of possession, use, or enjoyment.
\item Coyle and Morrow, supra note 14 at 10.
\end{enumerate}
\end{footnotesize}
interests may be. Ownership is not a simple relationship, but a complex bundle of rights and obligations, governing access to and control of material resources, that can vary in their character and effect.\textsuperscript{20} This is evidenced, in Canadian law, by my ability to lease, loan, gift, or sell an interest in my property, whereby I give up possession to another person. Although I no longer have physical possession of the property, my legal interest in the property differs significantly in each scenario.

A particularly robust definition of property relations has been put forth by Stephen Munzer. Munzer claims that property contains “a bundle of rights that includes claim-rights to possess, use, manage, and receive income; powers to transfer, waive, exclude, and abandon; liberties to consume or destroy; and immunity from expropriation without compensation.”\textsuperscript{21} Other authors have, in contrast, asserted that above and beyond the list provided by Munzer that there exists a prohibition on harmful uses.\textsuperscript{22} In this clash of opinion, we can see the development of one of the fundamental dilemmas of property rights. Do property rights include the right to dispose of, alienate, or use, which is not conditional on the owner’s performance of any social function, or do property rights have an inherent/natural limit not to harm other individuals? I argue that although property ownership and usage entail rights in that property, they do not entail exclusive rights, as it also includes obligations, for example, not to harm others.\textsuperscript{23} This obligation, not to use your property to the detriment of others, provides the theoretical basis for the public trust doctrine.

\textsuperscript{20} Waldron, \textit{supra} note 12 at 28.
\textsuperscript{23} This notion is also seen in the common law tort of nuisance, although in a more limited and negative sense.
A. Do Property Rights Have an Inherent Limit?

Let us turn our attention to the essential question of whether property rights have inherent limits. On the one hand, property, as historically understood in some circles, means an individual has a right to unfettered possession, disposition, and use of material (and nonmaterial) things. This view of property rights draws a circle around the activities of each private individual. Outside that circle, he or she must justify or explain his or her activities and demonstrate his or her authority. Within that circle, the owner has a much greater degree of freedom than outside. Within the circle, he or she is master, and the state must explain and justify any interference. The widely regarded English common law scholar Sir William Blackstone, claimed that “the right of property” is “that sole and despotic dominion which one man claims and exercises over the external things of the world, in the total exclusion of the right of any other individual in the universe.”

Blackstone’s absolutist conception of property treats property rights as subject merely to legislative, as opposed to intrinsic limitation. “[A person’s property] consists in free use, enjoyment, and disposition of all his acquisitions, without any control or diminution, save only by the laws of the land.” It has been suggested that on this view, property rights are determined by the particular political and legal arrangements of a state, meaning that property rights are shaped and limited exclusively by positive law.

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25 Charles Reich, “The New Property,” (1964) 73 Yale L.J. 733 at 771. It is as if property shifted the burden of proof; outside, the individual has the burden; inside, the burden is on government to demonstrate that something the owner wishes to do should not be done.
27 Ibid at para 138.
28 Coyle and Morrow, supra note 14 at 74.
By contrast those who believe property is not simply shaped by positive law, but by moral and more transcendent natural law as well, envision property rights as limited by an implied obligation that ownership or possession must not be injurious to the community. By envisioning a collective context for the exercise of the individual rights contained within the liberal conception of property, this broader approach gives universalist, or at least collectivist, values an integral role in defining and limiting the concept of property. Property is not simply that which describes and protects individual autonomy; rather, it is a complex concept that includes a broad range of human liberties understood as operating within a collective context of both support and restraint.  

4. John Locke’s Theory of Property

Assuming, for a moment, that the laws of nature constraint our property rights, the question becomes how do we uncover these laws of nature? According to John Locke, the laws of nature are equated with reason. The laws of nature are not instinctive, but discoverable by reason. This means that “although natural law can be said to be, in some sense, implanted in our hearts, it is not inscribed in our minds.” Uncovering the laws of nature is an exercise in continuing human rationality; one that continues to this day.

According to Locke, the laws of nature are plain and intelligible to all rational creatures, and plain to all who seek them out, by way of reason. “To say something is

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29 Underkuffel, supra note 24 at 141.
31 Ibid at 147.
32 Locke, supra note 8 at paras. 63, 136.
known by the light of nature is to hold that it is known by the exercise of our own faculties.\textsuperscript{33} Our rational understanding of the world around us is always evolving and as such the laws of nature are open to new interpretations. Our continuing search for knowledge in a wide variety of subjects, including science and the understanding of the limits of growth,\textsuperscript{34} help us to understand that there is a limit to our natural resource consumption that must be recognized, if the planet is to survive. Moreover, it must be recognized, from an ecological point of view, that not only are the laws of nature discovered by rational reflection on sense experience, but that this sense experience occurs over time; not just in the lifetimes of individuals.\textsuperscript{35}

A. The Origins of Property Rights

The earth is a gift, given by God to mankind, according to scripture.\textsuperscript{36} While, Sir Robert Filmer\textsuperscript{37} interpreted Genesis I. 28 as granting Adam and his heirs’ private dominium over the earth, Locke interpreted this passage differently. According to Filmer, Adam had natural and private dominion over all things and so none of his posterity had any right to possess anything, but by his grant or permission, or by succession from him.

\textsuperscript{35} \textit{Ibid} at 147.
\textsuperscript{36} Genesis I. 28 - And God blessed them, and God said unto them, be Fruitful and Multiply, and Replenish the Earth and subdue it, and have Dominion over the Fish of the Sea and over the Fowl of the Air, and over every living thing that moves upon the Earth.
\textsuperscript{37} Sir Robert Filmer was an English political theorist of the day. It is generally thought that Locke wrote his \textit{Second Treatise} in response to the writings of Filmer and his support for the absolutist monarchy. Filmer’s theory is founded upon the statement that the government of a family by the father is the true original and model of all government. Thus, Divine Right of the King could not be questioned.
This is, then, a natural, unlimited, and arbitrary right of private property for all mankind.\textsuperscript{38}

In Locke's view the book of Genesis granted the earth to mankind in common, to be used to fulfill man's duty towards God.

God...has given the Earth to the children of men, given it to mankind in common. But this thing being supposed, it seems to some a very great difficulty how any one should ever come to have a property in any thing.\textsuperscript{39}

According to this view, the wording in Genesis is indicative of a hierarchy of man over animals, not of certain men over other men. "The world's resources are fundamentally common and no theory of entitlements can rightly appropriate any resource to one person so absolutely as to negate that original communality of the world's stock"\textsuperscript{40} The natural resources and amenities found on the earth are common to \textit{all} humans.

Since, the world started out as common property of all mankind to the exclusion of other species, nature has conferred upon all men, \textit{in common}, dominion over all things, and consequently has given to every man a power to use those things; but nature has not so conferred private property with that domain.\textsuperscript{41} Locke's view was that God is the maker and thus man has only been given the liberty to use the things on earth as God has permitted.\textsuperscript{42} Man has a privilege to use a world, which is not essentially his own and which is to be used, and not abused, for purposes not his own, for preservation and

\textsuperscript{38} Filmer, \textit{supra} note 9 at 188, 203-204
\textsuperscript{39} Locke, \textit{supra} note 8 at para. 25.
\textsuperscript{41} Tully, \textit{supra} note 7 at 106.
\textsuperscript{42} Locke, \textit{supra} note 8 at para. 39.
enjoyment.\textsuperscript{43} Thus, in order to fulfill our duty to God, we must use the resources he has provided us, but not destroy them in a capricious manner.

\textbf{B. Acquiring Individual Property Rights}

As the earth has been given to humankind in common there must be some way to appropriate a piece of it for personal use. The desire by individuals to use natural resources for their own benefit led 17\textsuperscript{th} Century or "enlightenment natural law" theorists, such as Hugo Grotius\textsuperscript{44} and Samuel Pufendorf,\textsuperscript{45} to claim that consent by the people was needed to remove land from its original state. The original state of ownership was considered, by these writers, as common to all mankind. This common ownership is a different sort of ownership than the term common ownership implies today, and thus there exists an ongoing debate about what this type of ownership in the state of nature actually entailed.\textsuperscript{46}

A predominant interpretation is that everyone did not hold land in common, but everyone had the ability to take and consume what was necessary for them: a community of equal rights to things, not a state of positive community of things.\textsuperscript{47} In short, the original community was not one of joint ownership of land, but the absence of private property, referred to as a negative community.\textsuperscript{48}

\textsuperscript{43} Tully, \textit{supra} note 9 at 72.
\textsuperscript{46} Common ownership at the time meant a sort of negative ownership, where everyone did not have a joint property interest in the land, but common in the sense that land was not owned by anyone making it equal amongst all individuals.
\textsuperscript{47} Buckle, \textit{supra} note 30 at 164.
\textsuperscript{48} \textit{Ibid} at 94, n. 152.
Most commentators have interpreted John Locke in a similar manner; envisioning his idea of the state of nature in a similarly negative way. However, James Tully has cast some doubt on this position. In *A Discourse on Property: John Locke and his adversaries*, Tully redefines the original stock as one that is positive.\(^{49}\)

There are enormous differences in these two positions, as a positive community carries with it, an inclusive right: a right not to be excluded, but included. Cicero’s well-known theatre scenario is illustrative of this positive conception.\(^{50}\) If the state of nature was a negative community, then everyone has a property right in their seat in the theatre and once all the seats are taken others have a negative duty to respect their property interest in that seat and the seat occupier does not have a duty to provide space for the extra people. If the state of nature was a positive community once the theatre is filled to capacity there is a right for those excluded to demand that others make room for them so that they not be excluded. The right is based on first arrival, but it can be overridden by the rights of others in certain instances. A positive state of nature of course means that there exists a natural right of those excluded to demand access to life affirming natural resources.

There is however, one conceptual problem with the notion of a positive community in the state of nature. If it was a positive community where everyone had joint ownership, to take property out of the original stock without consent would be to steal from the other owners. How do we reconcile this idea of theft without consent, with communal notions of ownership? It was unlikely that everyone in this state of nature

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\(^{49}\) Tully, *supra* note 9 at 92.

could agree, at any one time, on privatizing property so another explanation for the basis and emergence of private property is needed.

**i. Labour Theory**

Locke dealt with this conceptual problem by insisting that an individual who mixes his labour with an object gives rise to a property right in that object. This is known as his Labour Theory. Thus, unlike the theories of Grotius and Pufendorf, Locke’s theory does not require consent of all those involved, in order to validly assert a property claim. Mixing your labour with an object provides a prima facie argument for ownership and this right of ownership must be respected by others. There must be a manner of alerting other individuals as to the boundaries of your property claim, such as erecting a fence. However, although enclosure may be seen as necessary to publicize the claim, it alone is an insufficient condition for appropriation. Occupying a piece of land is not sufficient, as an individual must work the land in order to appropriate it.

In Locke’s opinion, mixing your labour with the land is a rational activity, as it is needed to make property useful. Mixing your labour with the land was not primarily concerned with accumulation, but with improvement, as prior to cultivation land was a waste. By divine right, the earth’s resources were intended for our benefit, and to let them sit idle in a state of nature was to fail to fulfill your duty to God, which consisted in part, of using resources for the preservation of mankind. An individual, who by his labour acquires those things necessary for his preservation, acts in accordance with the duties
imposed by natural law.\textsuperscript{51} While enclosing the land would deprive others of land, it was thought to be legitimate as it would also raise productivity and thus help the poor.\textsuperscript{52}

A modern reading of Locke can show that his Labour Theory is only an appropriate theory when resources have yet to be owned. The act of mixing your labour with land is only a sufficient act for first appropriation of property. These acts of appropriation can only occur once per resource, as the second labourer cannot go about appropriation in the same manner. Thus, it is inappropriate to mix your labour with a piece of land that has been already appropriated to another, as to do so would be to steal his property or, at the very least, trespass on his land.

Appropriation was considered the first step in a series of steps which leads to the preservation of mankind.\textsuperscript{53} Everyone has the means necessary for comfortable subsistence and everyone is able to labour in, and enjoy the fruits of, his calling in a manner appropriate to man. This is how the Labour Theory rejects the need for consent among the community at large. Labour will only generate a proprietary title where actions improve the resource. Thus, based upon our current rational thought, the optimal model for human enrichment should be one of rational environmental management and improvement.\textsuperscript{54}

\textsuperscript{51} Buckle, supra note 30 at 174.
\textsuperscript{52} Tully, supra note 7 at 128.
\textsuperscript{53} Tully, supra note 9 at 121.
\textsuperscript{54} Coyle and Morrow, supra note 14 at 55.
C. Additional Conditions for Property Acquisition in the State of Nature

According to John Locke, the natural rights of man include the preservation of mankind, as “everyone...is bound to preserve himself.”\(^{55}\) Beyond the right and duty to preserve oneself, there exists a duty of charity. Once a man himself has the requisite resources to sustain his family, he is obliged to allow those in need to use the fruits of his labour to sustain them. Thus, the preservation of humankind should be a goal of each individual after he or she has acquired the goods needed to preserve themselves. It is also believed that this duty of charity is a duty which men are under naturally as well as civilly.\(^ {56}\)

Beyond mixing your labour with a piece of land, there are two extra conditions that must be present for legitimate appropriation in the state of nature. These are known as the “Spoilage Condition” and the “Lockean Proviso.” The first condition constrains the amount of property allowed to be appropriated in the state of nature, as individuals are bound by the limits that they, or their family, can make use of before it spoils. Anything beyond this amount is not their share. Taking more than your share leads to waste as you, or your family, would not be able to make use of the property or goods before they spoil. A person is entitled to take from the commons, but he or she is not entitled to take as much as they want, as “nothing was made by God for man to spoil or destroy.”\(^ {57}\)

Secondly, although mixing your labour with an object gives rise to a property claim, this claim is only valid where there is “enough, and as good” left in common for others. This is known at the Lockean Proviso and is our main concern in this study.

\(^{55}\) Locke, supra note 8 at para. 2.
\(^{57}\) Locke, supra note 8 at para. 31.
The first conceptual problem, involves interpreting the part of the Lockeanc Proviso that refers to "others," while the second conceptual problem involves trying to understand what "enough" means.\textsuperscript{58} These questions were theoretically moot in Locke’s day, but are of prime importance today!\textsuperscript{59} I submit that the "others" referred to in the Lockeanc Proviso would now include, not only the current members of that society, or even the earth's present population, but future generations as well. Also, "enough" should mean that enough natural resources are available to future persons in order to achieve a healthy life.\textsuperscript{60} "Enough" does not simply mean a certain quantity of resources, but that a certain quality of those resources is available, as well.

The Proviso can be best viewed as a special application of the more general principle announced in Locke’s First Treatise, according to which property could never justly be used to deprive others of the opportunity to use nature. God’s gifts are for the preservation of mankind as well as for their personal preservation.\textsuperscript{61} “Each does not enjoy the entire fruits of his labour if there is not enough left for the public good.”\textsuperscript{62} Locke argued that nature imposed limits on the amount of property each person could create. Each person was entitled to acquire only as much private property as could be individually utilized. The theoretical value of this notion was that it assured that there would always be enough common land for everyone to acquire private property.\textsuperscript{63}

\textsuperscript{59} Ibid at 379.
\textsuperscript{60} Whatever definition of a healthy life you subscribe to, it requires at its most basic level the natural resources essential for human survival. This means clean air, potable water, and any other resources needed to maintain the health and spirituality of our society.
\textsuperscript{61} Sanders, supra note 58 at 380.
\textsuperscript{62} Tully, supra note 9 at 168.
If there is not enough left over for others in the common stock than the appropriation is illegitimate. The Lockean Proviso has long been a source of debate and contention. How can there be a right to appropriate land for self-preservation, while at the same time an obligation to leave enough for others, to preserve mankind as a whole? Some authors believe the Proviso is implausible and should therefore be abandoned.64 One such author, Robert Nozick, has made an argument known as the “Zipper Argument” which he believes shows the impracticality of the proviso:

Consider the first person Z for whom there is not enough and as good left to appropriate. The last person Y to appropriate left Z without his previous liberty to act on an object, and so worsened Z’s situation. So Y’s appropriation is not allowed...Therefore the next to last person X to appropriate left Y in a worse position, for X’s act ended permissible appropriation. Therefore X’s appropriation wasn’t permissible. But then the appropriator two from last, W, ended permissible appropriation, and so on, since it worsened X’s position, W’s appropriation wasn’t permissible. And so on back to the first person A to appropriate a permanent property right.65

If it is impossible to leave “enough and as good” for a finite number of currently existing persons, how can we possibly hope to leave enough and as good for a potentially infinite number of future persons as well?66 James Tully argues that when there is not enough good land left in the state of nature men give up their exclusive rights in land they acquired under the old rule in order that their property be determined, regulated, and settled by majority consent, in conformity with the public good.67 This is a call for the state to fulfill its duty to preserve property akin to the state of nature, which is the

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64 Waldron, supra note 12 at 210.
67 Tully, supra note 7 at 118-119.
purpose for which the state was created. I believe this duty can be fulfilled through the public trust doctrine.

**D. Reconciling Individual and Collective Interests**

So how do we reconcile man’s duty to preserve himself with the Lockean Proviso? We must primarily recognize that there are three different background conditions, present within Locke’s writing. A modern reading of Locke’s work can be divided into three temporal stages of the state of nature. The first stage involves appropriation in conditions where there is no scarcity. In this first stage or “the state of nature,” the population is small enough and the natural world is abundant enough to provide natural resources for everyone. Without a money economy people could only make use of a certain amount of property before the bounty of that property goes to waste. This ensured that with a small population and the inability to utilize more than your share of natural resources before they spoil, there was enough property for everyone.

The second stage came into being when the natural resources of the earth became scarce. In this stage, there arose conflicts over property as there were no longer plentiful resources for everyone. The second stage revolved around the debate about which activities actually improve the land. As there was no longer enough land for all, conflicts arose regarding which activities were the most productive.

Compounding the growing scarcity of natural resources was the advent of a money economy. The third stage concerns the unequal holdings of property after the
advent of a money economy. In this stage humans have consented, or acquiesced, to value things, such as gold or paper currency, which do not spoil. This leads to an exchange economy and ultimately a money economy. It was now open to individuals to use more resources than they could use themselves, as the excess could be sold for monetary profit. Thus, unequal property holdings are justified by humans consenting or acquiescing to value something which is scarce, but does not spoil. Individuals are no longer constrained by what they can make use of before it spoils, but are only constrained by how industrious they can be with their labour.

The difference between the three stages is of the utmost importance, but one that is often overlooked. Clearly we are now into the third stage of background conditions. In our money driven and wealth accumulating society there are extreme differences in property holdings and material wealth, and exclusive ownership of some resources may no longer, if it ever was, be valid. At the time when the world was sparsely populated every man could have as much property as he could make use of and there would still be enough for others. With the advent of money into society men could horde more than they could use without worrying about spoliation. This led to natural resources being viewed as commodities to be bought and sold for profits culminating in the rise of Capitalism.

The advent of a monetary society brings the “golden age” to an end by creating the unnatural desire to seek more than one needs. With the competitive and industrious society we currently live in large individual possessions, especially those in crucial

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69 Ibid at 192.
70 Ibid at 150.
ecological areas, should be restricted to allow for the inclusive rights of everyone to be exercised. I believe it should fall upon the state to regulate and maintain individual property rights in order to maintain the common rights of access to shared resources and amenities, as the free market system of property ownership currently in place has led to the devaluation and destruction of many special resource areas.

E. The Role of Government

"The pravity of mankind being such that they had rather injuriously prey upon the fruits of other men’s labour than take pains to provide for themselves, the necessity of preserving men in the possession of what honest industry has already acquired, and also of preserving their liberty and strength, whereby they may acquire what they further want, obliges men to enter into society with one another."\(^{71}\)

"Human beings refused to accept the limits imposed by the law of nature."\(^{72}\) In Locke’s analysis the advent of a money society has led to the inevitable desire of people to have more for themselves then they can use. Hording resources became the norm and forced people into unequal and disproportionate distribution of land, in the name of profit and wealth. The acquiescence which allowed land to be distributed unequally, also gave rise for the need for government.\(^{73}\) The need for positive laws to determine and define property rights is one of the primary purposes of government. Human beings unite into societies to avoid the inconveniencies which disorder their properties. Humans can not exist without society so they must perform duties to society to ensure that it continues.

\(^{71}\) Tully, supra note 9 at 151.
\(^{72}\) Leeson, supra note 63 at 561.
\(^{73}\) Locke, supra note 8 at para. 30.
Locke believed that it was the role of the state to protect the principles of natural law. This idea was also understood by Blackstone, as he believed the laws of nature were divine and as such the state must uphold natural law as it is:

...superior in obligation to any other. It is binding over all the globe, in all countries and at all times: no human laws are of any validity if contrary to this...\textsuperscript{74}

There exists, according to Locke, a right of legitimate revolution, if the government does not fulfill its mandate. The people can overthrow the government by means of revolution, when the governors act contrary to the trust they undertake. “The power of the community is never alienated but entrusted only, and reverts to the people when governors act contrary to the original constitution.”\textsuperscript{75} I believe that by continually allowing the natural resources needed for future generations to be squandered, the government has not fulfilled its mandate of upholding the laws of nature. It is time for the state to fulfill its obligations by enforcing the natural limits present in property holding.

It is the duty of governments to organize the community’s possessions and strength for the public good.\textsuperscript{76} Man gives up his natural order to belong to society and thus he gives the state its mandate to harmonize human desire with the principles of natural law as much as possible, towards the goal of preserving mankind. Civil laws should not override the laws of nature, but harmonize with them:

When society’s power is in each man’s hands in the state of nature, it has as its ends the preservation of mankind. It has the same end, therefore, when it becomes political power in the hands of the legislative: ‘the end and measure of this Power, when in every Man’s hands in the state of Nature, being the preservation of all of his Society, that is, all Mankind in general, it can have no other end or measure, when in the hands of the Magistrate, but to preserve the Members of the Society.’\textsuperscript{77}

\textsuperscript{74} Blackstone, supra note 26 at para 41.
\textsuperscript{75} Tully, supra note 9 at 160.
\textsuperscript{76} Ibid at 170.
\textsuperscript{77} Locke, supra note 8 at para. 171.
This natural end is the aim of legislative power. Locke’s conceptual analysis of power is the production of a polity directed toward and bounded by natural law.\textsuperscript{78} The legislature is constrained by the sufficiency condition for legitimacy of any civil law: it must “be conformable to the law of nature.”\textsuperscript{79}

Tully believes the natural end of a political society should be the public good, where the public good is seen as a distributive principle.\textsuperscript{80} In this vein, “…all goods must become common when one man’s interest conflicts with another.”\textsuperscript{81} Government is obliged to distribute to each member of that society the civil rights to life, to the liberty of preserving himself and others, and to the requisite goods or means of achieving these goals. This is a governmental duty arising from natural law and is now backed up with the threat of legitimate revolution if not discharged. Each member is thereby assured of his comfortable subsistence in approximately the same manner as in the state of nature.\textsuperscript{82}

5. Conclusions

In Lockean theory, private property was originally justified as beneficial to humans, as property not being put to a use was considered a waste. It was assumed that private property served the public good, as it led to greater productivity and that there was plenty of land to distribute. Does private property invariably lead to greater productivity? Does ownership of private property have a great moralizing effect on the

\textsuperscript{78} Tully, supra note 9 at 162.
\textsuperscript{79} Locke, supra note 8 at para. 135.
\textsuperscript{80} Tully, supra note 9 at 162.
\textsuperscript{81} Ibid at 165.
individual owner? Is it proper to speak of increased productivity in the third stage of Locke’s analysis, where resources are now scarce?

During Locke’s time very few people wrote about destructive actions to the environment because at the time it was hard to imagine that the destruction and degradation of the environment could occur on the scale we are witnessing today. It was generally believed the land was so plentiful that humans could not use it all. We now know this view is mistaken. What happens when we realize that mixing labour with the land to “improve” it is actually destroying resources to the detriment of other humans and the environment more generally? As we have seen 400 years of improvement has wreaked environmental havoc. It is not possible to indefinitely appropriate goods in a finite world, as this assumption rests on the mistaken belief, prevalent in Locke’s time that the world’s resources are too plentiful to be exhausted by the human population.

With the help of subsequent authors, Locke’s doctrine of property rights has been wrenched from its original conditional context and elevated to an absolute right in favour of those who, for economic purposes, would oppose any governmental regulation whatsoever. The complicated theory of property that Locke developed in the Seventeenth Century has undergone a dramatic transformation and become a simplistic, dogmatic theory of natural rights that Locke himself would not have recognized.

Rights in Locke’s theory are self-limiting, as the law of nature which gives us property, does also bound that property. These limits include the amounts that any one

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83 See Waldron, supra note 12 at 22.
84 See Christopher Hill, Liberty Against the Law: Some Seventeenth-Century Controversies, (New York: Penguin Press, 1996) at 91-109. Hill is one author in England who was critical of deforestation and the enclosure of sheep during this time, as uncultivated land was becoming scarce as it was leased or sold for monetary gain.
85 Wolf, supra note 66 at 797.
86 Leeson supra note 63 at 564.
can use, and the ability only to use that property, not abuse it. This makes Locke’s exclusive right similar to a usufruct: the right to use and enjoy God’s property for God’s purposes. It comprises a due use limit on property, as we do not possess “full-blown” ownership, because we do not have the liberty to use property in a way that is harmful to ourselves or others. In a modern evocation, this prohibition on harmful uses also includes harm to future persons.

Because rights have a special moral status, claims based on rights simply “trump” claims of needs, utility, or interest. Modern ecological thought recognizes that general rights to the necessities of life supersede the right to private property, particularly when the rights are asserted on behalf of generations yet to come. A right to have something thus correlates with a negative service duty to abstain or a positive service duty to provide. It is morally wrong to cause suffering to future persons, to afford ourselves present benefits.

The preservation of mankind (including future generations) as a goal, can be read into Locke’s theory. In light of current ecological knowledge, a new reading of the Proviso is needed, one that requires the preservation of resources essential for life. The notion that property rights are subject to intrinsic limitations should not be articulated in terms of the competition between public and private interest, but in terms of natural versus unnatural user. Because not inherently coupled with an environment-preserving

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87 Tully, supra note 9 at 122.
88 Becker supra note 22 at 191.
90 Ibid at 810.
91 Coyle and Morrow, supra note 14 at 159. On this view a natural user is one who uses common natural resources in a sustainable manner, thus ensuring “enough and as good as” resources are available for other users, while an unnatural user does not leave “enough and as good as” for others by using more than her share or destroying common natural resources and amenities.
perspective "...the (individualistic) theory of property was concerned with increasing the complex and sophisticated relationships between individual property rights, emergent forms of commerce, and the idea of public virtue." The legal conceptions of property are currently undergoing a shift away from rights based notions to those of responsibilities.

The fundamental purpose of government is to protect and promote that full panoply of rights and duties dictated by this modern reading of John Locke's natural law theory. This implies that, at a minimum, the government is obliged to distribute to each citizen the requisite goods for preserving life. It has been stated that it is the duty of the state to protect the historical division of property, not to reorder it, on the basis of how we now think it should be done. We do not want to reorder private property, simply recognize its inherent limits within property holding.

This chapter reaffirms the natural limits of private property that has always existed, even if not always enforced. The modern reading of John Locke's natural law theory articulated in this chapter affirms that the state must fulfill its role ensuring that “enough and as good” of resources are available for the benefit of all humankind, present and future. I will argue that this can be properly done through the implementation of the public trust doctrine in Canadian society.

In the next chapter I will examine how the public trust doctrine has served this function, of limiting property ownership rights, for the good of society in the American context.

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92 Ibid at 61.
93 Ibid at 4.
94 Waldron, supra note 12 at 138.
Chapter 3 – The Public Trust Doctrine’s Representation in the United States

1. Introduction

The recent debates surrounding the use of a trust-based management system for natural resources that are “special in nature” has emerged from the Supreme Court of Canada case of British Columbia v. Canadian Forest Products Ltd. (Canfor). While this concept is of a recent vintage in Canada, the public trust doctrine has a long and storied existence south of the border. By examining the development of the public trust doctrine(s) in the United States in this chapter, I will suggest why and how the public trust doctrine can be a useful way of seeking to protect our natural resources and amenities thereby promoting a more sustainable existence in Canada.

In examining the law in the United States the term, the public trust doctrine(s) is used advisedly. As public trust doctrine is most often enforced at the state level, it has seen an uneven application across the country. While it is impossible, given the scope of this study, to articulate every incarnation of the public trust doctrine in America, some tendencies and possibilities can be drawn out of the existing practice and literature. Building on the sources we can see how the public trust doctrine imposes an affirmative duty upon the state to protect precious natural resources and amenities, resources which I argue have been historically mismanaged in Canada.

2. The Origins of the Public Trust Doctrine

Seeking the true origin of the public trust doctrine in the United States could warrant an entire thesis. However, it is necessary to give a brief synopsis of the murky origins of the doctrine in order to understand the role of the public trust doctrine throughout history. The public trust doctrine derives from classical Roman law. The doctrine, which was codified in *The Institutes of Justinian*, stated:

By the law of nature these things are common to mankind - the air, running water, the sea, and consequently the shores of the sea.  

These listed resources were considered “special” by their very nature as they were incapable of, or at least ill-suited to, private ownership and as such should be held as property for the benefit of all.

The public trust doctrine was later incorporated into the English common law sometime prior to the 13th Century, as it can be found within the Magna Carta as evidenced by Henry de Bracton writing on the laws of England. Bracton noted:

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 seashore. ... [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 cable to the trees upon the banks, as to navigate the river itself.

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The concept of inalienable public rights in certain natural resources has also found favour in other legal systems. For example, *The French Civil Code*, art. 538,\(^{102}\) provides that there are common property rights in navigable rivers and streams, beaches, ports, and harbours. Notably the rules set out in *Justinian's Institutes* have also found articulation in Spanish and Mexican law.\(^{103}\)

However, it was the English common law which introduced into the incipient public trust doctrine, a novel concept which reflected how the English legal mind thought about natural resources and amenities. The idea of private ownership fundamentally changed the Anglo-American outlook on common property. "An aversion towards communally owned property led to the view that everything capable of private ownership should be possessed, as a matter of law."\(^{104}\) As seen in the previous chapter, according to enlightenment natural law thinkers, such as John Locke, land left in its natural state was considered a waste. Land gained value only after an individual mixed his or her labour with the land to produce crops. The ecological value of land was not considered a valuable asset.

As the common law abhorred ownerless things, a legal fiction was created, whereby the ownership of the beds of navigable waters was vested in the King.\(^{105}\) Flowing from this fiction, it was held by Bracton that "all things which relate peculiarly to the public good cannot be given over or transferred to another person, or separated

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\(^{102}\) *The French Civil Code* art. 538, trans. E.B. Wright (1908).

\(^{103}\) *Las Siete Partidas* 3.28.6 (S. Scott trans. & ed. 1932). Every man has a right to use the rivers for commerce and fisheries, to tie up to the banks, and to land cargo and fish on them.


\(^{105}\) Stevens, *supra* note 4 at 197.
from the Crown.”106 The public trust doctrine having been incorporated into English common law, it was to become a part of British Colonial law and was subsequently incorporated into American common law in this particular form.

3. Adoption into the United States

While some commentators have viewed the origins of the public trust doctrine in United States law as a continuation of the English notion of the King’s ownership of navigable waters others have viewed it as a matter of the natural law right to common access to public resources.107 Regardless of its origins, the public trust doctrine exists, in some form, as a part of the American common law.

Following the American Revolution, the original thirteen states acquired sovereign status as well as the inherent rights formerly vested in the British Crown. The adoption of the English common law meant that whatever role as trustee of the “special” resources had been held by the British Crown was passed along to the members of the newly formed American Union. Although, the United States Supreme Court case of Illinois Central Railway Co. v. Illinois (Illinois Central)108 has been identified as the “lodestar” case involving the public trust in America,109 it is not the first instance of trust like language involving “special” types of resources and amenities to find its way into American case law. The first mention of the public trust doctrine in American

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106 Ibid at 198.
107 Ralph W. Johnson, & William C. Galloway, “Protection of Biodiversity under the Public Trust Doctrine” (1994), 8 Tulane Envtl. L.J. 21 at 23. The authors articulate the public trust as an aspect of natural law existing outside the confines of any constitution or other government-enabling or limiting document like the Magna Carta.
jurisprudence appears in the New Jersey case of *Arnold v. Mundy*,\(^{110}\) which involved a question of ownership of oysters placed on a river bed. The plaintiff initiated a trespass action against the defendant for taking the oysters he had planted in a navigable river, below the low tide mark, while the defendant claimed the oysters were common property which was subject to the rules of capture. Finding in favour of the defendant, the New Jersey Supreme Court found that the Crown was obligated to hold such waters “as a trustee to support the title for the common use.”\(^{111}\) The court added that the state was under the same obligations as the Crown to hold land under navigable water in trust for the people, and that the sovereign power itself cannot, consistent with the principles of the law of nature and “the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right.”\(^{112}\)

The reasoning in *Arnold v. Mundy* was followed in the same jurisdiction in the case of *Martin v. Waddell’s Lessee*,\(^{113}\) which involved another dispute over the ownership of oysters located on the bed of a navigable river. It was suggested there that “dominion and property in navigable waters, and in the lands under them were held by the King as a public trust” and further that “the Crown was under a duty to hold land under navigable water in trust for the people and thus could not alienate it.”\(^{114}\) These two cases can be read as an incorporation of the public trust doctrine into New Jersey state law by the mid 19\(^{th}\) Century.

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\(^{111}\) *Idid* at 49.

\(^{112}\) *Idid* at 53.


\(^{114}\) *Ibid* at 410-411.
However, the expansion of the public trust doctrine, to the rest of the United States, can most readily be linked to the *Illinois Central* case. In this case the Illinois state legislature tried to repeal a fee simple grant, to the Illinois Central Railroad Company, of submerged lands in Lake Michigan. Here, Justice Field stated that all navigable waterways are subject to the trust under federal law\(^{115}\) and in one of the most famous passages affirming the public trust in the United States claimed:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties... than it can abdicate its police powers in the administration of government and the preservation of peace.\(^{116}\)

Field J. went on to say that:

> “[s]uch abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public,” and that “[e]very legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it.”\(^{117}\)

Thus, *Illinois Central* stands for the proposition that navigable waterways are to be held in trust for the benefit of the entire population.\(^{118}\) Further, *Illinois Central* can be extended beyond federal law, to encompass state actions due to the “equal footing doctrine” as articulated in *Pollards Lessee v. Hagan*.\(^{119}\)

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\(^{115}\) *Illinois Central*, supra note 13 at 453.

\(^{116}\) *Ibid* at 453.

\(^{117}\) *Ibid* at 460.

\(^{118}\) Richard J. Lazarus, “Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine” (1986), 71 Iowa L. Rev. 631 at 638-639 where Lazarus claims the *Illinois Central* case is ambiguous at best on it’s authority as “the court did not cite any relevant precedent in Illinois law to support the decision.”

\(^{119}\) *Pollards Lessee v. Hagan*, 44 U.S. (3 How) 212 (1845) at 229. Simply put, the equal footing doctrine means that new states which join the Union, do so on equal sovereign footing with the original states. The equal footing doctrine has been largely accepted following *Illinois Central* as a rational for extending the public trust doctrine to all U.S. states, but it has been criticised as the underlying rationale for the adoption of the doctrine in the original thirteen states. See Douglas L. Grant, “Underpinnings of the Public Trust Doctrine: Lessons from *Illinois Central Railroad*” (2001) 33 Ariz. St. L.J. 849.
Two years after the seminal case of Illinois Central, the public trust doctrine’s place in the United States was cemented in Shively v. Bowlby,\textsuperscript{120} where Justice Gray speaking on behalf of the court stated that:

At common law, the title and dominion in lands flowed by the tide water were in the king for the benefit of the nation. Upon the settlement of the colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon the American Revolution, these rights, charged with a like trust, were vested in the original states within their respective borders, subject to the rights surrendered by the Constitution of the United States...The new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the tide waters, and in the lands under them within their respective jurisdictions.\textsuperscript{121}

I will next endeavour to examine how the various jurisdictions, federal and state, have articulated the responsibilities associated with trusteeship of “special” resources and amenities.

\section*{4. Diverging Directions: State Interpretation of the Public Trust Doctrine}

Given the public trust doctrine’s historical connection to water, it should come as no surprise that the doctrine was quite readily adopted in U.S. jurisprudence in connection with protecting access to navigable waters for the rights of citizens to engage in fishing, commerce, and navigation. Under the traditional public trust doctrine in England the public trust applied to all navigable waters subject to the ebb and flow of the tide.\textsuperscript{122} This reliance upon the ebb and flow of the tide was modified early on, in order to fit the U.S. context in Illinois Central, as the court noted that such reliance was “wholly inapplicable to our condition” as “some of our rivers are navigable for great distances

\textsuperscript{120} Shively v. Bowlby, 152 U.S. 1, (1894).
\textsuperscript{121} \textit{Ibid} at 57.
\textsuperscript{122} Barney v. City of Keokuk, 94 U.S. 324, (1876) at 337; Noting that “the only waters recognized as navigable in England were tide-waters.”
above the flow of the tide." Thus, the federal expression of the trust doctrine (the navigation servitude) applies to waters that are "navigable in fact," that is, used or susceptible to being used in their natural condition or with reasonable improvements for purposes of trade or commerce.

A. Broad Interpretations

More than just affirming the public trust doctrine, some states have expanded the reach of the doctrine to include new resources and rights incidental to the traditional rights of navigation, fishing, and commerce. While it is impossible, given the scope of this study, to identify how each jurisdiction has dealt with the public trust doctrine, it is useful to highlight some of the instances where the courts have expanded the doctrine.

One of the first expansions was to protect the flora and fauna found within already protected waters. In Smith v. Maryland and McCready v. Virginia the courts found no distinction between the tidelands and the fauna within the tidelands, thereby extending the trust to the fish within the tidewaters.

As a leader in the expansion of the public trust doctrine in the United States, the New Jersey state courts have seen fit to expand the public trust to include a right of access to the water. The public trust was expanded to include the shorelines and beaches abutting those waters. In Borough of Neptune City v. Borough of Avon-By-The-
Sea (Neptune City), the New Jersey Supreme Court extended the right of access beyond the high water mark, which was the traditional boundary to the public trust, to include the upland dry sand beaches. In this decision the court held the public trust doctrine could "be molded and extended to meet changing conditions and needs of the public it was created to benefit."

Subsequently, in Van Ness v. Borough of Deal (Van Ness), the New Jersey Supreme Court extended the rights of access under the public trust, from municipal owners to individual riparian owners. Van Ness abandoned the requirement from Neptune City that the beach must have been dedicated to public beach purposes for the public trust doctrine to apply. In subsequent cases the New Jersey courts have further extended the doctrine beyond municipal owned beaches to include beaches operated by corporations and private beaches. Thus, the public trust doctrine was expanded from a simple, easement like, right of access for fishing, commerce, and navigation to a right of recreation on all beaches in the state.

While New Jersey has taken a broad view of the public trust doctrine in a number of instances, it has not been the state with the most expansionist outlook on the public trust doctrine. That distinction belongs to California. The 1971 case of Marks v. Whitney (Marks) radically changed the core understanding of the public trust doctrine and its application, expanding it beyond land under navigable waters to include other resources:

There is a growing public recognition that one of the most important public uses of the tidelands - a use encompassed within the tidelands trust - is the preservation

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129 Ibid.
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.\textsuperscript{133}

A decade later, Justice Mosk delivered a pair of decisions of the California Supreme Court, on the same day, that expanded on \textit{Marks}. In the cases of \textit{State v. Superior Court (Lyon)}\textsuperscript{134} and \textit{State v. Superior Court (Fogarty)}\textsuperscript{135} he articulated the proposition that, as natural resources continue to disappear, there is a need to protect them in their natural state. Moreover, he concluded that the protection of resources in their natural state was a valid trust purpose.\textsuperscript{136}

These California decisions culminated in the high water mark of the public trust doctrine in that state, being reached in the case of \textit{National Audubon Society v. Superior Court (Mono Lake)}.\textsuperscript{137} \textit{Mono Lake} involved a dispute over the diversion of water from Mono Lake to fulfill the water needs of the City of Los Angeles. At that time Los Angeles had obtained permits for the use of almost the entire flow of water entering the lake. Justice Brossard of the California Supreme Court addressed the issues of the interconnection between all the species and users of this resource at some length, asserting that navigable waters interact with the non-navigable waters around them and that safe-guarding navigable waters, therefore, requires addressing this interconnectedness. Brossard J. also went on to confirm the ruling in \textit{Marks} by holding:

The principal values the 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

\textsuperscript{133} \textit{Ibid} at 380.
\textsuperscript{134} \textit{State v. Superior Court (Lyon)}, 29 Cal. 3d 210 (Cal. S.C. 1981).
\textsuperscript{135} \textit{State v. Superior Court (Fogarty)}, 29 Cal. 3d 240 (Cal. S.C. 1981).
\textsuperscript{136} Lyon, supra note 39 at 248 & \textit{Ibid} at 259.
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.\textsuperscript{138}

Thus, at least in California, the public trust doctrine has been expanded to include ecological integrity, as the preservation of trust property in its natural state is considered to be a valid trust purpose.\textsuperscript{139} This was a major victory for environmentalists in the state of California, as an understanding of the interconnections between all users of a natural resources leads to a fuller, more scientifically realistic understanding of the need to protect the earth’s resources in order to sustain life on the planet.

As well, the *Mono Lake* case stands for a number of propositions regarding the state’s duty in upholding the public trust. In that case Brossard J. stated that:

> In our opinion, the core of the public trust doctrine is the state’s authority as sovereign to exercise a continuous supervision and control over the navigable waters of the state and the lands underlying those waters.\textsuperscript{140}

He went on to also state that:

> ...the state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.\textsuperscript{141}

This affirmative duty of the state as administrator of the public trust is a power which extends to the revocation of previously granted rights or to the enforcement of the trust against lands long thought free of the trust.\textsuperscript{142}

> In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs.\textsuperscript{143}

\textsuperscript{138} *Ibid* at 721.
\textsuperscript{139} *Ibid* at 719.
\textsuperscript{140} *Ibid* at 712.
\textsuperscript{141} *Ibid* at 728.
\textsuperscript{142} *Ibid* at 723.
\textsuperscript{143} *Ibid* at 728.
In another broad interpretation of the public trust doctrine, the court in the Louisiana case of *Save Ourselves, Inc. v. Louisiana Environmental Control Commission*,

articulated the role of the trustee, in the enactment of the public trust doctrine, as being an affirmative duty to act on the public’s behalf. In this case, a citizens group sought review of a decision of the Environmental Control Commission to issue permits to allow construction and operation of a hazardous waste disposal facility, as they did not feel the health, safety, and welfare of the people of Louisiana was protected to the fullest extent possible. The court stated that “[The ECC’s] role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it; the rights of the public must receive active and affirmative protection at the hands of the commission.”

While the common law public trust doctrine has been a useful tool for environmental preservation and protection, when it has been interpreted in a broad manner, the common law version of the public trust doctrine has not been the only expression. The common law public trust doctrine has also provided the intellectual roots for U.S. courts to find a statutory public trust obligation. The most prominent example is the trust obligation flowing from parks legislation.

An example of this statutory trust obligation can be found in the case of *Sierra Club v. Department of Interior, (Sierra Club

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144 *Save Ourselves Inc. v. Louisiana Environmental Control Commission* 452 So. 2d 1156 (La S.C. 1984). This stream of reasoning was followed in *In re Water Use Penn It Applications*, 9 P.3d 409 (Hawaii S.C. 2000) at 453-454, where the court went on to state that the state’s water commission was bound by an “affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.” This meant that “any balancing between public and private purposes begins with a presumption in favour of public use, access, and enjoyment.”

145 *Ibid* at 1156.

which involved the Redwood National Park in northern California. In this case the
Sierra Club launched an action against the Secretary of the Interior for violating his
statutory obligation by failing to take action to protect the resources of the Redwood
National Park. The Sierra Club contended that the Secretary of the Interior was
violating his statutory public trust obligation by permitting logging near the Park to take
place. This nearby logging was alleged to cause the soil stability, and the water quality, in
the park to be adversely affected.

The National Park Systems Act, which the plaintiff Sierra Club relied on,
provided for the creation of the National Park Service in the Department of the Interior
which Service shall:

...promote and regulate the use of Federal areas known as national parks,
monuments, and reservations ... by such means and measures as conform to the
fundamental purpose of said parks, monuments, and reservations, which purpose
is to conserve the scenery and the natural and historic objects and the wild life
therein and to provide for the enjoyment of the same in such manner and by such
means as will leave them unimpaired for the enjoyment of future generations.

The plaintiff contended that the defendants had a judicially-enforceable duty to exercise
certain powers granted to them by the above section of the National Parks Systems Act to
prevent or to mitigate such actual or potential damage to the park and its redwoods.

In deciding in favour of the plaintiffs, and holding that the Secretary did have a
judicially enforceable duty, the District Court quoted the U. S. Supreme Court decision of

Knight v. United Land Association, which held that the:

The secretary (of the Department of the Interior) is the guardian of the people of
United States over the public lands. The obligations of his oath of office oblige

148 Ibid at 91.
150 Sierra Club I supra note 52 at 93.
him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it.\textsuperscript{151}

Just one year later, a second case regarding the statutory trust obligations regarding the Redwood National Park made its way to court. \textit{Sierra Club v. Department of Interior, (Sierra Club II)}\textsuperscript{152} was brought before the courts, in their supervisory capacity, to determine whether the Secretary of the Interior had complied with the earlier ruling. In the earlier decision, the court held that the Secretary does have certain statutory and fiduciary duties with respect to the Park.\textsuperscript{153} In this case the court determined that “the Secretary has not implemented any of the recommendations made by or on behalf of his own agency...”\textsuperscript{154} Therefore, “the Court concludes that, ..., the defendants unreasonably, arbitrarily and in abuse of discretion have failed, refused and neglected to take steps to exercise and perform duties imposed upon them by the \textit{National Park System Act}.”\textsuperscript{155} The court also declared that:

...the defendants take reasonable steps within a reasonable time to exercise the powers vested in them by law and to perform the duties imposed upon them by law, in order to afford as full protection as is reasonably possible to the timber, soil and streams within the boundaries of the Redwood National Park from adverse consequences of timbering and land use practices on lands located in the periphery of the Park and on watershed tributaries to streams which flow into the Park.\textsuperscript{156}

The \textit{Sierra Club} decisions have shown that even when the public trust doctrine is codified into statute the duties of the trustee can still be interpreted it in a broad manner. Here, protecting the park included protecting the slopes around the park from logging in

\begin{footnotesize}
\begin{itemize}
  \item[151] \textit{Knight v. United Land Association}, 142 U.S. 161 at 181 (1891).
  \item[153] \textit{Sierra Club I supra} note 52.
  \item[154] \textit{Sierra Club II supra} note 57 at 291.
  \item[155] \textit{Ibid} at 293.
  \item[156] \textit{Ibid} at 293.
\end{itemize}
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order to protect the ecological integrity within the park. Understanding the interconnection of those resources both within and outside of the artificially created park boundaries assisted the judiciary in upholding a standard of conduct incumbent on the public trustee.

Although, the above decisions arguably envision expanding the public trust to all ecologically sensitive areas (even those not connected to a water source) this stream of thought has not been picked up on by the judiciary in all other jurisdictions. However, in a surprising twist, a trust like duty in regards to wild animals has been developed in a few jurisdictions. It has been stated that wildlife, like water, is difficult to possess in the traditional sense and as such is “special” in nature.\footnote{Horner, \textit{supra} note 4 at 29.} This idea was articulated in the case of \textit{Geer v. Connecticut (Geer)},\footnote{\textit{Geer v. Connecticut} 161 U.S. 519(1896).} wherein Mr. Geer was charged under a Connecticut statute of possessing game birds, that were under state protection, with the intention of distributing them across state lines. In that case the Supreme Court of the United States stated:

While the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from the common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of all people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public.\footnote{\textit{Ibid} at 529.}

In the more recent case of \textit{Hughes v. Oklahoma (Hughes)} the United States Supreme Court refined the \textit{Geer} idea of ownership bringing it more in line with a trust obligation, where the title in wildlife rests with the people and not with the state.\footnote{\textit{Hughes v. Oklahoma}, 441 U.S. 322 (1979).} The
obligation of the state is not to act in the best interests of the state itself, but to act as a trustee of the people, in their best interests. In *Hughes*, the dispute was centered on an Oklahoma statute that allowed for an unlimited number of minnows to be taken for commercial purposes within the state, but limited the number of minnows that could be taken for sale across state lines, thus in effect discriminating against interstate commerce. *Hughes* overruled *Geer* on the separate matter of interstate commercial activity, which fell within the Commerce Clause. Whether or not it overruled *Geer* on the substantial interests the State has in the preservation of wild fish and game is still a matter of some debate.\(^{161}\)

The public trust doctrine in America has emerged from its murky origins to prove to be a useful tool of environmental protection in some jurisdictions. Unfortunately, the uneven application of the doctrine has lead to reams of academic speculation on what the doctrine means in each of the fifty states.

**B. Narrow Interpretations**

A second view of the public trust doctrine is one that subscribes to the notion that humans have not only private property but supremacy over nature, which inevitably leads to private ownership of resources. It is argued that conceptions of private property and ownership on which American society is based, means that the notion of communal property is either mistaken or limited in various ways. This viewpoint was articulated in the judgement of Chief Justice William Rehnquist, when writing for the United States Supreme Court in *Dolan v. City of Tigard (Dolan)*. There Rehnquist C.J. identified the

right to exclude others as of singular importance in the law of private property, by stating that:

Public access would deprive petitioner of the right to exclude others, “one of the most essential sticks in the bundle of rights that are commonly characterized as property.”162

In *Dolan*, the city of Tigard Oregon had placed a condition on the development of commercial property lots, which stated that a portion of the property be maintained in favour of a public right of access. The U.S. Supreme Court rejected the condition, as they found that although a public right of access was found to be a laudable goal, it was not one that could escape Constitutional scrutiny.163

Although Rehnquist C.J.’s point of view can be characterized as a rejection of the public trust doctrine, I believe that it can be more accurately seen as an affirmation of the Fifth Amendment of the United States Constitution.164 Rehnquist J. makes the point that private property rights include the right to exclude others and to infringe upon that right requires compensation. In other words, he does not dispute the existence of the public trust doctrine, only the reach and effect it may have on private property rights.

While some commentators argue that the public trust doctrine does not go far enough in the protection of natural resources, others claim the doctrine goes too far. A call for a restrictive reading of the doctrine, confining it to navigable waterways and a strict right of access to those waterways has been expressed in some opinions. Keeping the public trust doctrine within its historical place, i.e. extending the area of protection only to the low tide mark of navigable waters that ebb and flow, has been the dominant stream of thought in Delaware, for example. Judge Lee in the case of *Groves v. Secretary* 

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163 *Ibid* at 396.
164 *Infra* note 98.
of the Department of Natural Resources concluded on review that the rights of a riparian enure to the owner of bay and oceanfront properties in Delaware, and that a private riparian owns to the low water mark.\textsuperscript{165} It has been suggested that “the desire for free public access, which arguably underlies the public trust doctrine, is different from a goal of preserving natural ecological functions.”\textsuperscript{166} Thus, some have called for the recognition of the traditional or conservative articulation of the public trust doctrine only. Unfortunately such an articulation does little to protect the ecological realities of natural resources and does not contemplate the evolution of this common law doctrine. Just as common law torts have been allowed to expand over the years to cover new interests and situations so too should the public trust doctrine, as long as it does so in an incremental and principled manner.

C. Not Broad Enough Interpretations

Sweeping aside concerns about the origins of the public trust, some commentators have questioned the public trust doctrine’s ability to achieve ecological integrity and environmental sustainability.\textsuperscript{167} Critics of the trust model of environmental protection claim that “the public trust approach is inherently antagonistic to the promotion of innovative environmental thought, as a trust is, by its nature, conservative.”\textsuperscript{168} As well, they claim the trust approach is unlikely to succeed, because the trustee will construe trust instructions against a background of the same cultural

\textsuperscript{168} Ibid.
assumptions, values, and meanings that American have traditionally held about property rights.\textsuperscript{169} "No human trustee, burdened with the types of natural impulses that drive humans to overconsumption, will be capable of transcending this mind-set to manage natural resources in a responsible fashion."\textsuperscript{170} These view points are not unique to the public trust doctrine. They emphasize the problem of perspective, inherent in all forms of environmental protection.

Another prevalent critique of the public trust doctrine is its reliance on a pro-environmental judiciary as the doctrine is largely judge made.\textsuperscript{171} Because the public trust doctrine is largely judicially made, and therefore applied on a case by case basis under principles of judicial restraint, practitioners have not been left with any clear authority either as to the resources to which the doctrine should apply, or its necessary features.\textsuperscript{172} Thus, an argument can be made that the doctrine gives even less guidance than the statutes and developed common law rules it is meant to supplement. As well, judges may lack the technical competence to oversee resource-sensitive decisions by agency administrators who are more likely to be professional resource managers by training.\textsuperscript{173}

Others have argued that there is no longer a need for the public trust doctrine in today’s society as the legislature has the ability to enact statutes to protect our resources. Richard Lazarus believes that the state’s existing police and administrative powers adequately guarantee the vital public interests otherwise enforced by the trust.\textsuperscript{174}

\textsuperscript{169} Ibid at 1216.
\textsuperscript{172} Horner, supra note 4 at 24.
\textsuperscript{173} Ibid at 712.
\textsuperscript{174} Lazarus, supra note 23 at 634.
contends that contemporary political realities afford the state a far greater role in regulating property than it once had and the growth in the police power has led to an erosion in the sanctity of private property itself, thereby further increasing the government's powers of regulation.\textsuperscript{175}

5. The Mono Lake Success Story

For those who doubt the effectiveness of the public trust doctrine, as a tool of environmental protection and preservation, an example of its usefulness may be beneficial. The judiciary has, on occasion, taken a broad view of the public trust doctrine leading successfully to environmental sustainability. The most famous example of this is the Mono Lake case.\textsuperscript{176} As noted above, the Supreme Court of California stated that “the preservation of trust property in its natural state was a valid trust purpose.”\textsuperscript{177} However, the court did not specify how to go about preserving the trust property.

The California Supreme Court did not mandate any particular water allocations in its Mono Lake decision, but simply armed the parties with the tools for more effective negotiations. Up to that point there had been an ongoing dispute between the City of Los Angeles and the National Audubon Society over water diversions out of Mono Lake. Based on continued activism to “Save Mono Lake” and the Supreme Court of California’s articulation of the public trust doctrine in the Mono Lake decision, the National Audubon Society was finally able to negotiate an agreement with the City of Los Angeles concerning an appropriate water level for Mono Lake. An appropriate water

\textsuperscript{175} Ibid at 635.
\textsuperscript{176} Mono Lake supra note 42.
\textsuperscript{177} Ibid at 719.
level for Mono Lake would ensure that the lake ecosystem would function at its prime capacity and continue to support a wide variety of species.

In December 1993, the concerned parties finally reached agreement that culminated in the California State Water Resources Control Board Decision 1631, ending more than 15 years of environmental activism in the name of saving the Mono Lake. The State Water Resources Control Board issued its order to maintain the level of Mono Lake at about 6392 feet above sea level, in compliance with the court order. The Board found that a surface elevation of 6392 feet above sea level would be optimal for most trust resources, and that higher levels could actually cause harm to some species that relied on the lake ecosystem. The order provided for a twenty-year transition to allow the water levels to reach the appropriate height. At the time of Decision 1631 the lake level was 6374.6. As of April 1, 2007 Mono Lake’s water level had risen to 6384.7 feet above sea level.

Since the Water Board’s decision the City of Los Angeles has curtailed its water withdrawals in the name of ecosystem management, allowing Mono Lake to restore itself into a fully functioning ecosystem. The City of Los Angeles agreed to erect a fifty million dollar water reclamation plant, eliminating the need for almost one-half of the water normally withdrawn from the Mono Lake feeder system. This agreement marked the first time that Los Angeles voluntarily relinquished any of its water rights in favour of an

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179 Ibid.
181 S.W.R.C.B. Decision 1631, supra note 83.
alternate source.\textsuperscript{183} As an example of the effectiveness of the agreements in place, even though an additional one million people moved into Los Angeles between 1975 and 1995, the City's water usage did not change.\textsuperscript{184}

While the judiciary did not articulate how the trust resource was to be preserved, they did act in their capacity as supervisor and ultimate protector of the trust encumbered resource. The important aspect of this success story is the ability of the public trust doctrine to provide the impetus for a sustainable ecosystem. Based on this example the public trust doctrine can be seen as a powerful common law tool for environmental sustainability as it allowed Mono Lake to once again become a fully functioning ecosystem despite the presence of damage from over forty years of excessive diversions.

6. Forward Thinking, Effective Conservation and Other Conclusions

It is apparent from the American experience that the public trust doctrine can be a powerful tool for environmental protection. In its most developed form the doctrine possesses the three characteristics essential for an effective legal basis for environmental protection: (1) a legal right vested in the public; (2) a right enforceable against the government; and (3) the substance of the right is harmonious with environmental concerns.\textsuperscript{185} The trust obligation also imposes an affirmative duty on the state to protect natural resources,\textsuperscript{186} offers standing where none existed before,\textsuperscript{187} envisions a lasting

\textsuperscript{185} Sax, supra note 14 at 489.
\textsuperscript{186} State v. McHugh, 630 So. 2d 1259 (La. S.C. 1994).
\textsuperscript{187} Marks, supra note 37 at 381-382. The doctrine could supplement the common law doctrine of public nuisance, without the need to show damages different in kind.
influence where the beneficiaries of the doctrine include future generations, and counteracts the lack of environmental initiatives in legislatures.

Ultimately, the public trust reflects the fundamental precept that some resources in natural systems are so central to the well-being of the community that they must be protected by distinctive principles. According to one of the public trust doctrine’s main proponents, Joseph Sax, the public trust doctrine is necessary to “prevent the destabilizing disappointment of expectations held in common, but without formal recognition such as title.” The function of the public trust doctrine is to protect such public expectations against destabilizing changes, just as we protect conventional private property from such changes.

Considering the unsustainable way we currently interact with and consume our natural resources, I argue that the public trust doctrine holds great potential as a tool of environmental protection. It has the ability to hold the state accountable for decisions made or not made. Judicial supervision of state decision making will render those who make decisions regarding common resources accountable for those decisions and will ultimately lead to better decision making for all of us.

While the doctrine, in its traditional version, protected discrete elements of the natural world: a river, a stretch of shoreline or tidal area, it is now clear that this is not sufficient. Our ever expanding ecological and scientific knowledge consisting of the

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188 Shively, supra note 25, “a public trust for the benefit of the whole community.”
191 Ibid at 188.
interconnectedness between living organism leads to increasing acceptance that it is impossible to protect discreet natural resources without protecting the entire ecosystem of which those resources are but a part. Expanding upon the California view, the public trust doctrine can protect ecosystems as a whole. Understanding the interconnectedness of all living things leads to the realization that each member of a biotic community has a function in maintaining the health of ecosystems, and protecting navigable waters is meaningless unless we protect all the organisms that help that ecosystem survive!

7. Other Issues in U.S. Jurisprudence

When assessing the strength of the American public trust doctrine it is necessary to consider the Fifth Amendment, to the United States Constitution, commonly known as the “Takings Clause.” This issue is of prime importance for any concept of environmental regulation and will be canvassed in some detail in the sixth chapter.

This is one of main areas of interest in public trust litigation regarding private property seized from landowners for the benefit of the entire public. The U.S. Supreme Court has observed that the traditional role of the Takings Clause “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” Thus, as a matter of fairness when an individual’s property is burdened with an obligation that benefits the public as a whole she should be compensated to the degree of the burden encumbered. While this

193 The 5th Amendment (known as the Takings Clause) claims that “no person shall... be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.”
issue is of great concern south of the border it has not received the same level of attention in Canada, as our Constitution does not provide for protections in regard to property.¹⁹⁵

Before turning to the issue of compensation for the “taking” of property in the name of the public trust doctrine, we must examine how the public trust doctrine has been interpreted in Canada, up to this point. Discovering that a primitive version of the public trust doctrine has always existed in Canada will help us to better understand how a modern ecologically aware version of the doctrine can and should be implemented now.

¹⁹⁵ While our constitution does not recognize private property rights as a fundamental value worthy of protection, it should be noted that every Canadian jurisdiction has enacted legislation against expropriation without compensation. It should also be noted that although there have been attempts to bring property rights within s. 7 of the Canadian Charter of Rights and Freedoms, these attempts have gone largely unrecognized by the courts. See Jean McBean, Q.C., “The Implications of Entrenching Property Rights in Section 7 of the Charter of Right,” (1987-1988) 26 Alta. L. Rev. 548; Philip W. Augustine, “Protection of the Right to Property under the Canadian Charter of Rights and Freedoms,” (1986) 18 Ottawa L. Rev. 55; and Morris C. Shumitcher, “Property and the Canadian Charter of Rights and Freedoms,” (1988) 1 Can. J. L. & Jurisprudence 18.
Chapter 4 – The Public Trust Doctrine’s Representation in Canada

1. Introduction

When we turn our attention towards the Canadian interpretation of the public trust doctrine, the first thing we notice is how little jurisprudential and scholarly literature exists on the topic. The public trust doctrine has received sparse attention in Canada leaving us unclear about its place in Canadian law. At present, the public trust doctrine holds great potential as a tool of environmental protection and preservation. Unfortunately this potential has not been effectively utilized. However, the time may have come for the doctrine’s potential in Canada to be fulfilled, in light of the recent Supreme Court of Canada case of British Columbia v. Canadian Forest Products Ltd. (Canfor).¹

While we see many similarities between Canadian and American society, it is illogical to simply transplant the U.S. version of the public trust doctrine into Canada as a matter of convenience. Given the differences in our constitutional makeup² and worldviews, it seems preferable to recognize the similar origin of the public trust doctrine, while expanding upon it and defining it in our own, uniquely Canadian, way.

This chapter will examine the Canadian jurisprudence surrounding the public’s right of fishing and navigation that does exist, showing how these cases represent the affirmation of the public trust doctrine, even if not explicitly labelled as such. I will also examine how the dormancy of these rights of public access and control has been brought back to the forefront of our thought with the groundbreaking Canfor decision. Finally,

² See Chapter 6 and the discussion contained therein regarding the takings clause of the 5th Amendment contained in the U.S. Constitution.
turning our attention towards the Canadian interpretation of this (re)recognized tool of environmental protection I will explain how the public trust doctrine can be framed in ecologically sensitive terms thereby ensuring perpetual access to common natural resources.

2. The Public Trust Doctrine in Canadian Law

Before articulating the precise nature of the public trust doctrine in its modern incarnation, we should note that the idea that the public has certain rights in common resources is not a recent academic or judicial creation. As Binnie J. noted in Canfor, there are public rights in the environment that currently reside in the Crown and these rights have deep common law roots.³ Thus, the government has historically held an inalienable interest in certain resources it holds in trust for its citizens.⁴ In fact, the Canadian courts have long recognized the duty on the part of the state to protect all navigable waters, even though they have not labelled it as a trust obligation.⁵

The idea that the public has certain public rights in common resources has existed in Canada, since before Confederation. Traditionally, in English common law it was understood that certain resources were incapable of unrestricted private ownership. One instance was flowing water, which itself was considered incapable of ownership and so

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³ Canfor supra note 1 at para. 74.
was regarded as a “public” resource. It is in these ideas of the common ownership of,
and access to, certain resources that the public trust doctrine finds its roots in Canada.

The earliest instances of public trust ideas found within Canadian jurisprudence
tend to be in terms of navigation and fishing rights in navigable rivers. It is this
traditional view of the public trust doctrine, which I argue is not the full expression of the
public trust doctrine, which has found expression in a number of early Canadian cases.
This acceptance of a public right to navigation and fishing in early Canadian law
establishes that the public trust doctrine has deep roots in the common law. R. v. Meyers may be the first expression of a public trust in Canadian law. Referring to our English
common law roots the court determined that:

…the great lakes and streams which are in fact navigable, and which empty into
them in these provinces, must be regarded as vested in the crown in trust for
public uses for which nature intended them – that the crown, as the guardian of
public rights, is entitled to prosecute and to cause the removal of any obstacles
which obstruct the exercise of public right, and cannot by force of its prerogative
curtail or grant that which it is bound to protect and preserve for public use.

This decision was quickly followed by the case of Gage v. Bates, where the court
refused a trespass action against the defendant who continued to fish and navigate over an
inlet subject to an ownership claim by the plaintiff. The defendant was found to be
exerting his public rights to fish and navigate within navigable waters. In that case
Richards J. stated:

If the locus in quo is a public navigable river, then it is a public highway, and all
her Majesty’s subjects of common right may pass over it in boats and fish therein,

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8 Ibid at 357.
notwithstanding the grant of the soil by the Crown, for such grant must be taken subject to the public right.\textsuperscript{10}

It was also held that the common law rule, which considered a body of water to be navigable if there was a flux and reflux of the tide, was broadened to include an inlet which had a depth of water enough to be used by boats of considerable size.\textsuperscript{11}

Further, the Prince Edward Island case of \textit{R. v. Lord}\textsuperscript{12} held that the scope of the rights of navigation and fishing to be:

The right of property in the sea and the soil at the bottom, and also the land between the high and low marks, is in the Sovereign, but, although the King has the property, the people have the necessary use. But these rights of use are only the rights of piscary and navigation...With respect to these public rights, viz. navigation and fishery, the King is, in fact, nothing more than a trustee of the public and has no authority to obstruct, or grant to others, any right to obstruct, or abridge the public in the free enjoyment of them. But subject to these rights the King may grant the soil of the shore and all the private rights of the Crown with it.\textsuperscript{13}

Following these judgements the Supreme Court of Canada considered the nature of the rights of the public in a water resource in the case of \textit{Wood v. Esson}.\textsuperscript{14} The case involved a dispute over the access to the Halifax Harbour. Ritchie, C.J. stated:

\ldots There can be no doubt that all Her Majesty's liege subjects have a right to use the navigable waters of the Halifax harbour, and no person has any legal right to place in said harbour, below low water mark, any obstruction or impediment so as to prevent the free and full enjoyment of such right of navigation...\textsuperscript{15}

\textsuperscript{10} \textit{Ibid}.
\textsuperscript{12} \textit{R. v. Lord}, (1864) 1 P.E.I. 245.
\textsuperscript{13} \textit{Ibid} at 257.
\textsuperscript{14} \textit{Wood v. Esson}, (1884), 9 S.C.R. 239.
\textsuperscript{15} \textit{Ibid}.
Two years later a New Brunswick case followed the reasoning of the Supreme Court of Canada in Wood v. Esson. The case of Quiddy River Boom Co. v. Davidson\(^ {16} \) held that ownership of the bed of a river is subject to the public right of navigation which is a paramount right in all subjects of this realm.\(^ {17} \)

It should also be noted here that the existence of public rights in Crown lands could not be extinguished simply by transferring title into private ownership.

The Crown, as owner of the foreshore, had undoubtedly the right to cut it up and dispose of it as it deemed best; but clearly in so doing it owed a duty to the general public, irrespective of the special rights of the riparian owners to protect them in the enjoyment of the common law right of accès et sortie to the river which they then had and of which they must necessarily be deprived in the contingency then foreseen that the beach might be laid out for building lots. It is not to be assumed that the Crown would be more solicitous for the private interests of certain individuals than for the common law rights of the general public,...\(^ {18} \)

According to Tweedie v. R. a grantee of the foreshore holds it subject to the jus publicum of navigation and fishing.\(^ {19} \) "The public right of fishing and navigation is well established in Canada, even though its scope is fairly narrow."\(^ {20} \) In fact Ritchie C.J. in the Supreme Court of Canada case of R. v. Robertson went so far as to observe that the federal government must "protect and preserve" Canadian fisheries.\(^ {21} \)

\( ^{16} \text{Quiddy River Boom Co. v. Davidson, (1886), 25 N.B.R. 580 (C.A.).} \)
\( ^{17} \text{Hunt, supra note 11 at 165.} \)
\( ^{18} \text{Rhodes supra note 5.} \)
\( ^{19} \text{Tweedie v. R. (1915) 52 S.C.R. 197 at 214. Affirming Donnelly v. Vroom (1907) 40 N.S.R. 585 at 592, where the court stated "the right of navigation, as well as that of fishing, is paramount to the rights of a mere owner of the soil. In other words, the public right of navigation and fishing is not, and cannot be, affected nor diminished by any transfer of the soil of an arm of the sea, or its shores, to an individual.} \)
\( ^{20} \text{Hunt, supra note 11 at 166. While the public right of fishing and navigation is well established, it is not an absolute right. For example the Navigable Waters Protection Act (R.S., 1985, c. N-22) s. 5 allows for works constructed in navigable waters to proceed upon Ministerial approval.} \)
\( ^{21} \text{R. v. Robertson [1882] (1882), 6 S.C.R. 52 (1882), 6 R.C.S. 52.} \)
While the cases discussed above indicate that the public holds rights of fishing and navigation, they do not explicitly label this as part of the public trust doctrine, as it has come to be recognized in the United States of America. Thus in Canada, it can be argued that, the public trust doctrine has been confined to its incidental effect of access to navigable waters for navigation and fishing. The question thus arises of whether or not it has the potential to expand beyond its current boundaries.

The first attempt in Canada to enlarge this trust obligation and articulate the modern public trust doctrine, beyond its watery origins, appears to be the case of Green v. Ontario (Green). Here the plaintiff argued that a provincial lease of sand dunes to a private company was a breach of the public trust, particularly since the Province of Ontario subsequently designated adjacent lands as a provincial park. Various negative impacts of proposed projects were raised including aesthetic visual impairment and noise interferences. The court rejected the statutory trust claim, which asserted the view that the Provincial Parks Act required all provincial parks be dedicated to the healthful enjoyment of the public, on the grounds of uncertainty in the subject-matter of the trust. This decision can be readily distinguished as the plaintiff was attempting to invoke a statutory trust, for the benefit of the public, not the common law public trust doctrine.

The court in Green also ruled against the plaintiff by asserting that Mr. Green did not have the requisite standing to bring the claim, under the traditional standing rules of the day. However, as the discussion in chapter seven indicates, the standing rules for public interest claims have undergone a considerable relaxation since the Green case was heard. By ruling against Mr. Green the Ontario High Court sent the public trust doctrine

back into hibernation, from which it is only now emerging. *Canfor* seems to signal the Supreme Court of Canada’s acceptance of the public trust doctrine, but it is yet to be seen if this ancient common law doctrine will be recognized and affirmed in its fullest sense.

### A. The *Canfor* Case

The *Canfor* case represents a more recent attempt to articulate the modern public trust doctrine in Canada. *Canfor* can also be understood as the latest endeavour in a string of judgments, dating back to 1992, in which the Supreme Court has underscored the fundamental value of environmental protection and the need for the law to develop in a manner that gives effect to this value.\(^{24}\) There are many significant aspects of the decision, but what may be the most important is the statement that “...there is no reason to neglect the potential of the common law, if developed in a principled and incremental fashion, to assist in the realization of the fundamental value of environmental protection.”\(^{25}\) This idea of the common law evolving in a manner that assists in the realization of environmental sustainability, for generations to come, was cemented by the court’s recognition “that there are public rights in the environment that reside in the Crown.”\(^{26}\)

The *Canfor* dispute arose out of a 1992 forest fire in the Stone Creek area of the interior of British Columbia. The fire damaged 1491 hectares of forest, which included

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\(^{25}\) *Canfor*, supra note 1 at para 155.

\(^{26}\) *Ibid* at para 74.
areas intended to be logged and non-harvestable areas, identified as "Environmentally Sensitive Areas." At the lower courts Canadian Forest Products Ltd. accepted responsibility for the fire, which was caused by their negligence in failing to ensure that a pile of waste cuttings that had burned throughout the winter (as was a common practice in the area), was completely extinguished.

In an unexpected twist, at the Supreme Court of Canada, the province of British Columbia changed its position from that of the landowner of the area in question, to one of guardian of the people of the province. British Columbia argued that they could sue the corporation by invoking their parens patriae obligation to protect the interests of the public and used this argument as the basis for seeking to recover damages on behalf of the public through the common law. For the majority Binnie J. in denying the Crown’s argument said “Canfor takes too narrow a view of the entitlement of the Crown, represented by the Attorney General, to pursue compensation for environmental damage in a proper case.”\(^{27}\) Unfortunately, Binnie J.’s opinion was that this case did not provide a satisfactory occasion for protecting the environmental interest. He said “the groundwork for a claim on some broader ‘public’ basis was not fully argued in the courts below...” and as such “it would be unfair to the other parties to inject such far-reaching issues into the proceedings at this late date.”\(^{28}\) As well, he believed the Supreme Court of Canada, being a Court of Appeal was not in the best position to decide these novel policy issues when he stated that:

...there is no legal barrier to the Crown suing for compensation as well as injunctive relief in a proper case on account of public nuisance, or negligence causing environmental damage to public lands, and perhaps other torts such as

\(^{27}\) *Ibid* at para 72.

\(^{28}\) *Ibid* at para. 82.
trespass, but there are clearly important and novel policy questions raised by such actions. These include the Crown’s potential liability for inactivity in the face of threats to the environment, the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown in that regard, the limits to the role and function and remedies available to governments taking action on account of activity harmful to public enjoyment of public resources, and the spectre of imposing on private interests an indeterminate liability for an indeterminate amount of money for ecological or environmental damage.  

These issues were more appropriately suited for examination at the trial level. As such, we are left waiting for the next public trust suit in order to determine a number of important issues.  

Just as the pile of waste cuttings smouldered over the long winter igniting when the time was right to result in a spring blaze, so to has the public trust doctrine encountered the right conditions to awaken after the long slumber it has experienced in this country. “None of the parties, or interveners in this case argued for or against the public trust doctrine at the lower court level, but by the time the case wound its way up to the Supreme Court of Canada the conditions for the discussion of the potential of the public trust doctrine, were right.”  

With this one small fire in the Stone Creek area, the imaginations of the justices on the Supreme Court were ignited. Binnie J. took this opportunity to speak at length, in the judgment, about the public rights in the environment that reside in the Crown.  

Moreover, he initiated consideration of a common law remedy action similar to the American public trust doctrine.  

This case has brought the public trust doctrine to the forefront of Canadian environmental thinking. It may, in the process, have ushered in a new era in Canadian

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29 Ibid at para 81.  
31 Canfor, supra note 1 at para 73.
environmental protection. The public trust doctrine is a legal receptacle for enshrining the moral principle that we should preserve enough quality resources for future generations as it has the potential to provide an enforceable natural right on behalf of all citizens.

3. The Public Trust Doctrine: Moving Beyond Navigable Waters

As noted above, the public trust doctrine has been traditionally associated with a right of navigability in flowing rivers. This was the rationale behind the public trust doctrine in Canada, throughout the 19th century. During this period, the vast lands of Canada provided an almost limitless abundance of natural resources. However water resources, which served as the main transportation mode of the day, were at risk in some parts of the country and the protection of their quantity and quality was considered valid goal.32 However, understanding as we do the Lockeian rationale that underlies the public trust doctrine, the access to water resources for navigation purposes, can best be understood as an incidental aspect of the public trust doctrine, although an aspect which garnered historically more attention in Canadian jurisprudence, to the apparent exclusion of other resources interests. The foundation of a contemporary public trust doctrine should be broader, extending to natural resource use generally, in the name of sustainability for the common good.

As discussed in chapter three, some of the United States court decisions and statutes have extended the public trust doctrine to an expanded set of new resource sectors, such as nonnavigable waters, state parks, wildlife, and groundwater. Moreover, the purposes for which the public trust can be invoked has also been expanded beyond

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access to navigable waterways to include protection of aesthetic values, preservation of
tidelands in their natural state, public access to beaches, and recreational uses of water,
such as boating, swimming, and sun bathing.\textsuperscript{33}

While this expansion of the public trust in the United States is to be commended,
most of these uses are still too often rationalized by reference to the historical and unduly
conservative articulation of the public trust doctrine. Unfortunately, the public trust is
often referred to in terms of archaic legalisms instead of ecological realities.\textsuperscript{34} The public
trust doctrine has been historically rooted in a view of water resources predating modern
knowledge of the hydrologic cycle. The ecologically coherent view of the hydrologic
cycle, which has been articulated south of the boarder in the \textit{Mono Lake} case, makes
wetlands and riparian forests prime candidates for public trust protection.\textsuperscript{35} The public
trust doctrine can be used more generally to maintain the general health of natural
systems. “The doctrine, in its traditional form, protected discrete elements of the natural
world: a river, a stretch of shoreline or tidal area, which modern ecological knowledge
tells us is simply insufficient.”\textsuperscript{36}

The public trust doctrine is, according to a New Jersey court, “like all common
law principles, should not be considered fixed or static, but should be molded or extended
to meet changing conditions and needs of the public it was created to benefit.”\textsuperscript{37} A

Envtl. L. 301 at 314.
\textsuperscript{34} D.B. Hunter, “An Ecological Perspective on Property: A Call For Judicial Protection of the Public’s
\textsuperscript{35} \textit{National Audubon Society v. Superior Court, (Mono Lake)} 658 P.2d 709 (Cal. 1983).
\textsuperscript{36} Harry R. Bader, “Antaeus and the Public Trust Doctrine: A New Approach to Substantive Environmental
Protection in the Common Law” (1992) 19 Boston College Env. Affairs L. Rev. 749 at 756.
concise attempt to articulate this modern public trust was enunciated by Peter Manus,
when he stated that:

...the government has a fundamental duty to adhere to a program of
environmental husbandry aimed at maintaining a regenerative natural
environment. This obligation is perpetual and requires both preventative measures
to protect environmental health and remediative measures where past behaviour
has breached the trust. The public trust thus serves the general citizenry, including
future citizens, by ensuring that the natural environment thrives and will continue
to thrive as a healthy and diverse human habitat.38

This articulation of the trust implicitly rejects the more limited obligations and
aspirations of alternative formulations. First, it corrects the misperception that the
public trust doctrine exists only in the maritime setting, or is otherwise confined
in its application to the seashore. The doctrine has been and continues to be used
to address impacts on non-aqueous elements of the environment. Second, the
above articulation of the public trust dispels any misconception that it should
apply only to certain commercial and recreational activities. To the contrary, the
doctrine requires far broader and longer term considerations than those served by
a commercial regulator or public lands manager.39

Affirming this rationale behind the public trust doctrine, will give guidance to the
state and the judiciary as they try to formulate a Canadian interpretation of the public
trust doctrine.40 This desire for free public access which was an underlying purpose of the
public trust doctrine in early Canadian cases should be recognized, but only as one aspect
of the public trust doctrine, with its more fundamental purpose being a goal of preserving
natural ecological functions.41 The list of resources affected by the public trust should not
be fixed or exhaustive as reason and science are continually evolving and new resources
may be deemed to be worthy of protection in the future.

38 Peter Manus, “To A Candidate in Search of an Environmental Theme: Promote the Public Trust,” (2000)
39 Ibid at 321-322.
40 It should be reaffirmed here that the duties inherent within the public trust doctrine are more than a mere
right of the state to act, but an affirmative obligation of the state to act in accordance with the laws of
nature.
Rev. 185 at 188.
The proper and prudent articulation of the public trust doctrine must take into account the best scientific information regarding the environment around us, and our place within it, when decisions are made regarding our common natural resources and amenities. This means that an ecological perspective of our surroundings, and our connections to those surroundings, is needed. We have only just begun to understand the first law of ecology, which can be articulated as “everything is connected to everything else,” with humans being subject to this law as much as any other creature. The interconnections humans have with their surroundings, coupled with another major ecological tenet that the world is finite, means we must ensure proper use of the natural resources all living things depend on. This means decision makers must not view land as existing in isolated parcels, but as interrelated parts of a system.\(^{42}\)

The earth can support and sustain only so many people and only so much human activity. It has, what is called a “carrying capacity,” for all life as well as a carrying capacity for the levels of pollution that each ecosystem, and the world in general, can safely handle. The realities of that carrying capacity need to be recognized as:

Historically, we have changed the environment to fit our conceptions of property. We have fenced, plowed and paved. The environment has proven malleable and to a large extent still is. But there is a limit to this malleability, and certain types of ecologically important resources - for example, wetlands and riparian forests - can no longer be destroyed without enormous long-term effects on environmental and therefore social stability. To ecologists, the need for preserving sensitive resources does not reflect value choices but rather is the necessary result of objective observations of the laws of nature.\(^{43}\)

This brings us to another point that is often overlooked by environmental commentators. Not only should ecological realities be encapsulated within the public

\(^{42}\) Hunter, supra note 35 at 318.

\(^{43}\) Ibid at 315. The laws of nature being referred to here are the natural limits of the earth as a closed system and differ from those referred to by John Locke and other 17\(^{th}\) century theorists.
trust doctrine, but so also should the values of the public, for whom the trust is created. The public should have rights in the ecological integrity of land on which their survival depends.44 While the values of the public should be considered, it must be remembered that the public includes future generations who do not at the present time have a voice in discussions regarding natural resource allocation and usage. While it will not always be possible to make resource allocation and usage choices that benefit both current and future generations, as activities that create a benefit today may have negative impacts lasting into the future, judges must evaluate natural resource usage on all available scientific information available in each situation. If the use or depletion of natural resources and amenities is essential (not just convenient) for current society than the use of those resources is authorized by the public trust doctrine as the laws of nature prescribe that “everyone...is bound to preserve himself.”45

If the usage of natural resources is not essential long-term ecological stability must take precedence over short-term economic gain. The idea of long-term stability and happiness as a measure of prosperity was recently articulated in a new study.46 This study sought to quantify the level of, or quality of, life as a measuring stick for nation’s progress, instead of measuring a nation’s progress by their Gross Domestic Products, a measure which often does not accurately encapsulate environmental quality.47

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44 Ibid at 313.
Instead of an obsessive concern with wealth creation the state should be attempting to guide the public into the future, as a prosperous and healthy society. As part of this goal, the public trust doctrine can act as the basis for an affirmative duty balancing prosperity and concern for ecological protection. Simply put a stewardship ethic should guide the state as it fulfills what is effectively a fiduciary obligation to the public.

Stewardship . . . refers to management, a management which uses no more of the available resources than needed . . . which does not allow damage to go unattended . . . which includes a proper dominion . . . , and which looks out for others' needs . . . Wealth, power, or resources are held in trust and include serious social responsibilities.  

Rather than beginning with a fixed series of prosaic environmental objectives, environmental law should be guided by modern ecological perspectives which can offer a modern reinterpretation of a series of traditional ethical ideals embodied in our law.  

Thus, the goal of Canadian society has shifted from one of expanding the dominion to all the vast lands that would eventually make up Canada, as we know it today, and the rigorous exploitation of its resources, to the preservation of our natural resources and amenities for future Canadians. The Canadian state’s original objective of nation building is complete and the state’s role should shift paradigms to one of ensuring the present and future health of the nation and of promoting justice and equality within society.

Finally, the goal of the public trust doctrine is to protect certain resources not just because it is an ethical thing to do or a positive amenity, but because these resources are

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absolutely essential for human physical, spiritual, and economic well-being. The state’s obligation in short is to assist in maintaining the health of natural systems.

4. Resources Affected by The Public Trust Doctrine

Up this point in time, the public trust doctrine has been confined to those cases dealing with the access to navigable waters and the benefits of the shore, below the high tide mark. This traditional articulation is no longer acceptable. Protecting navigable waters, for transportation, commerce, and fishing, while polluting the waters beyond reasonable use, is illogical. The public trust should still be invoked to protect access to navigable waters, but it must also protect those waters in an ecological sense in order for the access to mean anything. The access to navigable waters is meaningless if those waters are polluted to such an extent that it is unsafe to eat any fish found within or safely use the waters as a site of transportation or recreation.

Beyond the traditional uses of the public trust doctrine, the trust should be invoked for the uses of protecting and promoting water quantity, air quality, and the quality of any other natural resource necessary for future generations to achieve a healthy life. Flowing from the classical Roman articulation of the public trust doctrine, clean and sustainable water systems are only one of the logical places where public trust protection could be invoked. This protection should include not only rivers, but wetland areas in and around navigable and non-navigable water systems. As well the public trust doctrine could be used as a means of ensuring that Canadians have access to clean fresh air. As we continue to utilize fossil fuels as our main fuel source, the burning of most fossil fuels

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50 Bader, supra note 36 at 755.
causes air pollution and leads to the degradation of this common natural resource, to the
detriment of the health of Canadians and as such should be worthy of protection under
the public trust doctrine, no matter if these resources are publicly or privately owned.

While the outer boundaries of resources coming under the public trust doctrine
has yet to be identified, a case could be made that the public trust doctrine should be
invoked for the purposes of protecting potable water for communities. Wildlife resources
and more generally National and Provincial parks, which are often designated as such due
to their unique natural qualities, could come under the protection of the public trust
doctrine as individual property rights are scarce in these areas, but the protection of these
natural resource areas is of the utmost importance. As the Canfor decision seems to
suggest, publicly owned forests are good candidates for coming under the protection of
the public trust doctrine as well. Finally, the public trust doctrine could provide the
impetus for the state to tackle some of our more pervasive environmental problems of the
day, including climate change. In fact, the greatest proponent of the American public trust
document, Joseph Sax has observed that historic applications of the trust have been
narrower than its potential when he stated that:

Public trust problems are found whenever governmental regulation comes into
question, and they occur in a wide range of situations in which diffuse public
interests need protection against tightly organized groups with clear and
immediate goals. Thus, it seems that the mixture of procedural and substantive
protections which the courts have applied in conventional public trust cases would
be equally applicable and equally appropriate in - controversies involving air
pollution, the dissemination of pesticides, the location of rights of way for
utilities, and strip mining or wetland filling on private lands in a state where
governmental permits are required. Certainly the principle of the public trust is
broader than its traditional application indicates.51

While it is impossible to list all the resources coming under the protection of the public trust doctrine, an ecological perspective backed by scientific evidence will provide the judiciary with guidance in assessing the circumstances appropriate for action. The scientific and ecological realities of each ecosystem will need to be weighed against economic considerations of the resource in question, to determine what level of quality natural resources are to be maintained at. The balancing of environmental impact against economic development is a procedure with which the judicial system is quite experienced, as the record in the United States of America demonstrates.\textsuperscript{52} Although some environmental controversies are highly technical and may best be addressed by expert evidence, final decisions in many controversies require wise and delicate trade-offs, which are the hallmarks of the judicial process. Courts are able to balance interests, both legal and political. However, the public trust doctrine tips the balance of power in favour of the protection of common natural resources and amenities and away from economic growth when these two objectives collide.

The sustainability of each ecosystem will not only require that different resources be protected, but that similar resources may be in need of protection at differing levels. A complete list of resources falling under the protection of the public trust doctrine is not only unnecessary, but counterproductive as it would create a list of discreet resources to be protected which ignores the ecological realities and interconnectedness of all living species within an ecosystem. Having said that, undoubtedly water resources, air quality, and forest resources are to be preserved by the public trust doctrine, as future generations

require clean supplies of water, certain levels of air quality, and sustainable forests to survive.

One prominent example where the public trust doctrine will have an impact is water allocation in Western Canada. Currently, western water use is largely governed by an archaic rule of temporal priority. The “first in time means first in right” theory of water allocation would no longer (if it ever was) be an effective way of allocating water resources. Instead, the state will have to examine the type of use and its ecological impacts in order to set priorities for preserving these scarce resources.

5. Conclusions

The fact that the public trust doctrine has been historically linked to water more than land resources does not hinder its expansion to other resources in Canadian law. When we examine the foundation of the public trust doctrine we see that the public trust is meant to ensure access to and enjoyment of common resources and amenities for the public. Changing our outlook on what constitutes the public and what needs to be done to ensure that a wide range of the natural resources of Canada are free to be used and enjoyed by future generations is the key. Water resources and access to those water resources were the first, although incomplete, articulation of the public trust, as it was easier to see the downstream effects of destroying such a resource. We now understand that all resources are ecologically connected and, as such, certain resources which are
needed for our continued survival are best suited for common ownership, managed by the state.\textsuperscript{53}

The public trust doctrine encapsulates the values of environmental sustainability in a manner that can and should be recognized in Canadian law. There are many radical ideas on how best to achieve sustainability ranging from more grassroots participation to more effective international organization, from strengthening democracy to the dissolution of governments. To the zealous defender of the earth, the public trust doctrine seems a rather timid and limited expedient. However, the public trust doctrine embodies a simple yet potentially profound idea, which finds strength in the fact that it has always been a part of the rule of law that we live under.\textsuperscript{54} The public trust doctrine importantly recognizes the inherent limits to property ownership and the responsibilities of governments that have always been with us.

There is a common metaphor in the legal community that characterizes the common law as a living tree, capable of growth in new directions. The Supreme Court in \textit{Canfor} turned its gaze back, looking to the roots of this living tree, and rediscovered that this ancient doctrine has important and novel applications in today’s inherently more complex world.

\textsuperscript{53} Carole Rose, “The Comedy of the Commons: Custom, Commerce and Inherently Public Property,” (1986) 53 U. CHI. L. REV. 711, 723, 749-61, 774-77. As Carol Rose has shown, the inherently public nature of waterways and submerged lands persisted from Roman law to English common law to modern American cases precisely because privatization of these resources would not produce efficiency. Public access rights prevented monopolization and private capture of public wealth, which would have undermined efficiency because waterways and submerged lands achieved their highest and best use through public use.

\textsuperscript{54} Joseph Sax, “Liberating the Public Trust Doctrine from its Historical Shackles,” (1980) 14 U. C. Davis L. Rev. 185 at 187-188, where he states that “The central idea of the public trust is preventing the destabilizing disappointment of expectations held in common but without formal recognition such as title,” since “destabilizing forces...prevent effective adaptation” and therefore provoke biological, social, and economic crisis.
In the next chapter I will examine how the public trust doctrine can best be understood and interpreted in modern legal terms. I argue that characterizing the public trust doctrine as an enforceable fiduciary obligation on the state will ensure its effective implementation in the years to come.
Chapter 5 – The Recognition of the State’s Fiduciary Obligation

1. Introduction

In the second chapter, I highlighted the existence of the natural limits to property ownership and usage, which can be infringed upon by the state, when doing so is in the best interests of the public, as a whole. Now we must examine how our modern Canadian legal system can be utilized to uphold these natural limits of property ownership and usage. I believe that it is incumbent upon the state to uphold the public trust doctrine as a means of ensuring common access to natural resources and amenities for present, as well as future, generations. This obligation needs to be expressed, not only in moral terms, but also in a manner recognized by our contemporary legal system.

In the United States, the public trust doctrine has been characterized in a multitude of ways, including description as: a case law creation of the courts, an easement located within property law, a trust, a source of authority for the state’s exercise of its police power, or as finding its roots within state or federal constitutions.¹ This list of possible characterizations points to the lack of a generally agreed upon definition of the public trust doctrine. Thus, the public trust doctrine continues to be an elusive concept within American jurisprudence, leading to the uneven application of the doctrine across states.² In fact, it has been claimed that “the public trust is all things to all people.”³ While the flexibility of the public trust doctrine is one of its redeeming qualities, it also

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¹ James L. Huffman, “A Fish out of Water: The Public Trust Doctrine in a Constitutional Democracy” (1989) 19 Envtl. L. 529. Huffman goes through a detailed analysis of these conceptions of the public trust doctrine, reaching the conclusion that the public trust doctrine is a part of property law.
² See Chapter 2 note 2.
leads to frustration, as we try to understand how it is to be applied in various situations.

In this chapter I will clarify how, and why, the public trust doctrine most accurately embodies a fiduciary obligation that must be upheld by the state.

According to Donovan Waters, a leading Canadian scholar of trust law,

...the public trust doctrine at its most basic level places a fiduciary obligation on the state to ensure public lands that constitute coastlines or bays of the sea, the rivers both as to their estuaries and their courses, or the beds of those waters and rivers, are made continuously available for the members of the public at large.\(^4\)

I believe this characterization of the duties embraced within the public trust doctrine is adequate, only if the phrase “made continuously available for the members of the public at large” is interpreted in its broadest sense. This means that the state must take affirmative steps to ensure that perpetual access to our “special” natural resources and amenities are available to the public as a whole, including both present and future generations.

It is necessary to move beyond how the doctrine has been implemented in other jurisdictions, in order to show the precise nature of the public trust concept in Canada today. The full panoply of fiduciary duties that may lie within the scope of the state’s legal and political power will not be dealt with here. Instead, I will investigate the scope of the public trust doctrine, as one manifestation of a larger state-owned fiduciary obligation. Suffice it to say, the public trust doctrine is one of the many manifestations of the state’s overarching fiduciary duty owed to its citizens.

“The fiduciary nature of the relationship between the state and its subjects provides the justification for the state’s legal authority, as well as its obligation to act in

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the best interests of the entire public.”⁵ An analogy may be helpful here. Just as an
elected official is obligated to act in the best interests of all her constituents, regardless of
whether or not they voted for her, so is the state obligated to act in the best interests of the
entire public, whether or not they currently exist. Even though the public is a fluid
concept, as those who make up the public are continually changing, the state is
nevertheless obliged to act in the best interest of that entity. As those who make up the
public change over time, it is necessary for the state, in upholding its fiduciary
obligations to the public(s), to ensure the effective implementation of the public trust
document for the public’s benefit. Taking a more robust view of the public gives credence
to the public trust doctrine’s claim of perpetual access to our common natural resources
and amenities for this generation, and those generations yet to come. As one author has
accurately claimed, “there is something ‘deeply fiduciary’ about the interaction between a
state and its subjects.”⁶

2. The Public Trust Doctrine Characterized as a Trust

“A trust is defined as a type of relationship which arises whenever a person
(called the trustee) is compelled in equity to hold property, whether real or personal, and
whether by legal or equitable title, for the benefit of some persons (of whom he may be
one, and who are termed beneficiaries) or for some object permitted by law, in such a
way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries

²⁵ Evan Fox-Deen, “The Fiduciary Nature of State Legal Authority” (2005) 31 Queen’s L.J. 259 at 261. …
everyone is subject to state power-regardless of civil or political status.
⁶ Ibid at 259.
or other objects of the trust."\textsuperscript{7} Thus, the legal definition describes an arrangement under which the legal and equitable titles, to property, are held by different persons. At first glance, it seems plausible that the public trust would fit within such a definition, with the legal title residing in the public and the equitable title residing in the state. In fact, some have characterized the public trust doctrine as a charitable trust because the beneficiaries can not all be named, the rule against perpetuities does not apply, and the balancing of interests is a form of the application of the trust cy-pres.\textsuperscript{8}

A. The Three Certainties of Trust Law

Upon closer inspection, it is evident that despite being a trust in name, the difficulties present in characterizing the public trust doctrine as a trust, in the traditional sense, are simply too great. There are three distinct entities relevant to a trust’s creation: the creator, the trustee, and the beneficiary. As noted above, most public trust doctrine discussions identify the public as the beneficiary, and the state or government as the trustee, but fail to identify the trust’s creator.\textsuperscript{9} Being unable to identify, with any amount of certainty, who has created the trust, leads to difficulties associated with classifying the public trust doctrine as a trust, in the legal sense.

There are some formal requirements of trust law that must be met, namely ascertaining the three certainties of trust law: the certainty of intention, the certainty of object, and the certainty of subject matter. In order to implement a valid trust at law we


\textsuperscript{8} Catherine Redgwell, \textit{Intergenerational Trusts and Environmental Protection}, (Manchester: Manchester University Press, 1999) at 64.

\textsuperscript{9} Huffman, \textit{supra} note 1 at 538.
must determine what the intention of the creating party is, what the subject matter to be held in trust is, and what are the objects of the subject matter is held in trust.

Determining what resources are “special” and thus, in need of protection within the public trust doctrine is not as easy as it sounds. Looking back to the original articulation of the public trust doctrine, the subject matter of the air, running water, and the sea were all identified as requiring protection. 10 Are these the only resources to be protected? Can these resources be individually protected without protecting the whole ecosystem? I submit that the public trust doctrine requires the complete protection of the natural resources and amenities needed for future generations to survive, and this means the protection of ecosystems as a whole. However, a grandiose claim of “environmental” protection does not lend itself to any degree of certainty of subject matter. One can not assume the “environment” is something discrete that can be identified and saved, as the environment is all around us and, as such, we ourselves make up part of it. 11 It is a difficult, but not impossible, task to identify all the subject matter that is to be protected, beyond those resources articulated within the traditional public trust doctrine. The subject matter to be considered as part of the public trust will have to be determined by a case-by-case basis, by the trier of fact.

Moving beyond the difficulties present in identifying what is to be held in trust; we must examine what to do with such things. This certainty of intention must be articulated with a certain degree of succinctness. In modern society the state is the distributor and regulator of environmental risks and rewards and as such it must

10 See Institutes Justinian Chapter 2 note 3.
determine what is in the best interests of the public. In our complex society the managing
of environmental risks and rewards is a balancing act. Managing for the common good
inevitably leads to competing claims where an action may harm one group, but help
another. Determining what is in the best interest of the public is problematic, as it is
unlikely that there can ever be one notion of “good,” as our perspectives and experiences
shape our perceptions of what is good. In other words, there is no universal or correct
truth, only competing visions of what is good.\textsuperscript{12} Moreover, power and knowledge
imbalance leave some aspects of the public in greater need of state protection.

A further difficulty arises in trying to ascertain who makes up the public in which
the environment is held in trust. Thus, we must be able to identify the certainty of
object inherent within the public trust doctrine. Put in the broadest terms, the public
consists of all members of Canada, who all have an interest in establishing a healthy and
sustainable environment.\textsuperscript{13} This is an overly broad group in and of itself. Determining
how best to manage all of the current assets of a nation is difficult, but adding the extra
requirement of managing those assets for future generations only adds to the problem.

The idea behind the public trust is to preserve our resources for the benefit of
future generations, but how do we represent a class of individuals who do not yet exist?
How can we ensure their best interests are acknowledged when they can not
communicate those interests to us? Moreover, not only does the public change over time,
so do the preferences of that public.

\textsuperscript{12} Avigail Eisenberg, \textit{Reconstructing Political Pluralism}, (Albany, NY: State University Press, 1995) at
157.
\textsuperscript{13} McPhail v Daulton [1971] AC 424, (H.L.). In Anglo-Canadian law the beneficiary class must be
ascertainable.
All of these difficulties lead us to the conclusion that the public trust doctrine is best understood as something other than a trust. We do not know who created the trust, we have difficulties identifying what is actually entrusted to the trustee (and how best to handle the resources we have already identified), and we have difficulties ascertaining who the beneficiaries of said trust are.

B. A Political Trust?

As the three certainties of trusts law can not be met, it could be that the public trust doctrine is not a trust in the classic sense, but a “political trust.” The leading case on “political trusts” is Kinloch v. Secretary of State for India, in which the House of Lords held that war booty captured during the Indian Mutiny campaign, held by virtue of a royal warrant “in trust” for soldiers, did not create an enforceable trust. There the booty was considered to be a held at the pleasure of the King and a distinction was made between “higher” and “lower” trusts:

...a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative and to the authority of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, the ordinary Courts of Equity; in the higher sense they are not. What their sense is here, is the question to be determined, looking at the whole instrument and at its nature and effect.

This line of reasoning was followed in Tito v. Waddell (No. 2), where statutory provisions indicated that certain royalties for phosphate mined on Ocean Island were to be held by the Crown “in trust” for the islanders. Megarry V.C. held that while the use of

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14 Kinloch v. Secretary of State for India (1882), 7 App. Cas. 619.
15 Ibid at 625-626.
16 Tito v. Waddell (No. 2) [1977] 3 All E.R. 129.
“trust” language would impose a true trust on a private individual, the nature of the
Crown’s governmental powers rendered such obligations political, rather than
enforceable through civil remedies in the courts:

I must also consider what is meant by “trust.” The word is in common use in the
English language, and whatever may be the position in this court, it must be
recognized that the word is often use in a sense different from that of an equitable
obligation enforceable as such by the courts. Many a man may be in a position of
trust without being a trustee in the equitable sense; and terms such as “brains trust,”
“anti-trust,” and “trust territories,” though commonly used, are not understood as
relating to a trust as enforced in a court of equity. At the same time, it can hardly be
disputed that a trust may be created without using the word “trust.” In every case
one has to look to see whether in the circumstances of the case, and on the true
construction of what was said and written, a sufficient intention to create a true
trust has been manifested. When it is alleged that the Crown is a trustee, an element
that is of special importance consists of the governmental powers and obligations
of the Crown; these readily provide an explanation, which is an alternative to a
trust. If money or other property is vested in the Crown and is used for the benefit
of others, one explanation can be that the Crown holds on a true trust for those
others. Another explanation can be that, without holding the property on a true
trust, the Crown is nevertheless administering that property in the exercise of the
Crown’s governmental functions. This latter possible explanation, which does not
exist in the case of an ordinary individual, makes it necessary to scrutinise with
greater care the words and circumstances which are alleged to impose a trust.¹⁷

Thus, a political or “higher” trust is not enforceable by the courts, while a true or
“lower” trust is. The distinction between higher and lower trusts made it difficult to
determine when a trust is a political trust. This difficulty prompted Dickson J., in Guerin
v. The Queen (Guerin), to state that he had “some doubt as to the cogency of the
terminology of ‘higher’ and ‘lower’ trusts.”¹⁸

The political trust cases show a general reluctance on the court’s behalf to impose
a trust obligation on the Crown in the absence of clear statutory language. In Guerin, at
the Federal Court of Appeals, it was stated that “there must be clear evidence of an

¹⁷ Ibid at 216–217.
intention to make the Crown a trustee” and “neither the use of the words ‘in trust’ nor the fact that property is to be held or dealt with in some manner for the benefit of others is conclusive of an intention to create a true trust.”

In Canada, it is even more difficult to prove a true trust against the Crown in contexts that involve property rights, as the courts tend to apply a “political trust” presumption, noting that the Crown is not normally subject to legally enforceable obligations in regard to real property. Flowing from this presumption, it is recognized that the Crown has unique responsibilities to the public as a whole, including the task of managing the public’s property for the common good, and placing the Crown under fiduciary duties to specific groups or individuals could prohibit the Crown from fulfilling its public duties and responsibilities. As well, it is often assumed that the Crown is accountable to the public at the ballot box for how well it fulfills those public duties and responsibilities, and court-imposed duties could undermine this accountability.

The political trust cases are examples of the outdated principle that “the Crown is not normally viewed as a fiduciary in the exercise of its legislative or administrative function.” In the past it had been suggested that the more extraordinary the scope of power the more likely it is that accountability should be political rather than legal. Therefore, whether or not property was involved, the courts tended not to impose legally enforceable fiduciary duties on the Crown in regard to its public responsibilities.

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21 Guerin, supra note 18 at 334.
justify imposing these duties, special circumstances were required. This could easily lead to the conclusion that a political trust is in fact a nothing as it does not give rise to any sort of fiduciary duty. On this view, a political trust is a wink and a nod by the state to be on its best behaviour, without recourse to those who rely upon its decisions!

However, I argue that the law of fiduciary obligations has evolved since these decisions to now include the Crown as a trustee of the public’s environmental rights. The law of fiduciary obligations has undergone an expansion since the Guerin decision and now includes a wider range of diverse relationships. In order to hold the state to a standard of care imposed by a fiduciary obligation it is necessary to circumvent the claim of a political trust. In order to accomplish this, it is necessary to establish that the interests protected are independent of the Crown, i.e. the interest of continued access to resources and amenities exists outside the limits the state can place upon it, such as a right imposed by natural law. In the next section, I will show the existence of the state duty to preserve those resources deemed “special” in nature, but argue that this obligation can best be described as a fiduciary obligation, not as a trust: true or political.

3. The Public Trust Doctrine Characterized as a Fiduciary Obligation

As we discovered in the sections above, contrary to its name, the public trust doctrine is not a trust at all, as it fails to meet the three certainties of trust law. Since we encountered so much difficulty with characterizing the public trust doctrine as a trust, it is appropriate now to turn our attention to determining whether or not the public trust

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24 Ibid at 9, n. 28.
25 Ibid at 11.
26 Donovan W.M. Waters, Law of Trusts in Canada, 2nd ed., (Toronto: Carswell, 1984) at 567. The public trust doctrine is a sui generis concept that does not invoke existing trust law such as the three certainties
doctrine gives rise to a fiduciary obligation against the state. "As a trustee is a subset of a fiduciary (with others including solicitors, agents, partners, and directors), all trust relationships are fiduciary ones, but not all fiduciary relationships are necessarily trusts."^27

While fiduciaries are held to a similar standard as trustees, their actions are not constrained by the same formalities as trust law. Fiduciary obligations are meant to fill in the gaps where a group or individual is in need of protection, but unable to fulfill the rigid requirements found within trust law. It is the essence of justice, where the realities of the relationship mean much more than the formalities of the relationship.

A. A General Definition of Fiduciary Obligations

Fiduciary obligations were a creation of the English Courts of Equity, which imposed certain duties of loyalty on individuals who undertook, either expressly or impliedly, to act on another’s behalf.^28 As a legal principle, the obligation originated in cases where Equity granted relief, when the common law could not. As Equity evolved, concrete rules supplanted the chancellors’ exercise of discretion based on broad principles. The term “fiduciary” itself was adopted to apply to situations falling short of “trusts,” but ones in which a person was nonetheless obliged to act like a trustee.^29 In these situations a person would have placed his or her trust or reliance in another, thus requiring a certain level of conduct upon the party so trusted. These situations would

come to be reflected in the traditional articulations of the fiduciary relationship, such as that of guardian-ward, trustee-beneficiary, and solicitor-client.

The search for a modern day, overarching definition of the fiduciary obligation proves to be difficult, as the fiduciary doctrine is an elusive concept. Despite having a lengthy existence, dating back over 250 years in English law to the case of *Keech v. Sandford*, there does not seem to be a consensus on what the fiduciary doctrine actually comprises. It is a common modern complaint that the law of fiduciary obligations lacks definition. As such, it has been stated that "[t]he fiduciary relationship is a concept in search of a principle."

Generally speaking a fiduciary is one who acquires access to the property of another for defined or limited purpose. "A fiduciary relationship will occur where a person undertakes, either expressly or by implication, to act in relation to a matter in the interests of another, in a manner that is defined or understood by them, and is entrusted with a power to affect those interests." This normally involves the trusted party acquiring access to assets of the trusting party. The mischief that can occur in these circumstances is that the trusted party may be able to divert value away from the trusting party. To obviate this danger a standard of conduct is required of the trusted party, in its dealings. If an opportunity to subvert the interests of the trusting party is present in any

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34 Flannigan, *supra* note 32 at 48
36 Flannigan, *supra* note 32 at 46.
form or respect, the possibility that the person might yield to it requires the application of fiduciary deterrence. Therefore, when “one party has an obligation to act for the benefit of another, and that obligation carries with it discretionary power, the party thus empowered becomes a fiduciary.”

An interesting aspect of the fiduciary principle, which differs from the concept of a trust, is that the beneficiary does not actually have to repose trust in the fiduciary for this obligation to arise; it arises from the operation of the fiduciary principle itself. This lends itself to increased flexibility in the implementation of fiduciary obligations as the presumption that trust can be transmitted by the fiduciary principle itself is necessary where consent to authority, of those who are the beneficiaries of the relationship, is impossible or impracticable.

B. The Traditional Categories of Fiduciary Relationships

We can see from the above attempts that an all-encompassing definition of the fiduciary obligation does not exist. “Traditionally, any attempt to create a taxonomic definition of fiduciary relations in the absence of context is seen as impossible or, at the very least, unwise.” This view does not deny that the concept of fiduciary obligations has content, or that the content is cogent and intelligible, just simply that any general theory of fiduciary obligation that ignored context would lack integrity and persuasiveness. This is a simple recognition of the flexibility of the fiduciary principle, which has always been one of its characteristics.

37 Guerin, supra note 18 at 384.
38 Fox-Decent, supra note 5 at 259.
39 Rotman, supra note 31 at 829.
40 DeMott, supra note 29 at 910.
Traditionally, fiduciary relationships have been defined according to established categories. It is by analogy that the fiduciary principle has evolved to its modern usage. Where questions of the fiduciary nature of particular relationships arose, judicial examinations would focus upon whether the relationship under scrutiny belonged to the list of relationships that were generally understood to be fiduciary in nature, such as trustee-beneficiary, parent-child, and guardian-ward. The nature of the relationship itself, or the interaction of the parties involved, was a secondary matter. Accordingly, there were no established guidelines for determining what constituted a fiduciary relationship.\(^\text{41}\)

The classic list of fiduciary relationships, such as doctor-patient, solicitor-client, and teacher-student, which were often referred to by analogy in the courts, was turned on its head by Dickson J. in the case of Guerin, wherein he stated that “the categories of fiduciary, like those of negligence should not be closed.”\(^\text{42}\) Suddenly, whenever “one party has an obligation to act for the benefit of another and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary.”\(^\text{43}\)

The usage of categories to determine the fiduciary nature of a relationship runs counter to the very basis of fiduciary doctrine. Fiduciary law has its origins in public policy; specifically the desire to protect certain types of relationships that are deemed to be socially valuable or necessary.\(^\text{44}\) Thus, the category analogy as a guide for fiduciary law should be discarded in favour of attempts to live up to the true intent of the fiduciary

\(^{41}\) Rotman, supra note 31 at 825  
^{42} Guerin, supra note 18 at 384.  
^{43} Ibid.  
^{44} Rotman, supra note 31 at 826
relationship. The greater the independent authority to be exercised by one party over the assets of another, the greater the likelihood that a fiduciary obligation will be present.

The fiduciary obligation’s primary function is as a public policy tool designed to regulate important social and economic relationships. Fiduciary law is impressed with the difficult task of maintaining the integrity of these valuable relationships which arise as a result of the increased complexity and interdependency in contemporary society.\footnote{Ibid at 826-827; Paul Finn, “Contract and the Fiduciary Principle” (1989) 12 U.N.S.W.L.J. 76 at 84; & Peter D. Maddaugh, “Definition of Fiduciary Duty” in Law Society of Upper Canada Fiduciary Duties (Toronto: De Boo, 1991) 15 at 26.}

**C. The Abandonment of Analogy**

As discussed above, the view of academic commentators is that, fiduciary law is now applied on the basis of its inherent purpose rather than through the application of “established” categories of fiduciary relations. Protecting the integrity of these relationships requires those who possess the ability to affect others’ interests be prevented from abusing their powers for personal gain.\footnote{Ibid at 827.}

The fiduciary concept is based on flexibility and fluidity in its approach, as:

\[
\text{...the existence of a list of nominate relations dulls the mind’s sensitivity to the purposes for which the list has evolved and tempts the court to regard the list as exhaustive and to refuse admittance to new relations which have been created as a matter of business exigency.}\footnote{Ernest J. Weinrib, “The Fiduciary Obligation” (1975) 25 U.T.L.J. 1 at 5.}
\]

Indeed, it is desirable to go beyond the categories and the labels to an awareness of the purpose for which the categories and the labels have been enshrined. The situation-specific nature of the fiduciary doctrine renders the judiciary’s role a more proactive endeavour than the application of most legal principles. This harkens back to the days of
equity’s original purpose while moving away from an aura of technical precision.\textsuperscript{48}

Protecting those who have placed their trust or reliance in another is the original purpose of the fiduciary obligation.

In \textit{Guerin}, the Supreme Court of Canada recognized a \textit{sui generis} obligation, on the part of the Crown, to act in the interests of Aboriginal peoples when dealing with communally held reserve lands.\textsuperscript{49} This new fiduciary obligation could not be categorized in terms of existing fiduciary relationships and thus steered fiduciary obligations in a new direction. In a later decision, La Forest J. stated that “the existence of a fiduciary obligation can be said to be a question of fact to be determined by examining the specific facts and circumstances surrounding each relationship.”\textsuperscript{50}

In the same year that \textit{Guerin} was decided here in Canada, another monumental case regarding fiduciary obligations was decided in Australia. In the case of \textit{Hospital Products Ltd. v. United States Surgical Corporation (Hospital Products)}, Mason J. held:

The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.\textsuperscript{51}

The defendant had negotiated a distribution deal for the plaintiff’s products, in Australia. It was held that there was an implied term to the relationship, whereby the defendant was not to engage in dealing similar products at the expense of the United States Surgical Corporation. Thus, the U.S. Surgical Corporation had relied on the defendant’s word, as

\textsuperscript{48} \textit{Ibid} at 10.
\textsuperscript{49} \textit{Guerin}, supra note 18 at 384.
\textsuperscript{50} \textit{International Corona Resources Ltd. v. LAC Minerals Ltd} [1989], 2 S.C.R. 574 at 648.
\textsuperscript{51} \textit{Hospital Products Ltd. v. United States Surgical Corporation} (1984) 156 CLR 41 at para. 68.
the sole distributor of their products, to act in their best interests. Over time it became clear that the defendant was engineering similar products, in order to compete against the U. S. Surgical Corporation.

The High Court of Australia went on to state that “inherent in the nature of the [fiduciary] relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other.”\textsuperscript{52} The reliance of the company upon its sole distributor’s good faith was not a recognized category of fiduciary obligations. Thus, in the minds of the judges the law of fiduciary obligations was shifting away from categorical analogy, towards an examination of the nature of the relationship between parties.

In Canada, the law of fiduciary obligations began to move in the same direction. Arising out of a family law dispute, where it was argued that a custodial parent is a fiduciary to the non-custodial parent, the case of \textit{Frame v. Smith (Frame)}, sets out a “rough and ready” guide to fiduciary obligations. Here Wilson J. noted that the physical arrangements that attract fiduciary responsibility “seem to possess three general characteristics:

(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; and,
(3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.”\textsuperscript{53}

This “rough and ready” guide has since been reaffirmed, with some qualifications, in a number of Supreme Court cases.\textsuperscript{54} Wilson J.’s guide was soon followed by the

\textsuperscript{52} \textit{Ibid} at para. 55.  
majority of the Supreme Court of Canada in *LAC Minerals Ltd. v. International Corona Resources Ltd. (LAC Minerals)* where Sopinka J. claimed that "[t]he one feature...considered to be indispensable to the existence of the relationship, and which is most relevant in this case, is that of dependency or vulnerability." In *LAC Minerals* the two companies where in the process of negotiating an agreement to form a joint venture to mine for gold. However, Lac Minerals Ltd. went ahead and purchased the property in question for itself, relying on confidential information provided by International Corona Resources Ltd.

Although the two companies were of relatively equal bargaining power, Corona had placed it's reliance in LAC Minerals as part of their good faith negotiations to form a partnership. Thus, the question became could two arm's length commercial parties enter into a fiduciary relationship? In answering in the affirmative, the Supreme Court made reference to *Hospital Products* where it was held that:

...the notion underlying all the cases of fiduciary obligation is that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other...  

Further, in *LAC Minerals*, La Forest J. writing for the minority stated that "vulnerability is not ...a necessary ingredient in every fiduciary relationship." Thus, on this view, the existence of some vulnerability is not conclusive as to a fiduciary relationship, although it may be indicative of one. Instead La Forest J. characterized

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55 *LAC Minerals*, supra note 50 at 646.

56 *Hospital Products*, supra note 51 at para. 55.

57 *LAC Minerals*, supra note 50 at 662.
"[t]he essence of the imposition of fiduciary obligations as its utility in the promotion and preservation of desired social behaviour and institutions."\textsuperscript{58} Viewed in this light the core of the concept is not one of vulnerability, but one of reasonable expectations between the parties. The issue should be whether, having regard to all the facts and circumstances, one party stands in relation to another such that it could reasonably be expected that that other would act in or refrain from acting in a way contrary to the interest of that other. Thus, Equity will impose a fiduciary duty when the purpose it serves is both clear and important.\textsuperscript{59} Here, we begin to see the split, which characterises later judgements within the Supreme Court of Canada. The members of the Supreme Court move back and forth between a vulnerability test and one based on the reasonable expectations of the parties, as the key ingredient in determining the existence of a fiduciary obligation.

The next Supreme Court of Canada case that touched upon the nature of fiduciary obligations was the case of Norberg v. Wynrib (Norberg), wherein McLachlin J. in her concurring judgement stated that "the fiduciary duty does not depend on the vulnerability created by inequality, but on the vulnerability inherent in the particular relationship."\textsuperscript{60} This means that the parties do not have to be of unequal bargaining position, but simply in a vulnerable position by the nature of the relationship. The general principle of the fiduciary approach, according to McLachlin J., "is founded on the recognition of the power imbalance inherent in the relationship between fiduciary and beneficiary, and to giving redress where that power imbalance is abused."\textsuperscript{61} If the parties were on equal footing, McLachlin believed that the parties could find redress in contract or negligence,

\textsuperscript{58} Ibid at 672.
\textsuperscript{59} Peter W. Hutchins, David Schuize, and Carol Hilling, "When Do Fiduciary Obligations to Aboriginal People Arise?" (1995) 59 Sask. L. Rev. 97 at 112.
\textsuperscript{61} Ibid at para 94.
but due to the severe inequality between the parties, here a physician and patient, a fiduciary obligation must have been present.

The Supreme Court of Canada majority decision in Hodgkinson v. Simms (Hodgkinson) is to date the Supreme Court’s most thorough discussion of fiduciary relationships. The case involved the reliance of Mr. Hodgkinson on the tax planning advice given to him by Mr. Simms. The majority decision written by La Forest J. noted that Wilson J.’s guidelines, from Frame, are more descriptive than analytic in that they “constitute indicia that help recognize a fiduciary relationship rather than the ingredients that define it.”62 The majority found that Wilson J.’s guide “encounters difficulties” in cases such as Hodgkinson where a fiduciary obligation is alleged to arise from factual circumstances that do not fall under one of the recognized categories. They relied instead on the “reasonable expectations” test previously elaborated by La Forest J. in his minority opinion in LAC Minerals: “[t]he question to ask is whether, given all the surrounding circumstances, one party could reasonably have expected that the other party would act in the former’s best interests with respect to the subject matter at issue.”63 Outside the established categories of fiduciary relationships, what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party.64

62 Hodgkinson v. Simms [1994] 3 S.C.R. 377 at para 30 (Q.L.), and Leonard I. Rotman, “Wewaykum: A New Spin on the Crown’s Fiduciary Obligations to Aboriginal Peoples” (2004) 37 U.B.C. L. Rev. 219 at 232 n. 52. Accordingly, it does not propose a method for identifying fiduciary relations, but proceeds by analogy from the criteria listed. The danger in proceeding by analogy in this manner is that it may result in the description of some relations as fiduciary where they share certain similarities with fiduciary interactions, but are not necessarily fiduciary themselves.
63 Ibid at para 32. “[t]he existence of a fiduciary duty in a given case will depend upon the reasonable expectations of the parties, and these in turn depend on factors such as trust, confidence, complexity of subject matter, and community or industry standards.”
64 Ibid at para. 33.
Sopinka J. continued his ongoing disagreement with La Forest J. in *Hodgkinson*. Sopinka J. writing for the minority stated that there exists a spectrum of reliance from total independence to total reliance, and “the law has imposed a fiduciary obligation only at the extreme of total reliance.”\(^{65}\) Thus, he believes that the reasonable expectations of the parties should not be the deciding factor, but rather the vulnerability of the entrusting party should be the key factor in determining whether a fiduciary relationship exists.

In *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, which dealt with the surrender of reserve land by an Aboriginal band, that was later found to be rich with natural gas reserves, McLachlin J. sided with Sopinka J.’s view by stressing the notion of vulnerability as the core of the fiduciary relationship:

> Generally speaking, a fiduciary obligation arises where one person possesses unilateral power or discretion on a matter affecting a second “peculiarly vulnerable” person... 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.\(^{66}\)

It seems that the Supreme Court judges have yet to adopt or formulate an abstract test that accurately traces or defines the boundary contemplated by the fiduciary principle.\(^{67}\) The confusion fuelled by the recent Supreme Court of Canada jurisprudence leaves us with several indicia of a fiduciary relationship, yet without a simple and workable standard by which to judge non-traditional situations, which may give rise to a

\(^{65}\) *Ibid* at para. 132.


fiduciary obligation. As examined above, formulating an abstract test, devoid of context, is not to be desired, although this seems to be the goal of the Supreme Court. Instead of formulating an abstract test, looking at the reasons behind the fiduciary obligation should be encouraged. While the shift away from the analogy to existing classes of fiduciary relationships is to be applauded, it has also lead to greater confusion in this area of law.

Whether the true articulation of the fiduciary obligation turns out to be one of vulnerability as set out by the Sopinka’s judgments or one of the maintenance of socially desirable relations as set out in La Forest’s judgments, the public trust doctrine fulfills both criteria. The public, as a whole, are vulnerable, as many of those whose interests are to be protected have no access to the decision makers. As well, it should be noted that the state has a strong social responsibility to act in the best interests of the public as the maintenance of common resources in the name of future generations is to be desired. It is reasonably expected that the state will not waste or wantonly destroy our common natural resources and amenities, for the benefit of a few, to the detriment of the public.

4. Crown Duties Owed to its Citizens

From this discussion of the Supreme Court of Canada’s treatment of fiduciary relationships, we have discovered that fiduciary relationships generally entail some sort of vulnerability and/or reliance. Now we must show how the public trust doctrine fits within the concept of a fiduciary obligation and consequently what steps the state must take in order to fulfill its duty.
A. Duties to the Public as a Whole

As noted above, the categories of fiduciary duties are currently expanding. The hallmark of a fiduciary obligation is the ability of one party to act for another party; usually where the party acted for is in a vulnerable position. I wish to reiterate the point that the state is a fiduciary to the public that it serves. This point has been made by Evan Fox-Decent in a recent article, and in many ways echoes the position put forth by John Locke, when he stated that the government is a trust set up by the people, for the people and can only be exercised for the good of the people.\textsuperscript{68}

As Professor Fox-Decent has stated “there is something ‘deeply fiduciary’ about the interaction between a state and its subjects.”\textsuperscript{69} The state is implored to act in the best interests of its subjects, even though the cynic in the crowd may all too readily point out that this has not always been the reality. The state exhibits the criteria set out in the Supreme Court jurisprudence, to be considered a fiduciary, by exercising its discretion and power over the public, who rely upon the state to set and maintain order within society. Modern society has grown in size and sophistication to the point where the ordinary citizen must rely upon his or her elected officials and government bureaucrats to effectively manage risks in our best interests. An inherent aspect of the fiduciary relation is that fiduciaries possess the ability to positively or negatively affect the interests of their beneficiaries by virtue of their fiduciary positions. This creates a situation of unequal power.\textsuperscript{70} Simply put, the public is at the mercy of the state in its management of environmental risks and rewards.

\textsuperscript{68} Fox-Decent, \textit{supra} note 5 & See Chapter 2 note 75.
\textsuperscript{69} \textit{Ibid} at 259.
\textsuperscript{70} Gillen, \textit{supra} note 27 at 747.
The fiduciary principle applies to exercises of sovereign power simply by virtue of the broad discretionary powers that sovereignty entails.71 "The fundamental interaction which triggers the fiduciary obligation is the fiduciary's exercise of de facto discretionary power over the interests of another party, interests that are potentially vulnerable by virtue of the existence of that power."72 Fox-Decent argues for this point by stating that a specific voluntary undertaking is not necessary to trigger a fiduciary obligation, but having a certain kind of power is both necessary and sufficient, and it is the exercise of this power which gives rise to a fiduciary obligation.73

The idea that the state is a fiduciary of its citizens has also been articulated, in other jurisdictions. In New Jersey, Chief Justice Vanderbilt stated that:

[Public officers] stand in a fiduciary relationship to the people whom they have been elected or appointed to serve.... As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office, they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity... These obligations are not mere theoretical concepts or idealistic abstractions of no practical force and effect; they are obligations imposed by the common law on public officers and assumed by them as a matter of law upon their entering public office. The enforcement of these obligations is essential to the soundness and efficiency of our government, which exists for the benefit of the people.74

Consent of the governed has been used as the justification for state authority, but arguably this consent has not been expressly given. However, in this chapter we are not concerned with the justification for state authority to set and maintain the laws which ensure social order. It is enough here to highlight the fact that the state does posses such

71 Fox-Decent, supra note 5 at 298.
72 Ibid.
73 Ibid.
authority, and regardless of where it originated, the ability to affect the wellbeing of the public on a grand scale gives rise to the fiduciary obligation to do so in the best interests of its citizens. An explicit declaration of trust on the part of the subject is unnecessary, as it is the law itself which deems the fiduciary to act on the basis of the beneficiary’s interest. It is not the beneficiary actually reposing trust in the fiduciary that triggers a fiduciary obligation, but rather the nature of the relationship that requires the entrusted party to act in an altruistic and responsible manner. It reflects a presumption implicit in the fiduciary principle that requires the fiduciary who exercises power over another, in the absence of consent, to do so on the basis of trust-like obligations that would arise if the party subject to power, in fact, reposed trust in the fiduciary.

As the state is considered to be in a fiduciary relationship with its subjects it must be held to a certain standard in its conduct. It should be noted here that the state does not possess unlimited powers, but is constrained by its intrinsic mandate, which is to govern for the welfare of the people, both those now living and those to be born. Governmental authority is inherently conditioned and shaped by responsibilities towards the communities and individuals governed.

Legal subjects depend on the state for the provision of legal order. This dependence reflects the state’s discretionary power and triggers the fiduciary principle.

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75 Fox-Decent, supra note 5 at 294.; and M.(K.), infra note 79 at 63 where La Forest J. suggests that “fiduciary obligations are imposed in some situations even in the absence of any unilateral undertaking by the fiduciary.”
76 Ibid at 263.
77 Brian Slattery, “First Nations and the Constitution: A Question of Trust” (1991) 71 Can. Bar Rev. 261 at 270. “The Crown also has fiduciary obligations to private individuals, as embodied in the Canadian Charter of Rights and Freedoms. Although the Charter is mostly worded in terms of rights, its actual effect is to impose a range of duties on various governmental institutions, including legislatures, executive bodies, and the courts. These duties are fiduciary in the sense that they are grounded in a relationship of trust between government and citizenry, …”
78 Ibid at 277-278. Government is intrinsically a matter of trust, regardless of its specific origins, character, or underlying philosophy.
This dependence by a vulnerable public lends itself to a reasonable expectation by the public that the requisite natural resources and amenities needed for future generations (as one aspect of the general public) to maintain perpetual access to clean air and water will be fulfilled.

**B. Duties Specific to the Public Trust Doctrine**

As the law of fiduciary duties is expanding, a claim for breach of fiduciary duty should not be struck merely because the Crown is the relevant fiduciary.\(^{79}\) As well, equitable compensation is now considered to be available to vindicate interests other than economic ones.\(^{80}\) In *Canson Enterprises v. Boughton & Co.*, the Supreme Court observed the “maxims of equity” are capable of great adaptation to serve the ends of justice to achieve a “fairer result.”\(^{81}\)

To impose a fiduciary duty, it is often thought these duties or obligations must be explicitly expressed in specific instruments or already held to be part of the common law.\(^{82}\) The public trust doctrine is an (unused) aspect of the common law. The latter fulfills the need for a legal source to trigger a fiduciary obligation. Thus, the public trust doctrine demands fair procedures, and that decisions are justified, and results are consistent with protection and perpetuation of the resource.\(^{83}\) The fiduciary model begins from the premise that an equitable relationship exists between administrative decision

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\(^{80}\) *M.(K.) v. M.(H.)* [1992] 3 SCR 6 at 64.; See also Norberg, *supra* note 61 at para. 93. where it was stated that fiduciary principles “are capable of protecting not only narrow legal and economic interests, but can also serve to defend fundamental human and personal interests.”; & Frame, *supra* note 54 at 136. where it was stated that the beneficiary should be extended to protect the “vital non-legal or ‘practical’ interests.”


\(^{82}\) Hutchins et al, *supra* note 59 at 99.

makers and vulnerable groups affected by their decisions. Questions such as fairness, reasonableness, and justice are more properly viewed through the prism of this relationship, than through the one-dimensional lens of legality.\textsuperscript{84}

One of the most fundamental duties of a trustee or a fiduciary is to be loyal to the beneficiaries, to perform every act of trust administration with the sole objective of bringing advantages to the beneficiaries, to refrain from placing himself in any position where his personal interest does or may conflict with the interest of the beneficiaries, and to exclude completely from consideration the welfare and financial gain of third persons.\textsuperscript{85} "The fiduciary's duties go beyond mere fairness and honesty; they oblige him to act to further the beneficiary's best interests."\textsuperscript{86}

The public trust doctrine requires the state to shift the focus of public policy away from economic growth, towards ecological sustainability. By actively implementing and enforcing laws that promote or sustain our natural resources and amenities that are special in nature, the state is fulfilling its common law duty to act in a fiduciary manner that is in the best interests of its citizens. When it does not, it faces challenges, through the invocation of the public trust doctrine, to act in the manner appropriate of a fiduciary.

5. Conclusions

The onus to prove a fiduciary relationship is on the beneficiary. The onus then shifts to the fiduciary to show they did not breach the fiduciary standard inherent in that relationship. There currently exists a general fiduciary duty owed by the state to its

\textsuperscript{86} DeMott, supra note 29 at 882.
citizens, and when the state acts in ways contrary to the interests of the public (as a whole) it is the right of the beneficiaries to seek restitution. This can be done via the public trust doctrine.

Where one party has the ability, and the obligation, to act for the benefit of another, and that obligation carries with it discretionary power, the party entrust with such an obligation is a fiduciary and Equity should hold that party to a strict standard of conduct. The public has ceded the responsibility for managing our common resources to the state. The public is, in consequence, in a vulnerable position, relying on the state to manage our natural resources, and as such when the state acts in a manner that damages our communal assets, the law must step in to ensure that justice prevails. The public trust doctrine is an ancient, although newly revived, medium which should be used to ensure state compliance with its duties as the environmental risk manager.

Understanding what the public trust doctrine actually is in modern legal thought helps us to decipher how the public trust doctrine can be a useful tool for environmental preservation and protection. However, this is not the end of our journey. Before the public trust doctrine will actually function as an ecologically sensitive tool of sustainability there are number of issues that must be explored. In the next chapters we will examine some of these contemporary issues and how they may prove to hinder the full expression and development of our natural right of protection of our common resources.
Chapter 6 – Takings in the Name of the Public Trust Doctrine

1. Introduction

There exists a deep and fundamental divide within Canadian society, between the notions of private property and the state’s ability to interfere with that property in the public’s interest. On the one hand, state interference with private property rights associated with environmentally progressive solutions to our current environmental challenges should be applauded. On the other hand, an individual’s private property is sometimes seen as right that binds and protects us against state coercive power, and any interference with those rights should be frowned upon.1 Examining this fundamental conflict in modern environmental and property law, raises the questions of the state’s ability to take land needed to fulfill its fiduciary duty as trustee of the environment, under the common law public trust doctrine.

As we saw in chapter three, the public trust doctrine is a relatively well developed concept in the United States, although the exact ambit of the doctrine is unclear in many states.2 However, as chapter four indicated the public trust doctrine is largely an unknown

entity in Canada. The case of British Columbia v. Canadian Forest Products Ltd. (Canfor)\(^3\) has brought this ancient common law doctrine to the forefront of Canadian environmental consciousness. The public trust doctrine requires the state, acting as trustee for the public, to ensure that the resources designated as public in nature, are protected for the benefit of the entire public, including future generations. The public trust doctrine provides perpetual access to common natural resources and amenities, and as such provides a fundamental and inalienable right of the public, including future generations, to a clean and healthy environment, necessary for survival. In order to fulfill this obligation the state may be required to place restrictions on the transfer, or use of, ecologically sensitive land, as well as to expropriate certain land for the benefit of the entire public, to the detriment of private land owners.

Justice Binnie speaking on behalf of the majority in Canfor stated that because the public trust doctrine has never been recognized in Canada (despite its common law roots) there exist important and novel policy questions to be addressed.\(^4\) This chapter will examine one prominent policy question; namely whether a private landowner is entitled to compensation for all or part of her land being taken for a public use? As noted earlier there exists a fundamental tension regarding property rights. Many individuals believe that their property rights should be absolute, as it was their hard earned money that allowed them to carve out a piece of land to call their own. It is this type of thinking that leads to the assumption that individual property rights should be compensated when they are infringed upon in the name of the common good. This was the type of thinking was prevalent in the “U.S. takings” jurisprudence, until recently. This type of thinking has


\(^4\) Ibid at 81.
remained largely resilient, as we all like to believe that our fairly acquired property is safe from seizure at the hands of government, unless it fairly pays to acquire it from us.

Takings jurisprudence regarding the public trust has garnered much more attention in American than it has here. The issues raised by restricting property uses, and taking property rights away from property owners, will have to be worked out in Canada before the public trust doctrine can be effectively implemented. In *Canfor* Justice Binnie opined that "there is no reason to neglect the potential of the common law, if developed in a principled and incremental fashion, to assist in the realization of the fundamental value of environmental protection"\(^5\) and that "there are public rights in the environment that reside in the Crown has deep roots in the common law."\(^6\) Giving weight to these statements means that environmental losses can be appropriately dealt with by common law claims. As such, in order for the state to fulfill its fiduciary duties to the public it must have the ability to affect the property interests of those individual who currently possess property needed by the public at large.

The novel policy consideration of the ability of the state to take land needed in order to protect common environmental interests when statutory provisions authorizing such a taking are not in place, make the "takings" issue ripe for consideration. Therefore, the effects and consequences of a common law "taking" of land by way of the public trust doctrine will be examined here, paying particular attention to the American jurisprudence and the effect of the Constitutional provision guaranteeing compensation for land taken, on that process.

\(^5\) *Ibid* at 155.  
\(^6\) *Ibid* at 74.
2. The American Experience

The case of *Illinois Central Railway Co. v. Illinois (Illinois Central)*\(^7\) is the seminal case in the U.S., espousing the view that certain resources are subject to a trust like relationship whereby the state acts for the benefit of the entire public. Writing for the majority, Justice Field stated that all navigable waterways are subject to the trust under federal law.\(^8\) This has led some authors to consider *Illinois Central* as standing for the proposition that navigable waterways are to be held in trust for the benefit of the entire population.\(^9\) Further, as we have seen, *Illinois Central* can be extended beyond federal law, to encompass state actions due to the “equal footing doctrine” as articulated in *Pollards Lessee v. Hagan.*\(^10\)

While the public trust is most often asserted at the state level, and as such receives an uneven application across state lines, the doctrine does make up part of the common law in each state. One prominent issue arising out of the doctrine is its effect on private landowners and their ability to seek compensation from the state for the “taking” of their land.

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\(^7\) *Illinois Central Railway Co. v. Illinois* 146 US 387 (1892).

\(^8\) *Ibid* at 453. “The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties... than it can abdicate its police powers in the administration of government and the preservation of peace.”... “[s]uch abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public,” and that “[e]very legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it.”

\(^9\) Lazarus, *supra* note 2 at 638-639 where Lazarus claims the *Illinois Central* case is ambiguous at best on it’s authority as “the court did not cite any relevant precedent in Illinois law to support the decision.”

\(^10\) *Pollards Lessee v. Hagan*, 44 U.S. (3 How) 212 (1845) at 229. The equal footing doctrine has been largely accepted following *Illinois Central* as a rational for extending the public trust doctrine to all U.S. states, but it has been criticised as the underlying rational for the adoption of the doctrine in the original thirteen states. See Douglas L. Grant, “Underpinnings of the Public Trust Doctrine: Lessons from *Illinois Central Railroad*” (2001) 33 Ariz. St. L.J. 849.
A. The Constitution

What effect does the U.S. Constitution have on the implementation of the public trust doctrine? The U.S. Constitution, unlike its Canadian counterpart, makes explicit mention of property rights and the requirement of just compensation for the infringement of those rights. The Fifth and Fourteenth Amendments of the United States Constitution provide for compensation for private property taken without the owner's consent, even if it is done so for the benefit of the public.\(^{11}\) The United States Supreme Court has observed that the just compensation clause (another term used for the Takings Clause) “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”\(^{12}\)

The Takings Clause reflects the view that private property in American society is an individual right apart from, and above, communal rights, and that notions of individual rights vested in private property are superior to any notions of a common good that infringes upon those private rights. This is a reflection of an important strain in Western liberal thought, which exists north of the border as well. However, the predominance of individual rights may have been more apparent than real in America, as the Takings Clause was traditionally a little used feature of the U.S. Constitution.

In fact, before 1986 in its nearly 200 years of deciding cases, the Supreme Court found only four instances in which a law or regulation amounted to a “regulatory taking.” Then, in the first ten years of William H. Rehnquist's tenure as Chief Justice, the Court found four more.\(^{13}\)

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\(^{11}\) The 5th Amendment (known as the Takings Clause) claims that... private property shall not be taken for public use, without just compensation; The 14th Amendment claims no State shall deprive any person of life, liberty, or property, without due process of law....


“Takings jurisprudence was borne out of the need for private land-owners to guard against overreaching public laws and governmental intrusion.” 14 The starting point in American “regulatory takings” jurisprudence is the case of Pennsylvania Coal Co. v. Mahon (Mahon). 15 Prior to Mahon it was believed that takings required a direct appropriation. 16 After, Mahon the court expanded the concept of takings to include innumerable interferences with private property. This extension was noted by Scalia J. in the course of his opinion in Lucas v. South Carolina Coastal Council (Lucas), wherein he noted that “in general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation.” 17

B. Regulatory Takings

As noted above, “regulatory takings” jurisprudence is grounded in Justice Holmes’ 1922 opinion in the case of Mahon wherein he stated that, “if regulation goes too far it will be recognized as a taking.” 18 In Mahon, the Court found that a Pennsylvania statute that prohibited the mining of coal, when doing so threatened the subsidence of the land, was unconstitutional, as it was in effect a taking without just compensation. 19 There it was believed that the regulation of the defendant’s rights to extract subsurface coal was in effect taking away a property right. Holmes J. warned

15 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
17 Ibid at 1015.
18 Mahon, supra note 15. The “goes too far” aspect from Mahon is often referred to as the economic diminution test.
19 Ibid at 414.
against the "danger of forgetting that a strong public desire to improve the public
condition is not enough to warrant achieving the desire by a shorter cut than the
constitutional way of paying for the change." 20 Unfortunately, Holmes J. did not explain
what he meant by "goes too far," thus leaving his opinion open to countless
interpretations. 21 The Mahon decision has been called, "both the most important and most
mysterious writing in takings law." 22 To say that takings jurisprudence got off to a
confused start is by no means an understatement.

It took more than fifty years after Mahon, for the U.S. Supreme Court to revisit
the issue of regulatory takings. The Supreme Court's opinion in Penn Central
Transportation Co. v. New York City (Penn Central), 23 noted that Mahon stood for the
proposition "that a state statute that substantially furthers important public policies may
so frustrate distinct investment-backed expectations as to amount to a 'taking.'" 24 The
Court concluded that the "too far" language, from Mahon, required "essentially ad hoc,
factual inquiries," 25 as to the circumstances surrounding each regulation and its purported
effect. Justice Brennan's majority opinion outlined a three-factor test to use in making
these ad hoc determinations:

(1) the "economic impact of the regulation on the claimant;" (2) "the extent to
which the regulation interfered with distinct investment-backed expectations;"
and (3) "the character of the governmental action." 26

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20 Ibid at 416.
21 Brauneis, supra note 13 at 617.
22 Sean T. Morris, "Taking Stock in the Public Trust Doctrine: Can States Provide for Public Beach Access
1024.
24 Ibid at 127; See also Daniel Mandelker, "Investment-Backed Expectations: Is There a Taking," (1987) 31
Wash. U. J. Urb. & Contemp. L. 3 at 4, where he insists that investment-backed expectations have been
characterized as property market created expectations in capital gains, and that these differ depending on
the type of property and the known restrictions encumbering that property at time of purchase.
25 Ibid at 124.
26 Ibid at 123.
Since then, courts have applied the concept of investment-backed expectations by asking whether the claimant’s property is restricted pursuant to regulations that predate the purchase of property by the claimant. If the answer is yes, then constructive notice implicit in the pre-existing regulations is said to preclude the formation of “reasonable” investment-backed expectations, and therefore, can defeat the claim.\textsuperscript{27}

Finally in 1992, the verdict public trust advocates were looking for was handed down. In \textit{Lucas}, a beachfront property owner claimed that a South Carolina statute, which was enacted after he had purchased the property in question, but before he began construction upon the property, deprived him of “all economically viable use of his property.”\textsuperscript{28} The U. S. Supreme Court rejected Lucas’ claim, by holding that the enforcement of certain coastal regulations may be considered a taking only if it deprives an individual of \textit{all} economically beneficial use of the land.\textsuperscript{29} Thus, the general rule seems to be that, if regulation deprives the landowner of all economic use of the property, or renders that property valueless, the government must compensate. Compensation for total regulatory takings has been established.

The \textit{Lucas} Court did, however, establish two exceptions to the otherwise inflexible “categorical rule” on total regulatory takings, declaring that the rule does not apply if: first, the challenged regulation prevents a nuisance or, second, the regulation is

\textsuperscript{28} \textit{Lucas}, supra note 16 at 1003
\textsuperscript{29} \textit{Ibid} at 1027. Pursuant to the Fifth Amendment to the United States Constitution, the rule requires the government to provide just compensation whenever it denies a property owner all “economically beneficial use.”
grounded in a state’s background principles of property law. The question for use then becomes: what are the background principles of property law?

Some scholars have suggested that the public trust doctrine, since its inception predates the formation of the United States, as a country, is a background principle of property law. On at least one occasion, a Federal Circuit court has recognized that the federal navigation servitude - the federal expression of the public trust – may be a background principle under Lucas. In Palm Beach Isles Association v. United States, owners of shoreline wetlands, and of submerged land adjacent to those wetlands, filed an action against the defendant, for its denial of a petition to dredge and fill the said wetlands. The landowners claimed this denial amounted to a regulatory taking. The United States Federal Court of Appeals vacated the lowers court’s ruling and remanded the case back to the Federal Circuit Court to determine if the government had made a “sufficient showing of navigational purpose behind the denial.” In the process the Court stated:

[in light of our understanding of Lucas and other cases we have considered, we hold that the navigational servitude may constitute part of the background principles to which a property owner’s rights are subject, and thus may provide the Government with a defense to a takings claim.]

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30 Ibid at 1032.
31 Callies, supra note 27, at 341. It is now clear that at least three sources of state property restrictions may qualify as background principles within the meaning of Lucas: statutory law existing prior to the acquisition of land, custom, and public trust; However in Lucas, the only concrete examples of property rules that the Court sanctioned as outside the categorical takings rule were nuisance principles that clearly emanate from the common law. As well Scalia J. (in Lucas at at 363) stated that statutes are not background principles as the mere passage of time does not make a statute a background principle.
33 Ibid at 1386.
34 Ibid at 1384.
The United States Supreme Court case of *Palazzolo v. Rhode Island (Palazzolo)*\(^{35}\) tried to shed some light on the background principles question, making it clear that "an otherwise unconstitutional regulation (absent compensation) does not become a background principle merely because it precedes the current owner’s acquisition of title."\(^{36}\)

At the end of the day, the viability of the public trust doctrine as a successful defence to takings allegations will depend upon notice, the amount of property encumbered, and the availability of alternative means of making the property economically viable.\(^{37}\) These factors will have to be assessed in a fact specific situation, but this does not give much guidance to government officials wishing to take land in fulfilling its public trust obligations.

**C. Partial Takings**

The above analysis seems to suggest that total regulatory takings, give rise to compensation, except in extraordinary circumstances. However, in fulfilling its public trust duties the state may not need to take a private landowners entire property, but only a small portion of your property (such as an easement). This is known as a partial taking.

According to *Palazzolo v. Rhode Island*, a "'taking' need not arise from an actual physical occupation of land by the government."\(^{38}\) This idea of a partial taking was examined in *Nollan v. California Coastal Commission (Nollan)*,\(^{39}\) where it was held that

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\(^{36}\) Ibid at 608.


\(^{38}\) *Palazzolo*, supra note 35 at 648.

a physical taking occurs "when the state physically intrudes (or authorizes third parties to do so) onto private property, thus abrogating the private owner’s right to exclude others."\textsuperscript{40} In this case, the California Coastal Commission ordered as a condition to approval of rebuilding permit that owners provide an access path for the public to pass across the property. The U. S. Supreme Court opined that limiting the uses to which land can be put may be a taking. "Even a slight diminution in value may be enough to constitute a taking."\textsuperscript{41} However, regulation is not a compensable taking if it "substantially advances legitimate state interests’ and does not deny an owner economically viable use of his land."\textsuperscript{42}

Where \textit{Nollan} leaves partial takings is anyone’s guess! Regulating land uses or taking a small portion of a private individuals land may not be compensable if it advances a state’s interest, but elucidating what are "legitimate state interests" seems to be as difficult as discovering what the background principles of law are, making partial takings an even more complex issue than total regulatory takings.

\textbf{3. The Background Principles of Property Law}

We must return to the above articulated question regarding the meaning of "background principles of property law." Although the case of \textit{Orion Corp. v. State} predates \textit{Lucas} it does shed some light into our inquiry. In that case the court stated that:

\textsuperscript{40} Stephanie Reckord, "Limiting the Expansion of the Public Trust Doctrine in New Jersey: A Way to Protect and Preserve the Rights of Private Ownership" (2005) 36 Seton Hall L. Rev. 249 at 257.

\textsuperscript{41} \textit{Nollan, supra} note 39 at 834. See the United States Supreme Court decision of \textit{Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency} 122 S.Ct. 1465, where Stevens J. stated that although a temporary moratorium on land which created a slight diminution of value for a temporary time period existed, it did not constitute a "taking" per se.

\textsuperscript{42} \textit{Ibid} at 834.
[O]n private lands the public trust doctrine imposes a burden akin to an easement as to public trust interests. Regulations that control this easement do not normally raise constitutional takings questions because the easement exists prior to and in derogation of the landowner’s title or other vested right. This easement is owned by the state in trust for all its citizens. In fact, the doctrine itself defines the scope of the private owner’s title. Thus, the doctrine is a property law rule that describes and limits a private owner’s right to use public trust resources.  

One author has tried to clarify what is meant by the term “background principles” of law by reading the cases of Lucas and Palazzolo together. Zachary Kleinsser articulates the conditions that make up a “background principles of law.”

Several factors contribute to rendering a legal doctrine or law a “background principle.” First, it must be a state, not federal, law or doctrine. Second, a doctrine or law “cannot be newly legislated or decreed.” That is, a limitation on property must be a “settled rule of law” that is part of the “existing rules or understandings” of state law. Third, in order to be considered a background principle, a restriction must “no more than duplicate the result that could have been achieved in the courts”; such a doctrine or law must be so implicit in state property law that, “at any point,” it is “open to the State” to make it explicit. Fourth, a doctrine or law is not a background principle if it applies to some landowners but not to others. Fifth, some courts may require that a doctrine or law’s application be relatively static. If the application of a doctrine or law greatly “vacillates” and, because of ambiguous application, it appears that courts are creating a doctrine or law rather than describing it—it is less likely to be a background principle. Finally; and perhaps most importantly; a limitation on property must “inhere in the tide itself” in order to qualify as a background principle.

Taking these six requirements together we can see that the public trust doctrine fulfills the requirements of a background principle of property law. “Any individual with an interest in trust resources is limited by the public’s interest; even though private owners may hold title to trust resources, they hold their title subservient to the trustee-government’s right to act on behalf of the beneficiary-public.” The public trust doctrine ostensibly meets all the requirements to qualify as a background principle of law and

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44 Kleinsasser, supra note 14 at 430-432.
compensation should not be required, in spite of the presumption of compensation articulated by the Fifth Amendment.

One possible difficulty arises with the requirement that the background principle must be "relatively static" or well established. It could be argued that sudden shifts in the reach of the public trust doctrine may not make it available for consideration as a background principle of property law. However, according to one of the earliest public trust doctrine cases in New Jersey, the public trust does not have to be frozen in time as it can change to meet the changing needs of society. The degree to which the specific actions of the state, when enacting its trust obligations, can vary from the well established public trust doctrine will be a question for the judiciary. The public trust doctrine should be interpreted in a continually evolving manner to allow for the use of the doctrine as a tool of environmental preservation, not simply as a tool promoting access to navigable waters as some have suggested. "It is now clear that at least three sources of state property restrictions may qualify as background principles within the meaning of Lucas: statutory law existing prior to the acquisition of land, custom, and public trust." This statement assumes the public trust is a settled rule of law, even though its reach is still disputed.

Since Lucas, the public trust doctrine has received favourable treatment in some courts. An unambiguous recognition of the public trust doctrine as a background principle of property law can be found in the decision of, the Court of Appeals for the

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46 Ibid at 433.
48 Callies, supra note 27.
49 Kleinsasser, supra note 14 at 434.
Ninth Circuit, in *Esplanade Properties, LLC v. City of Seattle (Esplanade)*. In *Esplanade*, the property owner claimed the restrictions placed upon his coastal property, by the City of Seattle, resulted in a complete deprivation of economic use of its property, amounting to a regulatory taking, which required just compensation. The threshold question became whether or not the company’s property was deprived of all beneficial uses. After finding a total regulatory taking, the court turned its attention to whether or not the public trust doctrine was a background principle of Washington state law. The Ninth Circuit noted that the doctrine was a settled rule of state law, declaring that “[i]t is beyond cavil that a public trust doctrine has always existed in Washington.”

Similarly, the Supreme Court of South Carolina recognized the public trust doctrine as a background principle of state law in *McQueen v. S.C. Coastal Council*. In this instance a landowner had applied for a permit to backfill in two lots of property which, having been left idle for a number of years had reverted back to tideland. Following *Palazzolo*, the permit was denied because the landowner’s lots were now considered “public trust property subject to control of the State,” and it was unnecessary for the state to “compensate [the landowner] for the denial of permits to do what he cannot otherwise do.” Although never expressly describing the public trust doctrine as a background principle, in *re Water Use Permit Applications*, the Supreme Court of Hawaii held that the public trust doctrine defeated a regulatory takings objection because the

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50 *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, (9th Cir. 2002).
51 *Ibid* at 985.
52 *Ibid* at 985.
54 *Ibid* at 120.
"original limitation of the public trust defeats [the plaintiff's] claims of absolute entitlement."\textsuperscript{55}

On the converse side of this issue, "it appears that there may be two exceptions within the background principles exception, which precludes a taking: (1) when a well settled state regulation is directly contrary to the public trust doctrine; and (2) when a regulation codifying the doctrine limits use of property beyond the doctrine's widely accepted boundaries."\textsuperscript{56} As it is up to each state to fulfill its public trust obligations in the manner it sees fit, these exceptions may operate, but it should be remembered that even in the first expression of the public trust in America it was presumed that the state could not abdicate its trust responsibilities.\textsuperscript{57}

If the public trust doctrine encumbered the landowner's title from the beginning, a regulation giving effect to the public trust doctrine has little or no economic impact. The courts will have to examine the property interests actually transferred to a landowner in considering the public trust doctrine's effect on investment-backed expectations. If a land-owner's proposed use was never permissible because of the public trust doctrine, the court will evaluate investment-backed expectations accordingly. Generally, this means that constructive knowledge of a state's common law property restrictions is a critical factor in evaluating a landowner's expectations.\textsuperscript{58} If a grant of a trust resource is void from its inception, and if that rule is firmly grounded in precedent, it makes little sense to compensate an improver because an improver who acts contrary to known, or knowable, law is generally not acting in good faith.

\textsuperscript{55} \textit{In re Water Use Penn it Applications,} 9 P.3d 409 (Hawaii S.C. 2000) at 494.
\textsuperscript{56} Kleinsasser, \textit{supra} note 14 at 442.
\textsuperscript{57} \textit{Illinois Central, supra} note 7.
Regardless of what property use a landowner anticipates enjoying, courts read long-established, predictable state property law principles, like the public trust doctrine, into a title.\textsuperscript{59} When presented in traditional terms, as a state-controlled public easement over tidal waters and their lands, it is increasingly clear that the public trust is a "background principle."\textsuperscript{60} It is only when the reach of the doctrine extends too far from its well established roots that it may be seen to stray from being a background principle of law.

The public trust doctrine, in the United States, authorizes the state to take public trust resources if necessary to fulfill its trustee obligations for the common good. It also allows for the taking to occur in frustration of individual property owners claims for compensation, even though the Constitution makes direct reference to such a claim. Being recognized as a background principle of law, the public trust doctrine swings the balance of power in the ongoing conflict between private property rights and communal rights, in favour of the common good, even if its application involves a total taking.

I will now turn my attention north of the border, to see if the lack of a Constitutional right for compensation, in the event of state interference with private property, gives rise to a presumption of compensation.

\textsuperscript{59} Lucas, supra note 16 at 1029
\textsuperscript{60} Callies, supra note 27 at 341.
4. The Canadian Experience

The starting point in any discussion of “takings” in Canada must be the *Canadian Bill of Rights*.\(^{61}\) The *Canadian Bill of Rights* explicitly recognized a right to the enjoyment of property and a right not to be deprived of that property without due process of law. This wording is very similar to that of the 5\(^{th}\) Amendment in the U.S. Constitution.\(^{62}\) However, the provision subsequently became redundant with the advent of a new Constitutional order.

A. Lack of Constitutional Provisions

In 1982, the *Canadian Charter of Rights and Freedoms* was introduced.\(^{63}\) Upon inspection we see that there is no mention of a right to property or a presumption of compensation flowing from the interference with private property, found within the *Charter*. The most logical place to find a property right would have been within s. 7,\(^{64}\) but it is not there. Whatever the reasons for property rights being excluded, the reality is that there is no Constitutional presumption of compensation for the infringement of private property rights, as currently exists in the United States.

Since, there is no Constitutional presumption of compensation in Canada we must look to other sources to clarify the issue of the legal effects of a “taking.” It should also

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\(^{61}\) *Canadian Bill of Rights*, 1960, c. 44, s 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and

the right not to be deprived thereof except by due process of law;

\(^{62}\) 5\(^{th}\) Amendment, *supra* note 11.


\(^{64}\) *Canadian Charter of Rights and Freedoms*, s. 7, part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.; Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice
be noted here that the relevant legal language in Canada is different, from that in the
United States even if the concepts are the same as south of the border. Canadian courts do
dnot speak of takings (either regulatory or partial), but instead speak of expropriation and
injurious affection. Both of these concepts will be examined in depth below.

Expropriation is considered to have taken place when there is a governmental
taking of an individual’s property rights. In order for a right of compensation to arise,
there needs to be a complete, if not total, deprivation of property rights in an object.
Furthermore, this deprivation of the property owner’s rights on the one hand must be met
with a corresponding benefit in the hands of the government on the other hand. When the
government takes an individual’s property rights to their corresponding benefit an
expropriation has occurred. The Nova Scotia Court of Appeal case of Mariner Real
Estate Ltd. v. Nova Scotia (Attorney General) supports this proposition, with the court
stating that “it is common ground ... that for there to be an expropriation, land must be
taken from the respondents and acquired by the Province.”65

For our purposes we are not concerned with the formal taking of property or
property rights, but with the regulation of those property rights in the name of the
common good and whether or not a right of compensation will arise in such situations.
Expropriation in law gives rise to fair compensation in Canadian law. Where the alleged
expropriation is done by excessive regulation, the right to compensation comes into
question. We must determine the point at which the regulation of property interests goes
too far and should be considered an expropriation.

B. A Presumption of Compensation

In Grayson v. The Queen, Mr. Justice Thorson, President of the Exchequer Court of Canada, stated that:

Canada has the most arbitrary system of expropriation of land in the whole of the civilized world. I am not aware of any other country in the civilized world that exercises its right of eminent domain in the arbitrary manner that Canada does. 66

As a general rule, takings are only carried out when authorized by validly enacted legislation. In fact, every province in Canada has enacted an Expropriation Act in one form or another, setting out detailed provisions regarding how to take land for public purposes and when compensation is required for such a taking of land.

While there is no Constitutional right to compensation in Canada, there may be a common law right to compensation when property is expropriated. On the one hand, one of the leading authors in Canada on expropriations, Eric C.E. Todd, claims that it has never been suggested that there is a common law right to compensation, for expropriation. 67 The English case of France Fenwick and Company Limited v. The King, stands as authority for the proposition that the presumption of a common law right to compensation is erroneous:

A mere negative prohibition, though it involves interference with an owner’s enjoyment of property, does not, I think, merely because it is obeyed, carry with it at common law any right to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the State. 68

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On the other hand, even in the face of this authority, some have suggested that takings law rests on a strong common law presumption in favour of compensation. Raymond E. Young suggests that “the presumption favouring a common law right to compensation for land taken, has successfully resisted erosion over time, as courts have struggled to identify the essential elements that constitute a constructive expropriation, thus giving rise to the application of the presumption.” Despite not enjoying Constitutional protection in Canadian law, rights associated with ownership of property, especially real property, have generally been well protected by common law courts. In fact in 1960, Viscount Simonds speaking in Belfast, quoted the famous Mahon judgement, stating:

The general rule at least is, that, while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.

So which is it? Is there a common law right to compensation for property expropriated or is the right to compensation only to be found in statute? In its 2002 decision in Nilsson, the Alberta Court of Appeal indicated, in obiter, that the right to compensation was either a common law right or a rebuttable presumption, but in either case could only be negated by express intention in the statute giving rise to the taking.

Accordingly, when property is taken by statutory authority, unless the governing statute expressly requires otherwise, compensation is payable. The court in Nilsson went on to wonder aloud, whether the principle in question is a common law right or a rule of

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statutory interpretation, and found that it was not relevant to the case at hand. "It is sufficient to rely on the general principle that, in the absence of an expressly contrary statute, compensation must be paid when the state expropriates a subject's property."73

_Nilsson_ follows the recognized rule in Canada, regarding de facto expropriation in that "unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation"74 This rule was articulated in _Belfast Corporation v. O.D. Cars Ltd. (Belfast)_ , an important Anglo-Canadian authority on this issue. In considering whether a particular piece of legislation contemplates taking without compensation, Lord Radcliffe said:

...the general principle, accepted by the legislature and scrupulously defended by the courts that the title to property or the enjoyment of its possession was not to be compulsorily acquired from a subject unless full compensation was afforded in its place. Acquisition of title or possession was "taking." Aspects of this principle are found in the rules of statutory interpretation devised by the courts, which required the presence of the most explicit words before an acquisition could be held to be sanctioned by an Act of Parliament without full compensation being provided, or imported an intention to give compensation and machinery for assessing it into any Act of Parliament that did not positively exclude it. This vigilance to see that the subject's rights to property were protected, so far as was consistent with the requirements of expropriation of what was previously enjoyed in specie, was regarded as an important guarantee of individual liberty. It would be a mistake to look on it as representing any conflict between the legislature and the courts. The principle was, generally speaking, common to both.75

A modern articulation of the general rule against expropriation without statutory compensation was given by Lambert J.A. speaking on behalf of the British Columbia Court of Appeals in _British Columbia Medical Assn. v. British Columbia_ , where he stated:

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73 Ibid at para. 47.
75 _Belfast Corporation, supra_ note 71 at 523.
I think the rule may be divided into three parts. The first is that the property of the subject cannot be taken by the Crown without some form of authorization. The second is that the authorization must be clear. If there is any ambiguity about whether the Crown may take the subject’s property, the authorization must be construed in favour of the subject. The third is that, even if the authorization clearly permits the taking of the subject’s property, there is a presumption, based on justice and fairness, that the Crown will pay compensation to the subject. That presumption can only be rebutted by a clear contrary intention in the authorization.\textsuperscript{76} I have used the word “authorization” in order to indicate the generality of the rule, in all three parts, but in the usual cases the authorization will be contained in some form of legislative enactment. In such cases, the rule, in its second and third parts, could properly be described as a rule of statutory construction. It is an aid in determining the intention of the legislature.\textsuperscript{77}

While the source of the presumption of compensation for land expropriated is unclear, the fact that compensation is forthcoming is not. While the debate surrounding where the presumption of compensation for expropriation arises from, is interesting, it is not our main concern here. The important question for us becomes, regardless of its origins, when does the right to compensation arise?

\textbf{5. De Facto Expropriation}

It is uncontroversial that the state may place restrictions on an individual’s property uses, in furtherance of a valid legislative objective. This can be readily seen by municipal planning and zoning restrictions on land. The contentious point is where state sanctioned restrictions become so burdensome that they are in effect expropriating an individual’s property, without doing so in law. This situation leaves the property owner in a worse situation than she would be in, if there was an expropriation at law. As noted above, an expropriation at law gives rise to compensation, while regulation to the point of


\textsuperscript{77} Ibid at para. 17.
expropriation in fact, but not in law, does not require compensation and leaves the
property owner with little recourse. Excessive regulation to the point of leaving property
virtually useless is known as de facto expropriation or constructive taking.

A de facto expropriation can be defined as a governmental taking or modification
of an individual’s property rights that, while it does not confer legal title upon the state, it
places such a burden on the owner’s property rights to leave the property virtually
useless. Although the title to the land remains in the private landowner and legal title
remains vested in that person, her property has been burdened by state interference to the
point of a confiscation of “… all reasonable private uses of the lands in question.” 78 This
is comparable to the standard set in the United States regarding total regulatory takings
such as in the case of Lucas. Therefore, in order for expropriation giving rise to
compensation to be present, there must be a deprivation of ownership rights that are
decidedly complete, if not total. In fact, one Canadian author has gone so far as to state,
that at the present time, “there is no case law, as yet, recognizing other than a complete
deprivation as a constructive taking.” 79

While a complete and total deprivation of the use of land, in and of itself, gives
rise to a compensation claim in the United States (unless the deprivation results from a
background principle of property law) there is a further condition that must be present
before compensation is required in Canada. In this country, not only must there be a
complete deprivation, the deprivation must also be accompanied by a constructive

(Van.) 561 at 574.

79 Young, supra note 69 at 347.
acquisition *in specie* by the public authority. Mere prohibition or dissipation of value is not necessarily a taking, as in order to invoke the presumption that compensation is payable, the court must be able to find that there was an actual transfer, or passing, of a property rights from the holder to the taker: “a taking over, not just a taking away.” In a Northern Irish decision which has found favour in Canadian courts, Lord MacDermott, L.C.J., in *Ulster Transport Authority v. James Brown and Sons Ltd.*, made this point when he stated:

The next question is whether the effect of the relevant prohibition is “to take” the property thus lost. This verb was the subject of much argument, most of it referable to two submissions advanced on behalf of the appellants as follows: (1) “to take” means to acquire or take over and thus signifies a transfer or passing of property from one to another, in contra-distinction to a taking away without acquisition, as by dissipation or destruction; and (2) a mere prohibition is not a taking whatever else “to take” may connote.

It has been noted, in obiter dicta in some cases, that the requirement of a transfer of the property to the entity taking the property may not be a precondition to compensation, but this has only been in obiter at the present time. For example, in *Harvard Investments Ltd. v. Winnipeg (City of)*, where there was not a complete or total deprivation, both the majority and minority of the Manitoba Court of Appeal noted, in obiter, that if there had been a complete deprivation of the use, no constructive acquisition would be necessary for a right of compensation to arise.

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80 Ibid; See *Steer Holdings Ltd. v. Manitoba* (1992), 99 D.L.R. (4th) 61 at 68, where the Court observed that “[t]o qualify for compensation there must be an expropriation, if not in name, then in effect. The limitation on usage must be balanced by some corresponding acquisition by the authority.”
82 *Ulster Transport Authority v. James Brown and Sons Ltd.*, [1953] N.I.L.R. 79 (C.A.) at 111. This proposition was accepted and affirmed in the Supreme Court of Canada case of *Manitoba Fisheries Ltd. v. The Queen*, [1979] 1 S.C.R. 101.
83 [1996], 129 D.L.R. (4th) 557, at 568. Twaddle J.A. noted, “If a building were rendered virtually useless and its value extinguished] my own view is that a notional taking could be deemed to exist as the city would have preserved a monument for the benefit of its citizens at the cost of a private owner.”
The most recent Supreme Court of Canada judgment regarding takings was in *Canadian Pacific Railway Co. v. Vancouver (City) (Vancouver City)*, where the City of Vancouver enacted a by-law which designated a corridor of land, which was granted by the province over a century earlier for use in the construction of a railway line. The railway company had not yet used the corridor for any such purpose. They intended to develop the land for commercial and residential purposes, but the by-law maintained that the corridor could only be used as a public thoroughfare for transportation, in effect freezing the redevelopment potential of the corridor and confining the land to uneconomic uses. McLachlin J. in dismissing the railway company’s claim, and not finding an expropriation, noted that:

For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property.\(^{84}\)

In Canada, we are left with the standard that regulation must, before it becomes an expropriation, deprive a property owner of the core rights that identify ownership; those essential characteristics which define a relationship to property between an owner and the property that is substantially different than the relationship between a stranger and the property.\(^{85}\) Once government sanctioned regulation meets the two points articulated by McLachlin J. in *Vancouver City*, whereby the property owner loses a beneficial interest in the property that is correspondingly placed in the control of the state and she is left with no reasonable uses of the property, then an expropriation has occurred and compensation is required.

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\(^{84}\) *Canadian Pacific Railway Co. v. Vancouver (City)*, 2006 SCC 5 at para. 30.

\(^{85}\) Young, *supra* note 69 at 347.
Thus, the general rule in Canadian law seems to suggest that when a de facto expropriation occurs, which deprives the property owner of all reasonable uses of the property, a requirement of compensation arises. In this situation the expropriation is no longer seen as a de facto expropriation, but comes to be viewed as a complete expropriation, which is compensable at law. When the property owner is not deprived of "all reasonably uses of the property" a right of compensation is not forthcoming. Determining what constitutes "all reasonable uses" and when regulation of individual property rights in the name of the common good goes too far is a factual question that will have to be determined on a case by case basis.

6. Injurious Affection

What about a lesser amount of regulation? In other words, what about regulation that does not deprive the property owner of all reasonable uses of the property? It seems that the general rule is one which favours compensation for outright expropriation and that it does not extend to injurious affection simpliciter. Injurious affection is considered a restriction placed upon your property, but not one that takes away "all reasonable uses." For example, the requirement that you set aside a ten meter path for pedestrians on your new property development could not be said to deprive the owner of all reasonable uses, but it does diminish the value of the property to some degree.

The Supreme Court of Canada case of British Columbia v. Tener (Tener) is directly on point here, as the respondents in this case were the registered owners of mineral claims on lands located within Wells Gray Provincial Park. The conditions

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governing the extraction of their natural resource claims in the park gradually became more onerous and eventually the respondents were denied the "park use permit" necessary to explore or work the claims as no new exploration or development work would be permitted. In the case, Wilson J. writing a minority judgment for herself and Dickson C.J., stated:

Where land has been taken the statute will be construed in light of a presumption in favour of compensation but no such presumption exists in the case of injurious affection where no land has been taken. In such a case the right to compensation has been severely circumscribed by the courts and, although the policy considerations reflected in the restrictive approach to recovery for injurious affection simpliciter have been seriously questioned, the concern over the indeterminate scope of the liability remains if recovery is permitted for any injury to private land resulting from the non-negligent, authorized acts of public authorities. It would appear... to the extent that he relied on a presumption in favour of recovery for injurious affection simpliciter to get to his result, his reasoning may be viewed as circular.  

Wilson J., later in Tener, went on to state that "I believe the principle on which he founds the theory is 'no expropriation without compensation', not 'no injurious affection without compensation.'" Injurious affection to property frequently goes uncompensated; again zoning is perhaps the most common example.  

Canada has a strong history of regulation upon land without giving rise to compensation. In fact, there is no Canadian case in which the decline of economic value of land, on its own, has been held to be the loss of an interest in land. Extensive and restrictive land use regulations have almost without exception, been found not to constitute compensable expropriation. "The law permits the appropriation of prospective development rights for the good of the community but allows the property owner nothing

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87 Ibid at 26.
88 Ibid.
89 Ibid at 30.
in return.\textsuperscript{90} It seems to be that whether regulation has the effect of being a taking is a matter of degree.

It should be noted that making out a claim for injurious affection to property, which is possible in some instances, is a much more difficult case to meet than a claim for de facto expropriation, as a four part test has been established by the courts. The conditions required to give rise to a claim for compensation for injurious affection to a property, when no land is taken, are now well established:

(1) the damage must result from an act rendered lawful by statutory powers of the person performing such act;
(2) the damage must be such as would have been actionable under the common law, but for the statutory powers;
(3) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade;
(4) the damage must be occasioned by the construction of the public work, not by its user.\textsuperscript{91}

It is much more difficult to make a successful claim for compensation by way of injurious affection than it is for de facto expropriation. As noted above de facto expropriation only gives rise to compensation when the two requirements articulated in \textit{Vancouver City} are met.

For a successful claim for compensation arising out of injurious affection there are four requirements as laid out in \textit{R. v. Loiselle}.\textsuperscript{92} However, state sanctioned regulation in the name of the public trust doctrine would rarely, if ever, amount to compensable taking under the guise of injurious affection, as the state is fulfilling its common law sanctioned fiduciary duty. Acting in furtherance of its fiduciary duty the state could not be committing damage that is actionable under the common law as the fiduciary duty

\textsuperscript{90} Todd, \textit{supra} note 67 at 22-23.
\textsuperscript{92} \textit{Ibid}.
inherent in the public trust doctrine calls for the preservation of resources deemed special in nature. To this author, a claim for compensation due to injurious affection, at the hands of the state in fulfillment of its public trust duty, would be very difficult to meet.

7. Conclusions

The important and novel policy questions posed by the public trust doctrine have just begun to be answered. This chapter examined one of the more prominent policy questions. Namely, whether or not a taking, sanctioned by the public trust doctrine, gives rise to compensation and what effects a Constitutional provision requiring compensation for the interference with private property rights has. In America, the public trust doctrine defeats any claims for compensation if it is a background principle of law, according to Lucas. Whether or not the public trust doctrine is a background principle of property law, has not yet been fully answered. However, the recent literature on this topic seems to suggest that this is the case.

In Canada, compensation is due when land is expropriated completely. A claim for compensation based on a de facto expropriation that deprives the land owner of substantially “all reasonable uses of the property” while at the same time vesting a substantial proprietary interest in the state also gives rise to a presumption favouring compensation. Restrictions and regulations that only injuriously affect, or impair the uses to which land can be put towards, in much the same manner as city planning or zoning does, is not worthy of compensation, especially if it is enacted in furtherance of the goals of the public trust doctrine.
The public trust doctrine presents an opportunity to achieved a more balanced and harmonious relationship with our environment. As we begin to articulate the important and novel policy considerations raised by the court in *Canfor* we can move another step closer to implementing this common law doctrine that will place an obligation upon the state to protect the public, who cannot protect themselves, regarding the vital concerns intertwined with our quest for sustainability. More important and novel policy questions will be canvassed in the next chapter.
Chapter 7 – Implementing the Canadian Version of the Public Trust Doctrine

1. Introduction

Previous chapters have shown us what the public trust doctrine is, where it comes from, and how it has been interpreted in various jurisdictions. The preceding chapter dealt with the legalities of taking, or restricting property uses, in the name of the public trust doctrine. While the issue of takings will be a central concern for state implementation of the public trust doctrine, it is by no means the only issue that the effective implementation of the public trust doctrine will raise. This chapter will delve into a number of practical issues that the effective implementation of the public trust doctrine will face.

Effective implementation of the public trust doctrine will not occur overnight, as the goal of sustainability is a slow and tedious process marked by rational choices, at every turn, in order to effectively manage our common resources and amenities. The public trust is a continuing duty, incumbent upon the state, to promote and maintain a healthy natural environment on behalf of current and future citizens. To overcome some of the obstacles inherent in this duty, I will focus on some of the practical issues that may arise in the Canadian context.

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2. Some Practical Challenges in Designing a Canadian Public Trust Doctrine

As Joseph Sax, the grandfather of the public trust doctrine has, stated; if the public trust doctrine is to provide a satisfactory tool for environmental sustainability, it must meet three criteria.

(1) It must contain some concept of a legal right in the general public; (2) it must be enforceable against the government; and (3) it must be capable of an interpretation consistent with contemporary concerns for environmental quality.²

These issues will be dealt with below, along with other questions including which level of government is responsible for implementing the trust, when and how individuals have standing to bring forth a public trust claim, what happens when fiduciary duties conflict, how Aboriginal rights may be affected by the public trust doctrine, remedies for breach of the public trust, how the trust may conform or conflict with Canada’s international obligations, and how statutory protections of the environment might be read in light of this common law doctrine. These challenges are by no means the only challenges that the public trust doctrine’s implementation raises, but they comprise the more obvious issues that must be dealt with at the outset of its implementation.

A. The Division of Powers Regarding the Environment

One common concern regarding any efforts to deal with environmental and natural resource management is the problem of jurisdiction. The environment is not an enumerated ground within the Constitution Act, 1867.³ Thus, jurisdiction over the

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² Sax, supra note 1 at 474.
³ The Constitution Act, 1867.
environment is split between the federal\textsuperscript{4} and provincial\textsuperscript{5} levels of government as issues surrounding environmental protection tend to touch upon a wide number of headings, creating confusion and overlap in environmental management.

Questions surrounding jurisdiction over environmental management were dealt with in the case of \textit{Friends of the Oldman River Society v. Canada (Minister of Transport)} (Oldman River), where the plaintiff group brought forth a claim seeking to compel the federal departments of Transport and Fisheries and Oceans to conduct an environmental assessment, pursuant to the federal Environmental Assessment and Review Process Guidelines Order, in respect of a dam constructed on the Oldman River by the province of Alberta. LaForest J., writing for the majority, stated that the environment is "…a constitutionally abstruse matter which does not comfortably fit within the existing division of powers without considerable overlap and uncertainty."\textsuperscript{6} In the same judgement LaForest J. also stated that the established view of the environment is one that understands that

"… \textit{The Constitution Act, 1867 has not assigned the matter of “environment” sui generis to either the provinces or Parliament. The environment, as understood in its generic sense, encompasses the physical, economic and social environment touching several of the heads of power assigned to the respective levels of government.}"\textsuperscript{7}

\textsuperscript{4} Federal heads of power that may be of use include: s. 91(24) Indians, and Lands reserved for Indians; s. 91(2) The regulation of Trade and Commerce; s. 91(10) Navigation and Shipping; s. 91(12) Sea Coast and Inland Fisheries; s. 91(27) The Criminal Law - which allows for federal jurisdiction over matters which concern the protection of human health, life and safety; The federal government may also rely on its shared authority with the provinces regarding agriculture, the regulation of facilities which are extra provincial in nature or it’s general powers concerning the Peace Order and Good Government of Canada.

\textsuperscript{5} Provincial heads of power that may be of use include: s. 92(13) Property and Civil Rights in the Province; s. 92(10) Local Works and Undertakings; s. 92(16) All Matters of a merely local or private Nature in the Province; s. 92(5) The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon; As well as any other areas where agreements to share jurisdiction have been made, such as Agriculture.

\textsuperscript{6} \textit{Friends of the Oldman River Society v. Canada (Minister of Transport)}, [1992] 1 S.C.R. 3; S.C.J. No. 1 at para 86.

\textsuperscript{7} \textit{Ibid} at para 85.
Given the goal of environmental sustainability and the all-pervasive nature of environmental management, it is difficult to conceive of one level of government as having exclusive power over it - indeed, one author has claimed that “conferring exclusive jurisdiction over sustainable development would be like conferring a legislative monopoly over common sense to one level of government.”\(^8\) Instead, environmental issues should be dealt with by the level of government in the best position to deal with each issue created by the goal of ecosystem sustainability. The public trust doctrine is no different. The affirmative obligation present on the state encompasses the view that the state (which includes federal, provincial, as well as municipal actors) is obliged to uphold the trust in a bona fide manner.

While the overlap between the different levels of government may make it difficult to determine acceptable standards of practice in regulating resources, it does not make effective resource usage impossible. For example, a riparian forest may abut a navigable waterway known for its salmon run. The province in this instance may have jurisdiction over the forest, while the federal Parliament has jurisdiction over the navigable water, as it is a fishing resource. It must be recognized that although these two resources are separate in the eyes of the Constitution, they are connected in an ecological sense. Thus, cooperation between the various levels of government is needed.

While cooperation and coordination between the various levels of government may be the key, there is another option available under the Constitution. There is some debate as to whether or not the federal government should be using its “Peace Order and

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good Government (P.O.G.G.)" powers to remedy certain environmental challenges.\(^9\)

Relying on the federal P.O.G.G. powers would give the federal government exclusive jurisdiction over the environment, doing away with the overlap of government resources leading to more effective environmental management.

This issue was also dealt with in the Supreme Court of Canada case of *Oldman River*. The proper steps to determine if the P.O.G.G. powers are applicable calls for an examination to see if the issue fits within the enumerated powers found in ss. 91 & 92, before turning to the residual P.O.G.G. powers. At the present time, the Supreme Court of Canada jurisprudence on this issue seems to indicate that the P.O.G.G. powers are only to be used only in a few select instances. The clause may be invoked to deal with three different scenarios: first, national emergencies, second, new matters not existing at the time of Confederation, and, third, those matters which, though originally considered local, now go beyond provincial ability to regulate and, from their inherent nature, are national.\(^{10}\)

The environment is certainly not a temporary concern, as the respect for and maintenance of our environment can not be accomplished by a quick fix, but must be done by informed and rational decision making, conservation, and care over the long run. As well, concern for the environment is unlikely to be considered a new matter that did not exist at the time of Confederation. While the preservation and protection of the vast natural wilderness of North America may not have been as high of a concern as it was in the United Kingdom and Europe at the time, where signs that the industrial revolution

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\(^9\) S. 91 of *The Constitution Act, 1867* provides that it shall be lawful for the Queen, by an with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces...

was causing environmental degradation were clear, the effects of pollution were known in Canada. The emergence of large factories consuming fossil fuels and other natural resources while creating immense air and water pollution was readily seen in 19th century Europe and while the concentration of pollution may not yet have been as intense in Canada the effects of pollution were certainly known around the time of Confederation. \(^{11}\)

Therefore, in order for the federal government to be able to use its P.O.G.G. powers we must determine if the ability to effectively manage the environment has now reached proportions where the provinces are no longer in a position to deal with it. If this is the case the inability of the provinces to deal with the matter would shift the responsibility for environmental management into the area of federal concern. “The dynamic quality of the P.O.G.G. power means that it can be particularly suitable as a means of allocating power between two levels of government for resource and environmental issues, where problems start locally, fester over time, and then become a national concern.”\(^{12}\) The time for the assertion of the P.O.G.G. powers in regard to the environment is due. In my view, ecosystem sustainability needs the focused attention of one level of government. While environmental concerns have been around since Confederation it has grown in scope and danger to the point where it should be considered a national concern (under P.O.G.G.).

LeDain J. speaking in *R. v. Crown Zellerbach Canada Ltd (Crown Zellerbach)*,\(^{13}\) suggested that the inability of a province to deal with an issue is a factor for determining whether a matter is of national concern. In this case a logging company was charged,


\(^{12}\) Walters, *supra* note 8 at 442.

under *The Ocean Dumping Control Act* with dumping substances which may be shown or presumed to have an adverse effect on the marine environment. Crown Zellerbach claimed that the activity was not under federal jurisdiction as it was confined to the province of British Columbia and thus the matter was ultra vires of the Parliament of Canada. The crucial element, suggested by Justice LeDain, is whether "the failure of one province to act would carry with it adverse consequences for residents of the other (co-operating) provinces." This "provincial inability" test asks whether a "provincial failure to deal with the intra-provincial aspects of the matter could have an adverse effect on extra-provincial interests." Given that the interconnectedness of ecosystems is becoming increasingly more apparent; the provincial inability test may one day prove to be a low threshold allowing the general federal power to predominate.

Today, I would argue that many environmental concerns can no longer be viewed as local concerns, as the condition of our environment has grown to, not only a national, but international concern. However, "the environment" is a broad term, encompassing innumerable concerns, and as such, to this point, it has been held not to have the requisite singleness and indivisibility so as to trigger the operation of the P.O.G.G. power. In essence, the question becomes whether the scientifically recognized unity of ecosystems translates to the sort of unity recognized in law as attracting federal regulation? In

*Crown Zellerbach*, LaForest J. did not believe so. He held that environmental

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15 *Crown Zellerbach*, supra note 13 at 431-432.
16 Walters, *supra* note 8 at 433.
17 One prominent example here is air pollution. Air pollution was thought to only be a local concern until the scientific realities understood the diverse nature of transboundary pollution and its effect on global climate change. This formerly local concern is now the basis of international agreements including the *1979 Convention on Long-Range Transboundary Air Pollution* and the *UN Framework Convention on Climate Change*.
18 *Crown Zellerbach*, supra note 13 at 431-432.
19 Walters, *supra* note 8 at 432.
management could not be construed as sufficiently distinct to meet the test under the national concern doctrine to warrant federal exclusivity. \(^{20}\)

As it currently stands, the failure of our "Fathers of Confederation" to assign specifically the matter of environment within the Constitution Act, 1867 has inevitably led to considerable overlap and uncertainty as between the two levels of government - a situation which could be remedied by federal reference to the "Peace, Order and good Government" clause. \(^{21}\)

While the P.O.G.G. powers may some day be used to justify exclusive federal jurisdiction over matters of the environment this step does not seem close at hand. While a strong federal presence in the field of environmental management and protection would be welcomed, the lack of such a presence does not, and should not, devalue the standard of care that the state holds as a fiduciary of the public. For our purposes, the public trust doctrine must be enforced regardless of which level of government has authority over a resource in question as the governments together have an affirmative obligation to act in the public's best interest, by fostering sustainability. \(^{22}\) This duty will only be affirmed by each government making prudent rational choices, when they occupy the field or when cooperative action is required in conjunction with the other governments in Canada, in a transparent decision making process.

\(^{20}\) Oldman River, supra note 6.


\(^{22}\) For a precedent that even municipalities may be trustees of the public see the case of Scarborough (Borough) v. R.E.F. Homes Ltd. (1979), 9 M.P.L.R. (Ont. C.A.) at 257 where it was stated that "In our judgment, the municipality is, in a broad sense, a trustee of the environment for the benefit of the residents in the area of the road allowance and, indeed, for the citizens of the community at large."
B. Standing

In the United States, since Joseph Sax’s influential article on the public trust, the idea that public trust doctrine could be a useful tool for environmental sustainability and protection has come into vogue. All of the U. S. cases since 1970 fall into three basic categories: (1) private citizens suing the government for allegedly violating the doctrine; (2) private citizens suing other private parties for allegedly violating the doctrine; and (3) the government suing private parties for allegedly violating the doctrine.

Unfortunately, in order to implement the public trust doctrine in Canada, in any one of the three above instances, standing is required to launch the suit. A concerned citizen must have the ability to pursue a legal claim, to force the state to fulfill its fiduciary obligation to the public, when it is unwilling to do so of its own volition. When an individual feels that the public’s best interests have not been taken into account regarding our common resources, the public trust doctrine could provide the avenue through which those best interests can be vindicated.

Binnie J. writing for the majority in *Canfor* claimed “...there is no reason to neglect the potential of the common law, if developed in a principled and incremental fashion, to assist in the realization of the fundamental value of environmental protection.” Unfortunately, as it currently stands in Canada, the ability to pursue a common law claim against another party is usually confined to matters in which the initiator has sustained personal harm. Outside of a statute granting the requisite standing to bring forth a claim in the name of environmental protection, the only common law

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action currently available, would seem to be a claim initiated as a public nuisance. While public nuisance, in name, would seem to be an effective tool for protection of the interests of the public against environmental damages, in reality it has been quite an abject failure. Examining public nuisance and the standing difficulties associated with it makes the need for recognizing the public trust doctrine in Canada even more urgent.

The traditional view on standing, in the name of the public’s interest, was articulated in the English case of Boyce v. Paddington Borough Council,26 and affirmed in the Supreme Court of Canada case of Minister of Finance of Canada et al. v. Finlay (Finlay).27 The general rule so laid out is that:

A plaintiff can sue without joining the Attorney-General in two cases: first, where the interference with the public right is such that some private right of his is at the same time interfered with (e.g., where an obstruction is so placed in a highway that the owner of the premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.28

Thus, under the traditional rule, an action should be maintained by the Attorney General when it is for the benefit of the public.29 The Attorney General has traditionally been regarded as having not only the standing, but the discretion to assert a purely public right. Also, the Attorney General’s exercise of discretion as to whether or not to give consent to relator proceedings is not reviewable by the courts.30

28 Ibid.
The discretion of the Attorney General as to what is a proper case for him to maintain, or bring, an action is absolute.\textsuperscript{31} This has led to the insufficient use of the common law public nuisance tort in this author's opinion. The notion that the Attorney General is the only suitable party to represent the public interest, a traditional foundation of the public nuisance standing rule, dates to an earlier era when there was believed to be "a single, monolithic public interest."\textsuperscript{32} Today, our vision of the public is more varied and inclusive, and we understand that a variety of peoples with varying interests make up the public, and all of these interests should be taken into account when we speak of the "public(s) interest(s)."

There may be other reasons why the Attorney General, may not be the only, or even the best, individual to initiate an action for the benefit of the public. As Professor Stewart Elgie has stated, it is:

\ldots fictitious to assume that the Attorney General's decision whether to pursue a particular public nuisance case is always based on a delicate balancing of the public interest. There are many other reasons why an Attorney General may elect not to pursue a claim, including: limited legal staff and resources (likely the most common reason); political reasons (e.g. the polluter is a major employer or has strong political connections); financial interest (the polluter could be a significant source of government revenue); or direct self interest (the polluter could be a government agency or Crown corporation). This is not to criticize Attorneys General; it is simply to point out that they are influenced by a variety of political and fiscal limitations - and their decision not to pursue a particular public nuisance claim certainly cannot be taken as an indication that the claim lacks merit or is not in the public interest.\textsuperscript{33}


\footnote{Stewart A.G. Elgie and Anastasia M. Lintner, "The Supreme Court's Canfor Decision: Losing the Battle but Winning the War for Environmental Damages," (2005) 38 U.B.C. L. Rev. 223 at 242.}

\footnote{\textit{Ibid} at 243.}
There is also a fear (justified or not) that governments may be so influenced by interest groups leaving them unable to manage large and diffuse environmental resources. This fear may colour the perception of whether or not the Attorney General was engaged in back room dealing. Thus, the traditional legal understanding of the Attorney General’s role and her discretion in pursuing a public interest claim is deeply flawed.

Understanding the background forces that affect the Attorney General’s willingness to bring forth a public interest claim leaves the concerned citizen with only one other option regarding a public interest claim regarding environmental damage. The option available is that of pursuing a claim in public nuisance, without the consent of the Attorney General. As the traditional rules states, an individual may bring forth a public nuisance claim, on their own, when they have suffered “special damage peculiar to himself from the interference with the public right.” Thus, an individual may not sue for declaratory or injunctive relief, without the consent of the Attorney General, unless she can show a sufficient private or personal interest in the subject matter of the proceedings.  

This “special damages” requirement of the public nuisance standing is what has made public nuisance a particularly ineffective private law remedy. The special damages exception originated nearly 500 years ago, in an era when property interests were a paramount concern of the legal system. It was also a reflection of the analogy drawn to actions in private nuisance whereby the plaintiff still required some form of property interest in the damaged property. It can be argued that the outdated special

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35 Finlay, supra note 27 at 618.
36 Canfor, supra note 25 at para 68.
37 Elgie, supra note 32 at 245-246.
damages requirement should be dropped and a more liberal view of public interest standing adopted.

In the context of environmental damages it is exceedingly difficult to show damages that arise only to an individual and that person’s interest, and, as such, the need to resort to some sort of public interest claim is needed. The unfortunate irony of the development of this branch of the law of nuisance is that the chances of the concerned citizen achieving positive results decrease in inverse proportion to the gravity of the offending pollution problem and its adverse consequences. In an environmental context, damages that are peculiar to the individual are rare, as we share the same habitat and resources with our neighbours. Denying a citizen the right to defend her home, places she feels spiritually connected to, or places she uses for an economic livelihood, simply because these areas are used and enjoyed by others is unsatisfactory. In fact, in Canor, Binnie J. referring to the case of Bazley v. Curry stated that “[t]he reality, of course, is that it would be impractical in most of these environmental cases for individual members of the public to show sufficient ‘special damages’ to mount a tort action having enough financial clout to serve the twin policy objectives of deterrence to wrongdoers and adequate compensation of their victims.”

The traditional rule for standing in the interests of the public has been loosened in other areas, as the Supreme Court of Canada has shown some willingness to liberalize public interest standing, since the mid 1970’s. In the cases of Thorson v. Attorney

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38 See the Ontario Law Reform Commission, Report on the Law of Standing (1989) at 39, where they stated that “[t]he effect of the public nuisance [standing] rule is most significantly felt in the area of environmental law, where it serves to frustrate efforts by private individuals or groups to prevent or halt pollution, at a cost to the environment that is borne by us all.”


General of Canada (Thorson), Nova Scotia (Board of Censors) v. McNeil (McNeil), and Canada v. Borowski (Borowski) the Court relaxed the public interest standing rules regarding constitutional cases. This was followed in the Finlay case extending the public interest standing to administrative review scenarios.

The Thorson-McNeil-Borowski-Finlay cases, which have come to be known as the “standing quartet,” serve as precedents for rejecting the restrictive public interest standing rule, at least in the areas of constitutional and administrative law. Unfortunately, the Court has yet to consider the traditional or restrictive rule with regard to the area of public nuisance law itself, let alone environmental protection. Instead, it established that courts should have discretion to grant standing to a private plaintiff seeking to raise issues involving broader “public rights.”

In Borowski, Martland J., delivering the judgment of the majority, summed up what Thorson and McNeil stood for as follows:

I interpret these cases as deciding that to establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

Thus, it can be extrapolated from Martland J.’s reasoning that there are three criteria in the new relaxed version of public interest standing. First, there must be a

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44 Finlay, supra note 27; In this case Le Dain J. speaking for the Court, extended the scope of the trilogy and held that courts have a discretion to award public interest standing to challenge an exercise of administrative authority as well as legislation. He based this conclusion on the underlying principle of discretionary standing which he defined as a recognition of the public interest in maintaining respect for “the limits of statutory authority.”
45 Elgie, supra note 32 at 236.
46 Borowski, supra note 43 at 620.
serious issue, second, the individual must show that she is affected directly by evidencing a genuine interest in the subject matter, and lastly, there must be no other reasonable and effective way to bring forth the claim. In Finlay, the Court goes on to hold that if the plaintiff does not have an interest under the traditional test (special damage peculiar to himself from the interference with the public right) then there is a discretion to grant standing. However, one of the factors relevant to the exercise of the discretion is whether the plaintiff has a “genuine interest.”47 There has been little discussion about what a genuine interest is or how it differs from the “sufficient personal interest” required to obtain standing as of right. “Presumably, the ‘genuine interest’ test is less onerous as the plaintiff in Finlay met it although he failed to show a sufficient personal interest.”48

While the relaxed view of public interest standing arising from the “standing quartet” has in some instances led to greater access to the courts, it has proven insufficient for cases in which environmental degradation has arisen. The situation was exacerbated when the Court took a step back in the early 1990’s. The Court reviewed the discretion to grant standing in Canadian Council of Churches v. Canada (Minister of Employment and Immigration).49 Here, the Canadian Council of Churches had expressed concern about the refugee determination process in the proposed amendments to the Immigration Act and they sought standing to bring forth these concerns. After outlining the development of public interest standing, Cory J. warned against its abuse and against expanding its availability:

The increasing recognition of the importance of public rights in our society confirms the need to extend the right to standing from the private law tradition which limited

47 Finlay, supra note 27 at 336.
48 Ibid at 106.
party status to those who possessed a private interest. In addition some extension of standing beyond the traditional parties accords with the provisions of the Constitution Act, 1982. However, I would stress that the recognition of the need to grant public interest standing in some circumstances does not amount to a blanket approval to grant standing to all who wish to litigate an issue. It is essential that a balance be struck between ensuring access to the courts and preserving judicial resources. It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important. It would be detrimental, if not devastating, to our system of justice and unfair to private litigants.

The whole purpose of granting status is to prevent the immunization of legislation or public acts from any challenge. The granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant. The principles for granting public standing set forth by this Court need not and should not be expanded. The decision whether to grant status is a discretionary one with all that designation implies. Thus undeserving applications may be refused. Nonetheless, when exercising the discretion the applicable principles should be interpreted in a liberal and generous manner.50

This step back may have been undertaken for a number of reasons. Six main concerns have been articulated regarding the broadening of standing in public nuisance disputes according to Stewart Elgie including: (a) Floodgates arguments; (b) Multiple proceedings against the same defendant; (c) Avoiding frivolous litigation ("mere busybodies"); (d) The benefits of the adversary system; (e) The need for political control; and (f) The effect on private interests.51 The danger that third parties may overburden court resources by initiating litigation when they do not have the appropriate motive or interest in resolving the issues raised in adjudication, has been a concern for some time, in regards to many new policy initiatives.52 However, it has never been adequately proven that breakthroughs into new areas of liability trigger a large numbers of claims, let

50 Ibid at 252-253.
51 Elgie, supra note 32 at 238.
alone claims which are trivial. As well, the cost of litigation is an inadequate reason for
the state to refuse to fulfill its fiduciary obligations to its citizens, in maintaining a
healthy environment for future generations.

The public interest standing doctrine seeks to close the adjudicative door in the
face of those who have no "personal attachment" to a case, so as to enable scarce judicial
resources to be allocated to individuals who bring "real" disputes.\footnote{Russell Binch, "The Mere Busybody: Autonomy, Equality and Standing," (2002) 40 Alberta L. Rev. 367 at 368.} If anything, a
plaintiff who seeks public interest standing is more likely to be acting in the public
interest than a private plaintiff (with special damages) who is acting to protect her own
property or personal interests.\footnote{Elgie, supra note 32 at 241.}

As indicated above, public interest standing in Canada was first established for
Constitutional cases, and then extended to administrative law challenges. According to
Professor Stewart Elgie "the next logical next step is to extend public interest standing to
the other major area of 'public rights' law, public nuisance."\footnote{Ibid at 237.} I would argue that the
judicial acknowledgment of the public trust doctrine would complement public nuisance,
as the public trust doctrine would be an effective way to implement change in cases of
state sanctioned environmental degradation.

The public trust doctrine can be envisioned as the next step in the process of
expanding public interest standing in Canada. Even the relaxed standards of public
interest standing have an element of discretion. The Attorney General or in some cases
the courts have the ability to frustrate an attempt to bring forth a claim in the interests of
the public if they deem that it does not meet the three criteria first set out in \textit{Thorson}.\footnote{Ibid at 237.}
The public trust doctrine has standing as an inherent aspect. Standing for the
public trust doctrine is always an issue, but according to Constance Hunt "standing for
individual citizens to enforce the trust is inherent in the concept of a public trust." Standing must be inherent within the public trust doctrine as individual citizens wishing
to invoke a public trust claim will likely not have an individual property interest in the
common natural resource. If individual citizens do not have an ability to launch public
trust actions then we are right back to the place we started, where the Attorney General is
in the position to filter out cases where she does not wish to pursue an action.

The public trust doctrine would circumvent the need for approval from the
Attorney General. Just by being a citizen of the state, in reliance upon the decision
regarding resource allocation and usage would provide the requisite elements for standing
to enforce the state to uphold its fiduciary duties.

With its decisions in the "standing quartet" of cases, the Supreme Court has
ushered in a new period of liberalized standing rules and these rules should be extended
to claims made in the public interest, to benefit such a public, as in the sphere of
environmental protection. Standing, in such cases would empower citizens to force the
state, when it is unwilling, to save or conserve our special resources and amenities.
Recently, the Supreme Court has again taken a step forward by adopting the proposition
that "any activity which unreasonably interferes with the public's interest in questions of
health, safety, morality, comfort or convenience" is capable of constituting a public

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56 See Christopher Stone, "Should Trees Have Standing, Toward Legal Rights For Natural Objects," (1972) 45 S. Cal. L. Rev. 450, where Stone talks about granting standing to a nontraditional list of objects and actors.
nuisance.\textsuperscript{58} This articulation may be a reflection of the view that Canadian society favours expanding the abilities of private citizens to initiate claims in the name of the public's interest.

C. The Effect on Aboriginal Rights

As with any newly recognised strategy for environmental preservation there is a concern about how the new strategy will work with the legalities of the existing system. Recognizing the common law public trust doctrine will undoubtedly have some effect on natural resources and amenities that affect, or are affected by, Aboriginal law.

As we know from our discussion in chapter five regarding the fiduciary duties inherent in the public trust doctrine, the Crown currently owes a fiduciary duty towards Aboriginal peoples, as recognized in \textit{R. v. Guerin}.\textsuperscript{59} Also looking back to chapter five, we see that the public trust doctrine is best characterized as a fiduciary duty, owed by the state to the entire public. The next logical question becomes how to reconcile two fiduciary obligations incumbent upon the state, when these duties conflict.

The Crown owes a fiduciary duty to Aboriginal peoples in general, but also more specifically owes a duty to each Indian band. There may be some instances where the fiduciary duty owed to one band conflicts with the fiduciary duty owed to a second band and the honour of the Crown could be called into question. This is the scenario dealt with by the Supreme Court of Canada in the case of \textit{Wewaykum Indian Band v. Canada} (\textit{Wewaykum}).\textsuperscript{60} The dispute in \textit{Wewaykum} arose as a result of a clerical error by a government clerk in a 1907 land transfer agreement. As a result of this error two bands

\textsuperscript{58} \textit{Ryan v. Victoria (City)}, [1999] 1 S.C.R. 201, at para. 52.
\textsuperscript{60} \textit{Wewaykum Indian Band v. Canada} [2002] 4 S.C.R. 245
claimed ownership to one area set aside as reserve land. The Crown owed a fiduciary
duty to each band, and both bands asserted that this duty required that they be granted
ownership of the area in question. Binnie J. writing for the majority of the Court stated
that the Crown’s fiduciary duty remains intact even when the duty is owed to Aboriginal
groups with competing claims against one another. 61

It is uncontroversial fiduciary law that where a fiduciary serves classes of
beneficiaries possessing different rights, though obliged to act in the interests of
the beneficiaries as a whole, the fiduciary is nonetheless required to act fairly as
between different classes of beneficiary in taking decisions which affect the rights
and interests of the classes inter se. 62

Fairness and reasonableness are simply what loyalty prescribes in cases where
there are multiple beneficiaries with conflicting interests. 63 “Whereas fairness sets a limit
on how the fiduciary may exercise power as between distinct classes of beneficiaries,
reasonableness establishes a floor.” 64 As the Supreme Court said in Wewaykum, when the
Crown has a fiduciary duty to parties whose interests conflict, that duty requires it to act
“with loyalty, good faith, full disclosure appropriate to the subject matter and with
‘ordinary’ diligence in what it reasonably regarded as the best interests of the
beneficiaries.” 65 Once the bands’ conflicting demands became apparent, the Crown had a
duty to be “even-handed towards and among the various beneficiaries.” 66

Wewaykum follows the line of reasoning set out in the case of Blueberry River
Indian Band v. Canada (Department of Indian Affairs and Northern Development)

61 Ibid at para 96-97
64 Ibid at 266.
65 Wewaykum, supra note 60 at para 97.
66 Ibid at para 90.
(Blueberry River).\textsuperscript{67} In 1916 a nomadic Aboriginal tribe entered into a treaty with the Crown for the surrender of Aboriginal title, in exchange for a parcel of land in British Columbia. Later when the population of the area increased and it was clear that the band was not using the reserve land for farming, they were asked to move farther north, closer to their traditional hunting territory, in order to ease the burden caused by incoming settlers. After the move, it was discovered that the former reserve lands, now sold, was rich in natural gas reserves. However, the band did not retain any mineral claims in their former land. Gonthier J. speaking for the majority of the Supreme Court of Canada suggested that where there are specific competing public interests, the level of the fiduciary duty can be affected by the immediacy and significance of the competing interests, and by the extent of the conflict. However, the decision did not say how other factors, such as the relative importance of the protected interest, might affect this situation.\textsuperscript{68}

Therefore, when the state owes a fiduciary duty to two or more competing groups, there is a balancing act that takes place. This balancing act requires loyalty, good faith, and disclosure of the reasons for not upholding the fiduciary duty to one group at the highest level. In the case of environmental protection and sustainability the obligations owed to Aboriginal people and the public as a whole will often align. Aboriginal peoples tend to have a spiritual connection and commitment to their lands that resembles a stewardship ethic. According to the case of Delgamuukw v. British Columbia Aboriginal land is communally held and First Nations’ “ownership” of traditional territories is more

\textsuperscript{67} Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development), [1995] 4 S.C.R. 344.
accurately described as stewardship, or a hereditary responsibility to manage traditional territories in a manner that will ensure that they will be available for the descendants of the future generations. In *R. v. Sparrow (Sparrow)* the court also noted that, the conservation and management of our resources is consistent with aboriginal beliefs and practices, and, indeed, with the enhancement of aboriginal rights.

The Supreme Court of Canada decisions in cases dealing with Aboriginal rights and title have also recognized this commitment to the land.

There are at least two principles which link Aboriginal title with ecological sustainability. First, conservation must be the over-riding priority in all resource management decisions (*Sparrow* and *Marshall*) and, second, Aboriginal title is subject to an “inherent limit” (*Delgamuukw*).

The Supreme Court also explained that the inherent limit to Aboriginal title meant that a First Nation could not undertake activities that would sever the special relationship between Aboriginal people and the land.

In *Delgamuukw* Lamer J. stated that there is an inherent limitation within Aboriginal title, and it is therefore distinguished from a fee simple ownership. The limitation was described in this way: “...uses must not be irreconcilable with the nature of the group’s attachment to the land.” For example, the strip mining of traditional hunting grounds would be considered an activity that violated the inherent limit to Aboriginal title as this activity would not allow for the traditional uses of the land to

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71 POLIS, *supra* note 69 at 29.
remain available for future generations. We must look at what activities have taken place, and what “special bonds” have been formed with the land.

As well, even when the fiduciary duty owed to Aboriginal peoples conflicts with the goals of conservation and environmental protection, there is precedent that the state should give precedence to the goals of conservation and environmental protection before upholding the fiduciary duty owed to Aboriginal peoples. In Sparrow, the Supreme Court ruled that the Aboriginal right to fish could be diminished where it conflicted with “a valid legislative objective” such as “conservation and resource management.”74 As well, all Aboriginal rights to the land or adjacent waters are subject to limitation on the ground of conservation.75 Although as part of the Crown’s fiduciary obligation to Aboriginal peoples, the Aboriginal peoples should be consulted on conservation measures that are to be implemented, Aboriginal title is not absolute, and can be infringed upon if justified.

Infringement of Aboriginal rights must be in furtherance of a legislative objective that is pressing and substantial. While the vague notion of “public interest” was rejected in Sparrow, as a pressing and substantial objective, regulations could be valid if reasonably justified as “necessary for the proper management and conservation of the resource...”76

It seems to be the general trend in the courts that the order of responsibilities in regards to the state’s fiduciary duties is reconciled with conservation being the first and

74 Sparrow, supra note 70; The justification of conservation and resource management, however, is uncontroversial at para 73.
76 Sparrow, supra note 70 at para 72, where it was stated that “...the ‘public interest’ justification to be so vague as to provide no meaningful guidance and so broad as to be unworkable as a test for the justification of a limitation on constitutional rights.”
foremost concern and then Aboriginal rights and last public rights.\textsuperscript{77} The public trust doctrine in reality will unlikely differ from Aboriginal worldviews regarding resource conservation and sustainability, but in the odd case of conflict, the fiduciary duty to the public as a whole (of which Aboriginal peoples are a significant part) would require the state to act in the best interests of conservation and sustainability first and foremost.

D. International Environmental Obligations

While international law may not be readily seen as a source of our common law, the values and principles of international law should be seen as a guiding principle to statutory interpretation and judicial review.\textsuperscript{78} Currently, Canada is a signatory to over 230 international environmental agreements,\textsuperscript{79} although a case can be made that our intention to implement all of these agreements has not been met with an effective follow thorough. LaForest J. speaking for the majority in \textit{R. v. Hydro-Quebec} stated that: "...‘Canada must be able to fulfil its international obligations in respect of the environment’...the stewardship of the environment is a fundamental value of our society...."\textsuperscript{80}

The public trust doctrine holds that the present generation of human beings has an obligation to future generations to preserve the diversity and quality of the earth’s life-sustaining environmental resources. The nature and extent of the responsibilities which arise from the public trust doctrine however remain under debate. Nevertheless, Edith

\textsuperscript{78} \textit{Baker v. Canada (Minister of Citizenship and Immigration)}[1999] 2 S.C.R. 817 at para 70.
Brown Weiss and others have noted that the public trust doctrine is increasingly being accepted as an emerging norm of customary international law.\textsuperscript{81}

The public trust doctrine centers on human responsibilities rather than the rights of natural entities, and it stretches those responsibilities beyond the present generation, requiring one purpose of society to be the realization and protection of the welfare and well-being of every generation. As each generation is bound to pass the planet on to future generations in no worse a condition than it received it and to provide future generations with equitable access to the earth’s resources and benefits, every generation is both a trustee for the planet, with obligations to care for it, and a beneficiary, with rights to use it.\textsuperscript{82}

The public trust doctrine in its modern conceptualization, as a fundamental right of access to common resources and amenities, does seem to align nicely with a number of international norms regarding environmental law. Most notably the public trust doctrine, in guaranteeing the perpetual access to natural resources needed for survival to future generations, can be seen as the common law incarnation of the Intergenerational Equity Principle.\textsuperscript{83} The Intergenerational Equity Principle simply states that “each generation has an obligation to future generations to pass on the natural and cultural resources of the planet in no worse condition than received and to provide reasonable access to the legacy for the present generation.”\textsuperscript{84} The public trust doctrine may not go as far as the


\textsuperscript{82} Ibid at 190.


intergenerational equity principle does, as it does not specify that less degradation is unacceptable, but it does require at a minimum healthy and self-sustaining ecosystems.

Intergenerational Equity is very similar in idea to sustainable development, as both extend the time frame for resources allocation decisions to future generations. As stated in the *Brundtland Report*, sustainable development is “development which meets the needs of the present generation without compromising the ability of future generations to meet their needs.”\(^{85}\) Thus, the public trust doctrine also fits squarely within the concept of sustainable development, as it allows for the current generation to use natural resources only when there is “enough of and as good as” of resources left for subsequent generations.

The “Precautionary Principle” or “Precautionary Approach” is thought to be a guiding principle of international environmental law, as well. The Precautionary Principle can most readily be seen in its articulation as Principle 15, found in the *Report of the United Nations Conference on Environment and Development (the 1992 Rio Declaration)*, wherein it was stated that “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”\(^{86}\)

“The distinguishing feature of the Precautionary Principle is its value base of forecaring for public health and the environment.”\(^{87}\) The public trust doctrine could endorse a precautionary approach to environmental and natural resources allocation and,


usage. Precautionary measures should be used, whenever feasible in order to ensure that the common resources needed for perpetual access and survival are always available.88

The Polluter Pays Principle was also adopted at the 1992 Rio Declaration.89 Simply stated, those who cause harm or degradation to natural resources should bear the costs of replenishing those natural resources. If those who cause environmental harm are not required to pay for it, then they will have little incentive to remedy the problem or prevent it in the first place. “If the environment is a ‘free good’ it will be undervalued and overexploited and society as a whole will bear the cost.”90

In Imperial Oil Ltd. v. Quebec (Minister of the Environment) (Imperial Oil), the Supreme Court of Canada found that “the polluter-pay principle ... has become firmly entrenched in environmental law in Canada.”91 Following a dispute over who was responsible for the cleanup of a contaminated site once owned by Imperial Oil, the Court further explained that “to encourage sustainable development, the principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities.”92 Thus, the Polluter Pays Principle is already found within Canadian law and the public trust doctrine may synthesize with it very well.

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88 The precautionary principle was affirmed in the Supreme Court of Canada case of 114957 Canada Ltd (Spraytech, Societe d’arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241; S.C.J. No. 42 at para. 31.
89 Report of the United Nations Conference on Environment and Development (the 1992 Rio Declaration), Principle 16. National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.
90 Elgie, supra note 32 at 223.
92 Ibid at para 24
More than anything, the public trust doctrine gives a voice to concerned citizens, in the name of this generation and future generations. The trust doctrine is a democratizing force preventing monopolizing of trust resources and promoting decision making that is accountable to the whole public.\textsuperscript{93} The public trust doctrine provides a means for those concerned about natural resource use today, and into the future, to initiate debate about how to use such resources. This debate would require the state to defend its policy decisions not only to this generation, but also to future generations, giving future generations a stake in resource decisions that will affect their quality of life.

\textbf{E. Statutory Trusts}

Up to this point, legislative attempts at achieving sustainability have been futile. Command and control type of statutes that deal with one environmental “problem” at a time tend to fail as they do not take into account a larger view of the interconnectedness of the different problems and natural systems in general. However, there have been a few attempts to develop the ideas of the public trust doctrine, of perpetual access to resources deemed special in nature for the benefit of future generations, into statute.

In the United States, the states of Hawaii,\textsuperscript{94} Louisiana,\textsuperscript{95} Alaska,\textsuperscript{96} and Pennsylvania\textsuperscript{97} among others\textsuperscript{98} have codified the public trust into their state constitutions.


\textsuperscript{94} Article XI, s. 1, of Hawaii’s constitution states “For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.” As well, Article XI, s. 9, provides “...each person has a right to a clean and healthful environment, as defined by law relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any other party, public or private, through appropriate legal proceedings, subject to reasonable limitation and regulation as provided by law.”
While none of the Canadian provinces have gone this far, the Northwest Territories\textsuperscript{99} and Yukon Territory\textsuperscript{100} have enacted statutes regarding the environment that have adopted public trust like language. The next logical question becomes how does the common law public trust doctrine interact with the statute based public trust?

"The common law is an evolutionary process, where decisions made by local judges in settling specific controversies yield results that reflect and become the standards of social behaviour."\textsuperscript{101} The common law evolves to deal with new realities, where as a statute has to be amended from time to time to keep up with the changing realities. A common law public trust would mean we do not have to worry about amending the statute as new information and scientific knowledge become available. Special interest groups often kill legislation that would adversely affect their business ventures. This often leads to a watered downed version of the legislation, if any is passed. The common

\textsuperscript{95} Article IX, s 1 of the Louisiana Constitution enacted in 1974 says "The natural resources of the state, including air and water, and the healthful, scenic, historic, and aesthetic quality of the environment shall be protected, conserved, and replenished insofar as possible and consistent with the health, safety and welfare of the people. The legislature shall enact laws to implement this policy."

\textsuperscript{96} Alaska's constitution in Article VIII, s. 2 states that "The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people." As well, Article VIII, s. 3 further provides that "Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use."

\textsuperscript{97} In 1971 Pennsylvania adopted Article I, s. 27 of its constitution, which provides "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people." This was held to be a recognition of the public trust doctrine in \textit{Payne v. Kassab}, 312 A.2d 86 (Pa. Commw. Ct. 1973).

\textsuperscript{98} See Joseph F. Dimento, "Citizen Environmental Legislation: An Overview," (1975-1976) 53 J. Urb. L. 413 where he states that at least ten states have some version of trust like language in regards to the environment; California, Connecticut, Florida, Indiana, Massachusetts, Michigan, Minnesota, Nevada, New Jersey and South Dakota.

\textsuperscript{99} Environmental Rights Act, R.S.N.W.T. 1988, c.83(Supp.) S. 6. (1) Every person resident in the Territories has the right to protect the environment and the public trust from the release of contaminants by commencing an action in the Supreme Court against any person releasing any contaminant into the environment.

\textsuperscript{100} \textit{Environment Act}, RSY 2002, c. 76 S. 7 It is hereby declared that it is in the public interest to provide every person resident in the Yukon with a remedy adequate to protect the natural environment and the public trust.

law public trust doctrine could not be watered down by interest groups, as the fiduciary obligation of the state is inherent and perpetual.

As well, the common law public trust may act retroactively as a remedy, unlike a statute which generally acts only from the time it is enacted by the legislature. This may mean that past decisions on resource allocation and projects could be re-examined as to their validity in light of the public trust doctrine, including the need for environmental assessments on these projects with regard to their impact on the environment. The common law public trust would thus fill in the gaps in statutory language.  

F. Remedies

"The effective implementation of the public trust doctrine will require preventive measures, remediative oversight, and restorative responsibilities." Adhering to these goals, the California Supreme Court, in the Mono Lake case, held that "the state has the authority under the public trust doctrine to amend perfected rights as necessary to prevent, and indeed reverse, harm to the trust uses." This means that the state is not confined by past decisions as it has the power to reconsider allocation decisions, even though they were made after due consideration of their effect on the public trust.

Along with the Mono Lake case, recent United States cases illustrate at least four different types of public trust remedies:

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105 Ibid.
(1) a public easement guaranteeing access to trust resources;\textsuperscript{106}
(2) a restrictive servitude insulating public regulation of private activities against constitutional takings claims;\textsuperscript{107}
(3) a rule of statutory and constitutional construction disfavoring terminations of the trust;\textsuperscript{108} and
(4) a requirement of reasoned administrative decision making.\textsuperscript{109}

Although these remedies vary widely depending upon the jurisdiction and the context of the dispute, they all possess a unifying theme of promoting public access - access both to resources impressed with the public trust as well as to decision makers with power to allocate those resources among competing users.\textsuperscript{110}

In Canada, due to the fact that the public trust doctrine has not yet received the same level of judicial acceptance as it has in the United States, the types of remedies that accompany the public trust right have yet to be fully explored. In the Common Law world the widespread view of remedies, envisions them as being inseparable from rights and thus serving the goal of enforcing those rights.\textsuperscript{111} Therefore, it is generally understood in Canadian law that a right should have a corresponding remedy available to enforce that right. Understanding that a right, such as the natural right of access to


\textsuperscript{108} \textit{CWC Fisheries, Inc. v. Bunker}, 755 P.2d 1115, (Alaska S.C. 1988) at 1119-20 where it was held conveyances in furtherance of specific trust purposes or without substantial impairment of trust uses can be made free of trust but only if legislative intent is ‘clearly expressed or necessarily implied’; \textit{Caminiti v. Boyle}, 107 Wash. 2d 662, (Wash. S.C. 1987) at 670-71. Both the \textit{CWC Fisheries} and \textit{Caminiti} courts ruled that tidelands conveyed to a private owner remained subject to public obligations.


\textsuperscript{110} Blunnm, \textit{supra} note 93.

common resources and amenities, has a corresponding remedy to enforce that right we need to examine how such a remedy would operate in terms of the public trust doctrine.

A remedy seeks to place the wronged party in the position they would have been in if not for the alleged wrongdoing. Thus, the aim of a remedy is to rectify, redress, and correct that which has been done to cause injury to one party by the breach of duty by another party. 112 Placing the aggrieved party back in the position they would have been in, if it were not for the tort of the other party, can usually be accomplished by way of an award of damages. However, in some cases monetary awards will not place the aggrieved party in the same position. In such instances the wrongdoer must relieve the aggrieved by way of an equitable remedy, such as specific performance or injunctive relief.

In the context of natural resource damages it is difficult to capture the value of natural resources and amenities. This is evidenced by the lack of a generally agreed upon theory for the valuation of environmental damages. 113 As there is currently no coherent and generally accepted measure of damages for natural resource destruction and degradation, it is often difficult for judges to provide an adequate monetary award that captures the significance of certain natural resources and amenities. Canfor addresses the lack of a coherent and principled approach to the assessment of environmental damages as the Supreme Court of Canada canvassed three separate components of environmental loss, that is to say:

“Use value” includes the services provided by the ecosystem to human beings, including food sources, water quality and recreational opportunities.

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112 See Black’s Law Dictionary 7th ed., This is known as the principle of restitutio in integrum.
“Passive use” or “existence” value recognizes that a member of the public may be prepared to pay something for the protection of a natural resource, even if he or she never directly uses it. It includes both the psychological benefit to the public of knowing that the resource is protected, and the option value of being able to use it in the future. Finally, an ecosystem may be said to have an “inherent value” beyond its usefulness to humans. Those who invoke inherent value argue that ecosystems should be preserved not just for their utility to humans, but because they are important in and of themselves...\footnote{114}

Flowing from the Supreme Court’s discussion of the difficulties associated with fashioning a coherent and consistent measure of environmental damages, Martin Olszynski illustrates these difficulties as he examines the concept of environmental value from three relevant fields: economics, philosophy, and ecology.\footnote{115} By identifying economic values of nature, environmental ethics conceptions of value, and the aesthetic values of nature he showcases the inherently difficult task of quantifying the worth of natural resources and amenities.

It is difficult to accurately capture the value of a shared resource which provides economic livelihood to some, aesthetic enjoyment to others, and spiritual or cultural significance to still other people. Illustrative of this point is that fact that all parties involved in the Canfor dispute agreed that “nobody in their right mind would value Stanley Park on the basis of stumpage revenue that could be obtained from the trees.”\footnote{116} Thus, in an environmental context, the view that economic value should be calculated at the cost of restoring the damaged natural resources back to their original state is deeply flawed as it does not capture the multitude of advantages that the environment provides. This is one scenario where the whole is greater than the sum of its parts.

\footnote{115} Olszynski, supra note 113 at 260.
\footnote{116} Canfor, supra note 25 at para. 136.
The difficulties associated with determining the value of natural resources and
amenities tends to make damages an inadequate response to environmental damage.
While arriving at a suitable valuation of our common natural resources and amenities is
difficult by itself, it is not the only difficulty we face in awarding damages for
environmental loss. It is also difficult to award damages to the whole public. How do you
compensate the public, including future generations, for damage to common natural
resources and amenities? While compensation to the public may seem difficult to
implement, funneling any monetary awards into projects that restore damaged resources,
can make monetary damages a limited, but potentially useful, remedy. Monetary awards
would provide badly needed funds to Environmental Non-governmental Organizations
(ENGO’s) who carry out clean up and restorations projects in damaged or degraded
resource areas. By replanting forests, cleaning lakes and rivers along with their shore
lines, monetary awards that assist ENGO’s in their cleanup and restoration efforts would
provide a limited remedy to the public as a whole, although only after damage has
already occurred.

However, I argue that the public trust doctrine, as it has as its purpose achieving
sustainable natural resource and amenities usage on an ongoing basis, should also provide
for proactive remedies, such as injunctive relief or specific performance, that can be
deployed to save resources in advance or at the very least to prevent further damage. How
the different remedies available operate depends upon the party trying to invoke public
trust protection of common resources and which party holds the proprietary rights of the
resources in question.
The instances of public trust disputes can generally be divided into two scenarios. The first scenario is where the state owns or regulates the resource in question and a citizen initiates an action claiming that it, or its Crown servants or agents, have deviated from the standard of ecological care required by the public trust doctrine. The second scenario is where a private individual owns or regulates the resource in question and the state is seeking to uphold its inherent fiduciary duties by invoking public trust protection.

In the first scenario, the type of remedies available, against the Crown, for the destruction and degradation of common natural resources and amenities appears to be constrained. In order to prevent damage to the environment before it has occurred, or as it is continuing to occur, the most useful remedy would be that of an injunction. An injunctive order directing a person to do, or not to do, a specified act, such as to stop the development of a destructive project on a fragile ecosystem, would be a useful way of preventing destruction of common natural resources and amenities before irreparable harm has taken place.

However, it is generally understood that, at common law, the prerogative writs, which include injunctions, mandamus, certiorari and prohibition, are not generally available against the Crown.\(^{117}\) For example, in *Grand Council of Crees of Que. v. R.* it was held that the Crown is immune from injunctive relief at common law.\(^{118}\) Following this case it appears that even when the Crown breaches its fiduciary duty towards the public, without a statutory remedy the common law prerogative writ of injunctive relief in unavailable against the Crown. While it is correct that at an abstract level, as


\(^{118}\) *Grand Council of Crees of Que. v. R.* [1982] 124 DLR (3d) 574.
injunctive relief is not available against the Crown, in reality injunctive relief is available against a Crown servant or agent, if he or she is acting outside the scope of his or her duties.\textsuperscript{119} Thus, injunctive relief to stop an action that degrades or destroys common natural resources and amenities, that are under the ownership or control of the Crown, is available when an individual Crown servant or agent has acted outside the scope of his or her mandated responsibilities. It is not the powers of the Crown as a whole, but the discretion of those powers exercised by the Minister or official that can be challenged. This amounts to an available remedy for the inadequate operational implementation of the public trust doctrine.\textsuperscript{120} As it is not the Crown as an abstract entity, but individual Crown servants, agents, or departments, such as the Minister of the Environment, that implement the public trust doctrine and make the day to day decisions regarding our common resources, the decisions that these individuals make are open to the equitable remedy of injunctive relief should the facts warrant it. Therefore, as injunctive relief is available against Crown servants and agents once an injunction has been issued against the responsible officials, the Crown is effectively bound.\textsuperscript{121}

As noted in chapter two, the right of perpetual access to common resources and amenities is a right that is prescribed by the laws of nature. This gives rise to the fiduciary duties of the state to manage these common resources for the benefit of the entire public. Thus, the policy decision of whether or not to uphold the duty of ecological care required by the public trust doctrine is not open to debate. How the state chooses to


\textsuperscript{120} See Just v. British Columbia [1989] 2 S.C.R. 1228, for a detailed analysis of the difference between operational and policy decisions made by the Crown. Here the decisions regarding how to implement rock slid safety measures along the Whistler highway was considered to be an operational matter and required a duty of care.

implement the public trust doctrine is an operational decision which is open to challenge.\(^{122}\) Thus, while injunctive relief is not available against the Crown as an entity, it is available against individual Crown servants and agents who fail to take the public trust doctrine into account, in a reasonable manner, when making decisions that affect our common natural resources and amenities.

At first glance, other avenues of potential remedial action also appear to be closed off to the public when trying to invoke them against the Crown. At common law the Crown is immune from prohibition and certiorari,\(^{123}\) as well as from specific performance.\(^{124}\) Beyond injunctive relief, prohibition and certiorari, and specific performance the prerogative writ of mandamus is also unavailable against the Crown, in most instances.\(^{125}\) Again, the distinction between the Crown as an entity and that of a Crown servants or agents is of the utmost importance. Where the public duty falls upon a particular Crown servant or agent, such as the Minister of the Environment, even in the face of the immunity that the Crown at large enjoys, the prerogative writ of mandamus would be available to ensure that an individual Crown servant or agent carries out their duties.\(^{126}\)

As there is currently confusion regarding which duties are to be applied against the Crown at large and which are to be applied against individual Crown servants or agents, there have been calls for the clear abolishment of the Crown’s immunity from


\(^{123}\) Hogg, supra note 117 at 43.

\(^{124}\) Ibid at 39.

\(^{125}\) Ibid at 40.

\(^{126}\) Ibid at 41.
mandamus. The easiest way to clear up this confusion would be to amend the *Crown Liability Act* in each jurisdiction, as there is no reason for the Crown to ignore the rules that they have enacted to for the regulation of society. Unfortunately, the calls for the abolition of this Crown privilege have not yet been heeded. Despite the confusion surrounding Crown immunity in each situation, the writ of mandamus has the greatest potential to provide an adequate remedy, as it could be used to necessitate the public agency or governmental body to perform an act required of it by law when it has neglected, or refused, to do so. The order of mandamus could thereby serve the purpose ensuring that the fiduciary obligations inherent upon the state are enforced, by way of the public trust doctrine, if not done so in a satisfactory manner.

To date, there have been only a few instances where the courts have used the writ of mandamus against a Crown servant, compelling him or her to fulfill their duties. In the case of *Air Canada v. British Columbia (Attorney General)* mandamus was issued against the Attorney General of British Columbia directing him to advise the Lieutenant Governor to grant a fiat that was necessary to enable a suit against the Crown to proceed. Here, the Supreme Court of Canada would not permit the Crown’s immunity from mandamus to shelter an unconstitutional act. S. 24(1) of the *Canadian Charter of Rights and Freedoms* was used to abrogate the common law rule and enable the courts

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128 In Australia the immunity of Crown servants against the awards of injunction have been specifically repealed. See Ch., ss. 60, 64.
130 Ibid at 549.
131 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. s. 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
to issue mandamus against the Crown.¹³² This case is illustrative of the viability of the
writ of mandamus upon an individual Crown servant, when he or she is not
implementing their prescribed duties. I believe such an order could be extended to any
individual Crown servant or agent who fails to uphold the standard of ecological care
require by the public trust doctrine.

In the second scenario described above, the Crown or individual party would
invoke the public trust doctrine against a private individual. In these situations beyond
damages, and the difficulties associated with their valuation, equitable remedies, such as
injunctive declarations, to stop proposed activities and continued uses that are detrimental
to common resources, are the most attractive remedies available to judges. Court ordered
injunctions to stop activities that degrade, destroy, or cut off access to common resources
and amenities may act as effective tools in preventing environmental damage before it
occurs and in stopping environmental abuse that is already underway.

Further, the courts may wish to compel the owner of the trust resources in
question to conduct an Environmental Assessment or an Environmental Impact Study of
any project or activity affecting common resources and amenities; thereby taking into
consideration the effects on the environment of such activities. By issuing an injunction
until such conditions are met the courts would be in effect taking on a supervisory role
over private projects affecting common natural resources and amenities. Arguably, such a
supervisory role was taken by the court in the Supreme Court of Ontario case of Russell
Transport Ltd. v. Ontario Malleable Iron Co. Ltd.¹³³ wherein the court decided that an
ongoing nuisance created by the defendant’s iron foundry gave rise to the need for an

¹³² Air Canada, supra note 129 at 556-557.
injunction, as the continuation of the business gave rise to a new cause of action each day.\textsuperscript{134} Thus, when the public trust doctrine’s responsibilities are not met the court may act in a supervisory manner by implementing conditions to be met, or a standard of care to be met, before any proposed activity, or ongoing activity, can be resumed that adversely affects common natural resources and amenities.\textsuperscript{135}

In extreme cases where court sanctioned public trust remedies are ignored by a party failing to adhere to the standard of conduct required by the public trust doctrine punitive damages may be claimed. The Supreme Court of Canada case of \textit{Whiten v. Pilot Insurance Co. (Whiten)} held that punishment is a legitimate objective, not only of the criminal law but also, of the civil law.\textsuperscript{136} In this case, the Whiten family home burnt down. Pilot Insurance decided to take an adversarial position against the Whiten family by stopping and refusing to issue insurance payments, although there was no evidence that the fire to the home was the result of arson. In holding for the plaintiff Whiten family and restoring the jury finding of one million dollars in punitive damages, Binnie J. determined that “jury awards of punitive damages in civil actions have a long and important history in Anglo-Canadian jurisprudence.”\textsuperscript{137} The importance of the issue of the vulnerability of a family who had just lost their home meant that the jury was invited to “treat the plaintiff as a public interest enforcer as well as a private interest claimant.”\textsuperscript{138} Punitive damages, which may seem extreme in some instances, can serve the function of sanctioning not only the behavior of the guilty party but deterring others in a similar

\begin{itemize}
\item \textsuperscript{134} \textit{Ibid} at para. 53.
\item \textsuperscript{135} \textit{Mono Lake, supra} note 104.
\item \textsuperscript{137} \textit{Ibid} at 619.
\item \textsuperscript{138} \textit{Ibid} at 619.
\end{itemize}
position, to ensure their behavior does not sink to the same depths of insensitivity and arbitrariness.

[A] jury have it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty; to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself.\textsuperscript{139}

Ultimately the court’s role will be to supervise the decisions of the state, and state organs, regarding the use of our natural resources. In most cases the court will not mandate how our common natural resources should be allocated and used, but will review administrative decisions regarding the use of natural resources when these decisions are questioned. The courts will not make the decisions for the state, but merely step in when asked to, in order to decide if such decisions made were made in good faith, for the benefit of the public as a whole.\textsuperscript{140} This judicial review of natural resource management and use will be of the utmost importance in ensuring the effective conservation of common resources.

3. Conclusions

The issues set out in this chapter will not be the only ones that arise from the effective implementation of the public trust doctrine. The scope of this chapter is not

\textsuperscript{139} Wilkes v. Wood (1763), Lofr. 1, 98 E.R. 489 (K.B.), at 498-499.

\textsuperscript{140} Craig Anthony Arnold, “Working out an Environmental Ethic: Anniversary Lessons from Mono Lake,” (2004) 4 Wyo. L. Rev. 1 at 34. “Judicial decisions can serve valuable functions in the pursuit of an environmental ethic and efforts to achieve environmental conservation when they: (1) readjust the relative bargaining power of the parties by upsetting the status quo and encourage both negotiation and innovation by adding a moderate degree of outcome-uncertainty to the conflict at hand; (2) facilitate innovative and flexible problem solving by the dispute participants, whose problems are complex, involve both legal and non-legal dimensions and institutions, while also setting, from the outset, very broad but very clear boundaries on the type and range of solutions that will be considered legitimate; and (3) affirm the reasonable results of legitimate collaborative problem-solving processes, thus discouraging participants from “opting out” of problem-solving efforts by coming back to court.”
large enough to deal with all the possible issues that may face the public trust doctrine’s effective implementation. The issues examined here are only a few of the more pertinent issues that need to be addressed. Others can be expected to arise in due course and will be open to subsequent scholarly analysis. Work on the invigoration of the public trust doctrine is a work in progress.

This chapter was meant only to highlight certain issues that may arise out of the full expression of the Canadian public trust doctrine. Hopefully these ideas will provide guidance to the courts as they move forth and recognize the public trust doctrine, not only for what it is, but for what it can be.
Chapter 8 – Conclusions

There have long existed public rights in the environment. The Crown has an obligation to uphold the public’s rights in the environment. The public trust doctrine embraces and expands upon these rights. The obligation to uphold the public trust doctrine is fiduciary in nature and supported by the natural law right to leave “enough and as good as” natural resources and amenities for future generations.

The Canfor decision has ignited a debate surrounding public rights in common natural resources and amenities in Canadian common law. The tentative acceptance of the public trust doctrine in Canfor, while done so in obiter dictum, does show a general acceptance by the Supreme Court of Canada of this ancient doctrine. This recognition may provide the judiciary, and the concerned citizen, with the ability to hold the state, and private resource owners, to a certain standard of ecological care when dealing with common natural resources and amenities. Canfor may prove to be a monumental decision in terms of arming the public with the tools needed to maintain perpetual access to common resources and amenities and ultimately foster a more sustainable future in regards to Canadian resource management.

In this study we have discovered that the public trust doctrine is a common law doctrine which upholds the natural right of access to common resources and amenities. It may also provide a natural right of their protection as well. By ensuring that the public has a perpetual right of access to common resources and amenities, the state being in the proper position to act, can ensure that the natural limits of property ownership and usage are reconciled with the needs of the public as a whole. However, simply confirming the existence of a common law right of access to common resources is not enough. In order
for this natural right of access to be an effective tool of environmental preservation, it
must be interpreted in a broad manner.

As the public trust doctrine provides a means of ensuring perpetual access for this
and future generations to those resources which are required for economic, spiritual and
physical wellbeing, a theoretical foundation for such claims is necessary. In chapter two
the discussions surrounding John Locke’s theories of natural law were examined, and the
misguided belief that natural law should be used as a justification for unlimited private
property ownership and usage was dispelled. Instead, a contemporary reading of Locke’s
works, in particular what is known as the Lockean Proviso, assert that property rights are
not unlimited, as there have always existed limits to private property ownership and
usage, even if these limits have not always been enforced. As the earth was given to all
humankind in common to use in fulfilment of its duties to God, property ownership and
usage must be reconciled with the needs of the community. Property ownership and
usage is therefore limited in the sense that it must not be used to the detriment of others.

The modern reading of the Lockean Proviso, which provides that there must be
“enough and as good as” natural resources left for others, supports the objectives of the
public trust doctrine. These objectives mainly consist of the preservation of those
common resources essential for life, and for the use and benefit of future generations. The
common good must be balanced against the needs of the individual, as Professor James
Tully has pointed out, when referring to the original state of nature as one that is a
positive community. Thus, when the earth’s natural resources and amenities become
scarce, and not enough of these special resources are available for appropriation, there is
a duty on those in possession of special resources to make room for others.
A right of perpetual access to the natural resources and amenities, needed by this and successive generations can also be interpreted to consist of a right to quality resources. A certain level of quality resources should be protected in order for the right of access enjoyed to be of any value. One of the fundamental purposes of the state, according to Lockean natural law, is to protect and promote that full panoply of rights and duties each individual possesses. Therefore, both the right of access to resources and the right to an adequate quality of those resources must be protected by the state.

The public trust doctrine, in its classical Roman articulation, justified keeping certain resources such as the air, water, and shores of the sea common to all, by the laws of nature. The theory contained within the classical Roman version of the laws of nature regarding special resources was, that the latter were ill suited for private ownership and should be made available for everyone to use and enjoy. This reasoning was later incorporated into the English common law according to the writings of Henry de Bracton. Ultimately, the public trust doctrine and the belief that some natural resources and amenities are by their very nature so special that they should be shared by all, has blossomed.

Throughout chapter three we discovered that, although the public trust doctrine has received uneven application across various states, it has proven to hold potential for effective environmental protection in some jurisdictions within the United States. While a great deal of disagreement still exists on what the public trust doctrine actually is, it has imposed an affirmative duty on the state to protect natural resources. By offering standing where none existed before, the public trust doctrine has empowered litigants and the judiciary with the tools to protect precious resources and amenities. The American
version of the public trust doctrine provides a continuous sustainable influence where the beneficiaries of the doctrine include future generations, thus upholding a natural right of perpetual access to common resources and amenities. The remedy of judicial supervision of decision making regarding common natural resources and amenities has rendered those in charge of making decisions accountable for their decisions and ultimately led to more sustainable decision making.

The idea of common ownership of special resources has existed since at least the classical Roman era, even if not always identified as the public trust doctrine. While often articulated as the public trust doctrine in the United States the fact that the idea of common ownership and access to natural resources has not been labelled as the public trust doctrine in Canada does not mean that it does not exist. It simply illustrates the fact that the public trust doctrine has been underutilized and has remained effectively dormant in Canadian law. The similar common law legacies of Canada and the United States lends credence to the idea that the ability of the American judiciary to recognize this common law doctrine arising from English common law, makes the judicial acceptance of the public trust doctrine plausible in Canada.

There have historically been public rights in Canada linked to common resources such as navigable waters and fisheries. These rights can be characterized as limited expressions of the public trust doctrine. Thus, the public trust doctrine in Canada has been historically linked to access to navigable water systems for transportation and fishing needs. The fact that the public trust doctrine has been historically linked to water more than land resources should not hinder its expansion to other resources in Canadian law.
I have shown in chapter four that water resources and access to those water resources were an incomplete articulation of the public trust doctrine, reflecting responses to environmental problems in earlier eras. When we expose the natural law foundations of the public trust doctrine we show that the public trust is meant to ensure access to, and enjoyment of, all common resources and amenities by the public. Expressing what constitutes the public and what needs to be done to ensure that a wide range of natural resources are open to being used and enjoyed by future generations is the key.

As chapter four indicates the pragmatic radicalism behind the idea of holding our elected officials up to a standard of conduct that protects our common natural resources and amenities, through existing structures, is simple yet profound. The public trust doctrine holds not only the state, but private resource owners, up to a standard of ecological care. The duty and honour of the state's affirmative fiduciary obligation to ensure our natural right of perpetual access to common resources, in the name of future generations, also serves the goal of promoting sustainability. The public trust doctrine embodies a simple but potentially profound idea, which finds strength in the fact that it has always been a part of the rule of law under which we live.

Understanding that the public trust doctrine is best characterized in modern legal terms as a fiduciary obligation incumbent upon the state provides a socially useful function of perpetuating access to common resources. Where one party has the ability, and the obligation, to act for the benefit of another, and that obligation carries with it discretionary power, the party entrusted with such an obligation is a fiduciary. Equity holds a fiduciary to a strict standard of conduct, which is to simply act in the best interests of the party to whom the obligation is owed. With regard to common natural
resources, the public has ceded the responsibility for managing those common resources to the state. The public is, in consequence, in a vulnerable position, relying on the state to manage our natural resources in a sustainable manner, and as such when the state acts in a manner that damages our communal assets, the law must step in to ensure that justice prevails.

Chapters five and six highlighted some of the more pervasive challenges the implementation of the public trust doctrine in Canada will face. Determining the ability of the state to take and restrict private property rights in the name of the common good will be the first and foremost impediment to the public trust doctrine’s effective implementation in Canada. This “takings” issue has been dealt with by a number of cases in the United States, with a trend towards characterizing the public trust doctrine as a “background principle of property law,” which defeats the requirement of compensation flowing from the 5th Amendment of the United States Constitution. While this trend has been far from universal, it has been recognized in a number of American jurisdictions.

In Canada, our different Constitutional order does not purport to afford any constitutional right for compensation for expropriated property. However, there does seem to be a presumption for compensation, although the source of such a presumption is unclear. Regardless of its source when an individual’s land has been taken away and placed in the hands of the state, an expropriation has occurred and compensation is required. When an individual’s land has only been adversely affected and all reasonable uses of land have not been lost, an injurious affection has occurred and no compensation is forthcoming. The prime question for the purposes of the implementation of the public trust doctrine in Canada becomes at what point does the state’s actions affecting a
person’s property interests, go far enough to be considered a de facto expropriation? When regulations and restrictions have been placed upon private property ownership and usage it is a matter of degree as to when these regulations and restrictions have gone too far. When the regulations and restrictions have seriously affected use of the properties injurious affection simpliciter can become a de facto expropriation and trigger the requirement of compensation.

Finally, the public trust doctrine will face a number of challenges when it is affirmed in Canadian common law, such as a need for synthesizing its application with the Constitutional divisions of powers. Deciphering which level of government will be under the fiduciary duty to act in the public’s best interests at any one time is at present a matter of uncertainty with federal and provincial authorities sharing responsibility. The implementation of the public trust doctrine by each level of government will depend on the natural resources and amenities in question and which level of government “occupies the field.” It remains to be seen whether the Peace, Order, and good Government clause can be invoked to argue federal paramountcy in the environmental field, even though it can already be argued that the dimensions of pollution and resource depletion are national and international in scope.

The affirmative fiduciary obligation to act in the interests of the public means that the state, whichever level of the government that might be, must act in furtherance of sustainability in its decision making regarding common natural resources and amenities. Unfortunately, this fiduciary duty to act in the public best interests may come into conflict with the already recognized fiduciary duty to act in the best interests of the Aboriginal peoples of Canada. While in most cases these two fiduciary duties will
complement each other, as Aboriginal peoples tend to have a preservationist outlook on their relationship with nature, when a conflict between the two duties does occur, the protection of the environment through conservation, for the entire public must prevail.

While, throughout this study, I have made reference to the public trust doctrine’s ability to provide a useful tool for environmental preservation and protection, it will only prove to be such a tool if the individual citizen has the ability to launch an action in the name of the public. The requisite standing to launch a public trust action is found within the public trust doctrine itself. The public interest standing rules in Canada have undergone a dramatic relaxation over the last twenty-five years and I submit that as standing is inherent within the public trust doctrine, there should be no rational objection to its acceptance in this country.

Chapter six has also shown how the public trust doctrine can be seen as synthesizing with Canada’s international environmental law commitments, such as those ratified as part of the 1992 Rio Convention. The public trust doctrine, if applied in its broadest fashion can be viewed as the common law articulation of the international legal principle of Intergenerational Equity. Leaving the planet, to the next generation, in a condition no worse than this generation received it in, can be seen as an articulation of both the Intergenerational Equity Principle and of the public trust doctrine, more generally. As well, the public trust doctrine does not offend but compliment the settled international environmental laws concerning the theories contained within the Precautionary Principle and the Polluter Pays Principle.

Understanding how the public trust doctrine, in its common law incarnation, will operate in those jurisdictions that have enacted a statutory version of the public trust
doctrine was also canvassed in chapter six and will be in need of continual monitoring into the future. As well, the types of remedies available for the breach of the fiduciary duty incumbent within the public trust doctrine will be a fruitful area of further research.

At the present time, it is generally understood that remedies seek to put the injured party back in the position they were in before the damage occurred. This is most often accomplished by way of awards for monetary damages. Unfortunately, the right to monetary damages arises only after the damage has occurred leaving the award of damages a reactionary measure that does not adequately protect the public’s right of access to common natural resources and amenities. Given the importance of many of our common natural resources and amenities from a cultural, spiritual, and aesthetic perspective remedial damages seem inadequate. Coupled with the difficulties of adequately capturing the value of natural resources and amenities the public trust doctrine will only be of limited significance if damages are the main compensatory model.

Beyond monetary damages, which are difficult to value and to implement, there must be proactive means of enforcing public trust responsibilities. In the event that statutory means are unavailable to implement the public trust doctrine, a common law means of implementing the public trust doctrine is needed. In situations where the Crown owns or controls a common resource or amenity, the use of the prerogative writs may be used to compel state action. While, in the past, it has been understood that the prerogative writs, such as injunctions, mandamus, certiorari and prohibition do not run against the Crown, this view is mistaken. It is true that the prerogative writs do not run against the Crown as an abstract entity, they do however bind individual Crown servants or agents
who are charged with the day to day tasks of upholding the fiduciary duty prescribed by the public trust doctrine.

When an individual Crown servant or agent acts outside of his or her mandated public trust responsibilities it is open to challenge those decisions to determine if the public’s right of perpetual access to common natural resources and amenities has been adequately taken into account. Petitioning the court for an order of mandamus requiring the appropriate Crown servant, agency, or department to make the decision making process, a public and transparent process will assist the judiciary in making sure the state makes sustainable choices regarding our common natural resources and amenities. Acknowledging that the Crown’s immunity does not extend to the individual Crown servants or agents will help to ensure that preventative measures, such as injunctive relief, can be undertaken before irreparable harm has occurred.

When it is a private individual who owns or controls common resources, on top of damages after the fact, the equitable remedy of injunctive relief is available to prevent damage before it occurs. Thus, the public trust doctrine will be a more effective tool of environmental preservation and protection when injunctive relief can be used to stop destruction and degradation before the fact or as it continues to occur.

“The public trust doctrine is a legal tool that provides for the state’s long-term duty, supported by the judiciary, to manage and perpetuate the public enjoyment of natural resources and amenities.”¹ By upholding the public trust doctrine we are effectively implementing a principled approach to environmental decision making. The public trust doctrine could also be characterized today as the rebellion against the idea

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that the sovereign may act as it pleases with respect to the natural world, at the expense of the people. By preventing the monopolizing of trust resources and promoting decision making that is accountable to the public, we are giving consideration to future generations who do not have a voice in natural resource management. Unfortunately the public trust doctrine alone cannot achieve a sustainable resource management scheme for our natural resources and amenities. In fact environmental law in general cannot force sustainability upon us.

Environmental law cannot, of its own force, achieve environmental conservation or manifest an effective and meaningful environmental ethic. In general, environmental law does not "of its own force and operation" resolve environmental disputes, protect the natural environment from human harm, or implement an environmental ethic. Instead, environmental law is a tool to shift or restructure power and expectations in environmental disputes and to facilitate solutions and conservation-regarding behaviours in non-judicial and non-legal arenas.

The public trust doctrine is one important tool that can be utilized in order to protect precious natural resources and amenities. A shift in how each and every one of us envisions and interacts with our surroundings is needed, in order to promote sustainability into the future. It is the duty of this generation to ensure our common resources are maintained in an adequate state so future generations can use and enjoy them.

The Supreme Court of Canada judgment in Canfor has opened the door for the reinterpretation and reinvigoration of the public trust doctrine. The obiter dictum of the majority and minority of Supreme Court of Canada has signalled the acceptance of the

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fundamental idea that the state has a responsibility to protect our environment. If interpreted from an ecological perspective, the public trust doctrine will protect the environmental right to a clean and healthy environment for all Canadians. Only time will tell how broadly the public trust doctrine, in its modern incarnation, will be interpreted and how effective it will be as an environmental catalyst.
Postscript

The first post Canfor action, arguing for the existence of the public trust doctrine, has been recently initiated in Prince Edward Island. The plaintiff's argument includes the proposition that the public trust doctrine should not be narrowed to single acts that violate the state's fiduciary duties, but should look to a number of decisions over a number of years. In the 2005 case of Prince Edward Island v. Canada, the question of whether or not the public trust doctrine could be invoked to deal with the historical and continuing mismanagement of the fisheries resources was raised. Although the case has yet to make it to trial on the merits, a motion to strike the claim as it was "devoid of any rational basis" (and therefore discloses no reasonable cause of action) was rejected.

While we eagerly await the ruling on the merits, it seems that the P.E.I. court referring to the Canfor judgment believes the public trust doctrine is a justiciable issue at common law which may give rise to a fiduciary duty; the fulfillment of which does not depend on each instance in isolation, but may be looked at from a perspective of the totality of decisions over the long run. In this decision G.L. Campbell J. speaking about the position taken by the province of British Columbia in Canfor, opined that

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 that 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.

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5 Ibid at para 27. In effect, the plaintiffs are seeking to challenge government policy as represented by a series of decisions over a number of years, the cumulative effect of which they allege has been the breach of the Federal Government's public trust obligations and has been to deny PEI and its fishers their fair share of the collective resource, which has harmed PEI and its fishers' economic interests. They are claiming that the Government is operating under a statute which is unconstitutional and they are seeking a declaration to that effect.
6 Ibid at para 37.
While the case has yet to proceed to trial the fact that the motion to strike was rejected and it was affirmed that the public trust doctrine is a justiciable issue signals that the invigoration of the public trust doctrine in Canada may be underway.
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