RECENT RESEARCH

# Keeping Public Resources in Public Hands: Advancing the Public Trust Doctrine in Canada*

*Scott Kidd***

## 1. INTRODUCTION

Over the past two decades, private interests have been granted increased control over Canadian natural resources, particularly public forests through exclusive long term Crown forest licences,[1] and public fisheries through sector or individual fish quotas.[2] These licences and quotas have effectively created private property rights in public resources. Accompanying this "privatization" has been the significant ecological diminishment of these resources, such as changes in natural biodiversity

---

* This article is an abbreviated version of a report to be published by the Conservation Council of New Brunswick (CCNB). The final report will more fully discuss how the public trust doctrine as articulated in American case law and legal literature could be used to address the issue of increasing private property rights in public fisheries, through individual transferable quotas, and public forests, through forestry licences, with a particular emphasis on New Brunswick. This research project was generously supported by a grant from the Canadian Bar Association Law for the Future Fund. It is expected the final report will be available in the Winter of 2006 at <http://www.conservationcouncil.ca>.

** B.Sc. (Guelph), LL.B. (Manitoba), legal researcher (term) – Conservation Council of New Brunswick. The author and CCNB wish to thank Andrew Gage, Anastasia Lintner, Mike Wenig, Monique Passelac-Ross, Vicki Vlavianos, and Neil Craik for providing references and suggested avenues of research. Any errors or omissions are entirely the fault of the author.

1 For example, in New Brunswick in 1982, the province's Crown forests were divided into ten Crown Timber License Areas. These ten Crown Timber Licenses are presently leased to six private forest companies.

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

because of industrial logging practices,[3] and wide-scale over-fishing under federal management plans.[4] Other results include the removal of wealth from rural communities, the loss of forest jobs to mechanization, and the decimation of small boat inshore fisheries.

In response to the increasing corporate control over natural resources and the ecological ills and social instability of resource dependent communities that currently accompany this control, there is now a growing movement among woodworkers, fishermen and local governments to revive their rural communities through community-based management. The objectives of community-based management are the creation of local wealth from local resources, and the management of those resources to restore natural biological diversity and abundance. The confounding factor in this effort, however, is the lack of access to common resources, whether forestry or fishery, because of their increasingly exclusive allocation to private parties. Unless access is gained, there can be no meaningful opportunity for rural communities to rebuild.[5]

In the U.S., the public trust doctrine has been used since the 1800's to protect and restore public control over, and access to, resources that have been conveyed to private interests. Over the years the scope of the doctrine has been expanded to preserve the public interest in a variety of resources, including waters, dunes, tidelands, underwater lands, fisheries, shellfish beds, parks and commons, and wildlife. The doctrine captures the responsibility of U.S. state and federal governments to act as "trustees" of these common resources, holding them "on behalf of the public as beneficiaries."[6]

---

3 See for example Andrew Park, Chris Henschel, Ben Kuttner, and Gillian McEachern, *A Cut Above: A Look at Alternatives to Cutting in the Boreal Forest* (Toronto: Wildlands League, 2005). Available at <http://207.5.94.222/attachments/A%20Cut%20Above.pdf>; and Emily Walter, "Decoding Codes of Practice: Approaches to Regulating the Ecological Impacts of Logging in British Columbia," (2004) 15 J.E.L.P. 143 at 150-154.

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

5 For more information on community based management, see Michael M'Gonigle, Brian Egan, and Lisa Ambus (POLIS Project on Ecological Governance), *When there's a Way there's a Will: Developing Sustainability through the Community Ecosystem Trust (Report Series)* (Victoria: Eco-Research Chair of Environmental Law & Policy, University of Victoria, 2001), available at <http://www.polisproject.org/polis2/publications-Main.html>.

6 Jerry V. DeMarco, Marcia Valiante, and Marie-Ann Bowden, "Opening the Door for Common Law Environmental Protection in Canada: The Decision in *British Columbia v. Canadian Forest Products Ltd.*," (2005) 15 J.E.L.P. 233 at 250.

The idea that the public trust doctrine can be used to promote environmental protection and careful stewardship of common resources in Canada is being increasingly supported by Canadian legal academics.[7] At the same time, many of these authors also note that the term "public trust" or the notion of the public trust doctrine is virtually non-existent in contemporary Canadian case law dealing with public natural resources.[8] As a result, how the public trust doctrine might be used by rural communities in New Brunswick to re-establish rights of access to common resources is unclear.[9] To address this uncertainty and other important questions including how the public trust, public rights, and native rights may co-exist, the Conservation Council of New Brunswick (CCNB) conducted a legal research project in which it sought to answer the following questions:

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

2. If the answer to question 1 is yes, a) what are the rights conferred by the public trust doctrine; b) who owns the rights; c) what are the grounds of a claim in common law against a government for not fulfilling their public trust obligations; d) what test would have to be met to establish standing in any legal action to assert such public rights?

---

7 See for example DeMarco, Valiante, and Bowden, ibid.; Constance D. Hunt, "The Public Trust Doctrine in Canada," in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1981) at chapter 3; John C. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized," (1997) 7 J.E.L.P. 1; Kate P. Smallwood, *Coming Out of Hibernation: The Canadian Public Trust Doctrine* (Unpublished Masters Thesis, U.B.C., 1993); David VanderZwaag, *Canada and Marine Environmental Protection: Charting a Legal Course Toward Sustainable Development* (London: Kluwar Law International, 1995) at 409-423; and Barbara von Tigerstrom, "The Public Trust Doctrine in Canada," (1997) 7 J.E.L.P. 379.

8 This appears to be changing. See for example *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74 (S.C.C.) [*Canfor*]; *Walpole Island First Nation, Bkejwanong Territory v. Canada (Attorney General)*, [2004] 3 C.N.L.R. 351 (Ont. S.C.J.); *Mann v. Canada* (April 25, 1991), Doc. Vancouver A881092 (B.C. S.C. [In Chambers]); and *Prince Edward Island v. Canada (Minister of Fisheries & Oceans)*, 2005 PESCTD 57 (P.E.I. T.D.). No decision regarding whether the public trust doctrine should be adopted into Canadian law was reached in any of these cases.

9 The same can be said for how the doctrine might by used by Canadians in general to protect the environment.

3. How might common law public trust rights co-exist with native rights to allow for rural livelihoods to be sustained through access to public resources?[10]

This article presents some of the main conclusions of this research as detailed in a forthcoming CCNB report.

## 2. BACKGROUND TO THE PUBLIC TRUST DOCTRINE

The public trust doctrine is a legal concept unfamiliar to many people. Accordingly, Part II of CCNB's report introduces the reader to the public trust doctrine by outlining its origins, examining some of its past and present use in the U.S., and discussing the past and present status of the doctrine in Canada.

### (a) Introduction to Public Rights

Any discussion of the public trust doctrine begins with an understanding of public rights. This is because originally, "the public trust doctrine [prevented] the substantial impairment of public rights in navigable waterways."[11] Historically, two public rights that were routinely recognized by British and later American and Canadian courts were the public right of navigation on navigable waters and the public right of fishing in tidal waters.[12]

It is generally accepted the Romans were the first to formally articulate the legal theory of public rights: "[B]y the law of nature these things are common to mankind—the air, running water, the sea and consequently

10 The original focus of this question were the decisions in *Marshall v. Canada*, [1999] 3 S.C.R. 456 (S.C.C.), reconsideration refused [1999] 3 S.C.R. 533 (S.C.C.) [*Marshall No. 1*]; and *R. v. Bernard* (2003), 262 N.B.R. (2d) 1 (N.B. C.A.), leave to appeal allowed (2004), 275 N.B.R. (2d) 400 (note) (S.C.C.), reversed [2005] 3 C.N.L.R. 214 (S.C.C.).

11 Charles F. Wilkinson, "The Headwaters of the Public Trust: Some Thoughts on the Source and Scope of the Traditional Doctrine," (1989) 19 Envtl. L. J. 425 at 459 (footnote 138).

12 This is not to say that other public rights in the environment, such as the right to clean air, do not exist in Canadian law. It is simply that they are not as judicially well-established as the two rights noted above. For a thorough discussion of public rights in the environment, see Andrew Gage, "Public Rights and the Lost Principle of Statutory Interpretation," (2004) 15 J.E.L.P. 107.

the shores of the sea."[13] This theory was later incorporated into the common law.[14]

However, English common law required all real property to be owned by someone, which in turn resulted in the King becoming the *de facto* owner of the foreshore and beds of navigable waters.[15] How then could the public exercise its rights to navigate and fish over the property of the King or a private subject? The answer was to recognize different property interests in the foreshore and beds of navigable waters:

> [T]he people have a publick interest, a *jus publicum*, of passage and repassage with their goods by water, and must not be obstructed by nuisances or impeached by exactions. . .For the *jus privatum* of the owner or proprietor is charged with and subject to that *jus publicum* which belongs to the king's subjects...which though in point of property it may be a private man's freehold, yet it is charged with a publick interest of the people, which may not be prejudiced or damnified.[16]

Coinciding with the development of a *jus publicum* and a *jus privatum* in tidal waters and the nearshore[17] was a judicial interpretation of the Magna Carta (1215) which stated that the King could not grant an exclusive fishery in tidal waters.[18] As a result, the public's right to use the sea and seashore continued.

The Canadian decision in *Esson v. Wood*,[19] sets out the main principles of the public right of navigation. The plaintiff Esson sued Woods in trespass after Woods pulled up piles driven by Esson into the bed of Halifax Harbour below the low water mark. The Supreme Court dismissed Esson's action, writing, "The title to the soil did not authorize the plaintiffs to, extend their wharf so as to be a public nuisance. . .for the Crown cannot grant the right to obstruct navigable waters; nothing short of legislative

---

13 Jan S. Stevens, "The Public Trust: A sovereign's ancient prerogative becomes the people's environmental right," (1980) 14 U.C. Davis L. Rev. 195 at 196-197, quoting *The Institutes of Justinian 2.1.1.* (T. Cooper trans. & ed. 1841). This statement is quoted extensively in public trust doctrine literature and case law, including recently by the Supreme Court of Canada in *Canfor, supra* note 8 at para. 66.

14 Ibid. at 197.

15 Ibid. at 198.

16 Smallwood, *supra* note 7 at 17, quoting Sir Matthew Hale, *De Jure Maris*, in Stuart A. Moore, *A History of the Foreshore and the Law Relating Thereto*, 3rd ed. (London: Stevens & Haynes, Law Publishers, 1888) at 404-405.

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

18 *British Columbia (Attorney General) v. Canada (Attorney General)* (1913), [1914] A.C. 153 (British Columbia P.C.) at 169-170, per Viscount Haldane.

19 (1884), 9 S.C.R. 239 (S.C.C.).

sanction can take from anything which hinders [the right of] navigation the character of a nuisance."[20]

The public right of fishing is very similar to that of the public right of navigation. As stated by the Privy Council in *British Columbia (Attorney General) v. Canada (Attorney General)*,[21] the public has a right to fish in all tidal waters and the Crown cannot interfere with this right by granting exclusive fisheries in tidal waters except by valid and specific legislation.

### (b) Introduction to the Public Trust Doctrine

Over time it became settled law that the public right of fishing derived from the Crown.[22] The King had the prerogative of the primary right of fishing in these waters. At the same time, "the common people of England have regularly a liberty of fishing in the sea. . .as a public common of piscary, and may not without injury to their right be restrained of it. . ."[23] Therefore, although the King had a prerogative over the fishery, the public had at the same time the right to fish, which in turn effectively "sterilized" the Crown's prerogative.[24] The prerogative placed fisheries, and the public's use of them, under the King's care, supervision and protection. Accordingly, "following the publication of *De Jure Maris* in 1787, [Sir Matthew] Hale's interpretation of the Crown prerogative over fish as some form of public trust became firmly established."[25]

---

20 Ibid. at 243 per Strong J. A thorough discussion of the right of navigation (and fishing) can be found in G. La Forest, *Water Law in Canada—The Atlantic Provinces* (Ottawa: Information Canada, 1973). The case of *International Minerals & Chemicals Corp. (Canada) v. Canada (Minister of Transport)* (1992), [1993] 1 F.C. 559 (Fed. T.D.), provides a good review of Canadian law on what are "navigable waters." Evidence of the continuing vitality of the public right of navigation can be found in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.).

21 *Supra* note 18. This ruling of the Privy Council was recently quoted with approval by the Supreme Court in *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.).

22 *Supra* note 18 at 168-9. Regarding the foreshore, Joseph Sax writes, "[T]he ownership of the shore, as between the public and the King, has been settled in favour of the King; but...this ownership is, and had been immemorially, liable to certain general rights of egress and regress, for fishing, trading, and other uses claimed and used by his subjects." *in* Joseph Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: Alfred A. Knopf, 1970) at 164; quoting R.H. Hall (citation omitted in original).

23 Tim Bonyhady, *The Law of the Countryside and the Rights of the Public* (Milton Park Estate, Bingdon: Professional Books, 1987) at 252, quoting Hale, *De Jure Maris* at 11. (See also *De Jure Maris* in Moore, *supra* note 16 at 377).

24 Ibid.

25 Ibid.

As mentioned earlier, there is scarce reference to the public trust doctrine in Canadian or British case law. American jurisprudence on the other hand is replete with references to a public trust, and the public trust doctrine has been extensively discussed in American legal literature.[26] It is for this reason that Canadian authors usually begin their discussion of the public trust doctrine with a review of the trust's history in the U.S.

### (c) American Treatment of the Public Trust Doctrine

The case which rooted the public trust doctrine in the U.S. is *Illinois Central Railroad Co. v. Illinois*.[27] In 1869, the Illinois legislature granted the Illinois Central Railroad the fee simple in a huge tract of the lake bottom of Lake Michigan bordering the City of Chicago. Included in the grant was all of the outer harbour of Chicago. Four years later the legislature repealed the 1869 act which permitted the grant and in 1883 brought a suit seeking revocation of the grant itself. The case made its way to the U.S. Supreme Court where the court upheld the Illinois legislature's revocation of the grant, stating, "[The bed of Chicago Harbour] is a title held in trust for the people of the State. . ."[28]

---

26 See for example Jack H. Archer and Terrance W. Stone, "The Interaction of the Public Trust and the "Takings" Doctrines: Protecting Wetlands and Critical Coastal Areas," (1985) Vt. L. Rev. 81; Harry R. Bader, "Antaeus and the Public Trust Doctrine: A New Approach to Substantive Environmental Protection in the Common Law," (1992) 19 B.C. Envtl. Aff. L. Rev. 749; Michael C. Blumm, "Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine," (1989) 19 Envtl. L. 573; Patrick Deveney, "Title, Jus Publicum and the Public Trust: An Historical Analysis," (1976) 1 Sea Grant L.J. 13; David B. Hunter, "An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources," (1988) 12 Harv. Envtl. L. Rev. 311; Richard J. Lazarus, "Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine," (1986) 71 Iowa L. Rev. 631; Note, "The Public Trust in Tidal Areas: A Sometimes Submerged Judicial Doctrine," (1970) 79 Yale L.J. 762; Erin Ryan, "Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management," (2001) 31 Envtl. L. 477; Joseph L. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention," (1970) 68 Mich. L. Rev. 471; Stevens, *supra* note 13; Various authors, "The Public Trust Doctrine in Natural Resources Law and Management: A Symposium," (1980) 14 U.C. Davis L. Rev. 181; Various authors, "Symposium on the Public Trust and the Waters of the American West: Yesterday, Today, and Tomorrow," (1989) 19 Envtl. L. 425; and Wilkinson, *supra* note 11.

27 146 U.S. 387 (U.S. Ill., 1892) [*Illinois Central*].

28 Ibid. at 452. Another statement of the court is extensively quoted at 453: "The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without a substantial impairment of the public interest in the lands and waters remaining."

Despite the importance of the decision, the public trust doctrine lay fairly dormant for almost 80 years[29] until Joseph Sax published his influential 1970 journal article, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention."[30] The article outlined how and why the American judiciary should adapt and apply the concept of the public trust as set out in *Illinois Central* and other important pre-1970 public trust cases to protect the environment. To be an environmental protection tool, Sax argued the public trust doctrine needed to achieve three things, "It must contain some concept of a legal right in the general public; it must be enforceable against the government; and it must be capable of an interpretation consistent with contemporary concerns for environmental quality."[31]

The public trust doctrine has expanded significantly in the U.S. since 1970. Professor Charles Wilkinson outlines four major developments:

1. The extension of the public trust doctrine in some states to include a diversity of state waters, such as bayous and streams, and not those simply navigable (tidal waters) or navigable in fact, such as large rivers.

2. Public interests in public waters that are protected by the trust include more than the traditional purposes of the protection of navigation and fishing.

3. The doctrine has moved beyond public waters to incorporate previously unidentified trust resources such as dry sand beaches, parks, and wildlife.

4. The doctrine has been used in the western U.S. to limit water rights obtained through appropriation.[32]

The California case of *National Audubon Society v. Superior Court of Alpine County*,[33] is a leading example of how this expansion allows the public trust doctrine to be used for the protection of "environmental" trust resources. The National Audubon Society argued the shores, beds and waters of Mono Lake were a trust resource and that upstream water diversions by the City of Los Angeles[34] were in breach of the public trust

29 Bader, *supra* note 26 at 753.
30 (1970) 68 Mich. L. Rev. 471.
31 Ibid. at 474.
32 Wilkinson, *supra* note 11 at 465-466.
33 658 P.2d 709 (U.S. Cal., 1983) [*Mono Lake*]. The *Mono Lake* case is frequently cited in U.S. public trust articles.
34 Ibid. at 711-712.

doctrine because they harmed a trust resource. The diversions had lowered lake levels by a third, increased the lake's salinity, and subjected the lake's migratory island-breeding bird populations to predation. The California Supreme Court agreed with the plaintiff and recognized that the purpose of the doctrine could evolve from being for protecting use of, or access to, the environment (*e.g.* a right of fishing), to protection of ecological values.

It is important to understand that at its heart the term "public trust" describes the state's original (now expanded) "fiduciary obligation to ensure that public lands that constitute the coastline of the bays of the seas, the rivers both as to their estuaries and courses, or the beds of those waters and rivers, are made continuously available for the members of the public at large."[35] This continuous availability is necessary for the preservation of the public's ability to exercise its rights to these resources. The public trust "doctrine" is the set of principles that have grown from the interpretation and enforcement of this fiduciary obligation.

### (d) Canadian Treatment of the Public Trust Doctrine

The CCNB report briefly reviews three pre-1900 Canadian cases identified by Kate Smallwood as precedent for the development of the public trust doctrine in Canada.[36] It then discusses the important public trust case of *Green v. Ontario*,[37] in which the plaintiff sought an injunction preventing the excavation of sand dunes outside the boundaries of Sandbanks Provincial Park by a private company. Mr. Green argued that s. 2 of the *Provincial Parks Act*[38] (Ontario) created a statutory public trust and that by authorizing the removal of the sand dunes, which he believed diminished the aesthetic and ecological health of the adjoining park, the Ontario Government breached this trust.

Mr. Justice Lerner was not enthused with Mr. Green's case, describing it as "pretentious" and "frivolous." More importantly for the public trust

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

36 Smallwood, *supra* note 7 at 79-83, the cases being *R. v. Meyers* (1853), 3 U.C.C.P. 305 (U.C. C.P.) at 357; *R. v. Lord* (1864), 1 P.E.I. 245; and *R. v. Robertson* (1882), 6 S.C.R. 52 (S.C.C.).

37 (1972), 34 D.L.R. (3d) 20 (Ont. H.C.).

38 R.S.O. 1970, c. 371, s. 2. All provincial parks are dedicated to the people of the Province of Ontario and others who may use them for their healthful enjoyment and education, and the provincial parks shall be maintained for the benefit of future generations in accordance with this Act and the regulations.

doctrine in Canada, he denied that the Act created a statutory trust.[39] He viewed the trust alleged by Mr. Green as a classic trust, rather than being a term of art as is suggested by American treatment of the public trust doctrine. Applying classic trust law, he held that the subject-matter of the trust was not certain because the statute did not compel the Province to hold the lands as park lands for a specific period of time or in perpetuity, and that there were no restrictions upon the actions of the Province in how it managed the park.[40]

The timing and facts of the *Green* case were not amenable to the judicial recognition of the public trust doctrine. The environmental movement was still in its infancy in Canada in 1972. Second, Mr. Green was asking the court to apply the public trust doctrine to a novel situation—the protection of aesthetics, recreation, and ecological integrity—rather than to navigable waters. Also, it would have interfered with private property rights that were in place prior to the creation of the park.[41]

In recent years the Supreme Court of Canada has repeatedly recognized the importance and need for environmental protection in Canada.[42] In 2004, the decision in *British Columbia v. Canadian Forest Products Ltd. (Canfor)*[43] made reference in *obiter* to the U.S. public trust doctrine and discussed the possibility of *enforceable fiduciary duties* owed to the public by the Crown with respect to public lands and the environment.[44] As DeMarco, Valiante, and Bowden write:

> [G]iven that the court made the effort to discuss the issue in some depth despite the fact that no party or intervener had canvassed U.S. public trust law in their arguments, it suggests a positive or sympathetic attitude that may manifest itself more fully in a future case...[45]

---

39 *Supra* note 37 at 30-31.

40 Ibid. at 31.

41 Mr. Justice Lerner seems to have been particularly vexed by this (see ibid. at 24).

42 *Friends of the Oldman River, supra* note 20 at 16; *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 (S.C.C.) at 1075-1076; *Canada (Procureure générale) c. Hydro-Québec*, [1997] 3 S.C.R. 213 (S.C.C.) at 266, 293-295; *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)*, [2001] 2 S.C.R. 241 (S.C.C.) at 248-249 [*Spraytech*]; *Cie pétrolière Impériale c. Québec (Tribunal administratif)*, [2003] 2 S.C.R. 624 (S.C.C.) at 639-40; *Canfor*, *supra* note 8 at paras. 74, 81, and 155. This list of cases was taken from the factum of the interveners: Friends of the Earth, Georgia Strait Alliance, and West Coast Environmental Law Association drafted by Sierra Legal Defence Fund, in *British Columbia Hydro & Power Authority v. British Columbia (Environmental Appeal Board)*, [2005] 1 S.C.R. 3 (S.C.C.).

43 *Supra* note 8. The Supreme Court's reasons for judgment in *Canfor* and their implications are extensively discussed by DeMarco, Valiante, and Bowden, *supra* note 6.

44 *Canfor,* ibid. at paras. 80-81.

45 DeMarco, Valiante and Bowden, *supra* note 6 at 252.

Accordingly, the emergence of the public trust doctrine in Canada can be envisioned.

## 3. PRIVATE PROPERTY RIGHTS IN PUBLIC RESOURCES

In answer to CCNB's first question, the report addresses two issues:

- What is the present-day legal rationale for the further development of the doctrine in Canada?
- Do government policies regarding the granting of fishing and forestry licenses create private property rights in these resources?

Like others who have written about the public trust doctrine in Canada, CCNB's report concludes that judicial precedent exists which would support the development of the public trust doctrine in Canada. As such, "the focus must...shift towards finding a way to encourage our courts and legislatures to dust off the foundation and begin to build on the doctrine."[46] One way this can be achieved is by using the public trust doctrine to tackle real and compelling examples of social and ecological injustice caused by government mismanagement of public resources.

### (a) The Public Trust as a Fiduciary Duty

The Canadian judiciary is generally conservative when it comes to making changes to the common law.[47] As such, it is difficult to imagine Canadian judges adopting the public trust doctrine without an existing strong legal underpinning. American case law on the public trust doctrine may not be the best place to search for this principled approach as there is no single U.S. definition of the public trust doctrine;[48] there are as many versions of the doctrine as there are U.S. states.[49] As a result there is controversy in the U.S. about how to legally classify the public trust.

In contrast to the U.S., there is little discord between recent Canadian commentators on the nature of the public trust doctrine. Most identify the

46 Maguire, *supra* note 7 at 41.

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

48 Maguire, *supra* note 7 at 2; Smallwood, *supra* note 7 at 104; von Tigerstrom, *supra* note 7 at 381.

49 Wilkinson, *supra* note 11 at 425.

public trust as a term to describe the government's fiduciary obligations in caring for public trust resources.[50]

The CCNB report provides reasons why the government fiduciary obligation exists. In particular, the report uses the three characteristics of fiduciary relationships as set out in *International Corona Resources Ltd. v. Lac Minerals Ltd.*[51] to explain why Canadian governments and the public are in a fiduciary relationship with regard to trust resources. Aboriginal case law and other Supreme Court decisions also support the proposition that Canadian governments have fiduciary obligations in their management of public resources.

Among the cases discussed in the report is *Comité pour la République du Canada — Committee for the Commonwealth of Canada v. Canada.*[52] At issue in the case was whether the prohibition on the dissemination of political propaganda in airports was inconsistent with the guarantee of freedom of expression s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The Court recognized that the government does not have the same rights as private owners with respect to its property, particularly with regard to exclusivity. As Lamer, C.J.C. (as he then was) states:

> The very nature of the relationship existing between citizens and the elected government provides that the latter will own places for the citizens' benefit and use, unlike a private owner who benefits personally from the places he owns. *The "quasi-fiduciary" nature of the government's right of ownership* was indeed clearly set out by the U.S. Supreme Court in *Hague v. Committee for Industrial Organization*...[Emphasis added][53]

If the government has "quasi-fiduciary" duties with respect to edifices—private places—its duties with respect to common places and resources, like clean air and water which are necessary for the public, are surely equivalent, if not greater.

Similarly, in *Canfor*, the proposition the Crown may have fiduciary duties in its care of the environment suggests that the idea is not outside the realm of judicial thinking.[54] Finally, in *114957 Canada Ltée (Spray-*

---

50 Maguire, *supra* note 7 at 25-32; Smallwood, *supra* note 7 at 119-125; Waters, *supra* note 35 at 384. See also Hunt, *supra* note 7 at 174-181 regarding a discussion of the Crown as a trustee.

51 [1989] 2 S.C.R. 574 (S.C.C.) at 646, citing *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.) at 136. See also: *Apsassin v. Canada (Department of Indian Affairs & Northern Development)*, [1995] 4 S.C.R. 344 (S.C.C.) at para. 38.

52 [1991] 1 S.C.R. 139 (S.C.C.), reconsideration refused (May 8, 1991), Doc. 20334(S.C.C.).

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

54 *Supra* note 8 at para. 81.

*Tech, Société d'arrosage) v. Hudson (Ville) (Spraytech)*[55] L'Heureux-Dubé, J. writing for the majority of the Supreme Court, quoted with approval the judgment of the Ontario Court of Appeal in *Scarborough (Borough) v. R.E.F. Homes Ltd.*[56] which states that the municipality is a "trustee of the environment."[57] If a municipality, a statutory creation of a province is a trustee of the environment, it follows that so are provincial governments.

**(b) The Loss of Public Resources to Private Property Rights**

The CCNB report also addresses whether public fisheries and Crown forests have become private property through the granting of individual transferable quotas and Crown forest licenses respectively. If not, then there is no loss of state control over trust resources and breach of the classic public trust doctrine as set out in *Illinois Central*.

The history of the licensing of access to East Coast fisheries reveals that there is nothing in the *Fisheries Act*[58] or accompanying regulations[59] that explicitly displace the public right of fishing. While licenses are now required, everyone remains entitled to a license. However, access to the "public" fishery is now determined by the Minister on the basis of the Commercial Fisheries Licensing Policy for Eastern Canada (1996).[60] Pursuant to the Policy, new fishermen will only receive licenses if they replace an existing fishing enterprise.[61]

The report's parallel examination of New Brunswick forestry legislation shows that licensing has long been a means of controlling access to the forest, but that control over this access has now been consolidated in the hands of several large corporations. As a result, the main outcomes of the present *Crown Lands and Forests Act*[62] have been perpetual access for large, industrial forest companies and the off-loading of government forest management responsibilities to these same interests.

The report next looks at whether this change in the way access to public fisheries and Crown forests is granted has in reality resulted in

55 *Spraytech, supra* note 42 at para. 27.
56 (1979), 9 M.P.L.R. 255 (Ont. C.A.).
57 Ibid. at 257.
58 R.S. 1985, c. F-14.
59 Such as the Atlantic Fishery Regulations, 1985, SOR/86-21 (much amended); and the Fishery (General) Regulations, SOR/93-53.
60 Fisheries and Oceans Canada, available at: <http://www.dfo-mpo.gc.ca/communic/lic_pol/index_e.htm>.
61 Ibid. at s. 10.
62 S.N.B. 1980, c. C-38.1. The Act did not come into affect until 1982.

these resources becoming private property. This was done by comparing the present rights of fishing and forestry license holders that have been created by legislation, government policy and executive action, to the hallmarks of private property: the right of exclusivity and transferability, the right to the income from the property, and durability of title.[63] The comparison revealed that private interests have gained significant property rights in these public resources. Accordingly, the common law public trust doctrine *does* establish a basis for action against the federal government in relation to inference or conferral of private property rights through individual transferable quotas and licenses in fisheries, and against the provincial government in relation to licenses in Crown forests.

## 4. USING THE PUBLIC TRUST DOCTRINE IN CANADA

CCNB's report also addresses some of the practical questions that are germane to advancing a legal action in support of the public trust doctrine.

### (a) What are the Rights Conferred by the Public Trust Doctrine?

U.S. case law and academic commentary on the public trust doctrine reveals that at its heart the "public trust" is the duty of the state to care for public resources so that such resources remain available to the public. What is not settled is the "exact nature of the equitable duties which are said to be imposed on government,"[64] or the rights of the public encompassed, by the trust. Arguably, if the public trust connotes a fiduciary relationship between government and the public then the rights conferred by the public trust doctrine should be synonymous with those found in other fiduciary relationships.

Using Canadian aboriginal case law[65] that discusses the fiduciary duties of governments as a guide, it is determined that after reviewing U.S. public trust case law, the U.S. public trust doctrine captures four fiduciary obligations owed by governments in their management of trust resources. The obligations are: 1) to act loyally,[66] 2) to act in good faith,[67]

---

63 The question of durability is the thorniest issue because the renewal of fishing and forestry licenses is, legislatively, not automatic (see for example *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans)*, [1997] 1 S.C.R. 12 (S.C.C.) at 25-26). This issue is addressed in Part 4(c) below.

64 Maguire, *supra* note 7 at 2.

65 *Roberts v. R.*, [2002] 4 S.C.R. 245 (S.C.C.); and *Apsassin, supra* note 51 at para. 104.

66 See for example *Illinois Central, supra* note 27 at 453.

67 See for example *Gould v. Greylock Reservation Commission*, 215 N.E.2d 114 (Mass., 1966).

3) to make full disclosure of the matter at hand,[68] and 4) to act like a person of ordinary prudence in managing their affairs (preserve the capital and plan for the future). The doctrine also captures the public's right to bring court actions to remedy breaches of the public trust by governments.

### (b) Who Owns Public Trust Rights?

The report concludes that public trust rights rest solely in the control of the general public. A rural community has no different public trust rights in a fishery than does the urban public. However, as is the case with public interest standing, there may be differences between groups the courts will view as the appropriate defender of a particular public right.[69]

### (c) Taking Action for Breaches of the Public Trust

A difficulty facing those who wish to use the public trust doctrine to address the inequities associated with the increase in private property rights in public fisheries (and public resources in general) is the discrepancy between the "law" and political reality. The case of *Joliffe v. Canada*,[70] exemplifies this issue in relation to fisheries licenses. The court used statute law as its guide, effectively allowing governments to profess protecting the public interest while in fact promoting private rights. Justice Strayer wrote that because fishing licenses terminate each year and the issuance of new licenses are subject to the Ministers "absolute discretion,"[71] he was "unable to find a legal underpinning for the "vesting" of a license beyond the rights which it gives for the year in which it was issued."[72] In spite of this finding, the reality of the situation is that "When a [fishing] license is issued, it confers, in effect, a perpetual benefit, because annual renewal of the license is usually automatic."[73]

---

68 See for example *Mono Lake, supra* note 33 at 712 and 728-9.

69 Part 2 of the test for public interest standing set out in the leading case of *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (S.C.C.) requires that the applicant have a genuine interest in the issue. For this reason, a court for example may look more favourably on an action brought to address improper forest management by an individual or group from a rural-forest community than a large urban centre.

70 (1985), [1986] 1 F.C. 511 (Fed. T.D.).

71 *Fisheries Act*, R.S. 1985, c. F-14, s.7.

72 *Supra* note 70 at 520.

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

The 2005 Supreme Court decision in *Chaoulli v. Québec (Procureur général)*[74] may signal a willingness of Canadian courts to look behind legislation into the heart of government action. In *Chaoulli*, the majority of the Supreme Court reviewed the actions of the executive branch, as well as the pertinent legislation, to conclude that private medical coverage was prohibited in Quebec.

In the case of public fisheries, the actions of the executive branch in its implementation of the *Fisheries Act* have effectively resulted in the privatization of the fishery.[75] In the *Chaoulli* case, the actions of the executive branch in its implementation of the pertinent health care acts effectively prevented private health care. In *Chaoulli*, this executive action contributed to a violation of the public's s. 7 *Charter* rights. Similarly, executive action is resulting in the infringement of the public's right to fish.

If permanent exclusive fisheries have not been created, it may be argued that the present decline in the Atlantic fishery is the result of mismanagement by the federal government; or more particularly, government policies, including the granting of ITQs and enterprise allocations. One of the federal government's fiduciary obligations with regard to the fishery is prudent management.[76] A prudent person would preserve the capital, thereby protecting the public right of fishing by not diminishing the resource itself. The granting of ITQs and enterprise allocations is contrary to the public trust[77] because it promotes the practice of high-grading and dumping.[78]

In spite of these arguments, there may be difficulty in trying to use the public trust doctrine to remedy interference with traditional public rights. These rights provide the public with access to a resource, such as the fishery, so that it can *use* the resource. As such, the need for public rights to access resources may not resonate with today's judiciary, partic-

---

74 2005 SCC 35 (S.C.C.) [*Chaoulli*].

75 "Canadian fisheries managers (and their counterparts abroad, notably in New Zealand and Iceland) began to implement "property rights-based management" in the form of "individual quota" fisheries. *Very much a bureaucratic initiative within the Department...*" [emphasis added]. Parliament of Canada—Senate Standing Committee on Fisheries and Oceans, *Interim Report on Canada's New and Evolving Policy Framework for Managing Fisheries and Oceans [Interim Report]*, available at <http://www.parl.gc.ca/38/1/parlbus/commbus/senate/com-e/fish-e/rep-e/repintmay05-e.htm>.

76 *Comeau's Sea Foods Ltd., supra* note 63 at para. 37: "Canada's fisheries are a "common property resource", belonging to all the people of Canada. Under the *Fisheries Act*, it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest."

77 Similar arguments can be made with respect to Crown forests.

78 *Interim Report, supra* note 75.

ularly if it is simply viewed as pitting competing enterprises, community-based management and private business, against one another to determine use. Canadian courts may not be receptive to modern use of the public trust doctrine as a means of ensuring direct access to a particular resource. Increased access for community-based management will more likely result from rulings that employ the doctrine to limit ecologically destructive activities, such as over-harvesting.

### (d) Using the Public Trust Doctrine to Protect the Environment

Use of the doctrine as a means of promoting environmental protection requires returning to the roots of the doctrine; the public trust prevents non-legislative government interference with public rights, and places fiduciary duties on government to care for resources that support recognized public rights. To expand public trust duties to resources beyond fisheries and navigable waters to the environment in general, requires the recognition of public rights in the environment. Fortunately, there is strong evidence the Canadian judiciary has made this recognition. A number of recent Supreme Court of Canada decisions have discussed the importance of and need for protection of the environment[79] and the right to a safe environment.[80] As the public has a right to a safe environment, it follows that the government has fiduciary duties with respect to its care and management of the common resources that support that right.[81]

Recognition of public rights in the environment and the accompanying public trust duties should promote environmental protection and provide opportunities for community-based management groups to gain renewed access to resources. For example, forests are a storehouse of natural biodiversity. They are important for providing clean air and water. They are also part of nature's cycle or the interconnectedness of all living things. Forestry operations can affect fish spawning, thereby impacting the public right of fishing. Large scale clear-cut logging causes other negative environmental impacts such as habitat loss and fragmentation, and soil compaction. These impacts in turn interfere with many public rights in the environment. Permitting this interference is a breach of a provincial government's trust obligations to properly care for the environment. If large scale clear-cut logging is found to be a breach of the public trust, by necessity other logging methods will be used, such as

---

79 See *supra* note 42.

80 *R. v. Canadian Pacific Ltd., supra* note 42 at para. 55.

81 For a more complete discussion on existing public rights, again see Gage, *supra* note 12.

selective logging. In turn this could result in more employment in logging activities. It could also make the industrial forest model less attractive to both governments and the forest industry, creating an opportunity for the re-ordering of forest allocations and management. Governments may argue that such questions are matters of public policy and therefore outside the purview of Canadian courts. However, as Campbell J. of the Prince Edward Island Supreme Court noted, "It appears to me that the *Chaoulli* decision signals a fundamental shift in the balance between the legislative or executive branch of government and the judicial branch."[82] If the Supreme Court is willing to wade into issues surrounding what is "reasonable" public health care, one of the most charged and value-laden public policy issues in Canada, why not policy issues dealing with protection of the environment?

## 5. THE PUBLIC TRUST AND ABORIGINAL RIGHTS IN NEW BRUNSWICK

Allocations of natural resources in New Brunswick, both present and future, need to be reconciled with the constitutionally protected rights of the Mi'kmaq, Maliseet and Passamaquoddy peoples of New Brunswick. In *Marshall v. Canada*[83] the Supreme Court of Canada held that the Mi'kmaq and all other beneficiaries of the Peace and Friendship Treaties of 1760 and 1761 have a right to catch and sell eels and other fish to obtain the necessaries for a moderate livelihood.[84] In *R. v. Bernard*,[85] the New Brunswick Court of Appeal ruled 2-1 that Mr. Bernard, a Mi'kmaq living on the Eel Ground reserve, had a treaty right to cut timber on Crown land in the Little Sevogle River region of New Brunswick. One of the two majority judges also held that Mr. Bernard had an aboriginal right to cut timber on Crown lands in the same area of New Brunswick because of Mi'kmaq aboriginal title. The Supreme Court of Canada has overturned the Court of Appeal's decision in *Bernard*.[86] However, its ruling does not

82 *Prince Edward Island v. Canada (Minister of Fisheries & Oceans)*, *supra* note 8 at para. 41.

83 [1999] 3 S.C.R. 456 (S.C.C.), reconsideration refused [1999] 3 S.C.R. 533 (S.C.C.) [*Marshall No. 1*].

84 This finding was reaffirmed by the Court in *Marshall v. Canada*, [1999] 3 S.C.R. 533 (S.C.C.) [*Marshall No. 2*].

85 *Supra* note 10.

86 *R. v. Bernard*, 2005 SCC 43 (S.C.C.). The Supreme Court rendered a joint decision for the two appeals—*R. v. Bernard* and *R. v. Marshall* (2003), 218 N.S.R. (2d) 78 (N.S. C.A.). The facts in *R. v. Marshall* were similar to ones that gave rise to the charges in *Bernard*.

foreclose the possibility that with the proper evidence aboriginal title, and the harvesting rights that accompany it, can be affirmed in New Brunswick. Given this possibility and the treaty rights affirmed in *Marshall No. 1*, plus the fairness of simply respecting the pre-existence of aboriginal societies in New Brunswick, any re-ordering of access to trust resources via the public trust doctrine must be done in a manner that respects and is in concert with aboriginal and treaty rights. As a result, CCNB asked, "How might common law public trust rights co-exist with native rights to allow for rural livelihoods to be sustained through access to public resources?"[87]

The irony is that there is more certainty regarding aboriginal rights, particularly aboriginal title, with regard to terrestrial land than there is to the nearshore or seabed. On the other hand there is more certainty regarding the public trust and public rights in tidal waters than there is in dry land. This makes a definitive answer to the question of the co-existence of aboriginal and treaty rights and the public trust doctrine difficult. However, Supreme Court decisions such as *R. v. Gladstone*[88] do provide some direction.

### (a) Public Waters

Aboriginal peoples can access different natural resources many ways, including through an aboriginal right not connected to aboriginal title,[89] through aboriginal title,[90] through the exercise of a treaty right,[91] and through other means available to all Canadians. An aboriginal right of fishing and currently recognized treaty rights should have little impact on the advancement of the public trust doctrine to promote ecologically and socially sustainable fishing in New Brunswick's tidal waters. Aboriginal title on the other hand provides "ownership" of the land to the aboriginal

---

87 Before answering this question, the report first provides a general discussion about aboriginal rights and treaty rights in New Brunswick and the decisions in *Marshall No. 1* and *No. 2* and the New Brunswick Court of Appeal and the Supreme Court's decisions in *Bernard*.

88 [1996] 2 S.C.R. 723 (S.C.C.).

89 *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.), reconsideration refused (January 16, 1997), Doc. 23803 (S.C.C.) at para. 48: "[A]boriginal rights lie in the practices, customs and traditions integral to the distinctive cultures of aboriginal peoples..." If fishing is an integral practice of an aboriginal society, it follows its members have an aboriginal right to access the fishery resource.

90 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.) at para. 117: "[A]boriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes..."

91 To access a fishery resource for example, *Marshall No. 1, supra* note 83.

group and the right to *exclusively* exploit its resources.[92] Therefore, recognition of aboriginal title could have a significant impact on the allocation and management of trust resources.

The Mi'kmaq, Maliseet and Passamaquoddy peoples' historical reliance upon the fishery as a means of sustenance, gives rise to an aboriginal right to fish to meet this need.[93] As well, *Marshall No. 1* established that the First Nations peoples of New Brunswick have a treaty right to trade or sell fish to secure necessaries for a moderate livelihood. *R. v. Sparrow*,[94] (elaborated upon in *Gladstone*[95]) held that after conservation goals have been met, aboriginal people are to be given priority to the fishery to satisfy their aboriginal and treaty rights that have internal limits.[96] At first blush this aboriginal priority appears to conflict with those who desire to use the public trust doctrine to re-order access to fisheries for the purposes of community-based management. However, it is submitted this conflict is more imagined than real. As Lamer C.J. (as he then was) points out in *Gladstone*:

> . . .in an *exceptional* year, when conservation concerns are severe, it will be possible for aboriginal rights holders to be alone allowed to participate in the fishery, while in more ordinary years other users will be allowed to participate in the fishery after the aboriginal rights to fish for food, social and ceremonial purposes have been met.[Emphasis in original][97]

In other words, the limited amount of fish required to satisfy these rights means there should be fish and shellfish left over for allocation to communities wanting to pursue the community-based management of fisheries.

Does this mean these communities will get all the fish they want? Probably not. But given the poor health of many Atlantic fisheries, these

---

92 Brian Slattery, "Making Sense of Aboriginal and Treaty Rights," (2000) 79 Can. Bar Rev. 196 at 219. It is important to remember that the Crown still retains the radical title to the land.

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

94 [1990] 1 S.C.R. 1075 (S.C.C.).

95 *Supra* note 88.

96 In situations when the aboriginal right has no internal limits, Lamer C.J. in *Gladstone, supra* note 88 at para. 62 wrote:

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

97 *Gladstone*, ibid. at para. 58.

communities would likely still not get all the fish they want, even in the absence of aboriginal and treaty fishing rights. Consequently, if done respectfully, use of the public trust doctrine to re-allocate access to the fishery should not interfere with the efforts of New Brunswick Indians to exercise their aboriginal and treaty rights to fish.

On the other hand, aboriginal title over portions of the foreshore and seabed could have an effect on the use of the public trust doctrine to re-allocate fishery resources because title could arguably create exclusive native fisheries. Before this can happen, actual aboriginal title in tidal waters needs to be established in the same manner it is established on dry land—by proving occupation and exclusivity.[98] There is much evidence that the Mi'kmaq occupied many bays, coves and river mouths along the New Brunswick coast. Exclusivity requires that the aboriginal group prove it had the "intention and capacity to retain exclusive control."[99] Given their seafaring abilities, it appears the Mi'kmaq had the capacity to do so. If the Mi'kmaq could adduce evidence that they also had the requisite intent to retain exclusive occupation then a strong claim for aboriginal title to portions of the tidal waters of New Brunswick could be made.

A finding of aboriginal title in the seabed raises another question—does this title create an exclusive fishery? At present, there seems to be a reticence among judges to acknowledge such exclusive fisheries. In *Gladstone*, Lamer C.J. used the existence of a public right of fishing as a reason for limiting the Heiltsuk's aboriginal right to commercially harvest herring spawn on kelp.[100] *Gladstone* did not deal with the relationship between aboriginal title and the public right of fishing and therefore the question of their co-existence is not yet answered. However, if aboriginal exclusive fisheries existed prior to British sovereignty over New Brunswick, then they should, unless extinguished, continue to exist.

Two results could flow from this. The first is the adjacent aboriginal community has exclusive use to the geographic area. The other may be that the geographic area can be allocated to non-aboriginals but only after consultation with the adjacent aboriginal community.

In the end though, the idea that an aboriginal community can have future exclusive use of a particular geographic area of tidal waters where non-aboriginals have now established fisheries would probably not be

98 *Delgamuukw, supra* note 90 at para. 143.

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

100 *Gladstone, supra* note 88 at para. 67.

entertained by governments and perhaps aboriginal communities themselves. As the backlash following the decision in *Marshall No. 1* from trying to promote aboriginal fishing in existing fisheries, such as lobster, has shown, such a move would not be politically expedient.[101]

### (b) Public Forests

The possible interaction between aboriginal and treaty rights and the public trust doctrine in access to public forests[102] is similar to that of the fisheries. Aboriginal and treaty rights to commercially log to obtain necessaries has an inherent limit in the amount of timber required. Although fulfillment of these rights requires that priority be given to aboriginal communities, this, like allocations for community-based management really amounts to a new division of the existing timber pie. Aboriginal title on the other hand changes who has control over how the pie is divided.

One significant difference between aboriginal title in portions of New Brunswick tidal waters versus public forests is that exclusive aboriginal use of tracts of forests is not as politically risky. Non-aboriginals have long standing access to use tidal waters for commercial fishing ventures. The same is not true for New Brunswick's forests which have long been under exclusive use arrangements. Returning exclusive use to aboriginal communities does not change non-aboriginals' opportunities to participate in the forest economy, only who would determine what those opportunities might be.

## 6. CONCLUSION

Support for community-based management or citizen property[103] over natural resources in Canada is coming from new sources. The Select Committee on Wood Supply in New Brunswick recently recommended that wood allocations be tied to local communities and that steps be taken to achieve this goal whenever a mill ceases to operate in a community

---

101 For discussions regarding some of the conflict following the decision in *Marshall No. 1*, see Bruce Wildsmith, Q.C., "Vindicating Mi'kmaq Rights: The Struggle Before, During, and After *Marshall*," (2001) 19 Windsor Y.B. Access Just. 203 at 234-240; and CBC, "The Marshall Decision," (May 9, 2004), available at <http://www.cbc.ca/news/background/fishing/marshall.html>.

102 For a thorough review of the status of aboriginal forestry rights in Canada, see Deborah Curran and Michael M'Gonigle, "Aboriginal Forestry: Community Management as Opportunity and Imperative," (1999) 37 Osgoode Hall L.J. 711.

103 Roy Vogt, *Whose Property? The Deepening Conflict between Private Property and Democracy in Canada* (Toronto: University of Toronto Press, 1999).

(this would free up the wood allocated to that mill).[104] As well, the Standing Committee on Fisheries and Oceans provides cogent arguments why fishing communities should be involved in decision-making regarding the allocation of fishing quotas.[105] It is hoped that Canadian governments will respond positively to these recommendations so that resource-dependent communities can play a greater role in the stewardship of the environment. If not, then these communities may turn to the public trust doctrine to advance the cause of community-based management.

104 Legislative Assembly of New Brunswick, Select Committee on Wood Supply, *Final Report on Wood Supply in New Brunswick* (Fredericton: Fifty-fifth Legislature, New Brunswick, 2004) at 21 (Recommendation 17).

105 *Interim Report, supra* note 75.