Public Rights and the Lost Principle of Statutory Interpretation

*Andrew Gage**

This article examines whether the principles of statutory interpretation related to legislation that impacts on public rights can be used to provide legal protection for environmental values. It begins with a discussion of some of the public environmental rights that likely exist at common law, including the right to live free from unreasonable levels of pollution. The article then examines how the courts have construed statutes that impact public rights, demonstrating a common law presumption that a legislator would use clear and unambiguous language if it intended to interfere with such rights. The implications of this presumption are three-fold. First, statutes that have the effect of negatively impacting public rights should be interpreted strictly. Second, government decisions which have the effect of infringing public rights may be ultra vires *the decision-maker unless the statutory authority clearly contemplates that public rights may be impacted. Third, there is the potential to adapt administrative law procedural requirements of fairness to statutory decisions which negatively impact public rights. In addition, in interpreting statutes which purport to address social and environmental problems, the courts may assume that the legislator intends to recognize and affirm existing public environmental rights. The article closes with a brief examination of the relationship between the principle of statutory interpretation and the American public trust doctrine, as well as the social benefits of applying such a principle in construing the legislative intent behind statutes.*

Le présent article examine la question de savoir si les principes d'interprétation législative applicables aux lois qui ont un impact sur les droits publics peuvent être utilisés pour fournir une protection juridique aux valeurs environnementales. Il commence par discuter de certains droits publics en matière d'environnement qui existent vraisemblablement en common law, y compris le droit de vivre sans avoir à endurer des niveaux déraisonnables de pollution. Il se penche ensuite sur la façon dont les tribunaux ont interprété les lois qui ont un impact sur les droits publics et établit ainsi l'existence d'une présomption de la common law selon laquelle le législateur utiliserait un langage clair et non équivoque s'il avait l'intention d'affecter ces droits.

---

* B.A. (Victoria), LL.B. (Victoria) and Staff Lawyer, West Coast Environmental Law. The author wishes to thank the Canadian Bar Association Law for the Future Fund, Chris Harvey, Q.C., Chris Rolfe and Nancy Klenavic for their assistance in preparation of this article.

Cette présomption a trois sortes de conséquences. Premièrement, il faut interpréter de façon stricte les lois qui peuvent avoir un impact négatif sur les droits publics. Deuxièmement, les décisions gouvernementales qui ont comme effet de porter atteinte aux droits publics peuvent se situer en dehors du champ de compétence du décideur à moins que le pouvoir qui lui est conféré par la loi envisage clairement l'impact possible sur les droits publics. Troisièmement, les exigences procédurales en matière d'équité qui font partie du droit administratif peuvent possiblement être adaptées pour s'appliquer aux décisions législatives qui ont un impact négatif sur les droits publics. De plus, lorsque les tribunaux interprètent des lois qui sont censées aborder les problèmes sociaux et environnementaux, ils peuvent présumer que le législateur a l'intention de reconnaître et d'affirmer les droits publics existants en matière d'environnement. En terminant, l'article examine brièvement le lien existant entre le principe d'interprétation législative et la doctrine américaine de la fiducie publique, ainsi que les bénéfices sociaux découlant de l'application d'un tel principe dans l'interprétation de l'intention qu'avait le législateur en adoptant ces lois.

1. INTRODUCTION

You won't find "Public Rights" in the index of any of the main texts on statutory interpretation in Canada. You will find sections on aboriginal rights, possibly customary rights, and definitely private rights. This is astounding, as the case law is clear that statutes should be interpreted as affirming and protecting public rights unless they contain clear language to the contrary.

By ignoring this lost principle of statutory interpretation, Canadian courts have tended to emphasize private rights over the rights of the public, viewing statutes that affirm public rights at the expense of private rights with suspicion. The result is a bias in the legal system against such issues as the environment and public health, particularly when they interfere with powerful economic interests.

If the Canadian courts instead choose to recognize and affirm the importance of public rights, Canadian law can use an old principle of statutory interpretation to advance a new and more balanced approach to dealing with the environment and other disputes affecting public rights.

Part I of this article will consider a range of public rights that could be used to further environmental protection, suggesting that the public may have rights:

- not to have pollution or other environmental problems interfere with their lives;
- to the use of public waters, including rights of navigation, fishing, and possibly to have such waters kept free from pollution;

- to the use and maintenance of lands dedicated for public purposes, including parks; and
- to the maintenance of key environmental values, likely including air, water, river banks, sea shore and public forests.

In Part II the article will conduct a review of the cases that have interpreted legislation that impacts on public rights. The relevant principle — that statutes should be interpreted as not derogating from, and, where appropriate, affirming, public rights — will be illustrated and discussed in the context of interpretation of:

- Crown grants at common law;
- statutory instruments that have the effect of negatively impacting public rights;
- procedural measures designed by the courts to protect public rights; and
- legislation intended to advance the interests underlying existing public rights.

The article will then consider some issues arising from the principle established by the above review of the case law: whether the principle is limited to particular public rights (specifically the rights of navigation, fishing and the use of highways); how this approach is related to the American public trust doctrine; and, finally, what public policy benefits result from such an approach to statutory interpretation.

2. PART I — WHAT ARE PUBLIC RIGHTS?

This article considers the relationship between public rights and statutory interpretation. Since public rights are not always a familiar concept, it is appropriate to begin with a general definition written by G.V. La Forest:

> By public rights is not meant rights owned by government, whether federal, provincial or municipal. These bodies may own land and water rights...in the same way as private individuals, in which case they are, in a manner of speaking, public rights. But what is here called public rights are those vested in the public generally, rights that any member of the public may enjoy.[1]

This article takes the position that the recognition of public environmental rights in the interpretation of statutes can play an important role in envi-

---

1 G. La Forest, *Water Law in Canada — The Atlantic Provinces* (Ottawa: Information Canada, 1973) at 178. Although written in the context of public rights arising from navigable rivers, the definition is more generally applicable.

ronmental protection. As it may not be clear what rights the public has in relation to the environment, this part will briefly examine some of the case law. In particular, this part will consider public environmental rights: (a) arising from the public right not to be exposed to environmental threats to person or property (i.e. public nuisance); (b) incidental or analogous to well established public rights related to public waters; (c) arising from the dedication of land to public purposes; and (d) pointed to by early and recent authority suggesting a more general public right to have environmental values protected. Finally, this part will close by examining common law protection granted public rights against government action taken without the benefit of statutory authority.

(a) Public Nuisance

The classic public right at common law is the right of the public not to be subjected to a public nuisance. A public nuisance occurs when:

> the conduct complained of...amount[s] to...an attack upon the rights of the public to live their lives unaffected by inconvenience, discomfort or other forms of interference.[2]

This public right is conceptually related to the rights of a private property owner defined by the tort of private nuisance, although they have different historic roots.[3] A private nuisance is defined as unreasonable interference with the use and enjoyment of land, including through:

> . . .physical damage to the land, interference with the exercise of an easement, *profit à prendre* or other similar right, or injury to the health, comfort or convenience of the occupier. In short, it is an environmental tort.[4]

In addition to a resemblance between the rights protected (a right to be free from unreasonable inconvenience, discomfort or harm) there is a more tangible relationship between public and private nuisances. Conduct that would otherwise be a private nuisance will become public in nature when the conduct complained of negatively impacts a significant portion of the public at large. While there is no hard dividing line between the two types of nuisance, the courts have said that a nuisance will be public when it:

---

2 *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at 236, quoting G.H.L. Fridman, *The Law of Torts in Canada*, vol. I (1989), at 168.

3 Public nuisance first arose as a criminal offence, rather than an actionable tort: A. Linden, *Canadian Tort Law*, 6th ed. (Toronto: Butterworths, 1997) at 524.

4 Ibid. at 530-31.

> . . .is so widespread in its range or indiscriminate in its effect that it is not reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility to the community at large.[5]

Environmental problems, by their nature, will often affect a class of the public, and not merely a small number of individuals.

While not all public nuisances will also result in private nuisances, any nuisance that affects a sufficient number of private property owners will also be a public nuisance; thus some public nuisances can be viewed, at least in part, as a cumulative version of the private rights of members of the public.[6] Once a nuisance becomes a public nuisance, an action to enforce the rights of the public may only be brought by the Attorney General.[7] However, in some cases a nuisance may be both private and public in nature.[8]

Since environmental problems can represent a very real and significant interference with the rights of both private individuals and of the public at large, nuisance has often been used to address environmental problems:

> Nuisance law — in its public and private forms — now covers a wide range of objectionable activities, such as noise, vibrations, noxious odours, air and water pollution....Using more modern terminology, nuisance law has become a citizen's weapon in the battle for a better environment.[9]

In environmental terms, then, the public has a right to live their lives without being subjected to unreasonable levels of air pollution, odours, noise, water pollution, and other environmental problems capable of interfering with their lives.[10]

---

5 *Attorney General v. P.Y.A. Quarries Ltd.*, [1957] 1 All E.R. 894 at 908 (Eng. C.A.) per Denning L.J.

6 The relationship between public and private nuisance is sufficiently strong that most commentators on tort law deal with the two, notwithstanding their differences, as two versions of the same concept, with discussion of both found in a single chapter entitled "nuisance."

7 There is also an exception where an individual has suffered a harm that is different than the harm suffered by the general public. For discussion of this complex area of the law, and its implications on the effectiveness of public nuisance as an environmental tort, see J. McLaren, "The Common Law Nuisance Actions and the Environmental Battle — Well-tempered Swords or Broken Reeds?" (1972) 10 Osgoode Hall L.J. 505.

8 *Stein v. Gonzales* (1984), 31 C.C.L.T. 19 at 23 (B.C. S.C.), per McLachlin J.

9 Linden, *supra* note 3 at 524; both private and public nuisance actions do have shortcomings as tools of environmental protection. See McLaren, *supra* note 7.

10 M. Faieta, *Environmental Harm: Civil Actions and Compensation* (Toronto: Butterworths, 1996) at 46-52.

(b) Public Waters and Public Rights

In addition to the public's right to be free from interference with their daily lives, the public has well established rights in relation to public rivers and the ocean. The most notable of these rights are the public rights to fish and to navigate on such rivers.[11]

There is no doubt that certain types of water pollution can interfere with the public's exercise of these rights, and there are several examples of the courts restraining pollution on the basis that it interferes with the public's exercise of these two rights.[12]

Such orders have also been granted even where there is relatively little evidence as to specific harm to the fishery or navigation,[13] leading some to argue that there is a more general right of the public to clean water: "[In addition to public fishing and navigation rights] Courts have also recognized that the public has a right to unpolluted natural water sources and water bodies."[14]

A judicial suggestion that public rights to clean water might extend beyond pollution that negatively impacts fishing and navigation rights is to be found in the early case of *Upper Canada (Attorney General) v. Harrison*, a case concerning a sawmill that deposited sawdust into a public river. While the sawdust had an impact on fish habitat and at least a potential long-term impact on navigation, the court expressed the view that the rights of the public in respect of a public river were analogous to the rights of a private riparian owner to use a private river.

> That [the nuisance] would be a case for relief at the suit of a subject if this were a private water-course can scarcely be questioned. I refer to the exposition of the law by Sir W. Page Wood, in *The Attorney-General v. Birmingham*, because

---

11 La Forest, *supra* note 1 at 178, listing these two rights as arising in public rivers, together with a public right to float logs.

12 For example, *R v. Fisher*, (1891), 2 Ex. C.R. 365 (Can. Ex. Ct.), in which silt deposited in a bay leading to a build-up of a sand-bar at the entrance to the bay was held to be a public nuisance. See also *Hickey v. Electric Reduction Co.* (1971), 21 D.L.R. (3d) 368 (Nfld. S.C.).

13 For example, in *R. v. "Sun Diamond"(The)*, [1984] 1 F.C. 3 (Fed. T.D.), cited with approval in *British Columbia v. Canadian Forest Products Ltd.*, [2004] SCC 38 [*Canfor*] at para. 69, the government of Canada was successful in a claim for damages in public nuisance for the costs of cleaning up an oil spill, with limited evidence of actual damage to fish stocks (although some damages were awarded on the basis of compensation paid to fishermen for damaged fishing equipment). Similarly in *Blanchard v. Cormier* (1980), 30 N.B.R. (2d) 198 (N.B. C.A.) the court found that the deposit of waste that discoloured the water was a public nuisance, noting that the polluted water was one that any member of the public might swim in.

14 Faieta, *supra* note 10 at 47-48.

> it states the law clearly and succinctly, and is not inapposite to this case...."[A riparian proprietor] has a clear right to enjoy the river, which before the defendants' operations flowed unpolluted, or, at all events, so far unpolluted that fish could live in the stream, and cattle would drink of it....He is entitled to the full use and benefit of the water in the river just as he enjoyed them before the passing of the municipal act . . ." The rights of the public in navigable waters are co-relative with that of a riparian proprietor. . .[15]

Recent statements from the Supreme Court of Canada on the long history of the public's rights in respect of oceans and running water support this view.[16] Similarly, that court's statement, in the context of a private claim for relief from water pollution, that "[p]ollution is always unlawful and in itself constitutes a nuisance,"[17] may be equally applicable to a claim for public nuisance.

At the same time, it is important not to underemphasize the fact that, to date, the rights of fishing and navigation are by far the best established of the public rights in respect of public waters.[18] Moreover, while those two rights can be used to prevent pollution from interfering with public use of the resource, they are not rights based on conservation of a public resource, but rather on use of that resource. As such, they will not always promote sound environmental stewardship.

(c) Land Dedicated for Public Use

Along with public fishing and navigation rights, the public's right to use highways is one of the best entrenched of the public rights. There are several different ways that a public highway can be created, with modern highways most often relying on statute. However, even highways statutes frequently refer to the common law process of dedication and acceptance. At common law, a public highway could be created when: (1) a property owner, including the Crown, dedicates land for use as a highway; and (2) the public signifies its acceptance of the dedication by making use of the land for that purpose.[19]

---

15 (1866), 12 Gr. 466 (U.C. Ch.) [*Harrison*] adopting the language of an earlier riparian rights case, *Attorney General v. Birmingham*, 4 K. & J. 528, as a valid statement of the public rights associated with public rivers.

16 *Canfor, supra* note 13 at para. 66, discussed further below at notes 26 to 31.

17 *Groat v. Edmonton (City)*, [1928] S.C.R. 522 at 532, per Rinfret J.

18 La Forest, for example, does not list an independent right to have public waters kept clear from pollution: *supra* note 1.

19 *Schraeder v. Grattan (Municipality)*, [1945] 4 D.L.R. 351 at 356 (Ont. H.C.); see also *McCann v. Dugas* (1979), 27 N.B.R. (2d) 361 (Q.B.). Concerning the ability of the Crown to bind itself through such a dedication, see *R. v. Moss* (1896), 26 S.C.R. 322 at 332-33; *Turner v. Walsh* (1881), 6 A.C. 636 (J.C.P.C. (New South Wales)).

Obviously a public right to use a highway is not an environmental right.[20] However, it appears that the same process of dedication and acceptance is equally capable of dedicating lands for a range of public uses. In *Wright v. Long Branch (Village)* the Supreme Court of Canada found that the public had a right to access and maintain a memorial located on private land. In doing so, the court adopted the language of the Ontario Court of Appeal:

> In *Re Lorne Park Road,*[21] the Appellate Division, speaking through Clute J.A., at 59 referred to 13 Cyc. 444 (IV.A.):
>
> > The doctrine expounded in the early English cases was applied to highways, but was gradually *extended to all kinds of public easement, such as squares, parks, wharves, etc.*, ...
>
> and to 448:
>
> > *The full applicability of the doctrine of dedication to parks and public squares and commons is now generally recognized*, and where land is dedicated for a public square without any specific designation of the uses to which it can be put, it will be presumed to have been dedicated to such appropriate uses as would under user and custom be deemed to have been fairly in contemplation at the time of the dedication.
>
> These references were not strictly necessary to the judgment but they are in harmony with previous authorities in the province and the extension given to parks, etc., is universally established in the United States. [Emphasis added][22]

It appears that dedication of parkland at a minimum may create public rights of access and recreational use.[23] Thus in *Carpenter v. Smith* an Ontario County Court judge applied the law concerning dedication and acceptance to find that public recreational rights existed in respect of a beach.[24] Similarly, the Nova Scotia Supreme Court recently accepted that it was "at least arguable" that the public could have acquired recreational rights in this manner in respect to an island.[25]

---

20 Although it has occasionally been used against pollution that interferes with use of the highway: *Code v. Jones* (1923), 54 O.L.R. 425 (C.A.) [*Code*] concerning a gas pump which interfered with use of a public highway due to location and noxious fumes.

21 (1914), 33 O.L.R. 51 (Ont. C.A.).

22 *Wright v. Long Branch (Village)*, [1959] S.C.R. 418 at 423 [*Wright*]; while the dissenting judges would have held that there was insufficient evidence of a dedication, they agree with the majority's statement of the law.

23 It is less clear whether it is possible to dedicate lands to the public for conservation purposes, and, if so, how the public's acceptance of such purposes would be signified.

24 [1951] O.R. 241 (Co. Ct.).

25 *Frank Georges Island Investments v. Nova Scotia (Attorney General)* (2004), 2004 CarswellNS 280 at para. 37 (N.S. S.C.). On the facts of this case, Moir J. found that there was no evidence that such dedication of the island had actually occurred.

(d) General Environmental Rights — *British Columbia v. Canadian Forest Products Ltd.*

The concept of public environmental rights received a recent boost in the recent Supreme Court of Canada decision in *British Columbia v. Canadian Forest Products Ltd.*,[26] which endorsed the view that the public may have a general interest in the environment. The approach taken by the court at a minimum strengthens the public environmental rights discussed above, suggesting that public rights need not be based on inconvenience to the public or the public's use of resources.

The case arose in the context of a claim, by the Province of British Columbia, for damages arising from a forest fire caused by Canadian Forest Products. By the time the issue reached the Supreme Court there was no dispute that Canfor had caused the fire through its negligence, and that it could be required to pay for the damage to commercially valuable timber. The controversy arose around whether the logging company should also be required to pay compensation for the loss of forest that would not be commercially logged, either because it was protected for environmental reasons or because the costs of logging the timber was excessive.

The Supreme Court discussed the common law concerning public nuisance as a basis for recovering compensation for the environmental value of the timber. In doing so, the court endorsed early authority that held that the public had rights in various aspects of the natural environment:

> The notion that there 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 ... (T.C. Sandars, The Institutes of Justinian (5th ed., 1876), at 2.1.1)
>
> A similar notion persisted in European legal systems. According to *The French Civil Code*, art. 538 (translated by E.B. Wright (1908)), 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 . . .

26 *Canfor*, *supra* note 13.

> 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* [the law of nations]. . .[27]

The court concluded that these public rights, as applied in nuisance law, could in theory result in compensation for "environmental damage" to public lands.[28] Such environmental harm was not based on the potential for market use of the resource, or on direct inconvenience to the public, but apparently on the basis of the "public's interest" in having the forest continue to stand.[29]

The court also noted that public environmental rights might raise questions as to fiduciary duties owed by the Crown to its subjects, possibly resulting in liability in cases where the Crown fails to protect public rights,[30] as well as the potential for the common law, "if developed in a principled and incremental fashion, to assist in the realization of the fundamental value of environmental protection."[31]

Although a majority of the judges hearing the case ultimately dismissed the Crown's claim on a technicality related to pleadings, the court was unanimous that public rights could have provided a basis for a claim for compensation for environmental features that had no commercial value whatsoever.

The court, therefore, seems to be inviting the articulation of public rights in respect of the maintenance of key environmental features such as running water, air, the sea, seashore, and river banks.

(e) Summary of Environmental Public Rights

The above should not be viewed as a full discussion of the nature and scope of public rights or as providing a comprehensive list of such rights at common law. While some public rights are well established, the exis-

---

27 Ibid. per Binnie J. at paras. 74-75.

28 Ibid. at para. 81.

29 Ibid. at para. 66, holding that burning down a public forest is capable of constituting a public nuisance, as "an activity which unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience," (a definition adopted from *Ryan*, *supra* note 2 at 168). Note that at para. 57 the Court outlined some of the environmental services that a forest provides that were removed by the fire: "The result has been serious physical damage to 1,491 hectares of formerly green forests. One could reasonably anticipate that the environmental impact, apart from dimunition of the value of the timber, was also significant. Erosion problems have likely been aggravated. Fish habitat likely threatened. Water supply to the local community to some extent degraded. Forest vistas replaced with the skeletons of blackened trees."

30 Ibid. at para. 81.

31 Ibid. at para. 155.

tence of others is less clear. Development of the common law anticipated by the Supreme Court in *Canfor* will likely necessitate greater judicial and academic attention to the exact parameters of public rights.

Many of the cases applying the principles of statutory interpretation discussed in this article are drawn from litigation concerning the best defined of the public rights discussed above (specifically public rights related to fishing, navigable waters and highways). This demonstrates the importance of more clearly defining the public's rights if they are to be effectively recognized and protected by the law.

In summary, the following is a very partial list of environment-related public rights that the law of public nuisance and other case law suggest may exist at common law:

- Right to not have unreasonable interference with "public convenience or welfare,"[32] including threats to public safety;[33]
- Right of use of public rivers[34] and oceans[35] (including rights of fishing[36] and navigation[37]);
- Rights of use of lands dedicated for public use[38] (including rights of public highways,[39] "parks, and public squares and commons"[40] and other dedicated public spaces);[41] and
- Rights to maintenance of key environmental features[42], likely including healthy fish stocks, clean air and water, and publicly owned forests.[43]

Unfortunately many of these public rights have not had the benefit of legal attention, and there remain unanswered questions about their nature and scope. As these rights become better articulated in the future, it will become easier for the courts to apply them as an effective tool for environmental protection.

---

32 Linden, *supra* note 3 at 525, *Ryan*, *supra* note 2.
33 *Ryan*, *supra* note 2 at 237.
34 *Canfor*, *supra* note 13 at paras. 74-75; *Harrison*, *supra* note 15 at 473.
35 *Sun Diamond*, *supra* note 13.
36 *Reference re Provincial Fisheries* (1895), 26 S.C.R. 444; *British Columbia (Attorney General) v. Canada (Attorney General)* (1913), 5 W.W.R. 878 (Canada P.C.).
37 *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 [*Friends of the Oldman River*].
38 *Wright, supra* note 22.
39 *Supra* note 19.
40 *Wright*, *supra* note 22 at 423.
41 In *Wright*, ibid., the public was held to have a right of access to a monument; see *Carpenter, supra* note 24 in relation to public recreation rights to a beach.
42 *Canfor*, *supra* note 13 at paras. 74-76.
43 *Canfor*, ibid., concerned liability for a forest fire that destroyed public forests.

(f) Crown Interference with Public Rights

Before moving to discussion of the construction of statutes that impact on public rights, it is important to note that the Courts have traditionally protected such rights from royal interference. In particular, the Crown had no power at common law to grant a private party the authority to interfere with public rights. Related to this principle was the idea that public rights would be paramount over any private rights the Crown granted in respect of the same resource or land.

One of the most authoritative and recent cases on this principle is the Supreme Court of Canada decision in *Friends of Oldman River*. La Forest J., writing for eight of the nine judges, turned to the common law concerning the public right of navigation for assistance in interpreting the federal *Navigable Waters Protection Act*. The court then discussed, with approval, the cases of *Attorney General v. Johnson* (1819)[44] and *Wood v. Esson* (1884),[45] as illustrating the presumption that the Crown could not easily interfere with the public right of navigation, concluding:

> The nature of the public right of navigation has been the subject of considerable judicial comment over time, but certain principles have held fast. First, the right of navigation is not a property right, but simply a public right of way . . .. It is not an absolute right, but must be exercised reasonably so as not to interfere with the equal rights of others. *Of particular significance for this case is that the right of navigation is paramount to the rights of the owner of the bed, even when the owner is the Crown. . . .*
>
> *[A]nother aspect of the paramountcy of the public right of navigation [is]...that it can only be modified or extinguished by an authorizing statute, and as such a Crown grant of land of itself does not and cannot confer a right to interfere with navigation.* [Emphasis added][46]

After reviewing the common law and the history of the *Navigable Waters Protection Act*, La Forest J. found that the Act did provide the statutory language necessary to authorize interference with the public right of navigation, and that without such statutory authority the Crown was bound not to create or authorize a public nuisance (that is, to violate a public right).[47]

---

44 (1819), 37 E.R. 240 (Eng. Ch. Div.).

45 (1884), 9 S.C.R. 239.

46 *Friends of the Oldman River*, *supra* note 37 at 54-55 per La Forest J.

47 Ibid. at 59: ". . .the circumstances surrounding the passage of the legislation, informing as they must the context of the statute, do lead to the logical inference that the Crown in right of a province is bound by the Act by necessary implication. Neither the Crown nor a grantee of the Crown may interfere with the public right of navigation without legislative authorization....Parliament has entered the field principally through the passage of the

The Supreme Court of Canada's conclusions in this regard are well supported by the jurisprudence.[48]

These cases establish that public rights cannot be legally affected through Crown grants without statutory authority. They do not indicate how statutes which grant such authority are to be construed. These cases do demonstrate, however, the considerable value that the courts have attached to public rights, and the reluctance, at least as against the Crown, to allow interference with such rights.

3. PART II — LEGISLATION DEALING WITH PUBLIC RIGHTS

Sullivan, in the third edition of *Driedger* states a general principle: that a legislator is presumed not to intend "to abolish, limit or otherwise interfere with the rights of subjects. Legislation that curtails rights is strictly construed."[49] However, in the discussion that follows, the rights of the public, as a specific example of this general principle, are not discussed.

As we will see, this general principle does apply to public rights, just as it applies to private rights and aboriginal rights.

The courts have applied this principle to government actions in a range of cases, including in relation to:

(1) Crown interference with public rights;
(2) Statutes interfering with public rights;
(3) Procedural protections intended to ensure public rights; and
(4) Statutes affirming public rights.

Navigable Waters Protection Act which delegated to the Governor General in Council, and now the Minister of Transport, authority to permit construction of what would otherwise be a public nuisance in navigable waters." This conclusion seems at odds with earlier jurisprudence: *Champion & White v. Vancouver (City)* [1918] 1 W.W.R. 216 (S.C.C.).

48 For example, *Gage v. Bates* (1858), 7 U.C.C.P. 116 at 121-22, adopting the same principle in regard to fishing: ". . .the king cannot by any grant or charter, including the soil or fishery, convey a several right to any individual to preclude another from the exercise of his general right of fishing. . .". See also *Donnelly v. Vroom* (1907), 40 N.S.R. 585 (N.S. S.C.); *R v. Hunt* (1865), 16 U.C.C.P. 145 (in relation to grants affecting highways); Smallwood, below, note 105 at 23-24 cites the following English Cases in support of this principle: *A.G. v. Parmeter* (1811), 10 Price 378 at 400-401; *Gann v. Free Fishers of Whitstable* (1865), 11 H.L. Cas 192 at 207-208; *A.G. v. Burridge* (1822), 10 Price 350; *Williams v. Wilcox* (1838), 8 Ad & Ed. 314; and *A.G. v. Wright*, [1897] Q.B. 318.

49 R. Sullivan, *Driedger on the Construction of Statutes,* 3d. ed. (Toronto: Butterworths, 1994) at 370.

Taken collectively, the cases discussed demonstrate the importance that the courts have attached to public rights and the strength of the presumption that a legislator does not intend to interfere with such rights.

(a) Crown Interference with Public Rights

As discussed, at common law the Crown could not interfere with public rights without clear statutory authority. Perhaps not surprisingly, this in turn led to a strong presumption that grants made by the Crown should not be interpreted as purporting to grant authority to affect public rights.

Thus, in *Attorney General v. Harrison*,[50] a case heard by the Court of Chancery of Upper Canada in 1866, a sawmill was sued in public nuisance for dumping its sawdust and other waste into the river on which it operated. The nuisance in question was two-fold: the sawdust was sinking and building up on the bottom of the river, potentially impacting on navigation on the river in the long-term,[51] and the sawdust had killed or driven away fish in the river. When the defendants argued that a term of their grant, which required them to construct a sawmill, endorsed the siting of the mill and the deposit of sawdust into the river, the Court dealt with this objection on two related grounds:

> That, however, can amount to no more than this, that the obligation to erect a saw-mill imposed by the Crown, carried with it an implied license to drop sawdust into the river. This is open to more than one answer. *One is that the Crown cannot grant a license to commit a public nuisance. It would be licensing an individual to do that which interferes with a right which is the common inheritance of the people. Another is, that such a license is not to be implied: it would be derogating from the honor of the Crown to assume an intention to do that which would be injurious to the people*; and it would be assuming ignorance on the part of the Crown of its own powers and of the rights of the subject. [Emphasis added][52]

Similarly, in 1908 the Supreme Court of Canada considered whether a grant of land allowed the owner to divide up the land and sell it as beach lots, thereby depriving the public of a right of access to the beach. The case came down to an interpretation of the grant, and whether the Crown had intended to reserve some of the land for public access. Unlike in

---

50 *Supra* note 15.

51 It appears that there had not actually been any impact on navigation at the time that the case was heard, due to the practice of the plaintiff (suing in the name of the Attorney General in a related action) of dredging the river on a regular basis to ensure that navigation could continue: ibid. at 472.

52 Ibid. at 473.

Harrison, the court did not suggest that the Crown had no ability to impact the public's rights, but nonetheless found that the grant should be interpreted so as to preserve such rights:

> The Crown, as owner of the foreshore, had undoubtedly the right to cut it up and dispose of it as it deemed best; but clearly *in so doing it owed a duty to the general public*, irrespective of the special rights of the riparian owners to protect them in the enjoyment of the common law right of *accès et sortie* to the river....*It is not to be assumed that the crown would be more solicitous for the private interests of certain individuals than for the common law rights of the general public*. . .[Emphasis added][53]

In summary, interference with public rights will require legislative sanction and grants made by the Crown should be presumed as not intending such interference.[54]

The common law treatment of the impact of Crown prerogative powers on public rights does not, of course, determine how statutes impacting such rights will be interpreted. However, the court's language about the importance of public rights to the "honour of the Crown" supports the view that an intention to interfere with such rights, even in a statutory context, will not be easily inferred. We must turn to the case law regarding statutes that interfere with public rights for confirmation of that suggestion.

(b) Statutes Interfering with Public Rights

The principles of interpretation outlined by the courts in cases regarding Crown grants that impact on public rights are easily transferable to statutory construction. And, not surprisingly, the Courts have insisted on strict interpretation of legislative provisions impacting on public rights.

Two decisions of the Supreme Court of Canada made in 1910 considered the impact of railways on public rights. In determining that legislation governing the Canadian Pacific Railway did not authorize the blocking of public highways, the court held:

> When we consider that a legislative concession [to authorize the blocking of public highways] *must be clear before the public rights can be so invaded or such supposed to have been an intent of these so legislating*, and we do not find it clearly so expressed, the claim fails. [Emphasis added][55]

---

53 *Rhodes v. Perusse* (1908), 41 S.C.R. 264 at 268-69.

54 For a further example of interpretation of a grant, see *Leamy v. R.* (1915), 23 D.L.R. 249 (Can. Ex. Ct.).

55 *Canadian Pacific Railway v. Toronto (City)*, (1910), 42 S.C.R. 613 at 645 per Idington J.; similarly, Davies J. references the impact on public rights in concluding, at 631, that

In *British Columbia Electric Railway v. Crompton*, the Supreme Court considered a claim for damages by a resident of Victoria who received an electric shock from the lighting system of the railway company. The majority took the view that the *Consolidated Railway Companies Act* of 1896 provided the railway company with legal protection in the form of a limitation period. However, Idington J., in dissent, apparently took the view that the company's management of their electrical system constituted a public nuisance, and relied upon:

> the well-known rule that anything in the way of legislation abridging the public rights or the rights of any of the public in favour of one acquiring a concession from Parliament or other legislative body must be construed strictly, and that the right must not be extended by implication. . .[56]

None of the other judges apparently viewed this matter as concerning public rights, and did not comment on Idington J.'s "well known rule."

The principle was illustrated again, in 1913, when the Halifax Power Company sought to expropriate land, including sections of the Indian and North-East rivers, for the purpose of building a dam, effectively diverting both rivers. There was considerable opposition to the proposal, and applications for injunctive relief were appealed to the Nova Scotia Supreme Court – Appeals Division, not once, but twice.

There is no doubt that the Lieutenant Governor in Council had broad powers to expropriate, including streams and rivers, on behalf of Halifax Power Company.[57] However, in both cases the judges looked for an explicit indication that the Legislature had intended to authorize an impact on public rights. In *Miller v. Halifax Power Co.* the petition ultimately failed on technical grounds of prematurity. However, two of the four judges would have granted the injunction, holding that the Act did not confer a power to extinguish public rights over the rivers in question.[58]

---

the interpretation urged by the railway company was "a singular construction."

56 (1910), 43 S.C.R. 1 at 13 [*B.C. Electric*] per Idington J.

57 "Whenever it shall be necessary that the company should be vested with lands...or whenever it may be necessary for the company to acquire *lakes or streams or lands covered by water*, or any easement therein...it shall be lawful for the company to apply by petition to the Governor-in-Council...[T]he Governor-in-Council], if satisfied, the property or easements sought to be expropriated is actually required for carrying on the works of the company...and is otherwise just and reasonable, shall thereupon by order-in-council declare the lands, lakes, streams, lands covered with water, or easements...to be vested in said company in fee simple . . .": S.N.S. 1911, c. 113, ss. 17, 19.

58 *Miller v. Halifax Power Co.* (1913), 13 D.L.R. 844 (N.S. C.A.) [*Miller*] per Ritchie J. at 852:

> Under [an Act granting a public right to use rivers for log booming] the public have rights which I think are inconsistent with the rights sought by expropriation. There is evidence that the said rivers have from time out of memory been floatable for logs

In *Thomson v. Halifax Power Co.* the issue of prematurity had been resolved, and Graham E.J., writing for a unanimous Court, held that the power company's expropriation powers did not extend to extinguishing public rights:

> It is purposed now with general words to destroy the public rights, and the rights and franchises of the corporations by diverting this river. In my opinion, the general words "streams and lands covered with water" ought to be limited so that these statutory rights will not be altered. Section 17 has abundant scope for application for private rivers in which there are no such rights. Take the case of highway, you cannot acquire compulsorily a highway *under general words enabling you to take land.* [Emphasis added][59]

In 1917 the Supreme Court of Canada, in *Champion & White v. Vancouver (City)*, held that the federal government's *Navigable Waters Protection Act* did not indicate a clear legislative intention to allow the Governor-General in Council to authorize the city of Vancouver to interfere with the public right of navigation by building a sea-wall.[60]

In the 1920s the Ontario Court of Appeal considered two cases concerning interference with public highways in which they applied the presumption against legislative interference with public rights, holding, respectively:

> There is no inherent right or authority in the municipality to place an obstruction on the highway: such right or authority must be *expressly conferred* by the Legislature.[61] [Emphasis added]

And:

> . . .I mention [the public rights to use the highway] in order to bring into bolder relief the fact that *the right of the public in the King's highway has always been jealously guarded by the Courts and is not lightly to be interfered with.* There is no question but that the Legislature of Ontario can by statute modify or abolish that right; but, *if it is to be modified and the rights of the public curtailed or*

> and have been used from time to time, as occasion might require, for lumber driving purposes. *I have to get at the intention of the legislature.* In view of the existing legislation and of the rights of the public, I have come to the conclusion that *the legislature could not have properly intended, and this is a reason for holding that it did not intend, by the general words used in section 17 to cover this case. If it has been so intended I think explicit and particular words, not general words such as used in this section which do not indicate any particular locus, would have been used to take away the rights of the public and the rights acquired under the Act of 1875.* [Emphasis added]

59 (1914), 16 D.L.R. 424 at 431 (N.S. C.A.) [*Thomson*].

60 *Supra* note 47. This aspect of *Champion* was applied by the B.C. Supreme Court in *Nicholson v. Moran*, [1949] 4 D.L.R. 571 (B.C. S.C.). These decisions seem at odds with the comments of the court in *Friends of the Oldman River*, *supra* note 37.

61 *Code*, *supra* note 20, per Kelly J. at 426.

> *affected, the will of the Legislature must be unequivocally expressed.* [Emphasis added][62]

Much more recently, in *R. v. Gladstone*, the Supreme Court of Canada turned to the public right to fish to assist in interpreting the scope of an aboriginal right to a commercial fishery. The court held that while the constitutional nature of aboriginal rights means that aboriginal fishing rights may have priority over the public's fishing rights, s. 35 of the *Constitution Act, 1982* did not indicate a sufficient intention to extinguish public rights.[63]

There is also authority that where legislation is intended to interfere with public rights, it will only do so to the extent "rendered necessary by what the act authorizes."[64] Even where there is valid interference with rights, then, such rights should not be presumed to be extinguished.[65]

On the basis of such authority, it appears that legislation must be "express" and "unequivocal," demonstrating a clear and unambiguous intention to restrict or extinguish public rights before such rights will be extinguished.[66]

Whether a statute can be said to interfere with public rights will depend on the wording of the individual statute. How specific does the statute need to be? It would appear that the phrase "public rights" need not be used, and that it is enough to regulate the subject matter of the public right in a manner that clearly indicates an intention to restrict or eliminate the public right.[67]

Nonetheless, these cases support the view that there is a strong presumption that statutory provisions should be interpreted as not interfering with public rights. Legislation will only authorize interference with public rights where the legislator's intention to do so is clear and unambiguous

---

62 *Ontario Hydro-Electric Power Commission v. Grey* (1924), 55 O.L.R. 339 at 344 (Ont. C.A.). See also 346. Note, however, that Middleton J.A. relied instead, at 341-2, upon a principle of statutory construction that a statute should not be presumed to authorize one public body to "invade the province of another public body."

63 [1996] 2 S.C.R. 723 at 770-71 [*Gladstone*].

64 *Vancouver (City) v. Canadian Pacific Railway* (1894), 23 S.C.R. 1 at 22 per King J.

65 *Gladstone*, *supra* note 63.

66 In addition to the case law discussed above, this test is consistent with the test concerning the extinguishment of community-held customary rights (such as aboriginal rights): *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1099, holding that an intention to extinguish aboriginal rights must be "clear and plain."

67 This is the implication from *Friends of the Oldman River*, *supra* note 37, in which the Supreme Court clearly accepted that the *Navigable Waters Protection Act* did authorize the federal government to interfere with the public right of navigation. See also *Vancouver (City) v. Canadian Pacific Railway*, *supra* note 64, in which public rights of access were extinguished by necessary implication.

on the face of the legislation or where an intention to negatively affect public rights is the unavoidable consequence of the operation of the Act.

This principle presumably applies not only to primary legislation, but also to subordinate legislation and decisions authorized by primary legislation. The fact that a statute does authorize interference with public rights does not mean that regulations, grants or other decisions made under that statute should be presumed to impact public rights. In most cases the legislation will merely give the decision-maker the discretion to interfere with public rights — a discretion which should be exercised in a clear manner.

(i) *Judicial Review to Protect Public Rights*

The principle that legislation should be interpreted, where possible, as not interfering with public rights applies to legislation authorizing statutory decisions. As a result, statutory provisions creating regulation-making powers or statutory decision-making powers will be presumed not to delegate the power to interfere with public rights, unless such a power is expressly delegated.

This raises the far-reaching possibility of a judicial review where a government decision purports to authorize interference with a public right without clear statutory authority to do so. Regulations or statutory decisions which have such an effect will be *ultra vires* a decision-maker unless the enabling statute specifically contemplates such an impact.

Most of the above cases arose in the context of litigation concerning an alleged public nuisance, and dealt with the question of whether legislation or a statutory decision provided a defence to such a nuisance. However, there are a few Canadian cases in which a government decision that purported to authorize a public nuisance has been challenged as *ultra vires* the decision-maker.[68]

Miller and *Thompson*,[69] which effectively challenged the ability of the Lieutenant Governor in Council of Nova Scotia to authorize the diversion of two public rivers, are discussed above.

In 1928 the Supreme Court of Canada considered a further case in which a public right was held to constrain a statutory decision-maker. The *Fish Canneries Reference* dealt with, among other issues, the ability

68 In addition to Canadian authority, it should be noted that the American courts have taken just such an approach, under the U.S. public trust doctrine, discussed below at notes 113 and 114.

69 *Miller*, *supra* note 58 and *Thomson*, *supra* note 59.

of the federal Minister of Fisheries to decline to issue licenses under the *Fisheries Act* to Canadians of Japanese ethnic origin.

The language of the *Fisheries Act* on its face gave the Minister wide discretion to decide whether or not to issue a fisheries license. However, a majority of the Supreme Court of Canada, in a decision unanimously upheld by the Judicial Committee of the Privy Council, held that the public's right to fish effectively constrained this discretion:

> The regulations in question [setting out the requirements for a license application] thus affect both public and private rights of fishing, and they should not be interpreted to derogate from those rights further than may be requisite to give the regulations their necessary and due effect....It is true that the licensing power is committed to the head of the Department [of Fisheries], and no doubt it will be administered with due care, but, if it were intended that he should exercise a discretion to refuse a license to a qualified applicant, there would, I should think, have been something expressive and definitive of that intention....No express power is conferred upon the Minister, except to issue licenses, and, in my view, it is improbable that it was intended to confer a reviewable discretion, or that, unless by plain legislative direction, discretionary licensing authority would have been granted which could be exercised in a manner that might sanction discrimination.[70]

The fact that there are not more examples of challenges of government decisions based on public rights likely arises from the fact that until recently the Attorney General was considered the sole guardian of such rights; a member of the public did not have standing to challenge an illegal government decision unless his or her personal or property rights were directly affected. This formidable barrier has only been overcome relatively recently, with the Canadian courts recognizing public interest standing as a basis for challenging *ultra vires* government decisions that would otherwise be difficult or impossible to challenge.[71]

For a sense of how a judicial review on the basis of public environmental rights might work, it is useful to consider a tangible example. Consider, for example, logging on public lands under B.C.'s *Forest Practices Code*. Until recently the Act provided a government decision-maker with authority to approve logging plans when "satisfied that the plan or

---

70 *Reference re Fisheries Act, 1914 (Canada)*, [1928] S.C.R. 457 at 476-77 per Newcombe J. Duff J. in his dissenting opinion, at 464, held that the *Fisheries Act* was sufficiently clear as to the Minister's discretion to decline to issue licenses, but agreed that "a statutory enactment which...might expose such [public] rights to oppressive or arbitrary or capricious restrictions, would receive jealous scrutiny in any court called upon to enforce it." Newcombe J.'s approach was affirmed in a unanimous decision of a panel of the Judicial Committee of the Privy Council at [1929] 3 W.W.R. 449 (Canada P.C.).

71 *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607.

amendment will adequately manage and conserve the forest resources ..."[72]

There is nothing in such a section that indicates that the Legislature intended to give the government decision-maker the power to approve plans that would destroy fish habitat (an act which would constitute a public nuisance). And yet, according to Fisheries and Oceans Canada, this has frequently occurred.[73]

Despite the fact that the language of the Code seems to promise environmental protection, a court that ignored the presumption in favour of the public rights approach would likely find that the government has a discretion to approve logging plans even when there is a significant possibility that fish habitat will be harmed. In *Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District)*, the B.C. Court of Appeal considered a case concerning logging plans that put at risk the survival of the Spotted Owl, an endangered species. The Court concluded that the Legislature intended to allow some risk to the continued survival of this endangered animal:

> It does not require a [District Manager] to be satisfied that forest resources are managed and conserved, but simply that they are "adequately" managed and conserved. *Had the Legislature intended to preclude all logging in an area in which there were endangered species, it could have done so by clear language to that effect.* [Emphasis added][74]

In a case related to a public right,[75] such as the public right to fish, the Court of Appeal's approach would turn the appropriate statutory presumption on its head, requiring the Legislature to indicate a clear intention to protect a public right. Applying a public-rights-based interpretation,

---

72 R.S.B.C. 1996, c. 159, s. 41(1).

73 Letter from D.M. Petrachenko, Director General, Pacific Region of Fisheries and Oceans Canada, to Lee Doney, Deputy Minister of Forests of the Province of British Columbia (received March 1, 2000).

74 (2003), 15 B.C.L.R. (4th) 229 at 242 (C.A.). The provincial government acknowledged that there was a 40% chance that Spotted Owl populations would not recover under the plan that was applied in approving the logging plans.

75 The Court did not consider whether the public has a right to the continued existence of an endangered species, or what the implications follow if it does. See S. O'Keeffe, "Using Public Nuisance Law to Protect Wildlife" (1998) 6:1 Buff. Envtl. L. J. 85 for discussion about whether such a public right exists in U.S. jurisprudence. Also *Cadman v. Saskatchewan (Department of Parks & Renewable Resources)* [1988] 4 W.W.R. 137 (Q.B.) that identifies the nature of the Crown's ownership of wildlife resource as "public ownership" designed to protect the resource.

however, the Legislature would need to indicate an intention to authorize interference with fish habitat in clear terms.[76]

Recognizing existing public rights when considering the interpretation of an enabling statute, therefore, puts some limits on broad statutory powers which otherwise can impact public rights in a wide range of ways and with little public oversight.

(c) Procedural Protection for Public Rights

The judicial concept of natural justice developed from the presumption that a legislator would not have intended a statute to authorize interference with private rights without also requiring the decision-maker to exercise procedural fairness in making his or her decision. Such fairness includes hearing from the affected individuals and making an unbiased decision.

While the judicial requirements of procedural fairness now encompasses cases where a person's "interests", and not merely private rights, are affected, the presumption has been that such procedural protections are not applicable to government actions that impact on the rights of the public at large, unless provided for in statute. This is presumably due to a number of factors, including the difficulty of hearing from the public at large, the tendency of the courts to emphasize private over public rights, and the presumption that the Crown is already aware of, and will protect, public rights.

Nonetheless, the case law does provide public rights with some procedural protections.

First, where there are procedural requirements in a statute authorizing interference with public rights, the courts will require strict compliance with such requirements.

Thus, in 1931 the Judicial Committee of the Privy Council (JCPC) heard an appeal concerning damages caused when the ship S.S. Eurana collided with a Vancouver bridge operated by the Burrard Inlet Tunnel & Bridge Co. The Exchequer Court of Canada had ruled that although the bridge interfered with navigation, the bridge company was protected from a claim in public nuisance by virtue of the legislation that created the company. The JCPC overturned this decision, finding that the bridge company had not adequately complied with procedural requirements contained in its enabling legislation. In doing so, the court explicitly rejected

---

76 Such authorization might also raise constitutional questions in the case of fish habitat, which falls under federal responsibility. See discussion below at notes 97 and 98.

the more permissive interpretation of the Act adopted by the lower courts, stating:

> [Their Lordships] content themselves with saying that there is excellent authority for requiring statutory conditions to be strictly fulfilled if interference with public rights is to be justified. They must not be taken to assent to the view expressed on this part of the case in the Courts below.[77]

Similarly, the Federal Court of Appeal, in *Society Promoting Environmental Conservation v. Canada (Attorney General)*, was asked to consider the impact of an expropriation on the public right of navigation. The court apparently accepted that the procedural requirements of the *Canada Expropriation Act* would need to be interpreted narrowly if the expropriation were to impact upon public rights, but found that in that case there was not sufficient evidence of such an impact.[78]

Second, where a statute sets out public hearing or notice requirements related to a statutory decision that may impact on public rights, administrative law requirements of fairness appear to be applied with a special vigour, with the courts adapting the administrative law requirements to the context of a broad public hearing. For example, it is not necessary in such cases to demonstrate that a particular person suffered prejudice as a result of a vague or misleading notice — if the notice would not have been clear to a reasonable person, prejudice to the public will be inferred.[79]

Third, the American Courts have imposed procedural requirements on government decisions which are likely to impact on public rights through the public trust doctrine. M.C. Blum writes about the "hard look" doctrine, under which the courts will require government agencies to:

> (1) offer detailed explanations of their decisions, (2) justify departures from past practices, (3) allow effective participation in the regulatory process of a broad range of affected interests, and (4) consider alternatives to proposed actions.[80]

---

77 *Burrard Inlet Tunnel & Bridge Co. v. "Eurana" (The)*, [1931] 1 D.L.R. 785 at 790 (Canada P.C.).

78 2003 FCA 239 at paras. 65-67 (Fed. C.A.).

79 *Wilson v. Secretary of State for the Environment*, (1972), [1973] 1 W.L.R. 1083 (Q.B.), concerning the expropriation of a commons, adopted in *Central Ontario Coalition Concerning Hydro Transmission Systems v. Ontario Hydro* (1984), 10 D.L.R. (4th) 341 at 368 to 371 (Ont. Div. Ct.) concerning determining the appropriate route for power transmission lines.

80 M.C. Blum, "Public Property and the Democratization of Western Water Law" (1989) 19 Envtl. L. 573 at 590. Blum cites a number of examples of the use of this hard look doctrine, including *National Audubon Soc'y v. Superior Court* (1983), 658 P. 2d 709 (S.C. of California); *Morse v. Oregon Div. Of State Lands* (1979), 590 P. 2d 709, 714-15 (Oregon S.C.); *Kootenai Environmental Alliance v. Panhandle Yacht Club*, 671 P. 2d 1085 (1983); *In re Stone Creek Channel Improvements* (1988), 424 N.W. 2d 894 (N.D. S.C.).

While it is quite possible to endorse legal recognition of public rights without adopting the U.S. public trust doctrine (see the discussion of the public trust, below), these cases recognize the value and utility of protecting public rights through procedural protections.

This raises the question of whether Canadian courts could extend the principles of procedural fairness in this way — a step that has not been taken to date. While administrative law requirements around notice and hearings would need to be adapted in regard to public rights, other requirements, such as the requirement that a decision-maker be unbiased, would be easily transferable and would make sense as a basic protection for public rights.

While there does not seem to be recent Canadian or British authority for extending the requirements of administrative fairness in this way, there is common law precedent for very active review of government decisions to evaluate their impact on public rights. Through the old and now obscure writ of *ad quod damnum*, or "what is the damage," the courts would at one time hold an inquiry into the King's exercise of certain prerogative powers which were likely to authorize a public nuisance or otherwise diminish public or private rights. Sir William Holdsworth's *History of English Law* describes the writ:

> The writ of *ad quod damnum* was used in a great number of cases; but the general principle which underlay them was this: the King, having been asked to confer some favour - to grant a franchise, for instance, or a licence in mortmain - he issued this writ to ascertain whether the granting of this favour would prejudice third persons. It was in accordance with this principle that this writ was issued where an application was made to the King for leave to stop or divert a highway. The writ directed that an inquisition should be held to ascertain whether the proposed stoppage or diversion would be to the prejudice of the public. If it was found that it would not be to the prejudice of the public, the King issued his licence to stop or divert; and it was not till the licence had been issued that the stoppage or diversion could be effected.[81]

In effect, an inquiry held pursuant to a writ *ad quod damnum* appears to have occupied the same function as a modern day socio-economic assessment.

Both Holdsworth and the early legal commentator Matthew Bacon indicate that the writ could be used in respect of a wide range of grants made under the royal prerogative,[82] although it was most commonly used

---

81 W. Holdsworth, *A History of English Law, vol. X*, (London: Methuen & Co. Ltd., 1938) at 320.

82 Holdsworth, ibid., referring to a "great number of cases." M. Bacon, *A New Abridgement of the Law* (London: A. Strahan, 1832) Vol. VI, at 481-82, "Prerogative", discusses a

in relation to the closure or diversion of public roads[83] and the licensing of fairs.[84] It is difficult to find a comprehensive list of circumstances under which the writ would be required; however, in relation to what are now considered environmental issues,[85] the writ was used to authorize blocking up an ocean channel and replacing it with another channel;[86] and diverting a watercourse to serve a community.[87]

An underlying principle of the writ appears to have been that where the exercise of a crown prerogative was likely to have a negative impact on public rights, thereby creating a public nuisance, that the prerogative grant could be reviewed through *ad quod damnum*.

The common law writ of *ad quod damnum* was evidently quite unwieldy, and was eventually replaced by statutory requirements,[88] although it does not appear to have been explicitly abolished. Nonetheless, the writ represents an early example of the willingness of the courts to provide a procedural protection in relation to government decisions likely to impact on public rights. To the extent that the legislation dealing with such grants recognized and provided procedural protections for the rights of the public, it is understandable that the courts let the common law writ of *ad quod damnum* fall by the wayside. However, where legislation does not

---

series of prerogative powers and then states: "indeed in all grants of this kind, the good of the public seems to be principally regarded, as appears by the writ of *ad quod damnum*. . ." It appears that "all grants of this kind" is intended to refer to grants "that have no existence till created, such as franchises, liberties, fairs, markets, hundreds, lets, parks, warrens, which the king only by his prerogative can establish" (at 481). An alternative interpretation of the text would hold that Bacon intended the phrase to refer to a narrower list, including grants to erect new bridges, walls, and ferries. However, this narrower list seems unlikely given that fairs and markets are among the grants for which the writ was used, according to Bacon in Vol. III, "Fairs and Markets", but do not appear on the narrower list.

83 Bacon, ibid., Vol. IV, at 218, "Highways."

84 Bacon, ibid., Vol. III, at 552, "Fairs and Markets": "though such fairs and markets are a benefit to the commonwealth, yet too great a number of them may become nuisances to the publick, as well as a detriment to those who have more ancient grants."

85 This list is limited by the fact that air pollution, pollution of the soil, and various other environmental issues did not, at common law, require a Crown grant or licence. Consequently there was no need for a writ of *ad quod damnum* in such cases. This need not be taken to mean that procedural requirements are not appropriate in such cases.

86 *The Prior and Covent of Christ-Church in Canterbury*, unreported, cited with approval in *Thomas v. Sorrell* (1673), 124 E.R. 1098 at 1108 (Eng. C.P.).

87 *The Prior and Covent of K.*, unreported, and the *Fraternity of Fryers Minors*, unreported, both cited with approval in *Thomas v. Sorrell*, ibid. at 1108-1109.

88 Holdsworth, *supra* note 81 at 321. However, in modern times the American state of Missouri has codified the use of writ of *ad quod damnum* as a necessary precondition before a river may be dammed, with a jury charged with considering the impact on public health, flooding and other public rights-related questions: *Dams, Mills and Electric Power*, Missouri Revised Statutes, c. 236, ss. 236.060-236.070.

provide such protections, it is intriguing to wonder whether the principle underlying the writ might apply in a modern context: that the common law can require, and has required, governments to abide by basic procedural protections before making decisions likely to negatively impact on public rights.

Nonetheless, even if the courts do not impose administrative law requirements on statutory decisions involving public rights, the case law at a minimum supports strict compliance with procedural requirements set out in a statute that may interfere with public rights.

(d) Statutes Affirming Public Rights

The flip side of the principle that a statute should be interpreted as not infringing on public rights, is the positive principle that a statute should be interpreted in a manner consistent with the existing public rights.

The impact of a statute on public rights is not relevant only when that impact is negative. A pre-existing public right is part of the context to be considered in determining the purposes of legislation. Given the courts' statements about the importance of presuming that the Crown intends to protect public rights, the courts may presume that legislation intended to protect the public from some form of public nuisance is intended to advance the rights of the public against that nuisance.

Thus in *Friends of the Oldman River Society* the Supreme Court of Canada looked to the common law public right of navigation in interpreting the *Navigable Waters Protection Act*. As La Forest J. explained:

> [T]he relevant "context" should not be too narrowly construed. Rather the context must include the circumstances which led to the enactment of the statute and the mischief to which it was directed. . . .
>
> In [examining the circumstances that existed when the legislation was first enacted], it is useful to return to some of the fundamental principles of water law in this area, particularly those pertaining to navigable waters. It is important to recall that the law of navigation in Canada has two fundamental dimensions — the ancient common law public right of navigation and the constitutional authority over the subject matter of navigation — both of which are necessarily interrelated by virtue of s. 91(10) of the *Constitution Act, 1867* which assigns exclusive legislative authority over navigation to Parliament.[89]

89 *Friends of the Oldman River*, *supra* note 37 at 53; see also *Champion*, *supra* note 47 at 218: "the object and purpose of the *Navigable Waters Protection Act*, as its very title indicates, is to preserve public rights of navigation."

The principle is also consistent with the dicta of Wilson J. of the Manitoba Queen's Bench, in *Texaco Canada Ltd. v. Manitoba (Clean Environment Commission)*.[90] The judge, in holding Manitoba's contaminated sites legislation *ultra vires* as infringing on the traditional jurisdiction of the courts, clearly failed to give the statute a broad and purposive approach to protecting the public's right to avoid contamination. Nonetheless, Wilson J. recognized the important role of common law public rights in interpreting legislation dealing with a similar subject matter:

> But surely, damage (or threat of damage) to the "environment", and the consequences, are not new to the law....[T]he courts of this and all the provinces have, from the earliest times, heard and decided cases of private and public nuisance. True, the greater awareness of the state of environmental problems is perhaps a thing of recent times. But so it was, too, with the automobile, the corporation, and other such phenomena, as their activities impinged more directly upon the everyday life of the citizen. And nowhere has it been suggested that the new rules introduced by the legislation under such headings, for its proper consideration and enforcement, should be divorced from the jurisprudence or procedure applicable to those new rules, or from the tribunals constituted to resolve disputes arising therefrom.[91]

While by no means conclusive of the purpose of a statute, such public rights may be an aid in understanding the legislative purpose. There are strong policy reasons for interpreting statutes, where possible, as affirming and expanding on public rights. It is consistent with judicial recognition of the urgency and importance of the environmental crisis.[92] There has been an unfortunate tendency for the courts to view environmental statutes as infringing on private rights, which suggests that such legislation should be interpreted narrowly. However, by emphasizing such legislation as affirming common law public rights that existed before the private rights came into existence, this balance can be shifted.[93]

While the Canadian courts have been increasingly willing to give environmental statutes a broad interpretation, notwithstanding the impact on private rights, the recognition of the relationship between these statutes

---

90 (1977), 79 D.L.R. (3d) 18 (Man. Q.B.).

91 Ibid. at 28.

92 *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241 at 248-49; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213 at 293-95.

93 Indeed, there is great interest in determining the scope of public rights in the U.S. academic literature for precisely this reason. Under the U.S. Constitution, as it has been interpreted, environmental regulation can amount to an unconstitutional expropriation of private rights. However, some commentators have suggested that since these private rights never included a right to create a public nuisance, regulation to prevent an environmental public nuisance would not amount to expropriation: See S. O'Keeffe, *supra* note 75.

and common law rights serves to further emphasize the public importance and legitimacy of environmental statutes.

4. NAVIGATION, HIGHWAYS AND FISHING — SPECIAL STATUS?

There is no doubt that the majority of cases discussed above concern the public rights related to highways, navigation, or fishing.

In some ways this is hardly surprising: these public rights are well-defined and associated with significant commercial interests, capable of mobilizing the resources necessary for litigation and the special harm necessary to get over the formidable standing hurdle associated with a claim in public nuisance.

Perhaps because of the large number of cases involving these rights, some commentators appear to suggest that the principle is restricted to public navigation rights and public fisheries.[94] This perception is perhaps because of the peculiar history of the U.S. public trust doctrine, which we will consider in greater detail below, which focused, in its early years, on the commercial interests associated with public navigation and fishing.[95]

Even an expanded appreciation of the role of these public rights in statutory interpretation would be a step forward for environmental law in Canada. As noted, cases involving public fishing and navigation rights have considered related issues such as diversion of water and pollution of fish habitat.[96]

Public navigation and fishing also raise some interesting constitutional issues that could serve to improve environmental protection. As the federal government has jurisdiction for both navigation and fishing under the *Constitution Act, 1867*, the provincial governments have no jurisdiction to authorize violations of these two public rights. This interpretation

---

94 J. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized" (1997) 7 J.E.L.P. 1 at 19. Note, however, that Maguire does not examine the case law on this point in any detail, and rather appears to assume without discussion that the principle is so limited. Indeed, Maguire, because of his focus on the public trust doctrine, does not even mention the well established case law concerning interference with public highways.

95 It has also been suggested that the *Magna Carta* gave special status in English law to these two rights. However, this is questionable, as the courts have rejected the suggestion that the Crown had a greater power to infringe the public right of navigation prior to the enactment of the *Magna Carta* [*Williams v. Wilcox et al.*, 8 A. & E. 314, cited with approval in *R. v. Meyers* (1853), 3 U.C.C.P. 305 at 331; see also *Reference Re Provincial Fisheries*, *supra* note 36].

96 For example, *Harrison*, *supra* note 15.

is amply supported by both *Friends of Oldman River*[97] and *Champion*.[98] However, to date this interpretation has not been used to challenge the *vires* of provincial authorization of actions that pollute or endanger fish habitat.

However, despite the importance of both of these rights (along with public highways, to which the presumption has frequently been applied), there is no basis for limiting the principle of statutory interpretation to these public rights only.

First, the case law frequently sets out the principle as a generic one. There is little or no case law explicitly limiting the application of the presumption against interference with public rights to certain types of public rights.

Second, public rights share a common origin with rights that do benefit from the presumption. As noted, the case law in respect of the creation of public highways through dedication and acceptance is directly applicable to the dedication of parks and common spaces for public use.[99] Similarly, the public rights associated with the pollution of navigable waters are closely connected to the rights to fish and navigate those waters.

Third, the public right not to be subjected to a nuisance is not easily separated from the rights of the individual members of the public not to be subjected to private nuisances. Legislation negatively impacting private rights is strictly construed,[100] and there is no reason to hold that there is no such presumption when the private rights of hundreds or thousands of members of the public are so impacted. In addition, in *B.C. Electric Railway* Idington J. would have applied the principle to a situation where the railway company's electrical system gave rise to a public nuisance.[101]

Fourth, there is no public policy rationale for so limiting the principle. Why presume that the legislator would not intend to create a public nuisance impacting on public navigation, but hold that no such presumption exists for a public nuisance which interferes with the public's right to clean air? As the courts have said, assuming that a legislator intended to authorize a public nuisance would "derogate from the honour of the Crown."[102] This is true not merely for interference with navigable waters

---

97 *Supra* note 37.
98 *Supra* note 47.
99 *Wright*, *supra* note 22.
100 Sullivan, *supra* note 49 at 371-73.
101 *Supra* note 56. While Idington J. was in dissent, the other judges did not find that a public nuisance existed in the facts of the case, and therefore did not comment on whether or not Idington's application of the general rule was appropriate.
102 *Harrison*, *supra* note 15 at 473.

or fisheries, but also for decisions purporting to authorize dangerous levels of air pollution or the contamination of a swimming beach. Surely it is reasonable to expect the Legislature to be clear if it intends to authorize such a result.

Finally, the principles discussed in this article are consistent with the general principle that legislation is to be interpreted so as not to infringe with existing rights. It would be contrary to fairness to interpret legislation strictly when it relates to private rights, customary rights (including aboriginal rights), and public rights related to highways, fishing and navigation, but not any other public rights. Rather, the principle must apply to all legally recognized rights.

5. RELATIONSHIP TO THE PUBLIC TRUST DOCTRINE

How do the rules of statutory interpretation posited in this article relate to the doctrine of the public trust, a doctrine widely used in American law? As this section explains, both flow from the concept of public rights. However, there are several differences. In particular, most statements of the public trust doctrine are based on a trust or fiduciary relation while the rule of statutory interpretation is based on a presumption that legislators would not intend to trample public rights. Several of the further reaching implications of the public trust doctrine do not necessarily flow from the principle of statutory interpretation. At the same time several of the objections to the public trust doctrine's application in Canada do not apply to the rule of statutory interpretation.

The 1869 decision of the U.S. Supreme Court in *Illinois Central Railway Company v. Illinois*[103] was the first in a series of American cases that eventually evolved into the modern public trust doctrine. The doctrine is difficult to define with precision, partly because there are different formulations of the principle in different states.[104]

> The public trust is something of an enigma....In essence however, the public trust means that despite its ownership of natural resources, the government holds certain natural resources on trust, or in a fiduciary capacity for the public.[105]

The relationship between the principles discussed in this article and the public trust doctrine vary considerably, depending on what formulation of the public trust doctrine is adopted. To the extent that the public trust

103 146 U.S. 387 (1892).

104 Maguire, *supra* note 94 at 11-12.

105 K. Smallwood, *Coming Out of Hibernation: The Canadian Public Trust Doctrine*, (Unpublished Masters Thesis, UBC: 1993) at 3.

doctrine focuses on a trust-like relationship between government and the public, there are considerable differences between the doctrine and the rule of statutory interpretation discussed in this article.

First, although some of the cases relied on in this article refer to such concepts as the "honour of the Crown,"[106] the suggestion that a statute should be construed in favour of existing public rights is in no way dependent upon a trust-relationship. The same presumption applies in respect of private rights, for example, entirely for reasons of fairness, and yet no one would suggest that the government holds a trust in respect of all private rights holders.

Second, the idea of a trust on its face suggests a positive obligation to manage land in favour of the trust, perhaps overriding even clear statutory terms.[107] This view has been further entrenched by cases linking the concept to various terms in state constitutions,[108] thereby giving the trust the ability to trump the wishes of state legislatures. The presumption of statutory interpretation, by contrast, simply means that government should be explicit when it intends to negatively impact a public right.

Third, several of the objections to adoption of the public trust doctrine in Canada do not apply to adoption of the rule of statutory interpretation. At least one court case has stated *in obiter* that a public trust is inconsistent with Canadian trust law.[109] That objection does not apply to a rule of statutory interpretation.

Commentators have also suggested that the public trust doctrine has not developed in Canada because of a traditional reluctance on the part of Canadian judges to engage in judicial activism and to "interfer[c] in actions authorized by legislation."[110] However, the rule of statutory interpretation does not interfere with actions authorized by legislation, it simply takes a different view of what the legislator meant to authorize.

On the other hand, however, at least one commentator has suggested that Canadian case law allowing public rights to be infringed by statute does not provide protection for natural resources equivalent to the public

---

106 *Harrison*, *supra* note 15.

107 For example, *Priewe v. Wisconsin State Land and Improvement Company* (1893), 67 N.W. 918 (Wisc. S.C.); *In re Crawford County Levee and Drainage District No. 1*, 196 N.W. 874 (Wisc. S.C.).

108 J. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention" 68 Mich. L. Rev. 471 at 538.

109 *Green v. Ontario* (1972), 34 D.L.R. (3d) 20 (Ont. H.C.); See Maguire, *supra* note 94 at 24-25 for discussion of this case in relation to the public trust doctrine.

110 C. Hunt, "The Public Trust Doctrine in Canada" in J. Swaigen, ed. *Environmental Rights in Canada* (Toronto: Butterworths, 1981) at 182.

trust doctrine.[111] While a strong presumption against statutory interference with public rights addresses this concern to a considerable degree, it is possible, although less than clear from the existing case law, that a trust-like relationship would justify a stronger presumption than a mere presumption of statutory interpretation.

Despite these differences, there is no inconsistency between the presumption of interpretation and public trust approaches to public rights. Indeed, there are strong links between the two approaches: the case law concerning the principles of statutory interpretation frequently adopts trust-like language, while the public trust doctrine would inevitably result in presumptions in statutory interpretation (amongst other consequences). Kate Smallwood, in a Masters thesis that seems to be the most comprehensive examination of the public trust doctrine in Canada, cites many of these cases in support of the view that the public trust exists in Canadian law.[112]

If one focuses on the legal impact of the public trust doctrine, rather than the trust language, then some versions of the doctrine bear a striking resemblance to the principles discussed in this article. For example, the Supreme Court of Massachusetts' formulation of the public trust doctrine centers on a "rule that a change in the use of public lands is impermissible without a clear showing of legislative approval."[113] In the landmark case of *Gould v. Greylock Reservation Committee* the court required clear and unambiguous legal authority for a grant of land that would impact the public trust lands:

> In addition to the *absence of any clear and express statutory authorization* of as broad a delegation of responsibility by the Authority as is given by the management agreement, we find *no express grant* to the Authority of power to permit use of public lands...for what seems, in part at least, a commercial venture for private profit. [Emphasis added][114]

Despite such similarities, to date the public trust doctrine has not been clearly adopted by the Canadian courts.[115] Until the courts make that leap, it is important to be aware of the principles of statutory interpretation that

---

111 B. von Tigerstrom, "The Public Trust Doctrine in Canada," (1997) 7 J.E.L.P. 379 at 386. However, Ms. Tigerstrom did not explicitly consider the existence of a presumption against such interference and whether a strong presumption could provide equivalent protection.

112 Smallwood, *supra* note 105.

113 Sax, *supra* note 108 at 492.

114 215 N.E. 2d at 126, discussed in Sax, ibid. at 492-98.

115 Despite recent favourable comment by the Supreme Court of Canada in *Canfor*, *supra* note 13 at paras. 78-80.

the Canadian courts have accepted. These principles provide significant protection for public rights, and may well be a first step towards the development of a made-in-Canada version of the public trust doctrine.

6. BENEFITS OF STATUTORY PRESUMPTION

If the principles of statutory interpretation discussed in this article are applied rigorously, and particularly if the presumption is a strong one, the implications for public law in Canada are significant. Although the principles have a long history in Canadian law, they have not been applied consistently, and have more recently fallen out of use in the jurisprudence.

There are strong reasons for reintroducing and expanding these principles at this time. Public rights in some cases are protected through legislation. However, in many cases general statutory powers delegate wide decision-making power to government agencies, capable of having a huge impact on public rights, with little or no direction as to how those powers are to be used. Such broad provisions rarely exist where private property rights are at stake.

There is no reason to assume that the legislator intended these broad powers to be used to the detriment of the public, and yet neither is there any explicit statutory language preventing such actions. J. Sax described the problem, in the context of the public trust doctrine, as follows:

> While it will seldom be true that a particular governmental act can be termed corrupt, it will often be the case that the whole of the public interest has not been adequately considered by the legislative or administrative officials whose conduct has been brought into question....The concessions desired by [private "interests seeking official concessions"] are often of limited visibility to the general public so that public sentiment is not aroused; but the importance of those grants to those who seek them may lead to extraordinarily vigorous and persistent efforts. It is in these situations that public trust lands are likely to be put in jeopardy and that legislative watchfulness is likely to be at the lowest levels. To send a case back for express legislative authority is to create through the courts an openness and visibility which is the public's principle protection against overreaching, but which is often absent in the routine political process. Thus, the court should intervene to provide the most appropriate climate for democratic policy making.[116]

If this problem exists in the U.S., which has a constitutionally enshrined separation of the executive and legislative arms of government, the potential for abuse is that much greater in Canada, where no such separation exists.

---

116 *Supra* note 108 at 495-96.

In such cases it may well be that the legislator did not specifically anticipate that a broad discretion, or even more specific, but vague, discretion, would be relied upon to violate a public right. Thus, by interpreting statutory decision-making powers in light of existing public rights, a legislator gains some confidence that broad powers will not be abused or cause harm to the public. The legislator can presume that a delegated decision-maker will respect the rights of the public unless the legislation indicates a specific intent to authorize a departure from those legal and social norms.

Reintroducing these rules of statutory interpretation to the common law in no way derogates from the principle that responsibility for major policy decisions, and new legal initiatives, should reside with the legislator, rather than the courts. By requiring the legislator to be clear about its intentions, the principle forces public debate on issues of public importance, and requires the legislator to be up front when it intends to negatively impact long-standing public rights.

This is not to say that there are no difficulties raised by the principle. Public rights and their relationship to conservation clearly need to be better defined, particularly in the case of public rights to use resources or lands. There may be cases in which competing public rights are raised. However, these problems can be addressed, and do not undermine the benefits of the approach.

The use of the presumption in favour of public rights is both democratic, in that it requires explicit consideration of matters that will negatively impact the public, and consistent with the role of the court, which is to make certain that the use of legislation reflects the intention of the legislator. When one considers that many of the environmental public rights can directly impact human health and the fundamental values of environmental sustainability, requiring some clarity does not seem to be an unreasonable requirement.

7. CONCLUSION

Both public rights, and the presumption that the Crown does not intend to interfere with them, have been part of the common law since well before Britain asserted sovereignty over the colonies that were to become part of Canada. The courts are increasingly recognizing the potential of these rights as a strong tool for environmental protection. Judicial direction to further define these rights, together with a recognition of their role at common law, is necessary to achieve this goal.

The courts have long recognized that government decisions can have a profound impact on public rights, and, starting with the presumption that the Crown did not intend to interfere with the rights of his or her subjects when making grants or issuing licences, have required clear legislative authority for any interference with public rights. In the absence of clear language, why should the courts presume that a legislator intended inconvenience or hardship to the public at large?

The implications of this principle are significant. In addition to assisting in the interpretation of statutes that would otherwise compromise public rights, the principle means that regulations, orders or other statutory decisions will need clear statutory authority; it will not be presumed that the legislator intended to authorize a public nuisance.

To date the Canadian courts have not inferred new procedural requirements on the basis of a presumed intent to be fair, as they have in respect of private rights. However, they have demanded strict compliance with statutory procedural steps where the public's rights are at stake; moreover, it is possible that further common law procedural requirements will evolve where statutory procedures do not adequately protect public rights.

Finally, pre-existing public rights may assist a court in determining the purpose and scope of legislation. Legislation should be interpreted, where possible, as recognizing and affirming public rights.

These principles, particularly when the presumption of legislative intent is given some weight, bear a significant resemblance to the American public trust doctrine. Indeed, it may be that a renewed recognition of these principles in the Canadian common law will eventually lead to a Canadian version of that doctrine.

Notwithstanding the long history of public rights, in recent times private property rights have gained far more judicial recognition and protection than public rights.[117] However, with the current environmental crisis, there appears to be a renewed judicial interest in public rights. Perhaps it is time for us to draw on old principles of the common law to strike a new balance between public and private rights.

---

117 This is probably not limited to recent times. Certainly the enclosure movement in Britain in the 17th and 18th centuries was possible because private property owners were more able to assert their rights than the users of public commons.