Appendix 7
The Public Trust Doctrine

This document provides a general overview of the Public Trust Doctrine, a summary of how U.S. case law has interpreted and applied it and how it has been treated in Canada. In addition, it provides examples of how the doctrine has been expressly adopted into state constitutions or environmental/water rights legislation.

As explained below, the Public Trust Doctrine has its roots in Roman law and is a well established legal principle in U.S. environmental law. For some reason the Public Trust Doctrine has not taken a firm hold in Canadian case law yet, although some jurisdictions have incorporated it into their environmental protection legislation. Many leading water experts continue to advocate for the recognition and adoption of the Public Trust Doctrine in Canada, for instance ecojustice and the International Institute for Sustainable Development.

Overview of the Public Trust Doctrine

The origins of the Public Trust Doctrine (PTD) date back to Roman law and reflect a natural law perspective, meaning it is an inherent and alienable right that does not derive its authority from man-made laws or from a sovereign. According to Roman law, the PTD is described as follows:

> By the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea.1

The underlying premise of the PTD is that "some things are considered too important to society to be owned by one person".2 The foundation of the PTD is that "everyone has the inalienable right to breathe clean air; to drink safe water; to fish and sail, and recreate upon the high seas, territorial seas and navigable waters; as well as to land on the seashores and riverbanks".3

The PTD was incorporated into English common law such that the sovereign "owns all of its navigable waterways and the lands lying beneath them 'as trustee of a public trust for the benefit of the people'". In *British Columbia v. Canadian Forest Products Ltd.* [*Canfor*], the Supreme Court of Canada noted that in the mid-13th century, English law recognized that "By natural law these are common to all: running water, air, the sea and the shores of the sea ...".4 The Court also noted that since that time, "public rights and jurisdiction over these cannot be separated from the Crown".5

1 T. C. Sandars, *The Institutes of Justinian* (1876), Book II, Title I, at p. 158, as quoted in *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 SCR 74 [*Canfor*] at para 74.

2 Syridon and LeBlanc, *The Overriding Public Interest in Privately Owned Natural Resources: Fashioning a Cause of Action,* 6 Tul.Envtl.L.J. 287 (1993), as quoted in *Sierra Club* v. *Kiawah Resort Associates*, 456 S.E.2d 397 (1995).

3 *Ibid.*

4 *Bracton on the Laws and Customs of England* (1968), vol. 2, at pp. 39-40, as quoted in *Canfor, supra* note 1, at para 75.

5 *Canfor*, *supra* note 1, at para 76.

The PTD requires the state to hold title to all submerged lands in a "public trust" for the benefit of the public for the public use. Because the state is a trustee and not an owner, it is not allowed to grant title in fee simple to navigable waters. A 2010 paper for the POLIS Water Sustainability Project entitled "The Public Trust and a Modern BC *Water Act*" describes the PTD as follows:

> Another way to view the public trust is as recognition that private rights to use water were not granted in a completely unencumbered fashion. Rights to use water are obtained through an appropriation (or licensing) system administered by government and with implicit restrictions to not unduly and irreparably harm the resource and associated values. This is consistent with the dual role of government to encourage private economic activities and its duty to protect trust resources. Thus, the PTD is a safeguard that prevents monopolizing of trust resources and promotes decision making that is accountable to the public.6

The PTD is a common law concept that has since been expressly recognized in constitutions or legislation. Some courts have discussed whether the PTD common law continues to exist independently or has been replaced or subsumed by legislation. In the 2000 case of *In Re Water Use Permit Applications* [*In Re Water Use*], the Hawaii Supreme Court held:

> The Code and its implementing agency, the Commission, do not override the public trust doctrine or render it superfluous. Even with the enactment and any future development of the Code, the doctrine continues to inform the Code's interpretation, define its permissible "outer limits", and justify its existence. To this end, although we regard the public trust and Code as sharing similar core principles, we hold that the Code does not supplant the protections of the public trust doctrine.7

The Public Trust Doctrine in the U.S.

The PTD was established as part of U.S. federal law in 1892. The U.S. Supreme Court subsequently held that each state has the authority to determine the scope and application of the PTD within its borders.

The primary authority on the PTD is the U.S. Supreme Court case of *Illinois Central Railway v. Illinois*.8 That case related to a grant by the Illinois legislature in 1886 to the Illinois Central Railway of almost all of the Chicago waterfront that four years later the legislature wished to revoke. The Court described the PTD as follows:

> ... A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are

6 POLIS Water Sustainability Project, "The Public Trust and a Modern BC *Water Act*", Legal Issues Brief 2010-1, accessed at: http://poliswaterproject.org/sites/default/files/public_trust_brief_2010-1.pdf

7 P.3d 409 (Haw. 2000), at p. 445.

8 146 US 387 (1892).

> interested, like navigable waters and soils under them ... than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, the lands under navigable waterways, they cannot be placed entirely beyond the direction and control of the State.9

Another leading U.S. case is *National Audubon Society v. Superior Court of Alpine County* [*Audubon*].10 In that case, the Supreme Court of California considered the impact of a permit given to the Department of Water and Power of the City of Los Angeles (DWP) in 1940 to appropriate water from the streams flowing from the Sierra Nevada mountains into Mono Lake, the second largest lake in California. After the permit was granted, the DWP built facilities to divert about half of the water from the streams into an aqueduct. In 1970, a second diversion tunnel was built resulting in almost all of the water in the streams being diverted into the aqueduct for use by the city of Los Angeles. The removal of all of that water caused the levels in Mono Lake to immediately recede by around one foot per year. By 1979, “the lake had shrunk from its prediversion area of 85 square miles to an area of 60.3 square miles and the “surface level had dropped ... 43 feet below the prediversion level”.11 Not surprisingly, there were significant negative impacts on the “scenic beauty and the ecological values” of the lake, including wildlife and birds. The *Audubon* case will be referenced in more detail in the other sections of this memo.

The public benefits and uses that are part of the public trust

The public benefits and uses protected under the PTD are not stagnant and frozen in time. In the *Audubon* case, the Supreme Court of California noted that “the objective of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways”.12 In addition, the Court stated “the state is not burdened with an outmoded classification favoring one mode of utilization over another”.13 The evolving nature of the scope of the PTD is reflected in the *In Re Water Use* case where the Hawaii Supreme Court noted that “the public trust, by its very nature, does not remain fixed for all time, but must conform to changing needs and circumstances”.14

Traditionally the public benefits and uses captured under the PTD were limited to navigation, commerce and fisheries. Since then, however, courts have broadened the objectives to include “the right to fish, hunt, bathe, swim, to use for boating and general recreation

9 *Ibid.*, at p. 453.

10 33 Cal. 3d 419 (1983).

11 *Ibid*., at p. 429.

12 *Ibid.*, at p. 434.

13 *Ibid.*

14 *In Re Water Use, supra* note 7, at p. 500.

purposes".15 Further, if the body of water is particularly scenic or ecologically significant, the public trust includes "the preservation of those lands in their natural state so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area".16 In the *In Re Water Use* case the Hawaii Supreme Court noted that "the maintenance of waters in their natural state constitutes a distinct 'use' under the water resources trust".17

In the 2008 case of *Center for Biological Diversity, Inc.* v. *FPL Group, Inc.* [*Center for Biological Diversity*], the California Court of Appeal, First District, added the protection of wildlife to the PTD.18 In that case the Court reviewed the trial court's dismissal of an action by the plaintiffs against the FPL Group with respect to its wind turbine generators. The plaintiffs alleged that since the 1980's the defendant's wind turbine generators had killed thousands of eagles, hawks and other raptors and that "current state-of-the-art generators would produce many times more electricity per generator and destroy far fewer birds".19 The Court considered whether the destruction of wildlife falls within the PTD as follows:

> ... Whatever the doctrine may have meant in Roman law, in medieval continental Europe, or in English law, the courts in this country have treated the public trust largely as public property right of access to certain public trust natural resources for various public purposes.
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> ...
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> ... it has long been recognized that wildlife are protected by the public trust doctrine. Because wildlife are generally transient and not easily confined, through the centuries and across societies they have been held to belong to no one and therefore to belong to everyone in common.
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> Thus, whatever its historical derivation, it is clear that the public trust doctrine encompasses the protection of undomesticated birds and wildlife. They are natural resources of inestimable value to the community as a whole. Their protection and preservation is a public interest that is now recognized in numerous state and federal statutory provisions. (citations omitted)20

While over time the courts have expanded the objective of the PTD, there are limits to its applicability. For example in the *In Re Water Use* case, the Hawaii Supreme Court rejected the argument that the private use of resources for economic development is a protected use. The Court went on to say:

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15 *Audubon, supra* note 10, at p. 434.

16 *Ibid.*, at pp. 434-435.

17 *In Re Water Use, supra* note 10, at p. 448.

18 83 Cal. Rptr. 3d 588 (2008).

19 *Ibid.*, at p. 1355.

20 *Ibid*., at pp. 1360-1363.

> Although its purpose has evolved over time, the public trust has never been understood to safeguard rights of exclusive use for private commercial gain. Such an interpretation, indeed, eviscerates the trust's basic purpose of reserving the resources for use and access by the general public without preference or restriction.
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> ...
>
> We hold that, while the state water resources trust acknowledges that private use for "economic development" may produce important public benefits and that such benefits must figure into any balancing of competing interests in water, it stops short of embracing private commercial use as a protected "trust purpose". (citations omitted)21

The scope of the public trust

In the *Audubon* case, the Court reaffirmed that the public trust "encompasses all navigable lakes and streams" and includes lake beds and shores.22 The Court went one step further and expanded the scope of the public trust to include the harm caused to navigable waters from the diversion of non-navigable tributaries so the streams at issue would be included.23 In the *In Re Water Use* case, the Hawaii Supreme Court included ground water in the public trust because "water is no less an essential 'usufruct of lands' when found below, rather than above, the ground".24

The duties and powers of the state as trustee of the public trust

In *Audubon*, the Court reviewed past decisions and found they "amply demonstrate the continuing power of the state as administrator of the public trust, 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".25 The public trust is not just an "affirmation of state power", but a "duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust".26

In the *In Re Water Use* case, the Hawaii Supreme Court described the powers and duties of the state under the PDT as "the authority and duty 'to maintain the *purity and flow* of our waters for future generations *and* to assure that the waters of our land are put to *reasonable and beneficial* uses".27 The Court went on to say that under the public trust, "the state has

21 *In Re Water Use, supra* note 7, at pp. 449-450.

22 *Audubon, supra* note 10, at p. 435.

23 *Ibid.*, at p. 437.

24 *In Re Water Use, supra* note 7, at p. 447.

25 *Audubon, supra* note 10, at p. 440.

26 *Ibid.*, at p. 441.

27 *In Re Water Use, supra* note 7, at p. 450.

both the authority and duty to preserve the rights of present and future generations in the waters of the state".28

In *Centre for Biological Diversity*, the California Court of Appeal dismissed the plaintiff's claim because it should have been against the state rather than the defendant. The Court described the state's duties as trustee and noted the PTD "places on the state the responsibility to enforce the trust" and if "the appropriate state agencies fail to do so, members of the public may seek to compel the agency to perform its duties".29 The Court went on to say that the "plaintiffs have the right to insist that the state, through its appropriate subdivisions and agencies, protect and preserve public trust property, including raptors and other wildlife".30

Reconciling the Public Trust Doctrine with the need for a regulated water rights regime

In *Audubon*, the Supreme Court of California highlighted the clash between the environmental impacts of the water diversion and the need for water for the city of Los Angeles. The Court found both sides raise legitimate and important legal principles and neither has priority over the other. The Court adopted a balancing approach to achieve reconciliation of the PTD with the need for a regulated water rights regime, as follows:

> This case brings together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes. Ever since we first recognized that the public trust protects environmental and recreational values, the two systems of legal thought have been on a collision course. They meet in a unique and dramatic setting which highlights the clash of values. Mono Lake is a scenic and ecological treasure of national significance, imperiled by continued diversions of water; yet, the need of Los Angeles for water is apparent, its reliance on rights granted by the board evident, the cost of curtailing development substantial.
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> ...
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> ... In our opinion, both the public trust doctrine and the water rights system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resource. To embrace one system of thought and reject the other would lead to an unbalanced structure, one which either decry as a breach of trust appropriations essential to the economic development of the state, or deny any duty to protect or even consider the values promoted by the public trust. (citations omitted)31

28 Ibid.,at p. 453.

29 *Center for Biological Diversity, supra* note 18, at p. 1368.

30 *Ibid.*, at p. 1369.

31 *Audubon, supra* note 10, at pp. 425 and 445.

After affirming the importance of the competing principles, the Court reached the following conclusions in an effort to accommodate both:

> a. The state as sovereign retains continuing supervisory control over its navigable waters and the lands beneath those waters. This principle, fundamental to the concept of the public trust, applies to rights in flowing waters as well as to the rights in tidelands and lakeshores; it prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.
>
> b. As a matter of current and historical necessity, the Legislature, acting directly or through an authorized agency such as the Water Board, has the power to grant usufructary licenses that will permit an appropriator to take water from flowing streams and use that water in a distant part of the state, even though this taking does not promote, and may unavoidably harm, the trust users at the source stream. The population and economy of this state depend upon the appropriation of vast quantities of water for uses unrelated to in-stream trust values. California's Constitution, its statutes, decisions and commentators all emphasize the need to make efficient use of California's limited water resources; all recognize, at least implicitly, that efficient use requires diverting water from in-stream uses.
>
> c. 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. Just as the history of this state shows that appropriation may be necessary for efficient use of water despite unavoidable harm to public trust values, it demonstrates that an appropriative water rights system administered without consideration of the public trust may cause unnecessary and unjustified harm to trust interests. As a matter of practical necessity the state may have to approve appropriation despite foreseeable harm to public trust uses. In so doing, however, the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust and to preserve, so far as consistent with the public interest, the uses protected by the trust. (citations omitted)32

Reconsidering or revisiting prior approvals/permits

In *Audubon*, the Supreme Court of California held that there is an ongoing obligation under the PTD for the state to revisit or reconsider previous decisions if the impacts on the public trust uses had not been considered at the time:

> The water rights enjoyed by DWP were granted, the diversion was commenced, and has continued to the present without any consideration of the impact upon the public trust. An objective study and reconsideration of the water rights in the Mono Basin is long overdue. The water law of California – which we conceive to be an integration including both the public trust doctrine and the board-administered appropriative rights system – permits such a reconsideration; the values underlying that integration require it.

32 *Ibid.* at pp. 445-447.

...

> Once the state has approved an appropriation, the public trust imposes a duty of continuing supervision over the taking and use of the appropriated water. 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.
>
> The state accordingly has the power to reconsider allocation decisions even though those decisions were made after due consideration of their effect on the public trust. The case for reconsidering a particular decision, however, is even stronger when that decision failed to weigh and consider public trust uses. In the case before us, the salient fact is that no responsible body has ever determined the impact of diverting the entire flow of the Mono Lake tributaries into the Los Angeles Aqueduct. This is not a case in which the Legislature, the Water Board, or any judicial body has determined that the needs of Los Angeles outweigh the needs of the Mono Basin, that the benefit gained is worth the price. Neither has any responsible body determined whether some lesser taking would better balance the diverse interests. Instead, DWP acquired rights to the entire flow in 1940 from a water bed which believed it lacked both the power and the duty to protect the Mono Lake environment, and continues to exercise those rights, in apparent disregard for the resulting damage to the scenery, ecology, and human uses of Mono Lake.
>
> It is clear that some responsible body ought to reconsider the allocation of the waters of the Mono Basin. No vested right bars such reconsideration. We recognize the substantial concerns voiced by Los Angeles – the city's need for water, its reliance upon the 1940 board decision, the cost both in terms of money and environmental impact of obtaining water elsewhere. Such concerns must enter into any allocation decision. We hold only that they do not preclude a reconsideration and reallocation which also takes into account the impact of water diversion on the Mono Lake environment.
>
> This opinion is but one step in the eventual resolution of the Mono Lake controversy. We do not dictate any particular allocation of water. Our objective is to resolve a legal conundrum in which two competing systems of thought – the public trust doctrine and the appropriative water rights system – existed independently of each other, espousing principles which seemingly suggested opposite results. We hope by integrating these two doctrines to clear away the legal barriers which have so far prevented either the Water Board or the courts from taking a new and objective look at the water resources of Mono Basin. The human and environmental uses of Mono Lake – uses protected by the public trust doctrine – deserve to be taken into account. Such uses should not be destroyed because the state mistakenly thought itself powerless to protect them. (citations omitted)33

In the *In Re Water Use* case, the Hawaii Supreme Court also recognized the "authority empowers the state to revisit prior diversions and allocations, even those made with due consideration of their effect on the public trust".34

33 *Ibid.,* at pp. 426-452.

34 *In Re Water Use, supra* note 7, at p. 453.

The presumption in favour of the public trust and the importance of regulatory agencies not being a rubber stamp

In the *In Re Water Use* case, the Hawaii Supreme Court said that "apart from the question of historical practice, reason and necessity dictate that the public trust may have to accommodate" uses that are inconsistent with the public trust.35 However, the Court went on to say that recognizing the need to balance competing interests does not mean "the state's public trust duties amount to nothing more than a restatement of its prerogatives".36 Rather, the Court held there is a presumption in favour of the public trust and also imposed an obligation on the state and regulatory authorities with respect to decision-making:

> ... we observe that the constitutional requirements of "protection" and "conservation", the historical and continuing understanding of the trust as a guarantee of public rights, and the common reality of the "zero-sum" game between competing water uses demand that any balancing between public and private purposes begin with a presumption in favour of public use, access, and enjoyment. ... In practical terms, this means that the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust. ... As such the Commission must not relegate itself to the role of a mere "umpire passively calling balls and strikes for adversaries appearing before it", but instead must take the initiative in considering, protecting and advancing public rights in the resources at every stage of the planning and decisionmaking process." ... Specifically, the public trust compels the state duly to consider the cumulative impact of existing and proposed diversions on trust purposes and to implement reasonable measures to mitigate this impact, including the use of alternative sources. In sum, the state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state.37

The Public Trust Doctrine in Canada

In *Canfor, supra,* the Supreme Court of Canada referred to the PTD but did not decide whether it applied in Canada. In that case, the Court did not go so far as to recognize a healthy environment as a "right", but instead reiterated the findings in previous cases and called it a "Canadian value":

> ... our common future, that of every Canadian community, depends on a healthy environment ... This Court has recognized that "(e)veryone is aware that individually and collectively, we are responsible for preserving the natural

35 *Ibid.*

36 *Ibid.*, at p. 454.

37 *Ibid.*

> environment ... environmental protection [has] emerged as a fundamental value in Canadian society ...38

In *Canfor*, the Supreme Court decided that the Crown could sue for compensation and injunctive relief regarding damage to the environment caused by a private company. When determining whether the Crown could sue for compensation for environmental damage caused by a private corporation, the Court traced the history of the common law relevant to the PTD as follows:

> The notion that thee are public rights in the environment that reside in the Crown has deep roots in the common law: ... Indeed, the notion of "public rights" existed in Roman law.
>
> > By the law of nature these things are common to mankind – the air, running water, the sea ...
>
> A similar notion persisted in European legal systems. According to the French *Civil Code*, art. 538, there was common property in navigable rivers and streams, beaches, ports, and harbours. A similar set of ideas was put forward by H. de Bracton in his treatise on English law in the mid-13th century:
>
> > By natural law these are common to all: running water, air, the sea and the shores of the sea ... No one therefore is forbidden access to the seashore ...
> >
> > All rivers and ports are public, so that the right to fish therein is common to all persons. The use of river banks, as of the river itself, is also public by the *jus gentium* ...
>
> By legal convention, ownership of such public rights was vested in the Crown, as too did authority to enforce public rights of use. According to de Bracton, *supra*, at pp. 166-167:
>
> > (It is the lord kind) himself who has ordinary jurisdiction and power over all who are within his realm ... He also has, in preference to all others in his realm, privileges by virtue of the *jus gentium*. (By the *jus gentium)* things are his ... which by natural law ought to be common to all ... Those concerned with jurisdiction and the peace ... belong to no one save the crown alone and the royal dignity, nor can they be separated from the crown, since they constitute the crown.
>
> Since the time of de Bracton is has been the case that public rights and jurisdiction over these cannot be separated from the Crown. This notion of the Crown as holder of inalienable "public rights" in the environment and certain common resources was accompanied by the procedural right of the Attorney General to sue for their protection representing the Crown as *parens patriae*. This is an important jurisdiction that should not be attenuated by a narrow judicial construction.

38 *Canfor, supra* note 1, at para 7.

> As stated, in the United States the *CERCLA* statute provides legislative authority for government actions in relation to the "public interest", including environmental damage, but this is not the only basis upon which claims in relation to the environment can be advanced by governments at the state and federal levels.
>
> Under the common law in that country, it has long been accepted that the state has a common law *parens patriae* jurisdiction to represent the collective interests of the public. ...
>
> The American law has also developed the notion that the states hold a "public trust". Thus, in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), the Supreme Court of the United States upheld Illinois' claim to have a land grand declared invalid. The State had granted the railroad in fee simple all land extending out one mile from Lake Michigan's shoreline, including one mile of shoreline through Chicago's central business district. It was held that this land was impressed with a public trust. The State's title to this land was
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> > different in character from that which the State holds in lands intended for sale ... It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The deed to the railway was therefore set aside. (citations removed)39

At para 81, Binnie J. made the following *obiter* comments that have been cited in support of the recognition and adoption of the PTD in Canada:

> It seems to me 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 ... 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.
>
> This is not a proper appeal for the Court to embark on a consideration of these difficulty issues. ...

Of additional note is that when determining the appropriate amount of damages to which the Crown was entitled to claim compensation, the Court stated:

> The Crown's basic proposition that our environment is an asset of superordinate importance that cannot precisely be quantified by its market value is not seriously disputed. The Ontario Law Reform Commission made the point as follows:

39 *Ibid.* at paras 74-79.

> Many writers in the environmental field state that the market price, even if it existed, cannot be considered an adequate proxy for the true economic value of an environmental resource. Adherence to the market value technique, it is argued, seriously undervalues the true worth of the environmental resource, results in a low assessment of damages, and leaves injuries largely uncompensated. As one American author stated, the "value of the famous Lone Cypress of Monterey Peninsula cannot be reduced to its price as lumber".

...

The Crown is well aware of the range and identity of evidence (both expert and non-expert) that could be marshalled in support of a claim for environmental loss. At paras 64-65 of its factum in this Court, the Crown identified at least three components of environmental loss: use value, passive use or existence value, and inherent value.

> "Use value" includes the services provided by the ecosystem to human beings, including food sources, water quality and recreational opportunities. Even if the public are not charged for these services, it may be possible to quantify them economically by observing what the public pays for comparable services on the market.
>
> "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. The branch of economics known as "contingent valuation" uses survey techniques to attempt to quantify what the public would be prepared to pay to maintain these benefits.
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> 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 ... [T]o the extent humans recognize this inherent value, and are willing to forego income or wealth for it, it becomes part of passive use value and becomes compensable. (citations omitted)40

There are few, if any, relevant cases that have expanded on the Court's *obiter* comments in *Canfor*, other than *Burns Bog Conservation Society v. Canada*.41 In that case, the Burns Bog Conservation Society filed a claim against the federal government arguing that it "owes the Canadian public a trust, fiduciary, or other legal duty to protect Burns Bog".42 The Society

40 *Ibid.* at paras 135-138.

41 2014 FCA 170.

42 *Ibid.* at para 11.

sought a declaration that “Burns Bog is subject to a public trust and/or equitable relationship with the Federal Government who is required to protect it”.43 The Society argued that the Court ought to recognize the PTD and cited the *Canfor* case in support of its assertion.

Both the Federal Court and the Federal Court of Appeal noted that no Canadian court has recognized the PTD to date and the Burns Bog Conservation Society’s claim was ultimately dismissed. The *Burns Bog* case may not be fatal to an argument that the PTD should be recognized by Canadian courts because it appears there were evidentiary problems and the federal government did not own the Burns Bog so it was too much of a stretch for the Court to find it owed a duty to protect it. In a different set of circumstances a Court may be more inclined to recognize the PTD or at least not dismiss it out of hand.

Many leading water experts continue to advocate for the adoption of the PTD in Canada. For example, in “The Public Trust and a Modern BC *Water Act*” cited above, the authors refer to the “untapped potential” of the PTD.44 The authors make a strong argument in favour of governments and the courts adopting the PTD because it “is of invaluable assistance in protecting ecological values, ensuring water for future needs, engaging the public and protecting public interests”.45 They assert that rather than characterizing the PTD as a *sui generis* concept, “it is more helpful to think of the PTD as a fiduciary duty, which means that government officials entrusted with managing the underlying resources ... owe a duty to preserve the resource and act in good faith in management decisions”.46 In addition, the authors point out that even though no Canadian courts have yet recognized the PTD, “the basic attributes of the doctrine are found throughout Canadian law”, for instance regarding the use of public rivers, the use of lands for public use and “the maintenance of key environmental features, likely including clean air and water, healthy fish stocks and wildlife, and publicly owned forests”.47

In a 2011 report published by the International Institute for Sustainable Development entitled “Water Security in Canada: Responsibilities of the federal government”, the authors cite water expert David Brooks at p. 61:

> If the public trust doctrine were adopted for water management in Canada, it would make explicit the responsibility of both provincial and federal governments to manage renewable natural resources within their respective areas of authority in such ways as to support the long-term use and enjoyment of them for the whole public. As one example, such a doctrine would [have made] it very difficult to adopt ... amendments to the Navigable Waters Protection Act, which [were] buried inside the Budget Implementation Act of 2009, that ... grant[ed] the federal government authority to identify waterways deemed worthy and unworthy of federal protection [see section 3.8], and therefore to limit the public’s right to use the latter.48

43 *Ibid.*

44 *Supra,* note 6, at p. 2.

45 *Ibid.* at p. 1.

46 *Ibid.* at p. 3.

47 *Ibid.* at p. 5. See also p. 7 for a chart that tracks the case law relevant to the PTD in Canada.

Examples of constitutional or statutory recognition of the Public Trust Doctrine in Canada and the U.S.

The following are some examples of where U.S. states and Canadian provinces/territories have expressly adopted the common law concept of the PTD into state constitutions or environmental or water rights legislation.

1. Alaska

Section 3 of Article 8 of Alaska's Constitution states:

> Wherever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use.

2. California

Article 10, s. 2 of California's Constitution states:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use ...

3. Hawaii

Article 11.7 of Hawaii's Constitution states:

> The State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people. The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant

48 Karla Zubrycki, Dimple Roy, Henry David Venema & David Brooks, "Water Security in Canada: Responsibilities of the federal government", April 2011, published by the International Institute of Sustainable Development, available at: http://www.iisd.org/sites/default/files/pdf/2011/water_security_canada.pdf

rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii's water resources.

4. Illinois

Sections 1 and 2 of Article XI of Illinois' Constitution state:

> Section 1. Public Policy – Legislative Responsibility
>
> The public policy of the State and the duty of each person is to provide and maintain an healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy.
>
> Section 2. Rights of Individuals
>
> Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.

5. Kentucky

Section 146.220 of Kentucky Revised Statutes states:

> 146.220 Legislative intent. The General Assembly hereby recognizes that certain streams of Kentucky possess outstanding and unique scenic, recreational, geological, fish and wildlife, botanical, historical, archaeological and other scientific, aesthetic, and cultural values. It is the policy of the General Assembly to complement dam construction and development projects on Kentucky's watercourses with other equally important and beneficial uses of our water resources. Therefore, it is hereby declared that in order to afford the citizens of the Commonwealth an opportunity to enjoy natural streams, to attract out-of-state visitors, to assure the well-being of our tourist industry, to preserve for future generations the beauty of certain areas untrammeled by man, it is in the interest of the Commonwealth to preserve some streams or portions thereof in their free-flowing condition because their natural, scenic, scientific, and aesthetic values outweigh their value for water development and control purposes now and in the future. For aesthetic, as well as ecological reasons, the foremost priority shall be to preserve the unique primitive character of those streams in Kentucky which still retain a large portion of their natural and scenic beauty, and to prevent future infringement on that beauty by impoundments or other man-made works. Since the stream areas are to be maintained in a natural state, they will also serve as areas for the perpetuation of Kentucky's wild fauna and flora. Few such streams remain in the Eastern portion of the United States, and the General Assembly feels a strong obligation to the people of Kentucky to preserve these remnants of their proud heritage. It is the purpose of KRS 146.200 to 146.360 to establish a Wild Rivers System by designating certain streams for immediate inclusion in the system and by prescribing the procedures and criteria for protecting and administering the system. It is not the intent of KRS 146.200 to 146.360 to require

or to authorize acquisition of all lands or interests in lands within the boundaries of the stream areas but to assure preservation of the scenic, ecological and other values and to provide proper management of the recreational, wildlife, water and other resources. It is the intent of KRS 146.200 to 146.360 to impose reasonable regulations as to the use of private and public land within the authorized boundaries of wild rivers for the general welfare of the people of the Commonwealth, and where necessary, to enable the department to acquire easements or lesser interests in or fee title to lands within the authorized boundaries of the wild rivers, so that the public trust in these unique natural rivers might be kept.

6. Louisiana

Section 1 of Article IX of Louisiana's Constitution states:

> The natural resources of the state, including air and water, and the healthful, scenic, historic, and esthetic 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.

7. Minnesota

Section 116B.01 of Minnesota's *Environmental Rights Act* states:

> The legislature finds and declares that each person is entitled by right to the protection, preservation, and enhancement of air, water, land, and other natural resources located within the state and that each person has the responsibility to contribute to the protection, preservation and enhancement thereof.

8. Tennessee

Section 69-3-102 of Title 69 of Tennessee's Code, *Waters, Waterways, Drains and Levees*, states:

> 69-3-102. Declaration of policy and purpose.
>
> (a) Recognizing that the waters of Tennessee are the property of the state and are held in public trust for the use of the people of the state, it is declared to be the public policy of Tennessee that the people of Tennessee, as beneficiaries of this trust, have a right to unpolluted waters. In the exercise of its public trust over the waters of the state, the government of Tennessee has an obligation to take all prudent steps to secure, protect, and preserve this right.
>
> (b) It is further declared that the purpose of this part is to abate existing pollution of the waters of Tennessee, to reclaim polluted waters, to prevent the future pollution of the waters, and to plan for the future use of the waters so that the water resources of Tennessee might be used and enjoyed to the fullest extent consistent with the maintenance of unpolluted waters.

9. Virginia

Section 1 of Virginia's Constitution states:

> To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

10. Yukon

The preamble and s. 38(1) of Yukon's *Environment Act*[49] state:

> Recognizing that the resources of the Yukon are the common heritage of the people of the Yukon including generations yet to come;
>
> Recognizing that the Government of the Yukon is the trustee of the public trust and is therefore responsible for the protection of the collective interest of the people of the Yukon in the quality of the natural environment.
>
> ...
>
> 38(1) The Government of the Yukon is the trustee of the public trust.
>
> (2) The Government of the Yukon shall, subject to this Act or a schedule 1 enactment, conserve the natural environment in accordance with the public trust.

11. Quebec

The Quebec government has taken the lead in Canada with the recent adoption of the *Act to Affirm the Collective Nature of Water Resources and Provide for Increased Water Resource Protection*.50 As the title suggests, the legislation starts with the recognition of water as a collective resource that is part of the common heritage of the Quebec nation. Every individual has the right to safe drinking water and the legislation sets out certain principles, including the duty to prevent and repair damage to water resources.

12. British Columbia

According to "The Public Trust and a Modern BC *Water Act*" cited above, the government's goals in modernizing the legislation include protecting the health of streams and aquatic environments and improving water governance. The following lengthy quote is particularly relevant as similar arguments could be made in Manitoba, as follows:

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49 RSY 2002, c. 76.

50 RSQ, c. C-62 (adopted as SQ 2009, c. 21)

The Public Trust Doctrine has real potential to assist the government in achieving each of these stated goals.

- The PTD, as demonstrated by international experience, is one of the strongest tools available to protect stream health, the aquatic environment and ensure the consideration of ecosystem integrity.

- The PTD improves water governance arrangements by bringing an ecosystem perspective to the governance process and by providing means for members of the public and local residents to become involved in the decision-making process.

- A fundamental strength of the PTD is its flexibility and adaptability, because its objective is to protect the priorities of the public interest over time. As circumstances change, the ongoing supervisory nature of the doctrine allows government officials to revisit previously made decisions if there have been unforeseen impacts.

- Adopting the PTD would help justify decisions of the Ministry of Environment aimed at protecting the environment and natural resources. Ministry decisions to protect crucial resources like water are routinely challenged in front of the Environmental Appeal Board, resulting in increased expense (to all parties) and overall lost administrative efficiency. Many scholars hold the view that adopting the Public Trust Doctrine gives government another legal basis – a context and framework – for regulation and action.51

Conclusion

The roots of the PTD originate in Roman law and have evolved over the centuries through the English common law to become firmly entrenched in U.S. law. For some reason the PTD has received little attention in Canada, although there does not appear to be any barrier to it becoming a common law or statutory duty. In addition, there are several examples of states and provinces/territories that have expressly adopted the PTD into their constitutions or legislation that we can look to for guidance.

The following is a summary of the principles gleaned from the relevant case law on the PTD:

- The underlying premise of the PTD is that “some things are considered too important to society to be owned by one person”. The foundation of the PTD is that every person has an inalienable and inherent right to the public benefit and public use to common resources such as navigable waters.52

- The PTD requires the state to hold title to all navigable waters in a “public trust” for the benefit of the public. The state is a trustee, not an owner of the water, and therefore cannot grant title in fee simple to anyone else. The state cannot abdicate its responsibility as trustee.

51 *Supra,* note 6, at pp. 8-9.

52 *Supra*, notes 2 and 3.

- The PTD encompasses all navigable lakes and streams, including lake beds and shores, and ground water. It is also triggered by the diversion of non-navigable tributaries flowing into a navigable body of water.

- The common law concept of the PTD has not been replaced by a statutory duty. The common law is still relevant to interpreting environmental protection/water rights legislation and to justify its existence

- The public benefits and uses that are protected under the PTD include:
    - navigation, commerce, and fisheries;
    - the right to fish, hunt, bathe, swim, and to use navigable waters for boating and general recreation purposes;
    - the preservation of particularly scenic or ecologically significant lands or waters in their natural state for the purposes of scientific study, as an open space, to provide food and habitat for birds and marine life; and
    - the protection of wildlife.

- The PTD does not include private use of for economic development.

- The PTD imposes a duty on the state "to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust". The PDT imposes a duty on the state "to maintain the *purity and flow* of our waters for future generations *and* to assure that the waters of our land are put to *reasonable and beneficial* uses".53

- The state has ongoing and continuing supervisory control over navigable waters. No party may acquire a vested right to take or use water in a manner that is harmful to the interested protected by the public trust.

- The rights and benefits protected under the PTD are not absolute and must be balanced with the need for a regulated water use regime.

- The state or an authorized agency has the power to grant a license permitted water to be used, even if that use does not promote and may unavoidably harm the public trust.

- Before planning and allocating water resources, the state has an affirmative duty to take the public interest into account and protect public trust users whenever feasible. A water rights system that does not take the public trust into consideration "may cause unnecessary and unjustified harm to trust interests". When approving the use of water that may cause harm to public trust users, "the state must bear in mind its duty as trustee to consider the effect on the public trust and to preserve, so far as consistent with the public interest, the uses protected by the trust".54

53 *Supra*, notes 26 and 28.

54 *Supra*, note 32.

- There is an ongoing obligation under the PTD for the state to revisit or reconsider previous decisions if the impacts on the public trust uses had not been considered at the time or circumstances have changed since the initial decision was made.

- There is a presumption in favour of the public trust "the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust".55

- State regulators/agencies must not be a mere "umpire passively calling balls and strikes for adversaries appearing before it", but instead must "take the initiative in considering, protecting and advancing public rights in the resources at every stage of the planning and decisionmaking process." The "state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state".56

55 *Supra*, note 37.

56 *Ibid*.