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# PUBLIC RIGHTS AND THE LOST PRINCIPLE OF STATUTORY INTERPRETATION

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## 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.

The legal commentaries seem to suggest that public rights don't really influence how the courts interpret statutes, perhaps taking the view that such rights exist only at the pleasure of the Crown. 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 rule of statutory interpretation, Canadian law has 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.

This paper will briefly consider what is meant by public rights before turning to a broader review of the cases that have interpreted government action that impacts on public rights. The relevant principle – that legal documents should be interpreted as not derogating from, and where appropriate affirming,

public rights – will be illustrated and discussed in the context of:

- constraints that the courts put on the monarch's exercise of prerogative powers;
- interpretation given by the courts to statutory instruments that have the effect of negatively impacting public rights;
- procedural measures designed by the courts to protect public rights; and
- interpretation given by the courts to legislation intended to advance the interests underlying existing public rights.

The paper will then consider some issues arising from the principle established by the above review of the case law: whether such principles are 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.

## A WORD ON PUBLIC RIGHTS

The concept of public rights is not often taught in law schools and rarely appears in the academic literature. In addition, there has been little recent judicial discussion of public rights. As a result many lawyers tend to overlook the legal significance of such rights.

A public right may be described generally as a legally recognized claim by all members of the public to do something, or to have something done or not done. In short, a public right is a legal right held by all members of the public in common.

Public nuisance is the starting point for consideration of public rights. Interference with a public right amounts to a public nuisance, and public rights have always been enforced through an action in public

nuisance. Indeed, public nuisance has been defined as “an unreasonable interference with a right common to the general public ...”<sup>1</sup>

At the same time, however, the tort of public nuisance has been applied to such a wide range of situations that it is often difficult to articulate the public rights that are being enforced. Perhaps for this reason, one of the most authoritative definitions does not explicitly refer to rights of the public: “A public nuisance has been defined as any activity which unreasonably interferes with the public’s interest in questions of health, safety, morality, comfort or convenience.”<sup>2</sup>

Public rights, for the most part, have not had the benefit of the same level of legal attention as private rights, particularly in recent times. As a result, the case law does not fully define the range of what constitutes a public right. While some statutes explicitly create or define public rights, this is the exception rather than the rule.<sup>3</sup>

However, the common law has defined some public rights relatively clearly. Three rights that have had a lot of judicial comment are the rights to use highways and navigable waters, and the right to fish. All three are relatively well defined,<sup>4</sup> as the significant economic interests historically attached to each have resulted in considerable litigation.

Many of the cases applying the principles of statutory interpretation discussed in this paper are drawn from litigation concerning these three rights. This seems to demonstrate the importance of more clearly defining the public’s rights if they are to be effectively recognized and protected by the law.

#### B.C. V. CANADIAN FOREST PRODUCTS

The Supreme Court of Canada seems to have recognized the need to further define public rights. In the recent decision of *BC v. Canadian Forest Products* the court, in discussing public nuisance law, noted:

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 ...

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]...<sup>5</sup>

The court went on to recognize that these public rights and public nuisance law 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.<sup>6</sup> The court also noted 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.”<sup>7</sup>

The court, therefore, seems to be inviting the articulation of public rights in respect of a range of environmental values and resources, such as running water, air, the sea, seashore, and river banks. Not surprisingly, the public’s interest in respect of many of these resources has been enforced through public nuisance suits.

#### ENVIRONMENTAL PUBLIC RIGHTS

It is beyond the scope of this paper to provide a full discussion of the nature and scope of public rights or to provide a comprehensive list of public rights that exist at common law. While some public rights are well established, the existence 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 the parameters of public rights.

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

- Right of use of public rivers<sup>8</sup> and oceans<sup>9</sup> (including rights of fishing<sup>10</sup> and navigation<sup>11</sup>);
- Rights of use of lands dedicated for public use<sup>12</sup> (including rights of public highways<sup>13</sup>, “parks, and public squares and commons”<sup>14</sup> and other dedicated public spaces;<sup>15</sup>
- Right to not have unreasonable interference with “public convenience or welfare”,<sup>16</sup> including threats to public safety<sup>17</sup>; and
- Rights to maintenance of key environmental features<sup>18</sup>, likely including clean air and water, healthy fish stocks and wildlife<sup>19</sup>, and publicly owned forests.<sup>20</sup>

As the less certain of 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.

#### LEGAL INSTRUMENTS 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.”<sup>21</sup> 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.

Taken collectively, the cases discussed demonstrate the importance that the courts have attached to public rights and the strength of their reluctance to presume that a legislator intended to interfere with such rights.

#### 1. CROWN INTERFERENCE WITH PUBLIC RIGHTS

The common law jurisprudence that established public rights, and in particular the public rights related to highways, navigation and fishing, also provided guarantees for those public rights. The most firmly established of these guarantees is the principle that the Crown, at common law cannot grant a private party the right to interfere with public rights. While technically not a case of statutory interpretation, since the prerogative powers are common law, rather than statutory, in origin, the cases recognizing this principle are the starting point for examining the presumption that government action should not interfere with public rights without clear statutory authority.

One of the most authoritative and recent cases on this principle is the Supreme Court of Canada decision in *Friends of Oldman River Society v. Canada*. 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)<sup>22</sup> and *Wood v. Esson* (1884)<sup>23</sup>, 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]*<sup>24</sup>

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).<sup>25</sup>

The Supreme Court of Canada's conclusions in this regard are well supported by the jurisprudence.<sup>26</sup> In *Gage v. Bates*, in a much cited judgment which set the groundwork for determining which rivers would be considered navigable in Canada, the Upper Canada Court of Common Pleas adopted similar language 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, and though some decisions may justify a contrary opinion, yet, to a free and dispassionate mind, they must appear to be established upon an objectionable basis, and operating to abridge a liberty which is contemporary with our earliest legal institutions.<sup>27</sup>

Historically the Courts also developed a procedural jurisdiction over Crown grants likely, but not certain, to impact on public rights. The writ of *ad quod damnum*, discussed in more detail below in the procedural protections section of this paper, functioned as a type of common law public hearing/socio-economic assessment in respect of Crown grants likely to impact on the rights of the public, including grants involving the creation, closure or diversion of public highways; licence for markets or fairs; interference with public rivers and various other public rights.<sup>28</sup>

Not surprisingly, the rule that the Crown could not interfere with public rights led to a strong presumption that such grants should be interpreted as not claiming such authority. Thus, in *Attorney General v. Harrison*,<sup>29</sup> 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;<sup>30</sup> 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 saw-dust 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]<sup>31</sup>

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. The Court found that the grant should be interpreted so as to preserve the rights of the public:

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]<sup>32</sup>

In summary, interference with public rights will require legislative sanction and grants made by the Crown should be presumed as not intending such interference.<sup>33</sup>

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. It does establish that public rights cannot be legally affected through Crown grants

without statutory authority. Moreover, 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. However, we must turn to the case law regarding statutes that interfere with public rights for confirmation of that suggestion.

## 2. 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 legislative*, and we do not find it clearly so expressed, the claim fails. [Emphasis added]<sup>34</sup>

In *B.C. 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...<sup>35</sup>

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

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 Halifax Power Company had broad powers to expropriate lands, including streams and rivers.<sup>36</sup> However, in both cases the judges looked for an explicit indication that the legislature had intended to impact public rights. In *Miller v. Halifax Power Co. Ltd.* 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.<sup>37</sup>

In *Thomson v. Halifax Power Co. Ltd.* 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]<sup>38</sup>

In 1917 the Supreme Court of Canada, in *Champion & White v. Vancouver*, 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.<sup>39</sup>

In the 1920s the Ontario Court of Appeal considered two claims 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.<sup>40</sup> [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 affected, the will of the Legislature must be unequivocally expressed. [Emphasis added]<sup>41</sup>

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, section 35 of the *Constitution Act, 1982* did not indicate a sufficient intention to extinguish public rights.<sup>42</sup>

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".<sup>43</sup> Even where there is valid interference with rights, then, such rights should not be presumed to be extinguished.<sup>44</sup>

On the basis of such authority, it appears that legislation must be "express" and "unequivocal", demonstrating a clear and unambiguous intention to extinguish public rights before such rights will be extinguished.<sup>45</sup>

Whether a statute can be said to interfere with public rights will depend on the wording of the individual statute. How specific does the language 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.<sup>46</sup>

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 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.

### **Judicial Review to Protect Public Rights**

It seems obvious that the principle that legislation should be interpreted, where possible, as not intending to authorize interference with a public right 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 statutory decision-maker unless the enabling statute specifically contemplates such an impact.

Interestingly, 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. There are relatively few Canadian cases in which a government decision that purported

to authorize a public nuisance has been challenged as *ultra vires* the decision-maker.<sup>47</sup>

The relatively small number of judicial reviews based on public rights likely arises from the fact that until recently the Attorney General was considered the sole guardian of public rights, to the point that a member of the public would not have had standing to challenge a government decision on the grounds that it impacted negatively on public rights. 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.<sup>48</sup>

For a sense of how this might work, it is useful to consider a tangible example. Consider, for example, logging on public lands under B.C.'s *Forest Practices Code*. The Act provides a government decision-maker with authority to approve logging plans when "satisfied that the plan or amendment will adequately manage and conserve the forest resources of the area to which it applies."<sup>49</sup>

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.<sup>50</sup>

Despite the fact that the language of the Code seems to promise environmental protection, a court that ignored the presumption in favour of 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*, 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]*<sup>51</sup>

In a case related to a public right,<sup>52</sup> 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, however, the Legislature would need to indicate an intention to authorize interference with fish habitat in clear terms.<sup>53</sup>

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.

### 3. 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 be fair 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, as *parens patriae*, 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 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 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.<sup>54</sup>

Similarly, the Federal Court of Appeal, in *Attorney General (Canada) v. SPEC*, 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.<sup>55</sup>

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.<sup>56</sup>

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.<sup>57</sup>

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 have no pecuniary interest in the outcome of a decision, would be easily transferable and would make sense as a basic protection for public rights. Indeed, it is difficult to see that the legislator would have intended the extinguishment of public rights to be authorized by a biased individual or party.

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.<sup>58</sup>

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,<sup>59</sup> although it was most commonly used in relation to the closure or diversion of public roads<sup>60</sup> and the licensing of fairs.<sup>61</sup> 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,<sup>62</sup> the writ was used in relation to blocking up an ocean channel and replacing it with another channel,<sup>63</sup> and diverting a watercourse to serve a community.<sup>64</sup>

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 British writ of *ad quod damnum* was evidently quite unwieldy, and was eventually replaced by statutory requirements,<sup>65</sup> 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 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 adapt administrative law requirements to 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.

#### 4. 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.<sup>66</sup>

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)*.<sup>67</sup> 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.<sup>68</sup>

While by no means conclusive of the purpose of a statute, such public rights may be an aid in understanding the purpose of the legislator. 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.<sup>69</sup> 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.<sup>70</sup>

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

## NAVIGATION, HIGHWAYS & FISHING – SPECIAL STATUS?

There is no doubt that the majority, although by no means all, cases that affirm the principle that statutes should be interpreted so as not to derogate from public rights concern the public rights related to highways, navigation, or fishing.

In some ways this is hardly surprising: these public rights are the best 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.<sup>71</sup> This 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.<sup>72</sup>

Even an expanded appreciation of the role of these public rights in statutory interpretation would be a step forward for environmental law in Canada. Cases involving public fishing and navigation rights have considered related issues such as diversion of water and pollution of fish habitat.<sup>73</sup>

Public navigation and fishing also raise some interesting constitutional issues. As the federal government has jurisdiction for both navigation and fishing under the *Constitution Act, 1867*, the provincial governments have no jurisdiction to authorize public nuisances associated with these two public rights. This interpretation is amply supported by both *Friends of Oldman River*<sup>74</sup> and *Champion*.<sup>75</sup> 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 principles of statutory interpretation to some public rights only. The language in many of the cases speak about public rights in a generic sense, and there are cases where the

principle has been applied to other public rights, including statutory public rights,<sup>76</sup> the right not to be exposed to unreasonable risks to personal safety,<sup>77</sup> and rights of access to a public beach<sup>78</sup> and a public monument.<sup>79</sup>

There is no basis to presume that the legislator would not intend to create a public nuisance impacting on public navigation, but hold that no such presumption exists for government action which could suffocate a neighbourhood. Public rights, as defined by the courts, share a common legal status. As the courts have said, assuming that a legislator intended to authorize a public nuisance would “derogate from the honour of the Crown.”<sup>80</sup> This is true not merely for interference with navigable waters 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 very clear if it intends to authorize such a result.

Finally, the principles discussed in this paper are consistent with the general principle that legislation is to be interpreted so as not to infringe with pre-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.

#### RELATIONSHIP TO THE PUBLIC TRUST DOCTRINE

How do the rules of statutory interpretation posited in this paper relate to the doctrine of 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 a rule 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*<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup>

The relationship between the principles discussed in this paper 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 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 paper.

First, although some of the cases relied on in this paper refer to such concepts as the “honour of the Crown”<sup>84</sup>, 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.<sup>85</sup> This view has been further entrenched by cases linking the concept to various terms in state constitutions,<sup>86</sup> 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.<sup>87</sup> 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[e] in actions authorized by legislation.”<sup>88</sup> 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 trust doctrine.<sup>89</sup> 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.<sup>90</sup>

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 paper. 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.”<sup>91</sup> 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]<sup>92</sup>

Despite such similarities, to date the public trust doctrine has not been clearly adopted by the Canadian courts.<sup>93</sup> Until the courts make that leap, it is important to be aware of the principles of statutory interpretation that 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.

## BENEFITS OF STATUTORY PRESUMPTION

If the principles of statutory interpretation discussed in this paper 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 nor 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.<sup>94</sup>

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.

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 approach 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, requiring some clarity does not seem to be an unreasonable requirement.

## 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 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 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.<sup>95</sup> 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.

## ENDNOTES

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- <sup>1</sup> B. Garner (ed.), *Black's Law Dictionary (8<sup>th</sup> Ed.)*. (Thomson West, 2004), p. 1097; See also *Stein v. Gonzales* (1984), 14 D.L.R. (4<sup>th</sup>) 263 (B.C.S.C.) per MacLachlin J., at p. 265 and *Cotter v. Levy*, [2000] O.J. 1086 (Ont. S.C. of Justice) at para. 26.
- <sup>2</sup> Klar, Lewis N. *Tort Law*, 2nd ed. Scarborough, Ont.: Carswell, 1996 at p. 525, cited with approval in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at 236 [hereinafter *Ryan*] and *British Columbia v. Canadian Forest Products*, [2004] SCC 38 at para. 66 [hereinafter *Canfor*].
- <sup>3</sup> For example, the *Hunting and Fishing Heritage Act*, S.B.C. 2002, c. 79, s. 1; or the *Fisheries Act*, R.S.C. 1985, c. F-14, s. 60.
- <sup>4</sup> Linden, A. *Canadian Tort Law (6<sup>th</sup> Ed.)*, (Butterworths, 1997), at pp. 525-6.
- <sup>5</sup> *Canfor*, supra, note 2, per Binnie J. at paras. 74 – 75 (“*Canfor*”).
- <sup>6</sup> *Ibid.*, para. 81.
- <sup>7</sup> *Ibid.*, para. 155.
- <sup>8</sup> *Ibid.*, paras. 74-75; *Attorney General v. Harrison* (1866), 12 Gr. 466 (Court of Chancery of Upper Canada) [hereinafter *Harrison*], at p. 473 adopting the language of an earlier riparian rights case, *Attorney General v. Birmingham*, unreported, as a valid statement of the public rights associated with public rivers.
- <sup>9</sup> *R. v. “Sun Diamond”*, [1984] 1 F.C. 3 (T.D.), cited with approval in *Canfor*, *ibid.*, para. 69.
- <sup>10</sup> *Re Provincial Fisheries* (1895), 26 S.C.R. 444; *Reference re BC Fisheries* (1913), 5 W.W.R. 878 (JCPC).
- <sup>11</sup> *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 [hereinafter *Oldman River*]
- <sup>12</sup> *Wright v. Long Branch (Village)*, [1959] S.C.R. 418 at 423, 18 D.L.R. (2d) 1 [hereinafter *Wright*], accepting that property may be dedicated for a range of public uses.
- <sup>13</sup> *Schraeder v. Gratton*, [1945] 4 D.L.R. 351 (Ont. H. Ct. of Justice); see also *McCann v. Dugas* (1979), 27 N.B.R. (2d) 361 (Q.B.).
- <sup>14</sup> *Wright*, supra, note 12, p. 423.
- <sup>15</sup> In *Wright*, *ibid.*, the public was held to have a right of access to a monument; see *Carpenter v. Smith* (1951), [1951] O.R. 241. [1951] 2 D.L.R. 609 (Co. Ct.) [hereinafter *Carpenter*] for a case in which public recreation rights to a beach were created through dedication and *Frank Georges Island Investments v. Nova Scotia (Attorney General)* (2004), 2004 NSSC 136 for discussion of public recreational rights in respect of an island (although in that case there was not sufficient evidence that the island had been dedicated to public use).
- <sup>16</sup> Linden, supra, note 4, at p. 525. *Ryan*, supra, note 2, at p. 236, quoting G. H. L. Fridman, *The Law of Torts in Canada*, vol. I (1989), at p. 168: “[t]he conduct complained of must amount to . . . an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort or other forms of interference”.
- <sup>17</sup> *Ryan*, supra, note 2, at 237.
- <sup>18</sup> *Canfor*, supra, note 2, at paras. 74-76.
- <sup>19</sup> In relation to wildlife, see S. O’Keeffe. “Using Public Nuisance Law to Protect Wildlife”, (Fall 98) Vol. 6, No. 1 *Buffalo Environmental Law Journal* 85. Also *Cadman v. Saskatchewan (Department of Parks & Renewable Resources)* (1988) 51 D.L.R. (4<sup>th</sup>) 52; [1988] 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.
- <sup>20</sup> *Canfor*, supra, note 2, concerned liability for a forest fire that destroyed public forests. Consequently, the court’s discussion of public rights strongly suggests that the public holds a right to the sustainable management of public forests.
- <sup>21</sup> R. Sullivan. *Driedger on the Construction of Statutes (3d. ed.)*. Toronto:Butterworths, 1994, p. 370.
- <sup>22</sup> *Attorney General v. Johnson* (1819), 2 Wils. Ch. 87, 37 E.R. 240
- <sup>23</sup> *Wood v. Esson* (1884), 9 S.C.R. 239.
- <sup>24</sup> *Oldman River*, supra, note 11, per La Forest J. at pp. 54-55.

- <sup>25</sup> *Ibid.*, p. 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 *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 odds with earlier jurisprudence: *Champion & White v. Vancouver* (1917), 1 S.C.R. 216 [hereinafter *Champion*]
- <sup>26</sup> *Donnelly v. Vroom* (1907), 40 N.S.R. 585; *R v. Hunt* (1865) 16 UCCP 145 (in relation to grants affecting highways); Smallwood, below, note 83, at pp. 23-24 cites the following British 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, *A.G. v. Wright*, [1897] Q.B. 318.
- <sup>27</sup> *Gage v. Bates* (1857), 7 U.C.C.P 116 at pp. 121-22.
- <sup>28</sup> See below, notes 58-65.
- <sup>29</sup> *Harrison*, supra, note 8.
- <sup>30</sup> 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 relator action) of dredging the river on a regular basis to ensure that navigation could continue: *Ibid.*, p. 472.
- <sup>31</sup> *Ibid.*, p. 473.
- <sup>32</sup> *Rhodes v. Perusse* (1908), 41 S.C.R. 264 at 268-69.
- <sup>33</sup> For a further example of interpretation of a grant, see *Leamy v. R.* (1915), 15 Ex. C.R. 189, 23 D.L.R. 249 (Ex. Ct. of Canada).
- <sup>34</sup> *Canadian Pacific Railway v. Toronto (City)*, 42 S.C.R. 613 per Idington J. at p. 645; similarly, Davies J. references the impact on public rights in concluding, at p. 631, that the interpretation urged by the railway company was "a singular construction".
- <sup>35</sup> *BC Electric Railway v. Crompton* (1910), 43 S.C.R. 1 [hereinafter *BC Electric*] per Idington, J. at p. 13.
- <sup>36</sup> "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.
- <sup>37</sup> *Miller v. Halifax Power Co. Ltd.* (1913), 13 D.L.R. 845 (N.S.C.A.) [hereinafter *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 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]
- <sup>38</sup> *Thomson v. Halifax Power Co. Ltd.* (1914), 16 D.L.R. 424 (N.S.C.A.) at 431 [hereinafter *Thomson*].
- <sup>39</sup> *Champion*, supra, note 25. This aspect of *Champion* was applied by the BC 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 11.
- <sup>40</sup> *Code v. Jones and Town of Perth* (1923), 54 O.L.R. 425 (C.A.) per Kelly J. at 426.
- <sup>41</sup> *Hydro-Electric Power Commission of Ontario v. County of Grey*, 55 O.L.R. 339 per Masten J.A. at 344. See also 346. Note, however, that Middleton, J.A. relied instead, at pp. 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".
- <sup>42</sup> *R. v. Gladstone*, [1996] 2 S.C.R. 723 at 770-71 [hereinafter *Gladstone*].
- <sup>43</sup> *Vancouver (City) v. Canadian Pacific Railway* (1894), 23 S.C.R. 1, per King J. at p. 22.
- <sup>44</sup> *Gladstone*, supra, note 42.
- <sup>45</sup> 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".
- <sup>46</sup> This is the implication from *Oldman River*, supra, note 11, 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 v. Canadian Pacific Railway*, supra, note 43, in which public rights of access were extinguished by necessary implication.

- <sup>47</sup> *Miller*, supra, note 37 and *Thomson*, supra, note 38 are the two primary examples. Under the U.S. public trust doctrine, discussed below, just such an approach has been taken. See below, notes 91 and 92.
- <sup>48</sup> *Finlay v. Canada*, [1986] 2 S.C.R. 607.
- <sup>49</sup> R.S.B.C. 1996, c. 159, s. 41(1).
- <sup>50</sup> 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 01, 2000).
- <sup>51</sup> *Western Canada Wilderness Committee v. British Columbia* (2003), 15 B.C.L.R. (4<sup>th</sup>) 229 (C.A.) at 242.
- <sup>52</sup> 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 *O'Keefe*, at note 19, for discussion about whether such a public right exists in U.S. jurisprudence.
- <sup>53</sup> Such authorization might also raise constitutional questions in the case of fish habitat, which falls under federal responsibility. See discussion below at notes 74 and 75.
- <sup>54</sup> *Burrard Inlet Tunnel & Bridge Co. v. "Eurana" (The)*, [1931] 1 D.L.R. 785 at 790 (JCPC).
- <sup>55</sup> *Canada (A.G.) v. Society Promoting Environmental Conservation*, 2003 FCA 239 at paras. 65-67.
- <sup>56</sup> *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 *Re Central Ontario Coalition Concerning Hydro Transmission Systems et al. and Ontario Hydro et al.* (1984), 10 D.L.R. (4<sup>th</sup>) 341 (Ont. High Court of Justice), at 368 to 371, concerning determining the appropriate route for power transmission lines.
- <sup>57</sup> M.C. Blum, "Public property and the democratization of Western Water Law", (1989) 19 Env. 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.)
- <sup>58</sup> W. Holdsworth. *A History of English Law, vol. X*, (London: Methuen & Co. Ltd., 1938), p. 320.
- <sup>59</sup> Holdsworth, *ibid.*, referring to a "great number of cases." M. Bacon. *A New Abridgement of the Law*. (London: A. Strahan, 1832) at Vol. VI, pp. 481-482, "Prerogative", discusses a 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." (p. 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.
- <sup>60</sup> Bacon, *ibid.*, Vol. IV, p. 218, "Highways".
- <sup>61</sup> Bacon, *ibid.*, Vol. III, p. 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."
- <sup>62</sup> 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.
- <sup>63</sup> *The Prior and Covent of Christ-Church in Canterbury*, unreported, cited with approval in *Thomas v. Sorrell*, Vaughan, 330 (K.B.) at 348.
- <sup>64</sup> *The Prior and Covent of K.*, unreported, and the *Fraternity of Fryers Minors*, unreported, both cited with approval in *Thomas v. Sorrell*, *ibid.* at pp. 348-49.
- <sup>65</sup> Holdsworth, supra, note 58, p. 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.
- <sup>66</sup> Oldman River, supra, note 11, p. 53; see also *Champion*, supra, note 25, at p. 218: "the object and purpose of the *Navigable Waters Protection Act*, as its very title indicates, is to preserve public rights of navigation."
- <sup>67</sup> *Texaco Canada Ltd. v. Manitoba (Clean Environment Commission)*, 79 D.L.R. (3d) 18 (Man. Q.B.).
- <sup>68</sup> *Ibid.*, at p. 28.
- <sup>69</sup> *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, [2001] 2 S.C.R. 241, pp.248-249; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, pp. 293-295.
- <sup>70</sup> Indeed, there is great interest in determining the scope of academic 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



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right to create a public nuisance, regulation to prevent an environmental public nuisance would not amount to expropriation: See S. O'Keefe, *supra*, note 19.

<sup>71</sup> J. Maquire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized", 7 J. Env. L. & Prac. 1 at p. 19. Note, however, that Maquire 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, Maquire, because of his focus on the public trust doctrine, does not even mention the well established case law concerning interference with public highways.

<sup>72</sup> It has also been suggested that the Magna Carta gave special status in British law to these two rights. However, this is of questionable, both because 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* (1852), 3 U.C.C.P. 305 at p. 331; see also *Reference Re BC Fisheries*, *supra*, note 10] and also because the courts have suggested that the Magna Carta likely does not apply in Canada: *Re Provincial Fisheries*, *supra*, note 10, per Girouard J. at p. 553.

<sup>73</sup> For example, *Harrison*, *supra*, note 8.

<sup>74</sup> *Oldman River*, *supra*, note 11.

<sup>75</sup> *Champion*, *supra*, note 25.

<sup>76</sup> *Miller*, *supra*, note 37 and *Thomson*, *supra*, note 38 both interpreted the relevant legislation in light of a statutory right to transport logs on the rivers in question.

<sup>77</sup> *BC Electric*, *supra*, note 35.

<sup>78</sup> *Carpenter*, *supra*, note 15.

<sup>79</sup> *Wright*, *supra*, note 12, concerning the paramountcy of the public right to the rights of a private land owner.

<sup>80</sup> *Harrison*, *supra*, note 8, at 473.

<sup>81</sup> *Illinois Central Railway Company v. Illinois*, 146 U.S. 387 (1892).

<sup>82</sup> Maguire, *supra*, note 71, at pp. 11-12.

<sup>83</sup> K. Smallwood. *Coming Out of Hibernation: the Canadian Public Trust Doctrine*. (Unpublished Masters Thesis, UBC: 1993), p. 3.

<sup>84</sup> *Harrison*, *supra*, note 8.

<sup>85</sup> 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.).

<sup>86</sup> J. Sax, "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention". 68 Mich. L. R. 471 at 538.

<sup>87</sup> *Green v. R.* (1972), 34 D.L.R. (3d) 20 (Ont. H.C.); See Maquire, *supra*, note 71, pp. 24-25 for discussion of this case in relation to the public trust doctrine.

<sup>88</sup> C. Hunt, "The Public Trust Doctrine in Canada" in J. Swaigen, ed. *Environmental Rights in Canada* (Toronto: Butterworths, 1981) at 182.

<sup>89</sup> B. von Tigerstrom, "The Public Trust Doctrine in Canada", 7 J. Env. L. & Prac. 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.

<sup>90</sup> Smallwood, *supra*, note 83.

<sup>91</sup> Sax, *supra*, note 86 at 492.

<sup>92</sup> 215 N.E. 2d at 126, discussed in J. Sax, *ibid*, at pp. 492-498.

<sup>93</sup> Despite recent favourable comment by the Supreme Court of Canada in *Canfor*, *supra*, note 2, paras. 78-80.

<sup>94</sup> Sax, *supra*, note 86, pp. 495-6.

<sup>95</sup> This is probably not limited to recent times. Certainly the enclosure movement in Britain in the 17<sup>th</sup> century was possible because private property owners were more able to assert their rights than the users of public commons.