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Crown Ownership of Water *in situ* in Common Law Canada : Public Trusts, Classical Trusts and Fiduciary Duties

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Résumé de l'article

Une compréhension appropriée des règles de droit privé portant sur l'eau *in situ* est un préalable nécessaire au succès de tout régime public de gestion de l'eau. L'article qui suit examine les règles de droit privé applicables dans les provinces de common law pour déterminer dans quelle mesure il y existe des équivalents fonctionnels à la *res communis*, principe de droit privé auquel l'eau est assujettie, ainsi qu'à la notion statutaire de l'État comme « gardien des intérêts de la nation » en droit québécois.

L'auteure conclut qu'il n'y a pas d'équivalent fonctionnel direct au concept de *res communis* mais plutôt une acceptation — presque par défaut — du fait que la Couronne est propriétaire de l'eau *in situ,* acceptation qui se retrouve d'ailleurs dans la législation des provinces de l'Ouest. Cependant, la propriété de la Couronne n'est pas pleine et absolue mais plutôt limitée, avec des pouvoirs s'assimilant davantage à ceux du gardien qu'à ceux du propriétaire. Cette conclusion découle de l'exploration de trois institutions reconnues en équité, soit la fiducie publique, la fiducie classique et les devoirs fiduciaires. Pour chaque institution, l'argument en faveur de l'existence d'une limitation est difficile, mais non impossible, à soutenir.

Crown Ownership of Water *in situ* in Common Law Canada : Public Trusts, Classical Trusts and Fiduciary Duties*

Jane MATTHEWS GLENN**

A clear understanding of the private law rules relating to water in situ *is a necessary pre-condition to the success of any public law management regime. This article thus examines the private law rules applicable in the common law provinces to determine if there are functional equivalents to Québec's private law principle of* res communis *and its statutory notion of State "custodianship".*

It concludes that while there is no direct functional equivalent to the concept of res communis*, there is an acceptance — almost by default — of Crown ownership of water in situ, an acceptance reflected in the legislation of the western provinces. However, this Crown ownership is not full and absolute but rather limited, more in the nature of "custodianship" than "ownership". This conclusion follows an exploration of three equitable institutions — the public trust, the classical trust and fiduciary duties. In each case, the argument for limitation is difficult, but not impossible, to make.*

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* My interest in this topic owes much to the influence of a McGill colleague, Madeleine CANTIN CUMYN, whose writings on Québec's private law of water have enticed me to reflect on the common law's approach to water *in situ*. Earlier versions were presented first at a *Rendez-vous international sur la gestion intégrée de l'eau*, Université de Sherbrooke, June 2009 ("La nature juridique de l'eau au Canada : A *res communis* in civil law and common law", presented jointly with Madeleine CANTIN CUMYN) and more recently at a conference on *Private Property, Planning and the Public Interest*, University of Windsor, March 2010 ("Ownership of Water in Situ in Common Law Canada : Reflections on *res communis*").

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L'auteure conclut qu'il n'y a pas d'équivalent fonctionnel direct au concept de res communis *mais plutôt une acceptation — presque par défaut — du fait que la Couronne est propriétaire de l'eau* in situ*, acceptation qui se retrouve d'ailleurs dans la législation des provinces de l'Ouest. Cependant, la propriété de la Couronne n'est pas pleine et absolue mais plutôt limitée, avec des pouvoirs s'assimilant davantage à ceux du gardien qu'à ceux du propriétaire. Cette conclusion découle de l'exploration de trois institutions reconnues en équité, soit la fiducie publique, la fiducie classique et les devoirs fiduciaires. Pour chaque institution, l'argument en faveur de l'existence d'une limitation est difficile, mais non impossible, à soutenir.*

Water is the source of life. It was the original cradle of life on earth and remains life's fundamental necessity. As Québec's recently adopted

legislation so aptly puts it, water is "of *vital* interest[1]". Views of our planet from space are reassuring, but closer inspection puts the lie to the myth of abundance of water. Deserts are growing, and rivers are drying. Even Canada is not immune. A leading Canadian water scientist, John Sprague, stresses the importance of distinguishing between volume of water and renewable supply when evaluating water availability[2]; he notes that while Canada's overall volume of water is large, its renewable supply is relatively limited, on par with that of the United States (6.5 percent and 6.4 percent of the world's supply, respectively). Moreover, much of Canada's renewable water flows north, and southern Canada — where most people live and work — has only 2.6 percent of the world's renewable supply, placing it between India and the Democratic Republic of the Congo and far below the United States in relative abundance[3].

The protection of water resources is thus an important issue across Canada, and the Québec government has taken a lead in this regard with the recent adoption of the *Act to Affirm the Collective Nature of Water Resources and Provide for Increased Water Resource Protection*[4]. As the title suggests, the Act takes as it starting point the private law's position that water is a collective resource. Section 1 of the Act affirms the basic civil law principle, found in article 913 of the *Civil Code of Québec*[5], that water *in situ* (both surface and underground) is, by its nature, a *res communis* (or common thing) which is not owned by anyone but is available to all to use; as such, it is "part of the common heritage of the Québec nation[6]". The preamble to the Act stresses that the State, "as custodian of the interests of the nation in water resources", must be vested with the necessary powers to protect and manage those resources "to meet the needs of present and future generations".

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1. *An Act to Affirm the Collective Nature of Water Resources and Provide for Increased Water Resource Protection*, R.S.Q., c. C-6.2 (adopted as S.Q. 2009, c. 21), s. 1 [emphasis added].
2. John B. Sprague, "Great Wet North? Canada's Myth of Water Abundance", in Karen Bakker (ed.), *Eau Canada. The Future of Canada's Water*, Vancouver, UBC Press, 2007, p. 23, at page 24: "To use a financial analogy, the water sitting in lakes and aquifers is comparable to a capital resource of money that can be spent only once. The rivers running out of the lakes would represent interest and dividends that could be used every year for an indefinite time."
3. *Id.*, at pages 24 and 25.
4. *An Act to Affirm the Collective Nature of Water Resources and Provide for Increased Water Resource Protection*, *supra*, note 1.
5. *Civil Code of Québec*, S.Q. 1991, c. 64.
6. *An Act to Affirm the Collective Nature of Water Resources and Provide for Increased Water Resource Protection*, *supra*, note 1, s. 1.

As in Québec, water management regimes must take into consideration private law rules relating to water *in situ* if they are to be successful, and the purpose of this article is to examine the legal regime applicable to water *in situ* in the other Canadian provinces, whose private law traditions are English rather than French. Do the common law provinces have functional equivalents to Québec's private law notion of *res communis* and its statutory notion of State "custodianship"? In attempting to answer this question, we will look first at the question of Crown (or State) ownership of water *in situ* and then at possible limits to such Crown ownership.

1 Crown ownership

Crown ownership of water *in situ* is expressly recognized by statute in the western Canadian provinces. For example, the present *Water Act* of Alberta stipulates that "[t]he *property in* and the right to the diversion and use of *all water* in the Province *is vested in* Her Majesty in right of Alberta" and the *Water Rights Act* of Manitoba is substantially to the same effect[7]; the *Saskatchewan Watershed Authority Act* goes one step further in recognizing that all surface and ground water "is, *and is deemed always to have been*, vested in the Crown[8]". These provisions can be traced back to legislation adopted by the federal government in the 1890s (*i.e.* prior to the 1905 creation of Saskatchewan and Alberta and enlargement of Manitoba) as part of its campaign to open the west to settlement. The *North-West Irrigation Act* was first adopted in 1894, but the specific reference to Crown ownership was added retroactively the following year as the original Act mentioned only the vesting of a right of use in the Crown[9]. The *North-West Irrigation Act* continued in force until ownership and control of public land and natural resources were transferred from the federal government to the three provinces in 1930[10] and the provisions of the federal Act were re-enacted as provincial law. As originally adopted, the Crown ownership provisions applied only to surface water; they were not extended to include groundwater until 1959 in Manitoba, 1961 in Saskatchewan, and 1962 in

7. *Water Act*, R.S.A. 2000, c. W-3, s. 3 (2) [emphasis added]; *Water Rights Act*, C.C.S.M., c. W80, s. 2.
8. *Saskatchewan Watershed Authority Act*, S.S. 2005, c. S-35.03, s. 38 (1) [emphasis added].
9. *North-West Irrigation Act*, S.C. 1895, c. 33, s. 2, amending S.C. 1894, c. 30, s. 4.
10. *Constitution Act, 1930* (U.K.), 20-21 Geo. V, c. 26, reprinted in R.S.C. 1985, App. II, No. 26. The intention to include water in the 1930 transfer was retroactively confirmed in 1938: *Natural Resources Transfer (Amendment) Act 1938*, S.C. 1938, c. 36, Schedule. See generally David R. Percy, "Responding to Water Scarcity in Western Canada", (2004-2005) 83 *Tex. L. Rev.* 2091.

Alberta[11]. As for British Columbia, although the colony had adopted legislation providing for Crown control of the use of water as early as 1892[12], it did not provide for Crown ownership of surface water until 1925[13] and did not recognize it as extending to underground water until 1995 (in terms recalling Saskatchewan's legislation) : " The property in and the right to the use, percolation and any flow of *ground water*, wherever ground water is found in British Columbia, are for all purposes *vested in the Crown in right of British Columbia* and are *conclusively deemed to have always been vested* in the Crown in right of British Columbia [14]."

However, Crown ownership seems to have been added to the statutes of the western provinces for purely instrumental reasons, as a management tool to complement a statutory permit system of requiring government approval for water withdrawals over a statutory minimum[15]. A leading western Canadian water law scholar, David Percy, describes Crown ownership as "a cornerstone of the legislation, *in order to* secure control over water use[16]", and this seems to be reflected in the purpose sections of some present provincial legislation[17]. This suggests that statutory Crown

11. *The Department of Agriculture and Immigration Act Amendment Act, 1959*, S.M. 1959 (2nd Sess.), c. 4, s. 47 ; *An Act to Amend The Water Rights Act*, S.S. 1961, c. 21, s. 3 ; *An Act to Amend The Water Resources Act*, S.A. 1962, c. 99, s. 2.
12. *Water Privileges Act, 1892*, S.B.C. 1892, c. 47, s. 2 ; see subsequently *Water Clauses Consolidation Act, 1897*, S.B.C. 1897, c. 45, s. 4 (statute generally similar to 1894 federal *North-West Irrigation Act*, *supra*, note 9).
13. *An Act to Amend the "Water Act"*, S.B.C. 1925, c. 61, s. 3 (see now *Water Act*, R.S.B.C. 1996, c. 483, s. 2 (1) ; see also *Water Protection Act*, R.S.B.C. 1996, c. 484, s. 3 (1)).
14. *Water Protection Act*, S.B.C. 1995, c. 34, s. 3 (2) (now R.S.B.C. 1996, c. 484, s. 3 (2)) [emphasis added] ; see *Saskatchewan Watershed Authority Act*, *supra*, note 8. B.C.'s earliest legislative mention of Crown ownership of groundwater came in 1960, when the *Water Act* was amended to authorize the Lieutenant-Governor-in-Council to extend Crown ownership provisions to ground water by regulation : *Water Act Amendment Act, 1960*, S.B.C. 1960, c. 60, s. 4. This provision still remains in the *Water Act* notwithstanding the broad scope of s. 3 (2) of the *Water Protection Act*.
15. The permit system was a necessary part of the main legislative change extending water access to non-riparian owners in order to attract settlers to the dry prairies.
16. D.R. Percy, *supra*, note 10, 2094 [emphasis added] ; see also David R. Percy, "Seventy-Five Years of Alberta Water Law : Maturity, Demise and Rebirth", (1996-1997) 35 *Alta. L. Rev.* 221, 223 : "Having secured control of the resource [through the declaration that the property in and the right to the use of all water was vested in the Crown], the Crown then allocated the right to divert and use water to those who obtained a licence" ; Randall W. Block and Joel Forrest, "A Gathering Storm : Water Conflict in Alberta", (2005-2006) 43 *Alta. L. Rev.* 31, 33 : Crown ownership "*allowed* the government to establish" the licensing system [emphasis added].
17. *E.g.*, the purpose of B.C.'s *Water Protection Act*, *supra*, note 14, s. 2, is "to foster sustainable use of British Columbia's water resources in continuation of the objectives of conserving and protecting the environment" ; and the over-riding purpose of Alberta's

ownership in the western provinces resembles the Québec requirement that the State, "as custodian of the interests of the nation in water resources", be vested with the necessarypowers to preserve and manage those resources[18]. It is what one American author, writing about the public trust, labels "'sovereign capacity' ownership[19]".

Nevertheless, the statutory rules in the western provinces cannot be considered in isolation from the private law principles that underpin them. And these principles also apply in the eastern common law provinces, where the question of ownership of water *in situ* is not dealt with explicitly by statute[20].

The starting point is to recognize that the common law does not regard water *in situ* as being capable of private ownership. As *Halsbury's Laws of England* puts it :

> Although certain rights as regards flowing water are incident to the ownership of riparian property, the water itself, whether flowing in a known and defined channel or percolating through the soil, is not, at common law, the subject of property or capable of being granted to anybody. Flowing water is only of public right in the sense that it is public or common to all who have a right of access to it[21].

Water Act, *supra*, note 7, s. 2, is "to support and promote the conservation and management of water, including the wise allocation and use of water" (with detailed matters to be taken into consideration including "the need to manage and conserve water resources to sustain our environment and to ensure a healthy environment and high quality of life in the present and the future" (s. 2 (a)) and "the need for Alberta's economic growth and prosperity" (s. 2 (b)) ; the section also includes "market forces" (s. 2 (c)) as a management tool).

18. *An Act to Affirm the Collective Nature of Water Resources and Provide for Increased Water Resource Protection*, *supra*, note 1, preamble.

19. Richard J. LAZARUS, "Changing Conceptions of Property and Sovereignty in Natural Resources : Questioning the Public Trust Doctrine", (1985-1986) 71 *Iowa L. Rev.* 631, 637.

20. Without having systematically surveyed the legislation of all the eastern provinces, a random sampling indicates that the Crown is vested with the simple "control of all water" in New Brunswick (*Clean Water Act*, S.N.B. 1989, c. C-6.1, s. 9), the Minister of the Environment has "supervision of all surface waters and ground waters in Ontario" (*Ontario Water Resources Act*, R.S.O. 1990, c. O.40, s. 29), and the legislation is silent on this issue in Nova Scotia.

21. *Halsbury's Laws of England*, 4th ed. by Lord HAILSHAM OF ST-MARYLEBONE, vol. 49 (2) "Water", London, LexisNexis / Butterworths, 2004, par. 47 [emphasis added]. *Halsbury's* analysis of water rights relies heavily on 19th century English decisions, and its approach and sources are reflected in the short treatment of water rights in the classic English and Canadian property law texts (*e.g. Cheshire and Burn's Modern Law of Real Property*, 17th ed. by Edward H. BURN and John CARTWRIGHT, Oxford, Oxford University Press, 2006, p. 177 ; Bruce H. ZIFF, *Principles of Property Law*, 4th ed., Toronto, Thomson / Carswell, 2006, p. 97 ff.). Other authors refer more explicitly to the influence of the civil law on the historical development of this area of the common law – *e.g.* Samuel C. WIEL,

The common law focus is thus on private rights of access to (*i.e.* use of) water, which are described as "natural rights" or "natural incidents" because they exist automatically as part of the normal rights associated with the ownership of land if its geographic situation supports it[22]. Briefly put, the common law rules of access to surface water (*i.e.* water flowing through a defined channel) try to strike a rough balance between the upstream and downstream riparian owners by recognizing to the lower riparian owner a right to the natural flow of water undiminished in quantity or quality, subject to "ordinary and reasonable use" by the upper riparian owner for purposes connected to the riparian property. On the other hand, rights of access to underground water (*i.e.* percolating water) are much more absolute at common law : all landholders have the right to withdraw as much water as they like, for whatever purpose they wish[23], without regard to the effect this withdrawal might have on neighbouring landholders (*e.g.* loss of water, subsidence)[24].

The common law thus rejects the notion of private ownership of water *in situ*. However, it seems to accept the principle of Crown ownership (even absent a specific statutory provision to this effect) almost by default. The Supreme Court of Canada in *British Columbia* v. *Canadian Forest Products Ltd.* describes it as being "by legal convention[25]", and most common law lawyers would instinctively agree. But the basis for this convention is not entirely clear. The Supreme Court supports its position by reference to

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"Origin and Comparative Development of the Law of Watercourses in the Common Law and in the Civil Law", (1917-1918) 6 *Cal. L. Rev.* 245 & 342 ; Joshua Getzler, *A History of Water Rights at Common Law*, Oxford, Oxford University Press, 2004, p. 1 and 2 : "The new water doctrines were built from Roman law and Roman-derived civil-law concepts of common goods and the natural rights of ownership, together with the English sources of Bracton and Blackstone, part-civilians themselves."

22. The natural incident theory was not accepted as the foundation of riparian use rights until the mid-19th century : see particularly J. Getzler, *supra*, note 21, p. 268-327. Interestingly, a leading case in the development of the common law position was a Privy Council decision in a case from Lower Canada, *Miner* v. *Gilmour*, (1858) 12 Moo. P.C. 131, 14 E.R. 861 : J. Getzler, *supra*, note 21, p. 292-294.
23. In other words, the water does not have to be used for purposes connected with the land in question, nor does the use have to be reasonable.
24. The possibility of conflict is attenuated but not eliminated by the adoption of a statutory permit system capping the amount of water that might be withdrawn as of right. See generally Cory Hill and others, "Appendix 1 : A Survey of Water Governance Legislation and Policies in the Provinces and Territories", in K. Bakker, *supra*, note 2, p. 369, at page 383 (Table A-4 "Water property rights by provincial and territorial jurisdictions") ; D.R. Percy, *supra*, note 10.
25. *British Columbia* v. *Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74, par. 76 [hereinafter "*Canadian Forest Products*"].

the historical influence of natural law, and quotes an extract from the 13th century author Henry de Bracton :

> [It is the lord king] himself who has ordinary jurisdiction and power over all who are within his realm […] He also has, in preference to all others in his realm, privileges by virtue of the *jus gentium* [By the *jus gentium*] *things are his […] which by natural law ought to be common to all* […] Those concerned with jurisdiction and the peace […] *belong to no one save the crown alone* and the royal dignity, nor can they be separated from the crown, since they constitute the crown[26].

The things referred to by Bracton — those things which "by natural law ought to be common to all" — include "running water" as well as air, the sea and the shores of the sea[27]. But a leading Oxford legal historian, Joshua Getzler, casts doubt on the extent to which Bracton's treatise accurately reflects English law of the period[28], and others suggest that from Saxon times up to the reign of Charles I — thus, even at the time of Bracton — much of the foreshore of England was in fact privately owned[29].

Other possible bases for the legal convention of Crown ownership are more instinctive than historical. One is the idea that all things must be owned by someone, and since water *in situ* is not susceptible to private ownership, it must be owned by the Crown : "the common law introduced into [the Justinian notion of the common nature of running water, the air, the sea and the shores of the sea] a concept less important in Roman times : ownership. *The common law abhorred ownerless things*. It was held, there-

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26. *Id.*, citing Henry DE BRACTON, *On the Laws and Customs of England [De Legibus et Consuetudinibus Angliæ]*, edited by George E. WOODBINE and translated by Samuel E. THORNE, vol. 2, Cambridge, Harvard University Press, 1968, p. 166 and 167 [emphasis added].
27. *British Columbia* v. *Canadian Forest Products Ltd.*, *supra*, note 25, par. 75, citing H. DE BRACTON, *supra*, note 26, p. 39 and 40. Bracton's list is itself generally recognized as echoing the *Institutes* of Justinian : *e.g.* J. GETZLER, *supra*, note 21, p. 67. See also the discussion *infra*, the text at note 35.
28. J. GETZLER, *supra*, note 21, p. 50 (the "account of the law [in *De Legibus*] often contradicts both itself and the evidence of thirteenth-century practice") and p. 52 ("*De Legibus* was therefore written not as an accurate handbook of legal practice, but as a scholarly treatise on a grand scale, resorting to Justinian for an abstract vocabulary with which to analyse the emergent native actions").
29. *E.g.* : Frederick R. COUDERT, "Riparian Rights ; A Perversion of Stare Decisis", (1909) 9 *Colum. L. Rev.* 217 ; Royal E.T. RIGGS, "The Alienability of the State's Title to the Foreshore", (1912) 12 *Colum. L. Rev.* 395 ; Patrick DEVENEY, "Title, Jus Publicum, and the Public Trust : An Historical Analysis", (1976) 1 *Sea Grant Law Journal* 13, 41 ff ; R.J. LAZARUS, *supra*, note 19, 635. They attribute the present position of a rebuttable presumption of Crown ownership to the influence of a 1569 pamphlet, *Proofs of the Queen's Interest in Lands left by the Sea and the Salt Shores thereof*, written by a Thomas Digges, who was a lawyer and advisor of Elizabeth I (and, it is said by some, a would-be land speculator).

fore, that the ownership of beds of navigable waters was in the King[30]." This conclusion is reinforced by a second instinctive notion grounded in the historical feudal underpinning of the common law of property which regards the Crown as ultimate owner of all real property, granted as well as ungranted. This was said to be the basis for Crown ownership of the foreshore: "the King […] in addition to this merely public function [safeguarding public rights of navigation and fishing] he possessed in his own right, *as the general residuary owner of all the soil in England*, the *jus privatum*, or title to the soil of the foreshore, which conferred upon him the right either to alienate or to use this property in any way not incompatible with the *jus publicum*[31]".

This analysis leads to a conclusion of State ownership (express or implied) of water *in situ* in the common law provinces. But what sort of ownership is it? Is it full and absolute ownership entitling the Crown to do what it wants with the water? Or is it ownership subject to some sort of limitation or restriction, and thus close to the notion of custodianship under Québec's new water law?

2 Limits to Crown ownership

Because of the fundamental importance of water to life, it is inconceivable that Crown ownership of water *in situ* is full and absolute, giving the Crown the right to do with the water whatever it wants. Rather, it must be limited ownership, with the limitations arguably coming from the principles governing trusts, especially the elusive American-style public trust, and those governing fiduciary relationships in general.

2.1 Public trusts

Canadian lawyers are much attracted to the public trust as a vehicle to redress environmental harms. However, a concise definition of it is hard to find as it seems to be, as one author puts it, "chameleon-like, its character depending on the context of the dispute at hand[32]". At its most basic, it represents the idea that the government holds some of its natural

30. Jan S. Stevens, "The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right", (1980-1981) 14 *U.C. Davis L. Rev.* 195, 197 and 198 [emphasis added]. See also *e.g.* Scott Kidd, "Keeping Public Resources in Public Hands: Advancing the Public Trust Doctrine in Canada", (2006) 16 *J. Envtl. L. & Prac.* 187, 191.
31. F.R. Coudert, *supra*, note 29, 223 [emphasis added]. Much of the historical discussion of Crown ownership focuses on ownership of the foreshore.
32. Michael C. Blumm, "Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine", (1988-1989) 19 *Envtl. L.* 573, 579.

resources — notably those "for which substitutes cannot be made by man" — in trust for the public[33]. The public trust applied traditionally to Crown ownership of the beds of navigable waterways and the foreshore, which the doctrine held could not be dealt with in a way detrimental to their public use for purposes of commerce, navigation and fishing. It has been extended more recently to encompass other resources, including surface and groundwater[34] as well as public lands, municipal infrastructure, archaeological remains, cemeteries, wildlife and so on[35].

The public trust doctrine is said to be derived from Roman law as set out in the *Institutes* of Justinian which, as we have seen, provides for common ownership of some resources ("And indeed, all of these things are by natural law common to all : air, flowing water, the sea and, consequently, the shores of the sea[36]"), and to have made its way from Roman law into the English common law in near-identical terms through the writings of Bracton[37]. The concept of a public trust first appeared in American cases in the early 19th century[38], and was given modern impetus by the publica-

33. Bernard S. COHEN, "The Constitution, the Public Trust Doctrine and the Environment", [1970] *Utah L. Rev.* 388, 388. See also David TAKACS, "The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property", (2008) 16 *N.Y.U. Envtl. L.J.* 711, 713.

34. See generally Ralph W. JOHNSON, "Water Pollution and the Public Trust Doctrine", (1988-1989) 19 *Envtl. L.* 485. See also : Charles F. WILKINSON, "The Headwaters of the Public Trust : Some Thoughts on the Source and Scope of the Traditional Doctrine", (1988-1989) 19 *Envtl. L.* 425, 466 (distribution of potable water) ; J.S. STEVENS, *supra*, note 30, 224 (allocation of water permits).

35. *E.g.* R.J. LAZARUS, *supra*, note 19, 640, 641, 649 and 650 ; D. TAKACS, *supra*, note 33, 718-720.

36. P. DEVENEY, *supra*, note 29, 23, translating the *Institutes* of Justinian, Inst. 2.1.1. Deveney argues at pages 26-28 that the Roman reference to "things common to all" originated with Marcian, a 3rd century jurist influenced by the idea of a primal Golden Age when the fruits of the earth were common to all, coupled with the Stoic notion of a moral duty not to deprive others of necessary things, particularly the earth's "elements" ; see also *e.g.* D. TAKACS, *supra*, note 33, 718 [emphasis added] : identifying public trust doctrine's power as coming from longstanding idea that "some parts of the natural world are gifts of nature so essential to human life that private interests cannot usurp them, and so the sovereign must steward them to prevent such capture".

37. *E.g.* J. GETZLER, *supra*, note 21, p. 67 : "These Justinianic and Bractonian formulations are perhaps the key texts in the long history of water rights ; they are cited continually in judgments and treatises for the next 600 years." Some authors cite the *Magna Carta* 1212, revised 1225, as another historical antecedent to the public trust : *e.g.* C.F. WILKINSON, *supra*, note 34, 429 ; but see P. DEVENEY, *supra*, note 29, 39-41.

38. J.S. STEVENS, *supra*, note 30, 199 (identifying *Arnold* v. *Mundy*, 6 N.J.L. 1 (Sup. Ct. Judicature, 1821), as first case in which American court "declared the law of public trust as we know it today") ; see also C.F. WILKINSON, *supra*, note 34, 450, at footnote 103.

tion of Sax's 1970 seminal article[39], which inspired much academic debate and judicial consideration.

The concept of a public trust has been invoked more tentatively in Canada. It was referred to in some early cases, notably *R.* v. *Robertson*[40], an 1882 decision of the Supreme Court of Canada in which Strong J. mentioned the existence of New York cases recognizing that the beds of large navigable inland waterways "are, by the common law, vested in the State as a trustee for the public, and are inalienable without legislative authority", but said that this "important question" had not been raised for adjudication in *Roberston*[41]. Other Canadian cases mentioning a public trust include *Green* v. *Ontario*[42], *R.* v. *Mann*[43] and *Walpole Island First Nation* v. *Canada*[44], and an established line of cases recognizes that municipalities hold title to streets in trust for the public[45]. As well, some pioneer writings explored the possibility of a public trust in Canada[46]. Then came the 2004

39. Joseph L. Sax, "The Public Trust Doctrine in Natural Resources Law : Effective Judicial Intervention", (1969-1970) 68 *Mich. L. Rev.* 471, 489 (identifying U.S. Supreme Court decision in *Illinois Central Railroad Company* v. *State of Illinois*, 146 U.S. 387 (1892) as "Lodestar in American Public Trust Law").
40. *R.* v. *Roberston*, (1882) 6 S.C.R. 52 (New Brunswick case deciding that ownership of ungranted beds of navigable rivers vested in provincial rather than federal Crown).
41. *Id.*, 132 and 138 (see also Ritchie C.J. at page 126, concluding that since ungranted lands of province were "in the [provincial] crown for the benefit of the people", so too was right to fish). Two earlier cases are *R.* v. *Meyers* (1852), 3 U.C.C.P. 305, par. 123 (major inland waterways "vested in the crown in trust for the public uses for which nature intended them") and *R.* v. *Lord* (1864), 1 P.E.I. 245 ("the king is […] nothing more than a trustee of the public" with respect to public rights of navigation and fishing), cited in Kate P. Smallwood, *Coming Out of Hibernation : The Canadian Public Trust Doctrine*, LL.M. Thesis, Faculty of Law, University of British Columbia, 1993, p. 80, [Online], [circle.ubc.ca/handle/2429/1465] (10 November 2010).
42. *Green* v. *Ontario* (1972), 34 D.L.R. (3d) 20 (Ont. H.C.J.) (extractive activities outside public park ; existence of public trust denied).
43. *R.* v. *Mann*, 1990 CanLII 603 (BC S.C.) (aboriginal priority in salmon fishery ; public trust held arguable). See also *Mann* v. *Canada*, 1991 CanLII 1962 (BC S.C.).
44. *Walpole Island First Nation* v. *Canada (Attorney General)*, [2004] 3 C.N.L.R. 351 (Ont. S.C.) (aboriginal title to bed of lake ; public trust held arguable).
45. *E.g. S.W.Properties Inc.* v. *Calgary (City)*, 2003 ABCA 10, par. 19, 222 D.L.R. (4th) 430. On the dedication of roads and other public spaces, see Andrew Gage, "Highways, Parks and the Public Trust Doctrine", (2007) 18 *J. Envtl. L. & Prac.* 1.
46. *E.g.* : Constance D. Hunt, "The Public Trust Doctrine in Canada", in John Swaigen (ed.), *Environmental Rights in Canada*, Canadian Environmental Law Research Foundation, Toronto, Butterworths, 1981, p. 151 ; K.P. Smallwood, *supra*, note 41 ; John C. Maguire, "Fashioning an Equitable Vision for Public Resource Protection and Development in Canada : The Public Trust Doctrine Revisited and Reconceptualized", (1997) 7 *J. Envtl. L. & Prac.* 1 ; Barbara von Tigerstrom, "The Public Trust Doctrine in Canada", (1997) 7 *J. Envtl. L. & Prac.* 379.

decision of the Supreme Court of Canada in *Canadian Forest Products*[47], an action by British Columbia for damages for the loss of trees on Crown land resulting from a forest fire caused by the defendant's negligence. Both the majority and the minority of the Court accepted the right of the Crown, in appropriate cases, to sue as *parens patriae* in damages for harm to the environment. Binnie J., speaking for the majority, supported this conclusion with references to Justinian and Bracton and to the American public trust[48]. Although these remarks are *obiter* (as the majority felt this was not an appropriate case in which to sanction environmental loss as the issue had not been fully argued in the courts below), *Canadian Forest Products*, like Sax's article, has been a catalyst for a more sustained Canadian interest in the public trust. It has been widely commented upon[49] and quoted with approval in several cases, notably by the trial judge in *Prince Edward Island* v. *Canada (Minister of Fisheries and Oceans)*[50].

The nature of an American-style public trust is not clear. At first blush it appears to be a property-based institution[51], and the evocative word

47. *British Columbia* v. *Canadian Forest Products Ltd.*, *supra*, note 25.
48. *Id.*, par. 71-80.
49. See specifically : Jerry V. DeMarco, Marcia Valiente and Marie-Ann Bowden, "Opening the Door for Common Law Environmental Protection in Canada : The Decision in *British Columbia* v. *Canadian Forest Products Ltd.*", (2005) 15 *J. Envtl. L. & Prac.* 233 ; Stewart A.G. Elgie and Anastasia M. Lintner, "The Supreme Court's *Canfor* Decision : Losing the Battle but Winning the War for Environmental Damages", (2005) 38 *U.B.C. L. Rev.* 223. See more generally : Jerry V. DeMarco, "The Supreme Court of Canada's Recognition of Fundamental Environmental Values : What Could be Next in Canadian Environmental Law ?", (2007) 17 *J. Envtl. L. & Prac.* 159 ; S. Kidd, *supra*, note 30. See also on *parens patriae* : William R. MacKay, "*Parens Patriae* as a Basis for Provincial Standing in Judicial Review of Federal Decisions", (2007-2008) 45 *Alta. L. Rev.* 961 ; Craig E. Jones, "The Attorney General's Standing to Seek Relief in the Public Interest : The Evolving Doctrine of *Parens Patriae*", (2007) 86 *Can. Bar. Rev.* 121.
50. *Prince Edward Island* v. *Canada (Minister of Fisheries and Oceans)*, 2005 PESCTD 57, 256 Nfld. & P.E.I. Rep. 343, rev'd 2006 PESCAD 27, 277 D.L.R. (4th) 735 (leave to appeal refused, S.C.C., 28-06-2007, 31887, [2007] S.C.R. vii) (motion to strike statement of claim in action challenging management of Atlantic fisheries denied ; reversed on procedural grounds). In denying the motion, the trial judge quoted with approval both *British Columbia* v. *Canadian Forest Products Ltd.*, *supra*, note 25, and Major J. in *Comeau's Sea Foods Ltd.* v. *Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, par. 37 : "Canada's fisheries are a 'common property resource', belonging to all the people of Canada […] it is the Minister's duty to manage, conserve and develop the fishery on behalf of Canadians in the public interest."
51. *E.g.* Harrison C. Dunning, "The Public Trust : A Fundamental Doctrine of American Property Law", (1988-1989) 19 *Envtl. L.* 515. Occasionally, however, the concept seems to be used more widely, to encompass the general trust and confidence the governed must have in their government and its public officials. See the discussion *infra*, section 2.3. Even J.L. Sax, *supra*, note 39, 484, speaks of "the rather dubious notion that the

"trust" implies the existence of twinned proprietary interests, one belonging to the State and the other to the public : the State's interest consists of the management obligation (or burden) and the public's interest represents the benefit[52]. However, this suggests a need to look more closely at the historical development of the public trust, to see to what extent it supports the concept of twinned proprietary interests implicit in a trust. A closer look is necessary because, as one author put it, "a great deal of Roman and medieval law and history lurks there [*i.e.* in the public trust doctrine] […] and not always in a form recognizable to one interested in 'pure' scholarly history. The courts have developed and erratically applied what is really a counter-history, a purely judicial history of the public's interest in the coastal area[53]."

Five areas need particular attention. One is the distinction between *res communes* (common things) and *res publicae* (public things), a distinction made by Justinian[54] but one which has become blurred in the modern discussion of the public trust. A second area needing attention is the basic distinction between property belonging to the sovereign in a personal capacity (the privy purse) and property belonging to the sovereign as head of state (the public purse), a distinction that came slowly to Roman law

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general public should be viewed as a property holder" and seems to regard the trust as providing for strengthened judicial review. See also M.C. Blumm, *supra*, note 32, 589 ff. : "Public Trust as 'Hard Look' Doctrine".

52. *E.g.* Erin Ryan, "Public Trust and Distrust : The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management", (2001) 31 *Envtl. L.* 477, 487 : "The public trust, after all, remains a 'trust' – in which a bundle of specifically designated private property rights are assigned to the 'public' and delegated to the oversight of the sovereign as trustee." Eileen E. Gillese and Martha Milczynski, *The Law of Trusts*, 2nd ed., Toronto, Irwin Law, 2005, p. 17, describe the trust relationship as one of "split-title ownership". A trust is not the only possible proprietary relationship, however, and the public's interests in navigation and fishing in the public trust example of Crown ownership of the beds of navigable rivers and the foreshore are sometimes classified as easements or profits à prendre. These are long-recognized, albeit limited, proprietary interests in another's property, and their title relationship does not reflect the symmetrical twinned ownership typical of a trust. Rather, the interests of each are separate and asymmetrical, with the owner of the burdened property having a larger "corporeal" interest and the owner of the easement or profit having a more limited "incorporeal" right.

53. P. Deveney, *supra*, note 29, 15.

54. *The Institutes of Justinian*, translated by Thomas Collett Sandars, Chicago, Callaghan & Company, 1876, p. 603, Book 2 "Law Relating to Things". *Res publicae* belong to the State and are said to include "rivers and ports, and the right of fishing therein, and the use for purposes of navigation of the banks thereof, although these banks might belong to private proprietors". Both *res communes* and *res publicae* fall under the category of "*res extra nostrum patrimonium*".

and very late to the common law[55]. Patrick Deveney calls an acceptance of this distinction "the basis for any real public trust[56]". A third is the distinction between (public) property held in full ownership and property held on trust. This distinction did not exist in Roman law and evolved only gradually over the 13th to 16th centuries in England[57], later than the period in which the public trust is usually said to have originated. A fourth area for study is the distinction between alienable and inalienable public property. Inalienability is not a necessary component of a trust, and trustees often have a power of sale over the individual assets in a trust, but some authors stress the inalienable nature of property subject to a public trust[58]. However, English and Canadian common law clearly accepts that the beds of navigable waters (the prototypical public trust asset) can be alienated by the Crown, and that this usually results in the right to fish being privatized but the right of navigation remaining public[59]. A final area needing attention is the distinction between public property and public rights. What is the nature of the trust asset being held on behalf of the public ? Is it property, or is it rights ? Of course, the two concepts, are interrelated, even interchangeable, in the sense that some rights, such as a right of navigation, might in some circumstances also be a proprietary interest (*i.e.* an easement), but might in other circumstance be something less (*i.e.* a mere license or permission). However, the various discussions of the public trust do not seem to distinguish particularly between these two concepts, and a closer analysis of the nature of the trust asset might be helpful.

In sum, one American author describes the public trust as a "legal fiction[60]", one which has outgrown its initial usefulness as it has been

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55. P. Deveney, *supra*, note 29, 17 and 50 (distinction not made in England until 1800s). See also J. Walter Jones, "The Early History of the *Fiscus*", (1927) 43 *Law Q. Rev.* 499.
56. P. Deveney, *supra*, note 29, 17.
57. Mark R. Gillen and Faye Woodman (eds.), *The Law of Trusts. A Contextual Approach*, 2nd ed., Toronto, Emond Montgomery Publications, 2008, p. 43-48.
58. Many quote the Court in *Illinois Central Railroad Company* v. *State of Illinois*, *supra*, note 39, 453 : "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and the soil under them […] than it can abdicate its police powers in the administration of government and the preservation of the peace." *E.g.* : R.J. Lazarus, *supra*, note 19, 638, at footnote 33 ; J.S. Stevens, *supra*, note 30, 212 ; C.F. Wilkinson, *supra*, note 34, 452 and 453.
59. *E.g.* E.H. Burn and J. Cartwright, *supra*, note 21, p. 177-179. For an exploration of the source of this rule, see *e.g.* F.R. Coudert, *supra*, note 29.
60. R.J. Lazarus, *supra*, note 19, 656 : "Assessment of the future value of the public trust doctrine must start with the candid premise that the doctrine rests on legal fictions. Notions of 'sovereign ownership' of certain natural resources and the 'duties of the sovereign as trustee' to natural resources are simply judicially created shorthand methods to justify treating differently governmental transactions that involve those resources."

replaced by developments in other areas of the law[61]. But the "public trust" is a concept that resonates strongly. As another author puts it, in relation to water :

> The public trust, as it is applied to the appropriation of water, is based on a set of modest beliefs : a belief that the public benefits mightily from private development, but that the public interest is in fact greater than the sum of the private interests ; a belief that property ownership must be profoundly respected but that property rights in water, like rights in land, are not absolute but rather can be regulated and adjusted in reasonable ways for the good of the citizenry as a whole ; a belief that wasteful uses of public resources are wrong and are not excused by return flows that return to our rivers not just water but also silt, salts, agrichemicals, and temperature changes ; a belief that our rivers and canyons are more than commodities, that they have a trace of the sacred ; a belief that words like "trust" ought to be taken seriously[62].

Perhaps, therefore, Canadian courts should simply adopt, or adapt, the public trust as a *sui generis* concept developed by the courts of a sister jurisdiction, without looking too closely at its historical origins[63]. Or they might consider whether classical Canadian trust and fiduciary law provides a similar sort of protection[64].

2.2 Classical trusts

Modern Canadian trust law recognizes two types of trusts[65]. One is a trust for persons and the other, a trust for purposes. Each is subject to the same basic requirements : a substantive requirement that the content of the trust respect the "three certainties", and a procedural requirement that the trust be properly constituted. These requirements are interrelated.

2.2.1 Certainty

The substantive "three certainties" are certainty of intention, subject matter and objects, and their application to ownership of water *in situ*

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61. *Id.*, 656 ff. (discussing developments relating to standing, torts, administrative law and police power – *i.e.* regulation). Critics fault Lazarus as being "hopelessly naive" in this regard : M.C. Blumm, *supra*, note 32, 593, at footnote 98.
62. C.F. Wilkinson, *supra*, note 34, 471 and 472.
63. "This 'public trust' is a *sui generis* concept that does not invoke traditional trust law. The concept of a common law pubic trust has yet to develop in Canada but it may also not yet be foreclosed" : Donovan W. Waters, Mark R. Gillen and Lionel D. Smith (eds.), *Waters' Law of Trusts in Canada*, 3rd ed., Toronto, Thomson/Carswell, 2005, p. 31.
64. See *e.g.* K.P. Smallwood, *supra*, note 41, p. 101 ff. ; see also C.D. Hunt, *supra*, note 46, at pages 174 ff.
65. The discussion of classical trust law relies particularly on : M.R. Gillen and F. Woodman (eds.), *supra*, note 57 ; D.W. Waters, M.R. Gillen and L.D. Smith, *supra*, note 63 ; E.E. Gillese and M. Milczynski, *supra*, note 52.

is not without difficulty. The first two certainties, intention and subject matter, apply in much the same way to trusts for persons or purposes. The first certainty, that of "certainty of intention", requires that the persons setting up the trust (the settlors) clearly intend that the persons holding the property hold it for the benefit of the persons or purposes indicated, and not simply for their own benefit. This requirement is interrelated with the basic procedural requirement that a trust be properly constituted, discussed below[66].

The second certainty, that of "certainty of subject matter", in principle ought not to cause much difficulty in regard to water *in situ*. It has two aspects, a collective certainty as to the property subject to the trust and an individual certainty as to the amount each beneficiary is to receive. The first aspect requires that the property be described in such a way that it is ascertained or ascertainable. If the property is the surface and underground water located in a province, it is presumably something that is either ascertained or capable of ascertainment by qualified hydrologists. However, there is some ambiguity in the public trust literature about the nature of the asset held on trust, as noted above[67]. Is it the property itself, or is it a more limited right over the property such as an easement? Although classical trust law recognizes that any sort of property — including intangible property such as rights — can be held in trust, the requirement of certainty of subject matter reinforces the need, identified above, for more clarity about this issue. As for the second aspect, that of certainty of each beneficiary's share, this can be satisfied either by having a method by which shares to water are to be determined (*e.g.* the common law property-based rules for access to water[68]), or by giving the trustee discretion to decide the share (*e.g.* statutory water withdrawal standards), or under a basic fall-back presumption of equality.

The third certainty, that of "certainty of objects", requires that the beneficiaries of the trust be defined with enough certainty that the trustees are able to administer the trust and the courts to enforce it. This is seen as an important stumbling block to the application of classical trust law to the public trust situation[69]. Trust objects may be either persons or, more

66. *Infra* the discussion at section 2.2.2.
67. *Supra* the discussion following note 59.
68. *Supra* the discussion following note 22. These rules might be certain enough to meet the requirements of trust law, without necessarily being fair or equitable in given circumstances.
69. *E.g.* C.D. Hunt, *supra*, note 46, at pages 174 ff., discussing *Green* v. *Ontario*, *supra*, note 42.

occasionally, purposes, and the certainty of objects requirement is applied differently to each.

2.2.1.1 Trusts for persons

Most classical trusts are trusts for persons, and this initially appears to be the case for trusts of water *in situ* as the trusts are diversely described as being for the benefit of "all", "the people", "the public", or another similar term[70]. The test for certainty of objects for person trusts differs for fixed and discretionary trusts. A fixed trust is one in which the beneficial interests have been specified in the trust instrument, and the trustees have no discretion as to choice of beneficiary or amount of benefit. This means that to implement the trust, the trustees must be able to identify each and every beneficiary, and for this reason, the test of certainty of objects for fixed trusts is a "complete list" (or "class ascertainability") test. However, where the trusts are discretionary — that is, where the trustees have discretion to choose which beneficiaries in a designated class will receive anything from the trust, how much each will receive, and when — the trustees do not have be able to identify all member of the class before choosing; rather, they just have to ascertain that the chosen beneficiaries are members of the designated class. For this reason, the test for certainty of objects for discretionary trusts is a less-demanding "is or is not" (or "individual ascertainability") test[71].

A trust of water *in situ* probably has both fixed and discretionary elements. It would be fixed as to basic needs (health and sanitation), and it seems likely that the government has enough personal data (*e.g.* social insurance numbers, census data and so on) to satisfy the complete list test in a way to ensure widespread and equitable distribution of this vital resource. It would probably be regarded as discretionary in regard to additional uses (*e.g.* agricultural, manufacturing, industrial, etc.), where the government must establish priorities amongst classes of users, but then has only to consider whether a particular permit applicant "is or is not" a member of the class in question.

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70. To cite examples from Justinian as quoted in: P. Deveney, *supra*, note 29, 23, and Bracton as quoted in *British Columbia* v. *Canadian Forest Products Ltd.*, *supra*, note 25, par. 75; *Illinois Central Railroad Company* v. *State of Illinois*, *supra*, note 39, as quoted in J.L. Sax, *supra*, note 39, 489 and 490, and *R.* v. *Robertson*, *supra*, note 40, 126; E. Ryan, *supra*, note 52, 487.
71. See *McPhail* v. *Doulton*, [1971] A.C. 424 (H.L.).

2.2.1.2 Trusts for purposes

Trusts of water *in situ* may perhaps be seen as trusts for purposes (*e.g.* the purpose of providing open and equitable access to water) rather than as trusts to benefit persons directly. In this case, different considerations about certainty of objects apply. Although purpose trusts are generally regarded as invalid because a purpose does not have standing to bring an action to enforce it, an important exception to this rule is made for trusts for *public* purposes (*i.e.* charitable trusts)[72]. The only required certainty is that the purpose be public (charitable) ; once this basic threshold is crossed, further specificity about the purpose is unnecessary[73]. The public nature of the purpose means that the Attorney General acting for the Crown as *parens patriae* has standing to enforce the trust, thus overcoming the principle obstacle to the recognition of purpose trusts generally.

A public, or charitable, purpose trust requires "an *exclusive* dedication of property to a *charitable purpose* in a way that provides a *public benefit*[74]". The first question, therefore, is whether the purpose of the trust is charitable, and a long line of cases categorizes charitable purposes under the four heads of : relief of poverty, advancement of religion, advancement of education, and "other purposes beneficial to the community[75]". The second question is whether there is the requisite public benefit, as proof of public benefit rather than private advantage is essential for a public purpose trust. Public benefit is presumed (although it can be rebutted) in regard to the first three charitable areas – religion, education and poverty — but must be proved in regard to the residual fourth category, "other purposes beneficial to the community". This is done both by arguing by analogy from recognized cases and by demonstrating a "benefit of the community or of an appreciably important class of the community". The third question is whether the trust assets are dedicated exclusively to a charitable purpose.

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72. *Private* purpose trusts (*i.e.* non-charitable trusts), on the other hand, are caught by the general rule and thus void, although the courts sometimes struggle to find a way around this result in particular cases.
73. The courts have inherent jurisdiction to supply a "scheme" to provide any additional necessary specificity.
74. M.R. GILLEN and F. WOODMAN (eds.), *supra*, note 57, p. 231.
75. The choice of these four heads of charity is encrusted with history. It follows a classification set out by Lord Macnaughton in *Special Commissioners of Income Tax* v. *Pemsel*, [1891] A.C. 531, 583 (H.L.), which was itself based on the preamble to the *Statute of Charitable Uses Act, 1601* (UK), 43 Eliz., c. 4. On the continued use of this approach in Canada, see *Vancouver Society of Immigrant and Visible Minority Women* v. *Canada (Minister of National Revenue)*, [1999] 1 S.C.R. 10.

Open and equitable access to water *in situ* would seem to be a particularly compelling example of a purpose "beneficial to the community". Access to water is more than beneficial : it is necessary, not just for humans but also for all living things. A purpose trust suggests taking a more ecocentric approach to water needs, not just an anthropocentric one as might be implied by a persons trust. And the exclusive dedication requirement stresses that all water must be dedicated to the public purpose, so that commercialization of any part of it — and the private advantage this entails — would not be permitted. However, *parens patriae* enforcement raises practical difficulties in the context, as the Crown would be both plaintiff and defendant ; public interest intervention might provide a partial solution[76].

2.2.2 Constitution

The second basic requirement for a valid trust is the procedural requirement that the trust be properly constituted. Mere intention to create a trust is not enough ; title to trust property must be vested in the trustee to be held in trust for the designated objects (persons or purposes). How is a trust of water *in situ* set up, or constituted ? Most trusts are constituted by the transfer of the asset from a settlor to a trustee, although they can also be created by declaration of trust or by operation of law. The first method, a transfer from settlor to trustee, is difficult to envisage for water *in situ* : if the Crown is the trustee, who is the settlor ? A declaration of trust by the Crown that it holds the water on trust seems more possible. For example, the statutory declarations of Crown ownership of water *in situ* in the western provinces could be read as declarations of trust, and the question would be whether the statutory provisions (and perhaps surrounding documentation) are sufficiently explicit in this regard to satisfy the certainty of intention requirement[77]. However, this implies that without a sufficiently clear declaration of trust, Crown ownership is

76. This subject is too large to canvass properly here. See *e.g.* Michelle Campbell, "Re-inventing Intervention in the Public Interest : Breaking Down Barriers to Access" (2005) 15 *J. Envtl. L. & Prac.* 187

77. *E.g.* British Columbia, Ministry of Environment, *Information Sheet : Water Rights in British Columbia*, 26 June 2006, [Online], [ww.env.gov.bc.ca/wsd/water_rights/cabinet/water_rights_in_bc.pdf] (12 November 2010) opens with a statement that the B.C. *Water Act*, *supra*, note 13, "assigns ownership of surface and ground water to the Crown, *on behalf of* the residents of the province" [emphasis added]. "On behalf of" is a classic phrase to signal a trust, but the ownership section of the Act itself (*id.*, s. 2) does not contain any words suggesting a trust relationship. Moreover, D.W. Waters, M.R. Gillen and L.D. Smith, *supra*, note 63, p. 30, caution that words alone do not create a trust, and that the Crown's intention to become a "true trustee" must be clear from the context.

absolute, which we have suggested is an untenable conclusion. The second possible method for constituting a trust to water *in situ*, that of operation of law, seems inherently satisfying in light of the historical references to natural law and the *jus gentium*[78], but how would classical Canadian trust law treat this method ?

The most important type of trust arising by law is the "constructive trust", and common law Canada recognizes two sorts : an "institutional" constructive trust (as in England) and a "remedial" constructive trust (as in the United States). The latter has attracted much attention in Canada as a remedy for unjust enrichment, with the Supreme Court of Canada playing a leading role in its development. Unjust enrichment is said to lie "at the heart of the constructive trust", and to have as its constituent elements "an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment[79]". The Supreme Court is said to take a "straightforward economic approach[80]" to the first two requirements, and to see enrichment as a tangible benefit conferred on the defendant by the plaintiff and detriment as comprising lost opportunity[81]. The third requirement — absence of juristic reason for the enrichment — is the most difficult to assess. It is at this stage that the courts consider the fairness or justness of the enrichment, which the Supreme Court has recently suggested involves assessing two factors, "the reasonable expectations of the parties and public policy considerations[82]". These requirements appear especially applicable to situations in which the State seeks to profit from its ownership of water *in situ* (by selling it in bulk, for example, or by permitting extensive use of it in resource extraction activities which generate royalties for the State). The State's coffers are enriched (although it is difficult to envisage this benefit as flowing *from* the public to the State) ; the public's supply of water is diminished or polluted ; and there does not appear to be any juristic reason, any legal justification, for this enrichment, as it neither reflects the reasonable expectations of the parties (since Crown ownership is merely intended to buttress the regulatory mechanisms) nor accords with public policy expectations (as commercialization of water in this way risks depriving the public and the environment of this vital resource).

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78. *E.g. supra*, the text at note 26.
79. *Becker* v. *Pettkus*, [1980] 2 S.C.R. 834, par. 37 and 38 (Dickson J., describing this approach as "supported by general principles of equity that have been fashioned by the courts for centuries").
80. *Peter* v. *Beblow*, [1993] 1 S.C.R. 980, par. 8 (McLachlin J.).
81. *Peel (Regional Municipality)* v. *Canada*, [1992] 3 S.C.R. 762, 790 (McLachlin J.).
82. *Garland* v. *Consumers' Gas Co.*, [2004] 1 S.C.R. 629, par. 46 (Iacobucci J.). For a critique of this approach, see Mitchell McInnis, "Making Sense of Juristic Reason : Unjust Enrichment After *Garland* v. *Consumers' Gas*", (2004-2005) 42 *Alta. L. Rev.* 399.

The institutional constructive trust, on the other hand, has been largely ignored in Canada for several decades, but its continued importance was reaffirmed by the Supreme Court of Canada in 1997 :

> The appeal thus presents two different views of the function and ambit of the constructive trust. One view sees the constructive trust exclusively as a remedy for clearly established loss. On this view, a constructive trust can arise only where there has been "enrichment" of the defendant and corresponding "deprivation" of the plaintiff. The other view, while not denying that the constructive trust may appropriately apply to prevent unjust enrichment, does not confine it to that role. On this view, the constructive trust may apply absent an established loss to *condemn a wrongful act and maintain the integrity of the relationships of trust* which underlie many of our industries and institutions.
>
> It is my view that the second, broader approach to constructive trust should prevail. This approach best accords with the history of the doctrine of the constructive trust […] and the purposes which the constructive trust serves in our legal system[83].

The idea of a constructive trust arising by operation of law to "maintain the integrity of the relationship of trust" underlying the public's acceptance of government management of water *in situ* and the possibility this gives the public to "condemn a wrongful act" in this management comes close to the American notion of a public trust and the Québec idea of custodianship. Moreover, the case for the imposition of an institutional constructive trust is strongest when there has been a breach of fiduciary duties, and several Canadian authors have emphasized the fiduciary role of the Crown when writing of the public trust[84].

2.3 Fiduciary duties

There has been an explosion of case law and academic commentary about fiduciaries and fiduciary duties in common law Canada over the last twenty-five years, and it is difficult to come up with a succinct description of what a fiduciary relationship is and the fiduciary duties arising from it[85]. At the risk of over-simplification, a fiduciary duty is a duty of loyalty owed by one to another, a duty to act solely in the other's interest and not in one's own interest. The strength and importance of such a duty was

83. *Soulos* v. *Korkontzilas*, [1997] 2 S.C.R. 217, par. 14 and 15 (McLachlin J., speaking for the Court) [emphasis added].
84. *E.g.* K.P. Smallwood, *supra*, note 41, p. 119 ff. ; J.C. Maguire, *supra*, note 46, 25 ff.
85. One judge spoke, with apparent frustration, of the word "fiduciary" being "flung around" : Southin J. in *Girardet* v. *Crease & Co.*, (1987) 11 B.C.L.R. (2d) 361, 362 (B.C.S.C.), as quoted in Leonard I. Rotman, "Fiduciary Doctrine : A Concept in Need of Understanding", (1995-1996) 34 *Alta. L. Rev.* 821, 823.

emphasized by the Supreme Court of Canada in *Guerin* v. *R.*, which deals with the obligations of the Crown in regard to Indian lands and held that :

> the nature of Indian title and the framework of the statutory scheme for [its disposition placed] upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians […] This obligation *does not amount to a trust in the private law sense. It is rather a fiduciary duty*. If, however, the Crown breaches this fiduciary duty it will be *liable to the Indians in the same way and to the same extent as if such a trust* were in effect[86].

The Supreme Court describes fiduciary relationships as possessing three general characteristics :

1) The fiduciary has scope for the exercise of some discretion or power.

2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.

3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power[87].

These indicia capture well the situation of Crown ownership of water *in situ* : the Crown has a good deal of discretionary power over access to water ; the manner in which this power is exercised certainly affects people ; and the people are in a peculiarly vulnerable position, given the necessity of water to them. These indicia are regularly cited with approval, but they are very wide and could apply to many, if not most, government activities.

The extent to which governments can be held subject to fiduciary duties was raised by the Supreme Court in *Guerin*. Although it expressed caution about imposing fiduciary duties on the Crown, the Court nevertheless accepted the possibility of doing so in appropriate circumstances :

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not *typically* give rise to a fiduciary relationship. As the "political trust" cases indicate, the Crown is not *normally* viewed as a fiduciary in the exercise of its legislative or administrative function. The mere fact, however, that it is the Crown which is obligated to act on the

86. *Guerin* v. *R.*, [1984] 2 S.C.R. 335, par. 79 (Dickson J.) [emphasis added].

87. *Frame* v. *Smith*, [1987] 2 S.C.R. 99, par. 60 (Wilson J., in dissent), cited with approval in *e.g. International Corona Resources Ltd.* v. *LAC Minerals Ltd.*, [1989] 2 S.C.R. 574, 646. See also *Hodgkinson* v. *Simms*, [1994] 3 S.C.R. 377, 409 (distinguishing between *per se* and *ad hoc* fiduciary relationships : that is, situations where fiduciary duties are "innate to a given relationship" (*i.e.* relationships that have "as their essence discretion, influence over interests, and an *inherent* vulnerability" [emphasis in original]) and those in which fiduciary obligations "arise as a matter of fact out of the specific circumstances of that particular relationship"). For a recent discussion of "the developing jurisprudence" on fiduciary duties, see *Perez* v. *Galambos*, [2009] 3 S.C.R. 247.

> Indians' behalf *does not of itself remove* the Crown's obligation from the scope of the fiduciary principle[88].

But what is a "political trust"? Here the word "trust" is not used in the proprietary sense of the twinned ownership institution recognized by equity but rather in the broader, generic sense of faith, confidence, reliance. In England, it is said to describe "the responsibility, the end, of government itself" and as such, to be "a political metaphor": it is not an enforceable trust but rather only a "moral" one[89]. English courts are therefore reticent to recognize the Crown as being subject to fiduciary duties in the exercise of its governance obligations, and the reason for this is said to be the constitutional imperative of parliamentary sovereignty. However, Commonwealth scholars argue that different imperatives apply in countries such as Canada and Australia and that courts here should be more willing to hold the Crown subject to fiduciary duties[90].

The Crown's fiduciary obligation in regard to aboriginal rights is firmly established in Canada, and there are now signs that the courts are willing to recognize that fiduciary obligations apply more widely. For example, in *Canadian Forest Products*, the Supreme Court raised the possibility of "enforceable fiduciary duties owed to the public by the Crown" in regard to the environment[91]. In *Authorson* v. *Canada (Attorney General)*, a class action on behalf of disabled veterans, both the Superior Court and the Court of Appeal of Ontario held that the Crown was acting as a fiduciary in its administration of pensions on their behalf and had breached its duty

88. *Guerin* v. *R.*, *supra*, note 86, par. 100 (Dickson J.) [emphasis added].

89. Paul Finn, "The Forgotten 'Trust': The People and the State", in Malcolm Cope (ed.), *Equity. Issues and Trends*, Sydney, Federation Press, 1995, p. 131, at page 134, citing *The Collected Papers of Frederic William Maitland*, by Herbert A.L. Fisher (ed.), vol. 3, Cambridge, University Press, 1911, p. 403. "Political" or "moral" trusts are also sometimes referred to as trust "in the higher sense", as opposed to enforceable trusts "in the lower sense", terms which Dickson J. criticized in *Guerin* v. *R.*, *supra*, note 86, 375.

90. *E.g.* Brian Slattery, "First Nations and the Constitution: A Question of Trust", (1992) 71 *Can. Bar Rev.* 261; P. Finn, *supra*, note 89; Lorne Sossin, "Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law", (2003) 66 *Sask. L. Rev.* 129. See also Evan Fox-Decent, "The Fiduciary Nature of State Legal Authority", (2005-2006) 31 *Queen's L.J.* 259 (grounding State's fiduciary obligations in Kant's generally applicable theory of right, rather than locally applicable constitutional imperatives).

91. *British Columbia* v. *Canadian Forest Products Ltd.*, *supra*, note 25, par. 81. The statement actually refers, somewhat ambiguously, to fiduciary duties owed "in that regard". Grammatically, this probably refers back to the immediately preceding mention of the Crown's potential liability for "*inactivity* in the face of threats to the environment", but it is doubtful that the Court meant to suggest by this that the Crown would be liable for acts of nonfeasance but not of misfeasance.

to them by failing to invest the funds or pay interest; this finding was accepted by the Crown before the Supreme Court of Canada, which ruled against the veterans on other grounds[92]. And in *Elder Advocates of Alberta Society* v. *Alberta*, a class action on behalf of residents of long term care facilities, the Alberta Court of Appeal accepted as arguable that the Crown was acting as a fiduciary to the residents and had breached its duty to them by the way in which it set their accommodation charge[93]. On the other hand, in *Harris* v. *Canada.*, a class action on behalf of Canadian taxpayers, the Trial Division of the Federal Court held that the Crown was not acting in a fiduciary capacity towards taxpayers when issuing advance tax rulings favouring particular taxpayers (although both the Trial Division and the Federal Court of Appeal had earlier held this to be arguable in proceedings to have the pleadings struck for failure to disclose a cause of action)[94]. In so ruling, the Court stressed that fiduciary relationships are unlikely to exist "where that would place the Crown in a conflict between its responsibility to act in the public interest and the fiduciary's duty of loyalty to its beneficiary[95]". This approach has been applied in a number of cases since

92. *Authorson (Litigation Guardian of)* v. *Canada (Attorney General)* (2000), 53 O.R. (3d) 221 (Ont. S.C.), aff'd (2002), 58 O.R. (3d) 417 (Ont. C.A.), rev'd in part [2003] 2 S.C.R. 40 (class action; decision on merits). The 1990 legislation which required the Crown to pay interest on the moneys excused the Crown from responsibility for interest accruing earlier, and the sole issue before the Supreme Court was whether this provision was inoperative under the *Canadian Bill of Rights*, S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III. There are a number of interrelated proceedings in *Authorson*: see *e.g. Authorson (Litigation Guardian of)* v. *Canada (Attorney General)*, 2007 ONCA 501, 86 O.R. (3d) 321 for a résumé. *Authorson* was applied in *Stopford* v. *Canada*, [2004] 1 F.C.R. 431 (F.C.T.D.), to find the Crown in breach of fiduciary to a disabled veteran, not for financial mismanagement as in *Authorson* but for failure to provide adequate moral and physical support on his return from Croatia.

93. *Elder Advocates of Alberta Society* v. *Alberta*, 2009 ABCA 403, rev'g in part 2008 ABQB 490, [2008] 11 W.W.R. (leave to appeal granted, S.C.C., 20-05-2010, 33551, 2010 CanLII 27723) (application for certification of class action). Note that in *Western Bank* v. *Alberta*, [2007] 2 S.C.R. 3, par. 88, the Supreme Court clarified that "refusal of leave should not be taken to indicate agreement with the judgment sought to be appealed, from any more than the grant of leave can be taken to indicate disagreement. In the leave process, the Court does not hear or adjudicate a case on the merits."

94. *Harris* v. *Canada*, [2002] 2 F.C. 484 (F.C.T.D.) (decision on merits); [1999] 2 F.C. 392 (F.C.T.D.), aff'd [2000] 4 F.C. 37 (F.C.A.) (leave to appeal refused, S.C.C., 26-10-2000, 28041) (motion to strike) (plaintiff's argument was that excusing privileged case of taxpayers increased tax burden of all others, or led to decreased government services).

95. *Harris* v. *Canada* (F.C.T.D., 2002), *supra*, note 94, par. 178.

Harris[96], and it clearly restricts the type of situations in which a fiduciary duty will be found.

These cases suggest that the argument that the Crown is subject to fiduciary duties in regard to water *in situ* is not easy. One of the factors setting this situation apart from the exercise of most government regulatory functions is the Crown's assumption of ownership of the water. Robert Flannigan's explanation of the fiduciary relationship stresses the importance of access to property in deciding whether a fiduciary relationship exists. He states that the conventional function of fiduciary responsibility is to control "opportunism" (*i.e.* acting on one's own behalf, not on behalf of the other) in "limited access arrangements" (*i.e.* access that is limited by an obligation to act on the other's behalf):

> The physical arrangement that attracts fiduciary regulation is *limited* access or, in traditional terms, the undertaking to act wholly or partly in the interest of another. Those who are trusted for some defined purpose invariably acquire access to the assets (and opportunities) of their beneficiaries. The mischief associated with that access is that the value of the assets will be diverted or exploited for self-interested ends […] Where there is no access, on the other hand, there can be no opportunistic diversion. Similarly, if the access is *open*, rather than limited, consumption or exploitation does not amount to objectionable self-regard[97].

Guerin is a good example of a limited access arrangement, as the Crown has access (*i.e.* formal title) to reserve lands, but this access is limited, as the lands are to be dealt with only in the interest of the band. So too is *Authorson*, as the Crown has access to the pension moneys deposited in the Consolidated Revenue Fund, but this access is limited to using the moneys for the benefit of the disabled veterans. And the Court of Appeal in *Elder Advocates* suggested that the Crown's access to the accommodation

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96. *E.g.*: *Mosquito* v. *Saskatchewan*, 2005 SKCA 31, 250 D.L.R. (4th) 520, rev'g 2004 SKQB 53, 245 *Sask. R.* 132 (*sub nom Dustyhorn Estate* v. *Stickney*) (motion to strike; not arguable that Crown's fiduciary duty to aboriginals extends to death of intoxicated person released from custody); *Wuttunee* v. *Merck Frost Canada Ltd.*, 2007 SKQB 29 (application to certify class action; not arguable that Crown acting as fiduciary when licensing prescription drugs); *Mainville* v. *Canada (Attorney General)*, 2007 FC 251 (F.C.T.D.), 310 F.T.R. 100 (Crown not acting as fiduciary when assigning snow crab quotas); *South Yukon Forest Corporation* v. *Canada*, 2010 FC 495(F.C.T.D.) (Crown not under fiduciary duty to ensure saw mill sustainable supply of timber). Moreover, these cases often cite *Guerin* v. *R.*, *supra*, note 86 (notably the quotation cited *supra* the text at note 88), restrictively rather than permissively, in support of a decision to deny rather than recognize the existence of a fiduciary duty. See also *e.g.*: *Laroza* v. *Ontario* (2005), 257 D.L.R. (4th) 761 (Ont. Sup.Ct.); *C.H.S.* v. *Alberta (Director of Child Welfare)*, 2008 ABQB 513, [2008] 12 W.W.R. 432.

97. Robert Flannigan, "The Boundaries of Fiduciary Accountability", (2004) 83 *Can. Bar Rev.* 35, 36 and 37 [emphasis added].

charges paid by residents of long term care facilities might also be similarly limited as the residents might retain an interest in any amounts paid in excess of the real costs of accommodation[98]. Applying this approach to water *in situ*, all provincial governments have "access" to the asset of water through their licensing powers, and this "access" is stronger when the licensing power is complemented by ownership rights. But in neither case is the access "open", in the sense of being full and absolute, so that the government is therefore not entitled to exploit the water for self-interested ends (*e.g.* permitting the commercialization of water resources for purely budgetary reasons, particularly if this results in water being transferred out of an aquifer) or for the ends of a privileged minority (*e.g.* permitting the use of large quantities of water for the extraction of natural resources, such as bituminous tar or shale gas).

Conclusion

This article has looked at the legal regime applicable to water *in situ* in the common law provinces of Canada, with a view to seeing whether there are functional equivalents to Québec's long-standing private law principle of *res communis* and its recently adopted statutory notion of State "custodianship" over water in its natural state. The first conclusion is that there is no direct functional equivalent to the notion of *res communis*, as the common law rejects the notion of private ownership of water *in situ* (recognizing instead a simple right of access to riparian and surface owners of land) but accepts, almost by default, the principle of Crown ownership. This acceptance is reflected in the legislation of the arid western provinces but remains implicit in the humid eastern provinces.

However, the article's working hypothesis has been that the fundamental importance of water to life necessarily means that this Crown ownership of water *in situ*, whether reflected in statute or not, cannot be full and absolute but rather must be limited, more in the nature of "custodianship" than "ownership". The role of equity is to attenuate the rigours of the common law in situations when conscience demands it, and the article has explored three equitable institutions — the public trust, the classical trust and fiduciary duties — to see to what extent they might be applicable to limit Crown ownership of water. The second conclusion is that in each case, the argument that Crown ownership of water is so limited is difficult, but not impossible, to make. The major problem with an American-style

98. *Guerin* v. *R.*, *supra*, note 86; *Authorson (Litigation Guardian of)* v. *Canada (Attorney General)*, *supra*, note 92; *Elder Advocates of Alberta Society* v. *Alberta*, *supra*, note 93, par. 100.

public trust is assessing its historical underpinnings, and a possible solution is simply to adopt the doctrine as a *sui generis* concept developed by a sister jurisdiction, without being unduly concerned about its earlier roots. The principal hurdle with a classical trust is not the question of certainty of objects, as was expected, but rather determining how the trust was constituted. The most probable answer is that the Crown's ownership of water is impressed with a trust in favour of the public by operation of law, under a constructive trust of one sort or another. Finally, the main obstacle with fiduciary duties is determining whether the Crown's duties in regard to water are fiduciary in nature, and enforceable by the courts as such, or merely "political". *Guerin* recognizes that public law duties can give rise to fiduciary duties, but subsequent cases have interpreted this recognition restrictively. The law relating to fiduciary duties in general, and political trusts in particular, is evolving. The upcoming decision of the Supreme Court of Canada in *Elder Advocates* thus bears watching.