

FIDUCIARY DUTIES UNDER THE TRUSTEESHIP THEORY: THE CONTRIBUTION OF CANADIAN CASE LAW IN JUDICIAL REVIEW OF ENVIRONMENTAL MATTERS

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ABSTRACT

The potential of trusteeship theory and related fiduciary duties in resolving environmental problems first emerged in the 1970s. Trusteeship theory suggests a governance model that would allow the State to adopt a holistic approach to nature management and to consider future generations' interests. The theory is of particular interest to researchers in Canada, as it draws on concepts that already exist in Canadian public law, and therefore might allow for a rapid paradigm shift in environmental governance. It nevertheless remains necessary to define the substance and nature of the fiduciary duties that this shift implies for the public sector. This Essay brings to light aspects of Canadian jurisprudence in the environmental domain that imposes duties of environmental protection on the government and sets out a path for advancing the trusteeship theory to address the mounting ecological challenges of the Anthropocene.

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INTRODUCTION

In 1970, when the international community was beginning to demonstrate awareness of the human impact on its natural environment,¹ Joseph L. Sax published one of the most cited articles of all time,² *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*,³ as a reaction to the increasing number of lawsuits brought against governmental agencies that are supposed to protect the public interest and natural resources in the U.S.⁴ Sax believed the increase in lawsuits was in part due to inconsistency in legislative responses and administrative actions.⁵ The public trust doctrine is the legal approach Sax suggested as the most likely to obtain effective court intervention related to environmental problems.⁶ Other similar concepts redefining government obligations towards the environment have emerged in the legal and political literature proposing solutions to government inaction to protect the environment, including *parens patriae*,⁷ *stewardship*,⁸ *nature's trust*,⁹ and *trusteeship*.¹⁰ These concepts and theories all rely on the central proposal of

1. See U.N. Conference on the Human Environment, *Stockholm Report of the U.N. Conference on the Human Environment*, ¶ 7, U.N. Doc A/CONF.48Rev.1 (June 16, 1972) (“A growing class of environmental problems . . . will require extensive co-operation among nations and action by international organizations in the common interest.”).

2. Fred R. Shapiro & Michelle Pearce, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1490 (2012).

3. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 473 (1970).

4. *Id.* at 473–74.

5. *Id.*

6. *Id.* at 474.

7. See Wilfred Estey, *Public Nuisance and Standing to Sue*, 10 OSGOODE HALL L.J. 563, 576 (1972) (explaining the historic role of the government to act as *parens patriae*, i.e., as legal representative to protect the public's rights, including rights to enjoy the environment, through the concept of public nuisance); see also Allan Kenner, *The Public Trust Doctrine, Parens Patriae, and the Attorney General as the Guardian of the State's Natural Resources*, 16 DUKE ENVTL. L. & POL'Y F. 57, 100–01 (2005) (explaining the general concept of *parens patriae*).

8. Emily Barritt, *Conceptualising Stewardship in Environmental Law*, 26 J. ENVTL. L. 1, 3 (2014); PAULE HALLEY & JULIA SOTOUSEK, L'ENVIRONNEMENT, NOTRE PATRIMOINE COMMUN ET SON ÉTAT GARDIEN: ASPECTS JURIDIQUES, NATIONAUX, TRANSNATIONAUX ET INTERNATIONAUX 14–15 (2012).

9. See MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 17 (2014) (proposing a radical expansion of the public trust doctrine to cover all natural resources essential to life on Earth, including the atmosphere).

10. See EDITH BROWN, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 123 (United Nations Univ. 1989) (describing natural resource trustees “who are required to bring claims for damages to natural resources . . .”); see generally KLAUS BOSSELMANN, EARTH GOVERNANCE: TRUSTEESHIP OF THE GLOBAL COMMONS (2015)

imposing fiduciary duties on the government and consider the natural environment to be the common property of citizens. The government would therefore have to act in the best interest of its current citizens and future generations.¹¹

In her 2013 book, *Nature's Trust: Environmental Law for a New Ecological Age*, Professor Mary C. Wood argues in favor of infusing current environmental law with trust principles in order to make it more protective.¹² Wood explains that current governmental decision making based on discretion has proved ineffective for environmental protection.¹³ Discretion-based decision making allows the executive—that is, government agencies—to consider single monetary interests and short-term considerations when it exercises delegated rulemaking, issues technical determinations of a project's impacts, or chooses to enforce regulations.¹⁴ By comparison, imposing a fiduciary obligation would force the government to act in the best interest of citizens and future generations and to protect the natural assets on which their future depends, in addition to making the government more accountable.¹⁵

Professor Klaus Bosselmann suggested the adoption of trusteeship as an overarching framework to establish better international environmental governance in his 2015 book, *Earth Governance: Trusteeship of the Global Commons*.¹⁶ For Bosselmann, “political leaders and the state-centered structure of international governance appear incapable of responding to [an emerging ecological crisis] in an effective way: there is not only a democratic deficit but an ecological deficit as well.”¹⁷ Bosselmann therefore creates a governance model that would reconcile democracy with ecological well-being.¹⁸ The task of this book, he explains, is to “help establish a culture of democracy powerful enough to achieve sustainable societies.”¹⁹ This task includes separating markets from the commons by reshaping state sovereignty, empowering governments to define the functions and legitimacy of the market, and restructuring democracy to protect the commons.²⁰ The solution to the ecological predicament is to establish a value-based democracy that should not be confined to nation-

(detailing and advocating for an international trusteeship to govern global environmental decision making).

11. See *infra* Part I.A (detailing the fundamental principles behind trusteeship theories).

12. WOOD, *supra* note 9, at 15–16.

13. *Id.*

14. *Id.* at 68–69.

15. *Id.* at 138–39, 203–04.

16. PETER G. BROWN, *RESTORING THE PUBLIC TRUST: A FRESH VISION FOR PROGRESSIVE GOVERNMENT IN AMERICA* (1994); BOSSELMANN, *supra* note 10, at 116.

17. BOSSELMANN, *supra* note 10, at 1.

18. *Id.* at 21–22.

19. *Id.* at 23.

20. *Id.* at 29.

states, but rather should be shared internationally, to achieve “earth governance” of this universal concern.²¹

But what would such a model change in our political system? That is, how does the trusteeship or nature’s trust model of governance derive from the actual “command and control” approach?²² Some would argue that the government—in the Canadian model of parliamentary sovereignty—already acts in the public interest, already is accountable to Parliament, and already must be loyal and equitable to its citizens according to responsibilities set by public law.²³ However, what is lacking in this model of governmental responsibility is an understanding that the goal of preserving nature is not set only to avoid damages.²⁴ Rather, governments should take on the greater responsibility to let nature thrive and to recognize the interconnectedness of humanity and nature.²⁵ This interconnectedness should inform our obligations towards future generations of humans, to ensure their survival by preserving the Earth’s ecosystems upon which we depend.²⁶

In this Essay, I argue that the trusteeship theory—which builds on the experience with, and critiques of, public trust doctrine—would allow for a rapid paradigm shift towards ecological responsibility in public governance by using tools and concepts that are already known to jurists. But the pragmatists—including me—will ask: how would governments and legislatures apply their fiduciary duties on a day-to-day basis? How would the duty translate into administrative law and action? In this Essay, I provide some answers to these questions by considering judicial review cases decided by the Supreme Court of Canada and provincial Courts of Appeals in environmental matters.

I demonstrate that relevant Canadian case law indicates a path for advancing the application of trusteeship theory to address the mounting ecological challenges of the Anthropocene. The resort to this case law to demonstrate aspects of the trusteeship theory is justified in two ways. First, when reviewing administrative action, courts already impose duties on the government in their evaluating the *reasonableness* of government action. Second, the similarities between the concepts of *public interest*,

21. *Id.* at 29–30.

22. COLIN T. REID & WALTERS NSOH, *THE PRIVATISATION OF BIODIVERSITY? NEW APPROACHES TO CONSERVATION LAW* 14–15 (2016).

23. 1 PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 12–2 (5th ed. 2007).

24. *Cf.* REID & NSOH, *supra* note 22, at 15 (2016) (explaining that the issue with the *command and control* approach is the reaction once damage is already done to the species rather than intercepting the degradation before it becomes a problem).

25. *Cf. id.* at 4 (recognizing that an acknowledgement of an interconnected world is necessary to preserve nature).

26. *See id.* (explaining that preservation of ecosystems is necessary to ensure that natural heritage of the Earth is passed to later generations).

accountability, impartiality, and fairness that are used in Canadian public law and in the trusteeship literature show that this case law is applicable to trusteeship theory by analogy. Extracting detailed examples from the case law helps us to understand how these public law concepts could be applied in further cases to establish clear conditions of the application, content, and scope of fiduciary duties. Part I of the Essay sets out the most promising literature on the trusteeship theory that distinguishes it from the American public trust doctrine. Part II studies Canadian judicial review cases that are related to the environment to illustrate how relevant judicial decisions can contribute to a practical, working definition of trusteeship that could be imposed on the government.

I. TRUSTEESHIP THEORY

A. Foundational Principles

Developing a legal doctrine based on trust is not a new idea. In addition to the public trust doctrine already applied in the U.S. and in other common law jurisdictions,²⁷ other countries have adopted public trust inspired legislation,²⁸ and many authors have suggested mechanisms or governance frameworks based on trust at the international level.²⁹ The trusteeship theory set out by Mary C. Wood and Klaus Bosselmann, considered from a different perspective, would allow the State to adopt a holistic approach in nature management and to consider the interests of

27. Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. DAVIS L. REV. 741, 745 (2012) (identifying India, Pakistan, and South Africa as countries where “the [public trust] doctrine has become equated with environmental protection . . .”).

28. *Philippines Environmental Policy*, Pres. Dec. No. 1151 (June 6, 1979) (Phil.), https://www.lawphil.net/statutes/presdecs/pd1977/pd_1151_1977.html (proclaiming “the responsibilities of each generation as trustee and guardian of the environment for succeeding generations”). Sweden has had an environmental ombudsman—a role close to that of a trustee—since 1909. Thomas Hillmo & Ulrik Lohm, *Nature’s Ombudsmen: The Evolution of Environmental Representation in Sweden*, 3 ENV’T & HIST. 19, 25 (1997).

29. See, e.g., Jeanine Gama Sá, *Le Trust : de la protection patrimoniale au Moyen Âge à la protection internationale de l’environnement au XXIe siècle*, 21.1 REVUE QUEBECOISE DE DROIT INTERNATIONAL 97, 98 (2008) (analyzing the use of environmental trust funds at the international level); Peter H. Sand, *Sovereignty Bounded: Public Trusteeship for Common Pool Resources?*, 4 GLOB. ENVTL. POL. 47, 55–56 (2004) (proposing a model of international environmental trusteeship where the state is trustee; the community is trustor; and, the people are beneficiaries); PETER BARNES, WHO OWNS THE SKY?: OUR COMMON ASSETS AND THE FUTURE OF CAPITALISM xix (2001) (proposing a trust model to bring accurate pricing to shared atmospheric resources, thereby conserving them); Christopher D. Stone, *Defending the Global Commons*, in GREENING INTERNATIONAL LAW 34–40 (Philippe Sands ed., 1993) (proposing a global system of guardians assigned to advocate on behalf of the environment in an international system of guardianship); Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT. L. 295, 295–333 (2013) (articulating “three moral arguments supporting the interpretation of contemporary sovereignty as trusteeship”).

future generations and nature itself when making decisions.³⁰ One of the goals of this theory is to increase the duties of government towards the environment and future generations, and therefore remedy the lack of accountability of government representatives and the insufficient number of long-term measures that consider future generations' environmental interests.³¹ The duties in question are those that traditionally exist in a fiduciary relationship, more specifically that exist under a trust,³² as the name of the theory suggests. A fiduciary relationship is one where the holder "has rights and powers he or she must exercise for the benefit of" another person.³³ The fiduciary has a duty of loyalty, which means that she must not benefit from the position she holds unless explicitly authorized by the other person.³⁴ Other fiduciary obligations derive from this duty of loyalty.³⁵ Where fiduciary duties protect relationships that are of importance to the public—for instance, solicitor–client, guardian–ward, director–company, and principal–agent relationships—the trust–beneficiary relationship is the most stringent because the trustee has control over a property that belongs to another, the beneficiary.³⁶ The trustee will consequently be held to the highest fiduciary standards.³⁷ Another element that distinguishes the trust from other fiduciary relationships is that "a trust relationship cannot exist without trust property."³⁸

The traditional fiduciary duties a trustee must respect in addition to the duty of loyalty are: the obligation to perform personally,³⁹ the duty to invest

30. Cf. WOOD, *supra* note 9, at 191 (advocating for fiduciary duties as a way of ensuring environmental decision makers protect the interests of future generations); see also BOSSELMANN, *supra* note 10, at 39–40 (calling for an international covenant to bind governments in respecting "the greater community of life"—human and non-human, present and future).

31. See, e.g., WOOD, *supra* note 9, at 191–92 (explaining that the duty of loyalty to trust beneficiaries would improve legislative accountability by "prohibit[ing] a legislator from voting on a particular resource issue if he or she accepted significant campaign contributions from an [interested] industry" and by "prohibit[ing] legislative 'vote trading' on environmental matters").

32. See *Trust*, BARRON'S CANADIAN LAW DICTIONARY (6th ed. 2009) (defining "trust" as "[a] right of property held by one party for the benefit of another," and noting that the term "implies two interests, one legal and the other equitable; the trustee holding the legal title or interest, and the cestui que trust, or beneficiary, holding the equitable title or interest"); see also *Fiduciary*, BARRON'S CANADIAN LAW DICTIONARY, *supra* (defining "fiduciary" as "[r]elating to or proceeding from trust or confidence" and noting that "[o]ne stands in a fiduciary relationship, with regard to another person when he or she has rights and powers he or she must exercise for the benefit of that other person. Consequently, a fiduciary is not allowed to benefit personally in any way from the position he or she holds unless he has the requisite consent").

33. See *Fiduciary*, BARRON'S CANADIAN LAW DICTIONARY, *supra* note 32 (providing the definition for fiduciary).

34. EILEEN E. GILLESSE, *THE LAW OF TRUSTS* 10 (3d ed. 2014).

35. *Id.*

36. *Id.* at 10–11.

37. *Id.*

38. *Id.* at 11.

39. *Id.* at 130.

the trust assets,⁴⁰ the obligation to act impartially,⁴¹ the duty to account,⁴² and the duty to provide information.⁴³ If governments were to apply these duties, it would obviously translate into types of action other than a private trust.⁴⁴ As an example of these other causes of action, it could force a government to take positive actions towards the environment, not only conservative ones, as the government would have the duty to make nature thrive (that is, to “invest the trust assets”).⁴⁵ The trusteeship also allows citizens to undertake lawsuits against the government in case of omission, in ways similar to the public trust doctrine currently applied in the U.S.⁴⁶ This raises questions of how these trusteeship approaches to environmental law can be meaningfully differentiated from the public trust doctrine. In fact, the public trust doctrine is a type of “trusteeship in action,”⁴⁷ but the trusteeship theory considered in this Essay has broader application, as is suggested by Wood and Bosselmann.⁴⁸

B. The Public Trust Doctrine

The public trust doctrine developed in the U.S. can be defined as “an ancient Roman law doctrine which provides that states must hold certain natural resources, particularly submerged lands under tidal and navigable waters, in trust for the use and benefit of the public and future generations.”⁴⁹ In short, it means that states ought to protect natural resources that are included in the trust for future use and enjoyment, and that the alienation of these resources is prohibited.⁵⁰ States have “some discretion in managing their trust resources, although many impose a presumption against alienation of public resources, requiring clear legislative intent to accomplish such alienation.”⁵¹ The alienation of

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 155.

44. *Cf.* BOSSELMANN, *supra* note 10, at 193 (arguing that the state, as trustee, must consider future generations and act for beneficiaries beyond the scope in a private trust).

45. GILLESE, *supra* note 34, at 130.

46. *See, e.g.*, WOOD, *supra* note 9, at 221 (describing the legal theory behind atmospheric trust litigation—that governments have harmed trust resources by failing to regulate greenhouse gas emissions).

47. BOSSELMANN, *supra* note 10, at 180.

48. WOOD, *supra* note 9, at 125; *see* BOSSELMANN, *supra* note 10, at 183 (offering the public trust doctrine as an example but distinguishing environmental trusteeship as applying more broadly to become “a fundamental principle of governance”).

49. Alexandra B. Klass, *The Public Trust Doctrine in the Shadow of State Environmental Rights Laws: A Case Study*, 45 ENVTL. L. 431, 432–33 (2015).

50. Michael C. Blumm & Aurora Paulsen Moses, *The Public Trust as an Antimonopoly Doctrine*, 44 B.C. ENVTL. AFF. REV. 1, 2 (2017).

51. *Id.* at 17–18.

resources, parcels of land for instance, will be justified when it furthers the purposes of the trust or “do[es] not substantially impair the public interest” in the trust resource that is remaining.⁵²

The U.S. Supreme Court referred to the doctrine for the first time in 1842⁵³ and articulated the parameters of the theory fifty years later in the 1892 case *Illinois Central Railroad Co. v. Illinois*.⁵⁴ Its application was then limited to navigable waters and their underlying beds, and was extended to wildlife four years later in *Geer v. Connecticut*.⁵⁵ Courts subsequently applied the doctrine to these limited common resources until 1970, when Sax suggested that the courts should use the doctrine to compel the government to apply fiduciary duties not only to submerged lands and navigable waters, but also to other natural resources on public lands.⁵⁶ Sax argued that this extension of the doctrine would allow courts to balance conflicting private and public interests when the executive and legislative branches fail to do so for a greater number of resources.⁵⁷

In the second half of the twentieth century, mainly in the years following Sax’s article, courts have extended public trust protection to other resources.⁵⁸ However, as the public trust is under state rather than federal jurisdiction, the doctrine has evolved in different ways in different state jurisdictions.⁵⁹ A number of states added ecological preservation as a trust purpose.⁶⁰ Some state courts (including California, Hawaii, New York, and Louisiana) have developed case law applying the public trust doctrine to a range of environmental problems arising outside of submerged lands, including: groundwater,⁶¹ lakes,⁶² wetlands,⁶³ parkland,⁶⁴ the dry sand area

52. *Id.* at 17 n.104 (quoting *Ill. Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892)).

53. *Martin v. Waddell’s Lessee*, 41 U.S. 367, 411 (1842).

54. *Ill. Cent. R.R.*, 146 U.S. at 452.

55. *Geer v. Connecticut*, 161 U.S. 519, 535 (1896), *overruled on other grounds by Hughes v. Oklahoma*, 441 U.S. 322 (1979); Blumm & Moses, *supra* note 50, at 4.

56. Sax, *supra* note 3, at 473.

57. *Id.* at 561–62 (characterizing courts’ role as “democratization” in response to cases “not . . . properly handled at the administrative or legislative level”).

58. *See infra* notes 61–67 (providing examples of how courts have extended the public trust doctrine to other resources).

59. Blumm & Moses, *supra* note 50, at 25–26.

60. *Id.*

61. *See, e.g., In re Water Use Permit Applications*, 9 P.3d 409, 447 (Haw. 2000) (declaring no distinction between ground and surface water under the public trust doctrine).

62. *Id.* at 448.

63. *See, e.g., Nat’l Audubon Soc’y v. Super. Ct. of Alpine Cty.*, 658 P.2d 709, 721 (Cal. 1983) (expanding public trust protection to non-navigable waters under California law).

64. *See, e.g., Raritan Baykeeper, Inc. v. City of New York*, No. 31145/06, 2013 WL 6916531, at *5 (N.Y. Sup. Ct. Dec. 20, 2013) (asserting that only the legislature may command that park lands be utilized for anything but serving the public interest).

of beaches,⁶⁵ archeological remains,⁶⁶ and likely problems arising out of a hazardous waste disposal facility's operation.⁶⁷ The ongoing case of *Juliana v. United States* could also lead to recognition of the atmosphere as a trust resource.⁶⁸ In that case, 21 youth plaintiffs brought an action against the U.S. government for adopting fossil fuel policies that threaten the atmosphere and therefore impede their rights to life, liberty, and property.⁶⁹ They also claim these actions violate the federal government's duty to manage public resources in trust for the people and future generations.⁷⁰ At the time of writing, the U.S. District Court for the District of Oregon has allowed the case to proceed, but proceedings are stayed pending an interlocutory appeal filed by the Trump administration, which will be decided before any judgment on the merits.⁷¹ Despite these developments, for most states, the doctrine remains limited to the protection of use and access to navigable waters, submerged lands, and fishing, but has evolved to include not only commercial but also recreational water-based resources.⁷² Therefore, the scope of states' jurisdiction on natural resources is still limited by the high-water mark in many places.⁷³

Over the past forty years, the U.S. public trust doctrine has been the subject of many critiques.⁷⁴ These critiques touch mainly on two themes: the power of the judiciary and the doctrine's reliance on private property.⁷⁵ The power of judges to overturn democratic decisions of the executive or the legislature has been criticized because judges are not accountable to the public.⁷⁶ Some commentators, such as Richard Lazarus, who produced one

65. See, e.g., *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365–66 (N.J. 1984) (holding that the public has an interest in accessing dry sand areas of beaches despite private ownership).

66. See, e.g., *Wade v. Kramer*, 459 N.E.2d 1025, 1027 (Ill. App. Ct. 1984) (discussing trusteeship of the state over archaeological sites).

67. See, e.g., *Save Ourselves, Inc. v. La. Env'tl. Control Comm'n*, 452 So. 2d 1152, 1154, 1157 (La. 1984) (describing the responsibility of government to act as trustee and prevent environmental pollution by hazardous waste).

68. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1252–55, 1255 n.10 (D. Or. 2016); see also *Meet the Youth Plaintiffs*, OUR CHILDREN'S TRUST, <https://www.ourchildrenstrust.org/federal-plaintiffs/> (last visited Apr. 14, 2019) (providing biographical information on the 21 youth plaintiffs).

69. *Juliana*, 217 F. Supp. 3d at 1233.

70. *Id.*

71. Order at 1, *United States v. U.S. Dist. Ct. for the Dist. of Ore.*, No. 18-73014 (9th Cir. 2018).

72. Klass, *supra* note 49, at 437–38.

73. See WOOD, *supra* note 9, at 147 (explaining that many courts are reluctant to expand the scope of the public trust doctrine for fear of interfering with private property rights).

74. See, e.g., Erin Ryan, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 ENVTL. L. 477, 484–85 (2001) (summarizing critiques of the public trust doctrine from various perspectives).

75. *Id.* (quoting public trust critics who say that the public trust is “vulnerabl[y] dependen[t] on a proenvironment judicial bias” and supports a theory of property that “contradicts the first law of ecology”).

76. *Id.* at 483.

of the most influential critiques of the public trust doctrine, believe that it relies unduly on pro-environment judicial bias.⁷⁷ For Lazarus, the judiciary lacks the technical competence to decide whether fiduciary duties are performed adequately by the government and its agencies.⁷⁸ In his view, agency administrators are more likely to have professional training as resource managers.⁷⁹ The subjective definitions of fundamental concepts such as *beneficial use* or *public concern* exemplify the problematic reliance on the judiciary.⁸⁰ Indeed, for a resource (e.g., water) to be held in trust, there has to be a beneficial use of the resource for the public.⁸¹ If the resource is not seen as beneficial or of public concern, it is not considered public property and therefore not subject to the trust.⁸² Shifting judicial visions of what constitutes a “beneficial use” could be detrimental to resource protection and move courts in favor of more development.⁸³ As Wood explains, “[c]ourts must constantly refresh their understanding of ‘public concern’ in order to determine the appropriate scope of the trust.”⁸⁴ As a result, some courts modernize the scope of the trust while others keep it at its historic definition.⁸⁵ This also demonstrates how the reliance on property as the basis of the trust can be a problem, which leads us to the second theme of critiques: property rights.⁸⁶

On the one hand, authors defending liberal theories of property argue that the doctrine is incompatible with private property rights, as it can limit these in favor of public property rights.⁸⁷ On the other hand, green property theorists also criticize the fact that the public trust doctrine is deeply rooted in the notion of private property, but for a different reason.⁸⁸ They believe classical liberal property theory is outdated, as it fails to take into account

77. *Id.* at 485; Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 IOWA L. REV. 631, 712–15 (1986).

78. *See, e.g.*, Ryan, *supra* note 74, at 487; Lazarus, *supra* note 77, at 712.

79. Lazarus, *supra* note 77, at 712.

80. *See* Ryan, *supra* note 74, at 488 (illustrating the vulnerabilities of the public trust doctrine to shifting ideas of what constitutes beneficial uses).

81. Joseph L. Sax, *The Limits of Private Rights in Public Waters*, 19 ENVTL. L. 473, 476 (1989) (stating that the public’s claim to water depends on uses considered to be within the public’s interests).

82. *Id.* at 478.

83. Ryan, *supra* note 74, at 488; *see, e.g.*, *Empire Water & Power Co. v. Cascade Town Co.*, 205 F. 123, 125, 128–29 (8th Cir. 1913) (reasoning that the instream flow that produced a 30-foot waterfall with enough spray to turn a canyon three-quarters of a mile long into a lush haven of native vegetation was not a “beneficial use” protected under contemporary prior appropriation law though common law riparianism would have protected the natural flow of the falls).

84. WOOD, *supra* note 9, at 144.

85. *Id.* at 146.

86. Ryan, *supra* note 74, at 484 (“The most prominent concern is the relationship between the doctrine and theoretical constructions of property law.”).

87. *Id.*; Nancie G. Marzulla, *State Private Property Rights Initiatives as a Response to “Environmental Takings,”* 46 S.C. L. REV. 613, 613–15 (1995).

88. Ryan, *supra* note 74.

the interconnectedness of humans and non-humans in favor of individual autonomy.⁸⁹ Lazarus was also of the opinion that a better framework for structuring our relationship with nature would not be dominated by property and ownership, nor by the concept of public interest, which he found too vague.⁹⁰ Rather, Lazarus's framework would include a formulation of competing values, based on private expectations in rights of use and subject to communal constraints.⁹¹

C. Room for Improvement

Critiques of the public trust doctrine have also suggested strategies for its betterment.⁹² If some see judicial oversight to be a problem because judges are unaccountable, then channeling environmental decisions through the executive—assuming it has more expertise and is accountable to the public—is preferable.⁹³ However, our current institutional structure does not guarantee the protection of environmental interests.⁹⁴ Even if it did, when the executive is not pro-environment, then the judiciary is the branch most shielded from short-term majoritarian interests.⁹⁵ Thus, the judiciary is better placed to protect trust resources.⁹⁶ Governance of the environment seems to necessitate the contribution of all branches of government, which in turn needs structural change to govern more responsibly.

It also appears that “public property,” as understood under the public trust doctrine, does not comprise sufficient environmental resources to effectively preserve nature for future generations.⁹⁷ Michael Blumm and Aurora Moses affirm that, so far, the doctrine has served as an antimonopoly doctrine, since it has protected against states' attempts to create private monopolies over natural resources.⁹⁸ It has undoubtedly had beneficial impacts on resource protection in past decades, but the rate of ecosystem degradation and species extinction prove that environmental law and the public trust doctrine are unsuccessful.⁹⁹ The public trust doctrine's

89. *Id.* at 484.

90. Lazarus, *supra* note 77, at 703.

91. *Id.* at 706–10; Ryan, *supra* note 74, at 489.

92. Ryan, *supra* note 74, at 488.

93. *See id.* at 492–93 (expanding on competing ideas regarding whether the judiciary or executive is best equipped to handle natural resources concerns).

94. *Id.* at 493.

95. *Id.*

96. *Id.* at 492.

97. *Id.* at 488, 490 (lamenting that the public trust doctrine remains a formidable theme of natural resource law only in a rhetorical manner because “it has not made significant progress toward protecting natural resources unrelated to water”).

98. Blumm & Moses, *supra* note 50, at 6.

99. Wildlife has declined by 58% since 1970 worldwide due to the excessive demand of humanity on planetary resources. WORLD WILDLIFE FUND, LIVING PLANET REPORT 2016: RISK AND

roots in liberal property law limit its scope.¹⁰⁰ However, modern use of the doctrine—or of another trusteeship theory—does not require a “backwards-looking appeal to a property law rationale.”¹⁰¹ As Erin Ryan eloquently put it, “the fact that the public trust [doctrine] is *in* the common law hardly requires that it be *of* the common law.”¹⁰² Because as long as the doctrine relies on concepts of property to preserve environmental resources, it does not reconsider the assumptions on which the law and the economy are based, which is necessary to find a sustainable approach to managing our planet.¹⁰³

What are the necessary changes? Lazarus notes: “[B]etter solutions, suggested by critics of the judicial function in environmental matters, may reside in new modes of administrative decisionmaking that are less dependent on effective judicial oversight of agency action to ensure full representation of competing considerations.”¹⁰⁴ This is exactly what Professors Wood and Bosselmann suggest in their work.¹⁰⁵

D. Trusteeship 2.0

To improve the effectiveness of environmental law, Wood suggests a nature trust that involves judicial oversight and that rests on the idea that legislatures and agencies respect precise duties.¹⁰⁶ These duties are not clearly articulated under the public trust doctrine, which lacks “the precision necessary to apply it to a broad realm of practical conflicts arising before modern legislatures and agencies.”¹⁰⁷ Wood endeavors to explain and describe substantive and procedural duties governments must carry out as trustees of public resources.¹⁰⁸ She identifies the six following substantive duties:

RESILIENCE IN A NEW ERA 6 (2016). A 2015 study has shown that the Earth has started its sixth mass animal extinction. Gerardo Ceballos et al., *Accelerated Modern Human-Induced Species Losses: Entering the Sixth Mass Extinction*, 1 SCI. ADVANCES, June 9, 2015, at 4. Forests are also under threat. The forest cover has declined by 30%, and the rest is either degraded (20%) or fragmented, leaving only 15% of forests intact. *Forests*, WORLD RES. INST., <https://www.wri.org/our-work/topics/forests> (last visited Apr. 14, 2019).

100. Terry Frazier, *The Green Alternative to Classical Liberal Property Theory*, 20 VT. L. REV. 299, 300–01 (1995) (“Classical liberalism lacks the balance that should produce the tension between individual autonomy and the interests of . . . communities.”).

101. Ryan, *supra* note 74, at 496.

102. *Id.*

103. Lazarus, *supra* note 77, at 633.

104. *Id.* at 712–13.

105. WOOD, *supra* note 9, at 167, 193; BOSSELMANN, *supra* note 10, at 116.

106. WOOD, *supra* note 9, at 167, 240.

107. *Id.* at 337.

108. MICHAEL C. BLUMM & MARY CHRISTINA WOOD, *THE PUBLIC TRUST DOCTRINE IN ENVIRONMENTAL AND NATURAL RESOURCES LAW* 7–8 (2d ed. 2015); WOOD, *supra* note 9, at 337.

(1) [P]rotect the *res*; (2) conserve the natural inheritance of future generations (the duty against waste); (3) maximize the societal value of natural resources; (4) restore the trust *res* where it has been damaged; (5) recover natural resource damages from third parties that have injured public trust assets; and (6) refrain from alienating (that is, privatizing) the trust except in limited circumstances.¹⁰⁹

She then identifies five procedural duties that both legislators and their agents should apply:

(1) [M]aintain uncompromised loyalty to the beneficiaries; (2) adequately supervise agents; (3) exercise good faith and reasonable skill in managing the assets; (4) use caution in managing the assets; and (5) furnish information to the beneficiaries regarding trust management and asset health.¹¹⁰

In her framework, citizens are positioned as ethical actors who owe a duty to their community and the next generation to protect nature,¹¹¹ as she believes “only constant citizen vigilance will keep government corruption at bay.”¹¹² Statutory law serves as a guide to structure and order the trust obligation for the executive.¹¹³ The corpus of the trust is broader than that of the public trust doctrine and includes all ecosystems.¹¹⁴ Consequently, rights of ownership should balance public and private rights, so that private property is subject to some communal constraints that are justified by the goal of ecological protection.¹¹⁵ The judiciary still enforces fiduciary obligations towards nature and is therefore a cornerstone of the trust.¹¹⁶ Wood also believes that the Earth’s environment should be part of a planetary trust.¹¹⁷ Under a planetary trust, nation-states would all stand as sovereign trustees of natural resources and be considered co-tenants of this planetary trust.¹¹⁸ The trust would encompass resources of planetary concern such as the oceans and the atmosphere.¹¹⁹ She specifies that “[t]here remains . . . the task of extrapolating general trust principles into a

109. WOOD, *supra* note 9, at 167.

110. *Id.* at 189.

111. *Id.* at 275–76.

112. *Id.* at 141.

113. *Id.*

114. *Id.* at 143, 149.

115. *Id.* at 311.

116. *Id.* at 230–35.

117. *Id.* at 337–38.

118. *Id.*

119. *Id.*

more precise logical construct that can organize and enforce ecological duties among the nation-states.”¹²⁰

That is what Bosselmann achieved two years later when he published *Earth Governance: Trusteeship of the Global Commons*, in which he elaborates a trusteeship model of governance to manage the Earth common corpus of the trust.¹²¹ According to Bosselmann, a global-governance model is necessary to manage the environment because environmental issues know no boundaries, and ecosystems are diffuse and interconnected, regardless of states’ sovereignty.¹²² Hence, this global problem cannot be solved at the state level, but rather must be solved at the international level.¹²³ Private property ownership of natural resources such as timber, minerals, or water leads private or corporate citizens to seek the enhancement of their personal benefits—at the expense of global well-being and long-term environmental health.¹²⁴ Private ownership is also a serious impediment to the global health of resources, their rates of renewal, and the fair and responsible consumption (in terms of management and conservation) of the Earth’s ecosystems.¹²⁵ Indeed, science has already established thresholds that every Earth system (such as water, minerals, and carbon) should not reach, enabling environmental management that would allow us to calculate what can be exploited and what would need to be protected.¹²⁶ This knowledge could be integrated in the governance of the Earth’s commons, which is currently unattainable in a global system where every state decides how to manage their resources on sovereign land without considering the environment as a whole.¹²⁷ In Bosselmann’s vision of the trusteeship, the different components of the environment would be considered as commons of all citizens, so that no one could invoke a private right to exploit.¹²⁸

Bosselmann’s conception, focusing on global governance, nevertheless considers national issues regarding the role of the state and the definition of commons.¹²⁹ For example, he argues that property rights would still exist if

120. *Id.* at 209.

121. BOSSELMANN, *supra* note 10, at 29, 53.

122. *Id.* at 155–56.

123. *Id.* at 4–15 (explaining that globalization, economic crises, and liberalizing free trade agreements have weakened national in favor of international policy).

124. *Id.* at 52.

125. *See id.* at 64, 66 (“Indeed, many goods that were considered inexhaustible have begun to be threatened and to be subtractable, that is, depletable.”).

126. Will Steffen et al., *Planetary Boundaries: Guiding Human Development on a Changing Planet*, SCIENCE, Feb. 13, 2015, at 1259855-1.

127. *See* BOSSELMANN, *supra* note 10, at 155 (“[W]e operate in a ‘cramped and mundane vista’ wherein the earth in all its ecological wholeness has been artificially divided into a system of political territories.”).

128. *Id.* at 53, 59.

129. *Id.* at 50, 57–61.

states were trustees, but landowners would have to act as stewards to protect resources on their land for the benefit of all citizens.¹³⁰ “Internationally, both states and non-state actors such as large multinationals would likewise become stewards, a role which would define their relationship with nature.”¹³¹

At the international level, environmental resources located beyond states’ boundaries—including the atmosphere, the biosphere, outer space, the high seas, and Antarctica—would also be included in the “commons” and be subject to the Earth’s trusteeship.¹³² The beneficiaries of the trust would be all living beings—including but not limited to humans—which would acknowledge their interconnectedness and allow for a holistic approach.¹³³ Such global governance would necessitate the contribution of all levels of governance—global, regional, national, and local.¹³⁴ These levels of governance would cooperate to assess, protect, and consume the environment with the best local practices and knowledge of local resources, and would commit to protect and share resources on a global level.¹³⁵ At the global level, Bosselmann proposes the creation of an international legal entity, the World Environment Organization (WEO), which would be responsible for protecting the global commons.¹³⁶ Such a global institution would not replace states or compete with them but would rather be complementary to them.¹³⁷ States would act as environmental trustees to protect resources on their sovereign land and would have to cooperate to protect the Earth’s commons.¹³⁸ According to Bosselmann, the U.N. would provide fertile normative ground to act as trustee to protect the planet’s ecological integrity.¹³⁹ The U.N. has experience acting as a trustee (including for the International Trusteeship System, the World Trade Organization, and the World Health Organization) and understands the importance of intergenerational equity and the sustainable development nexus.¹⁴⁰ The U.N. would mandate or create the WEO, but the WEO would function independently and with the assent of states in order to put the

130. *Id.* at 125.

131. *Id.*

132. *Id.* at 248–49, 260.

133. *Id.* at 152.

134. *Id.* at 31; *see also id.* at 35 (explaining that humanity cannot solve global problems without local solutions nor can humanity solve local problems without global awareness—interconnections are the key).

135. *Id.*

136. *See id.* at 257–67 (working with the proposed WEO as a model and discussing its creation, authority, legitimacy, funding, and governance).

137. *Id.* at 50.

138. *Cf. id.* at 200 (expressing concern that efforts by individual states will be ineffective unless states work together to implement global solutions to environmental problems).

139. *Id.* at 199.

140. *Id.* at 198–99.

global interest over sectoral or national interests.¹⁴¹ Its functions would include “monitoring and promoting international environmental agreements, such as the proposed Draft People’s Sustainability Treaty.”¹⁴² International law created current institutions to address environmental issues, which are piecemeal and negotiated by states.¹⁴³ According to Bosselmann, these institutions equal “the lowest common denominator” because “[t]he consensus-based system gives each country a veto.”¹⁴⁴ Therefore, what he envisages is a governance framework that necessitates states to rethink their understanding of sovereignty.¹⁴⁵

In their capacity as trustees, states would include other types of wealth and values in their management of public affairs,¹⁴⁶ which is currently focused on prosperity and economic growth, and which neglects ecological aspects.¹⁴⁷ Bosselmann argues that state sovereignty is already fundamentally a trust relationship between governments and their citizens.¹⁴⁸ If governments are trustees of their territories, and thus part of the global environment, then “they are, together, responsible for the global environment.”¹⁴⁹ In order to protect the global commons adequately, states should act as agents of humanity as a whole, consider the public to be affected by their decisions, and “incorporate global interests into the formulation of national interests.”¹⁵⁰ But how can we be sure that individual states will fulfill their fiduciary obligations to the global commons?

At the moment, there are already many countries that recognize their government has a special responsibility to protect the environment.¹⁵¹ The constitutions of about 100 countries contain references to environmental protection, and half of these include environmental rights.¹⁵² But the current state of the environment and global warming proves that these protections

141. *Id.* at 259.

142. *Id.* at 239.

143. *Id.* at 245–46.

144. *Id.* at 246.

145. *See id.* at 246, 267 (explaining that his trusteeship framework will require states to shift their focus from self-interested competition to the common good of the Earth).

146. *See id.* at 156 (employing a broad concept of wealth, which includes ecological, social, democratic, and moral value).

147. *Id.* at 174–75.

148. *Id.* at 173.

149. *Id.* at 173, 196.

150. *Id.* at 245; *see also id.* at 175–76 (arguing that legitimate state sovereignty depends on promoting the interests of humanity broadly and not just those of the sovereign’s citizens); Benvenisti, *supra* note 29, at 306 (“Why should a government be regarded as the trustee only of its people rather than of the whole of humanity?”).

151. *See* BOSSELMANN, *supra* note 10, at 179 (identifying countries in the E.U. and South America that contain environmental provisions and rights in their constitutions).

152. *Id.*

are ineffective.¹⁵³ “What remains is for all these states to pragmatically realize their role as environmental trustee. Like a constitutional obligation, this needs to be a non-derogable function of government, to the extent that deviating from trusteeship would trigger the courts’ jurisdiction to invoke trusteeship to halt contrary policy.”¹⁵⁴ Like Wood, Bosselmann suggests that this can only happen if civil society and its citizens ask for the protection of our shared environment on which our future depends.¹⁵⁵ Bosselmann and Wood argue that to make citizens feel invested in protecting the environment and in holding their governments accountable, they have to be imbued with their role as stewards.¹⁵⁶ This includes realizing their “common ‘ownership’ of the commons is a kind of property holding that requires sustainability.”¹⁵⁷

This seems ambitious and is maybe idealistic, as it requires serious changes to our way of life and how we understand economic systems.¹⁵⁸ However, this view of citizenship is promising as it would allow for a necessary paradigm shift in our relationship with the Earth and would encourage us to recognize the interconnectedness of all species.¹⁵⁹ Furthermore, a trusteeship is coherent with other mechanisms already suggested to improve environmental law and could serve as an overarching framework to implement these mechanisms.¹⁶⁰ Along with the increased duties and responsibilities of the state towards the environment, a trusteeship provides an ethical foundation for public action that acknowledges the responsibility of humans towards nature and the Earth, as Aldo Leopold identified in 1949.¹⁶¹ It is also consistent with Geoffrey Garver’s suggestions, in his article *The Rule of Ecological Law*, that ecological law must be constrained by ecological considerations, must

153. See *id.* at 1 (explaining that global climate change and ecological crises make plain the weakness of international law and governance).

154. *Id.* at 179.

155. *Id.* at 192–93.

156. *Id.* at 186–94; cf. WOOD, *supra* note 9, at 275–76 (noting the disconnect between environmental policy and individual consumerism and explaining that implementing environmental trusteeship necessitates citizen participation in the role of trustee).

157. BOSSELMANN, *supra* note 10, at 194.

158. Geoffrey Garver, *The Rule of Ecological Law: The Legal Complement to Degrowth Economics*, 5 SUSTAINABILITY 316, 325–30 (2013).

159. *Id.* (proposing ten principles to create such a paradigm shift).

160. Sand, *supra* note 29, at 48.

161. See ALDO LEOPOLD, A SAND COUNTY ALMANAC 224–25 (Oxford Univ. Press 1966) (“[Q]uit thinking about decent land-use as solely an economic problem. Examine each question in terms of what is ethically and esthetically right, as well as what is economically expedient. A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.”); see also Peter G. Brown, *Are There Any Natural Resources?*, in WATER ETHICS: FOUNDATIONAL READINGS FOR STUDENTS AND PROFESSIONALS 203, 218 (Jeremy J. Schmidt & Peter G. Brown eds., 2010) (“The hallmark of our membership in the commonwealth of life should be the health of the ecosphere: what Aldo Leopold called ‘land.’”); BOSSELMANN, *supra* note 10, at 133 (crediting Aldo Leopold as one of the first advocates for stewardship ethics).

integrate other disciplines in a systemic ways, and must be adaptive to science developing knowledge in relation to ecosystems.¹⁶² Indeed, the government's duty under a trusteeship would mean that it would have to consider relevant data and science on matters relating to the environment in order to fully assess the impacts of its actions on ecosystems.¹⁶³ A trusteeship would also be coherent with the obligation to recognize rights to nature in a constitution because there would be a body (the trustee) able to enforce these rights.¹⁶⁴ In addition, increasing the government's duties and correlative recourses would lead to a stronger rule of law.¹⁶⁵ This would include more effective enforcement of established laws and greater accountability of governments, which has been correlated to superior environmental performance.¹⁶⁶ "While no legal approach offers a panacea,"¹⁶⁷ the trusteeship has the advantage of bringing together many legal solutions that have been proffered to solve the crisis, while giving effect to an ethic of responsibility and a reverence towards nature.¹⁶⁸ It is also compatible with a range of legal tools that favor individual initiatives to implement better technology and produce less waste,¹⁶⁹ while also implementing global, state, and local duties of environmental protection and sanctions for breaches of the law.

In my view, before we can implement a trusteeship approach at the national level, we must resolve two major theoretical and practical challenges. The first challenge is how do we move from a legal system where private property is considered an absolute right to one which recognizes a broader set of rights, uses, and obligations of owners to act as stewards to manage environmental resources? The second challenge relates to the scope and content of duties of protection at the domestic level. Wood has enumerated a number of substantive and procedural duties that states would have to respect.¹⁷⁰ But what would these duties imply for the executive on a day-to-day basis? The rest of this Essay focuses on this second challenge. Here, I endeavor to give concrete examples of

162. Garver, *supra* note 158.

163. *Id.* at 319.

164. DAVID R. BOYD, *THE RIGHTS OF NATURE: A LEGAL REVOLUTION THAT COULD SAVE THE WORLD* 173–74 (2017).

165. *Id.*

166. Jessica Scott, *From Environmental Rights to Environmental Rule of Law: A Proposal for Better Environmental Outcomes*, 6 MICH. J. ENVTL. ADMIN. L. 203, 209, 230–37 (2016).

167. WOOD, *supra* note 9.

168. *See supra* notes 27–29, 161, 164–66 and accompanying text (reviewing the numerous legal solutions that trusteeship embraces and the value these approaches place on nature).

169. *See, e.g.*, WOOD, *supra* note 9, at 288–96 (discussing strategies to end fossil fuel consumption, eliminate waste, and other similar concerns within the trusteeship framework).

170. *See supra* text accompanying notes 109–10 (quoting Wood's list of the government's six substantive and five procedural duties as trustee).

environmental cases where courts have applied analogous duties in the Canadian context.

II. THE CANADIAN CASE LAW: JUDICIAL REVIEW OF ENVIRONMENTAL MATTERS

A. The Canadian Context and the Role of Public Law

On few occasions, Canadian courts have recognized the role of governments as trustees¹⁷¹ or demonstrated an openness to recognize it.¹⁷² For example, in the *Scarborough* case of 1979, the Ontario Superior Court recognized that the Borough was a trustee of the environment and was therefore entitled to claim damages for the destruction of trees on a road for the benefit of local citizens.¹⁷³ In a 2004 case, the Supreme Court of Canada acknowledged that Canadian common law had common roots with that of the U.S.¹⁷⁴ Therefore, there was “no legal barrier to the Crown suing for compensation as well as injunctive relief in a proper case on account of public nuisance, or negligence causing environmental damage to public lands, and perhaps other torts such as trespass.”¹⁷⁵ In this case, British Columbia claimed damages for the loss of trees caused by a forest fire, for which Canadian Forest Products was held responsible.¹⁷⁶ However, the Supreme Court did not grant the damages claimed on this basis, as the claim was not fully argued in the first instance.¹⁷⁷ The Court mentioned that, if the Crown could sue for compensation for damages caused to the environment on public land, there are clearly important and novel policy questions raised by such actions.¹⁷⁸ These include: (1) the Crown’s potential liability for *inactivity* in the face of threats to the environment; (2) the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown in that regard; (3) the limits to the role, function, and remedies available to governments taking action on account of activity harmful to public enjoyment of public resources; and (4) the specter of

171. *Scarborough (Borough) v. R.E.F. Homes Ltd.*, [1979] O.J. No. 78, para. 5 (Can. Ont. S.C.) (QL), cited with approval in 114957 *Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)*, 2001 SCC 40, para. 27 (Can.).

172. *Colombia v. Canadian Forest Products Ltd.*, 2004 SCC 38, paras. 9, 79 (Can.); see *Comeau’s Sea Foods Ltd. v. Canada (Minister of Fisheries and Oceans)*, [1997] 1 S.C.R. 12, 25 (Can.) (demonstrating the Court’s openness to considering the government as trustee in the context of fisheries); *Saulnier v. Royal Bank of Canada*, 2008 SCC 58, para. 14 (Can.) (holding that the Minister has a duty to manage fisheries as a common resource).

173. *Scarborough*, [1979] O.J. No. 78, paras. 5, 6.

174. *Canadian Forest Products Ltd.*, 2004 SCC 38, para. 81.

175. *Id.*

176. *Id.* para. 2.

177. *Id.* para. 82.

178. *Id.*

imposing on private interests an indeterminate liability for an indeterminate amount of money for ecological or environmental damage.¹⁷⁹

These judicial developments did not impose a clear fiduciary obligation on governments to protect the environment, such as the public trust doctrine, nor did they suggest the implementation of a model of governance based on the idea of trusteeship.¹⁸⁰ Nevertheless, Canadian administrative and constitutional law does use concepts similar to those of trusteeship, such as accountability, acting in the best interest of citizens, and loyalty. In Canada, the executive branch of government is accountable to the legislative assembly (Parliament), so that the Executive must have the confidence of the legislative branch in order to stay in office.¹⁸¹ If the Parliament withdraws its confidence from the government, then the cabinet must resign or advise the Governor General to call an election to form a new House of Commons.¹⁸² Individually, ministers are also responsible for their actions.¹⁸³ They have the obligation to resign if their actions and omissions, or those of their ministries, are considered to be contrary to the public interest, the execution of the law, and an abuse of Parliament's trust.¹⁸⁴ As a representative assembly, the role of the Parliament is to ensure the transparency and justification of the acts of the Executive.¹⁸⁵ In addition to Parliament, other mechanisms and bodies were implemented to hold the government to account, such as judicial review, public inquiries, and the Auditor General.¹⁸⁶

The Canadian government also has the obligation to act in the *public interest*, which refers generally to the common interests of the community.¹⁸⁷ The government's actions must be taken in the best interest of citizens, who are the beneficiaries of such actions.¹⁸⁸ According to public

179. *Id.*

180. Barbara von Tigerstrom, *The Public Trust Doctrine in Canada*, 7 J. ENVTL. L. PRACT. 379, 387–88 (1997) (describing limited developments of the public trust doctrine in Canada).

181. HOGG, *supra* note 23, at 9–2.

182. *Id.* at 9–2 to 9–3.

183. PIERRE ISSALYS & DENIS LEMIEUX, *L'ACTION GOUVERNEMENTALE: PRECIS DE DROIT DES INSTITUTIONS ADMINISTRATIVES* 343 (3d ed. 2009) (stating the responsibilities and obligations imposed on ministers).

184. *Id.*

185. See HOGG, *supra* note 23, at 9–2 (explaining that the Executive must continue to receive the confidence of Parliament to remain in office; in this way, Parliament holds the Executive responsible).

186. Carol Harlow, *Accountability and Constitutional Law*, in *THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY* 195, 203–04 (Mark Bovens, Robert E. Goodin & Thomas Schillemans eds., 2014); see also RICHARD MULGAN, *HOLDING POWER TO ACCOUNT: ACCOUNTABILITY IN MODERN DEMOCRACIES* 31 (2003) (detailing the different types of institutional accountability mechanisms).

187. See generally EVAN FOX-DECENT, *SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY* 29 (2011) [hereinafter *SOVEREIGNTY'S PROMISE*] (explaining the overarching fiduciary relationship between government and its citizens).

188. *Id.*

law, the government also has to act fairly and reasonably towards citizens.¹⁸⁹ Pursuant to their duty of procedural fairness, when taking any individual measure, public decision makers have to provide a fair hearing to individuals who are affected by their decisions and decide impartially.¹⁹⁰ These obligations entail hearing the arguments of individuals either orally or in writing, giving notice of the hearing, and allowing an individual the opportunity to respond to those facts and arguments that might ultimately lead to a decision.¹⁹¹ In some cases (depending on the context) the duty of procedural fairness also compels a decision maker to give reasons for their decision.¹⁹² Likewise, the duty to act reasonably refers to the way in which an agency exercises its statutory powers.¹⁹³ In *Roncarelli v. Duplessis*, Justice Rand established that any legal power must be exercised non-arbitrarily, taking into account not only the Legislature's intention in adopting a statute, but also its purpose and objectives.¹⁹⁴

Professor Evan Fox-Decent advances the position that these obligations (procedural fairness and reasonableness) are the equivalent of the duty of loyalty in public law.¹⁹⁵ He argues that the duty of fairness owed by a government to its people is not a "free-floating moral principle," but rather one that is justified by an overarching fiduciary relationship between the state and each person subject to its authority.¹⁹⁶ This fiduciary relationship arises from sovereignty, which gives the state attributes such as the power to legislate, administer, and adjudicate.¹⁹⁷ These attributes, along with the power of the state to use coercive force to maintain legal order, point to a "non-consensual relationship of proclaimed authority between state and subject, notwithstanding democratic channels (in democratic states) through which the people's voice may be heard."¹⁹⁸ Further, the fiduciary nature of the relationship means that it is also legal in nature, and thus it generates legal duties for the state.¹⁹⁹ For Fox-Decent, the obligations of procedural fairness and reasonableness imposed on governments in Canada are

189. *Id.* at 25.

190. *Id.*; Evan Fox-Decent & Alexander Pless, *The Charter and Administrative Law Part I: Procedural Fairness*, in ADMINISTRATIVE LAW IN CONTEXT 238 (Colleen M Flood & Lorne Sossin eds., 3d ed. 2018).

191. Fox-Decent & Pless, *supra* note 190.

192. *Id.*

193. *Id.*

194. *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 140 (Can.); SOVEREIGNTY'S PROMISE, *supra* note 187, at 25.

195. Evan Fox-Decent, *The Fiduciary Nature of State Legal Authority*, 31 QUEENS L.J. 259, 265 (2005) [hereinafter *Fiduciary Nature*].

196. SOVEREIGNTY'S PROMISE, *supra* note 187, at 29, 177.

197. *Fiduciary Nature*, *supra* note 195, at 286.

198. SOVEREIGNTY'S PROMISE, *supra* note 187.

199. See *Fiduciary Nature*, *supra* note 195, at 290 (arguing that legal authority flows from the state's fiduciary obligations).

therefore a public law translation of the fiduciary duty of loyalty in private law.²⁰⁰

However, the way the government has traditionally applied these obligations has proven to be detrimental to ecosystems.²⁰¹ Economic growth has often been interpreted as being synonymous with public interest, even though nature's resources are finite and cannot support constant growth.²⁰² Imposing stricter fiduciary duties in accordance with the trusteeship theory could contribute to the transition from an anthropocentric to a more holistic legal and governance system.²⁰³ It draws on concepts that already exist in Canadian public law and takes them further by imposing a responsibility to protect nature and to identify environmental resources as common property.²⁰⁴ Also, the trusteeship theory internalizes an ethic of mutually enhancing human-Earth relationship.²⁰⁵ However, the question of determining what it would mean for an executive to apply fiduciary duties on a daily basis remains, at this stage, unanswered.

B. The Contribution of Case Law

The first sections of this Essay set out the known elements of the fiduciary duty of a trustee²⁰⁶ and how to articulate this duty in a public setting.²⁰⁷ However, it is challenging to determine how the adoption of fiduciary duties in this context would affect an executive's activities on a daily basis. This is particularly challenging in the Canadian context, where there has been no application of a public trust doctrine of any sort.²⁰⁸ Thus, in an attempt to make the trusteeship theory more appealing for courts or legislatures to apply in practice, this Part of the Essay sets out some case examples where similar duties have been applied in a Canadian context. Studying the Canadian case law of judicial review in environmental law is a useful means to achieve this task, as courts often impose obligations in this context that can, in many cases, resemble fiduciary duties.²⁰⁹

200. *Id.* at 267–68.

201. Peter A. Victor, *Living Well: Explorations into the End of Growth*, 5 MINDING NATURE 24, 25 (2012).

202. *Id.*

203. Garver, *supra* note 158, at 325.

204. *Id.*

205. *Id.*

206. *See supra* Part I.A (establishing the foundational principles of trusteeship theory).

207. *See supra* Part I.D (identifying six substantive duties governments must carry out as trustees of public resources).

208. von Tigerstrom, *supra* note 180, at 380.

209. *See supra* Part II.A (recounting instances where Canadian courts have imposed fiduciary-type obligations).

When performing judicial review, courts review the legality of the government's action, therefore ensuring respect of the rule of law.²¹⁰ In Canada, the Court verifies whether the government acted within its authority and in a fair and reasonable manner.²¹¹ The extent of the legal authority of a given administrative body on a specific subject matter is determined through the "standard of review analysis,"²¹² which will ultimately determine the strictness of review to apply to an administrative decision.²¹³ There are two standards of review: reasonableness (deferential) and correctness (not deferential).²¹⁴ An administrative body must exercise statutory powers that, at the very least, rely on the decision maker's reasonable interpretation of the statute.²¹⁵ This means that the decision reached should be justified, transparent, and intelligible within the decision-making process and "fall[] within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."²¹⁶ When defining what is reasonable, the Court will study the legislative and factual context, the nature and expertise of the decision maker, and the nature of the question.²¹⁷ In carrying out this review, courts often impose duties on the State with regard to the environment.²¹⁸

For the purpose of this Essay, I have selected Canadian Supreme Court cases reviewing environmental matters and two cases from Alberta and Quebec's appellate courts, as these decisions are made in two different political climates.²¹⁹ These cases illustrate how the work of judges can assist in defining the obligations of provincial and federal governments towards the environment when applying concepts—such as accountability, access to information, reasonableness, and fairness—in ways analogous to fiduciary duties and the duty of loyalty. Analyzing the application of these concepts in environmental law can also help to determine how to apply

210. *Fiduciary Nature*, *supra* note 195, at 268.

211. *Dunsmuir v. New Brunswick*, 2008 SCC 9, paras. 29, 65 (Can.).

212. *Id.* para 29.

213. *Id.* para. 32.

214. *Id.*

215. *Id.* para. 141.

216. *Id.* para. 47.

217. *Id.* paras. 51–55.

218. *Id.* paras. 47–50.

219. In Alberta, the right-wing Conservative Party of the province has been in power from 1976 to 2017 and lost the elections in 2017 to the center-left New Democratic Party. See Evan Annett & Jeremy Agius, *The PC Dynasty Falls: Understanding Alberta's History of One-Party Rule*, *GLOBE & MAIL* (May 5, 2015), <https://www.theglobeandmail.com/news/alberta/albertas-political-dynasties/article24255480/>. In Quebec, the more centrist parties, Liberals and Parti Québécois, have alternatively been in power from 1970 to 2018. *Id.*; see also *Quebec Votes 2014*, *CBC NEWS* (Apr. 8, 2014), <http://www.cbc.ca/elections/quebecvotes2014/>. Note that a broader compilation of case law that encompasses decisions rendered in environmental judicial review after 1970 to clarify the application, content, and scope of these duties is the subject of future work by the author.

these fiduciary concepts in a more stringent and structured way in a future trusteeship framework.

1. The Supreme Court of Canada

There are two judicial review cases of the Supreme Court of Canada that raise the issue of state obligations towards the environment. In *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, landscaping and lawn care companies were charged with having used pesticides in violation of By-law 270, adopted by the Town.²²⁰ The Town has the power to adopt by-laws to “secure peace, order, good government, health and general welfare in the territory of the municipality” under section 410(1) of the Cities and Towns Act.²²¹ The pesticides used by the companies were nevertheless allowed under federal law.²²² The landscaping companies brought a motion for declaratory judgment asking the Superior Court to declare the by-law “inoperative and *ultra vires* the Town’s authority.”²²³ The question before the court was thus to determine whether the Town had the legal authority to enact By-Law 270 that regulated and restricted pesticide use.²²⁴ Both the Superior Court and the Court of Appeal found that the by-law fell within the scope of the Town’s powers.²²⁵

Before the Supreme Court, the landscaping companies raised various arguments against the by-law.²²⁶ They argued that the by-law did not delegate to municipalities a specific power to regulate the use of pesticides.²²⁷ They further argued that even if there was legislative authority, the by-law would be discriminatory as it would create impermissible distinctions that affected their commercial activity,²²⁸ in this case, the distinction between essential and non-essential uses of pesticides.²²⁹ Justice L’Heureux-Dubé, writing for the Court, concluded that the general provision of section 410(1) authorized the Town to regulate the use of pesticides to improve the health of its citizens.²³⁰ As Justice LeBel explained, absent a specific grant of power, a general welfare provision like section 410(1) must be given some meaning.²³¹ The existing power must be

220. *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, para. 6 (Can.).

221. *Id.* para. 23.

222. *Id.* para. 5.

223. *Id.* para. 7.

224. *Id.* paras. 2, 5–8; Cities and Towns Act, R.S.Q., c C-19, s. 410 (Can.) (repealed 2005).

225. *114957 Canada Ltée*, 2001 SCC 40, para. 8.

226. *Id.* paras. 25, 28.

227. *Id.* para. 25.

228. *Id.* para. 28.

229. *Id.* para. 27.

230. *Id.* paras. 22–29.

231. *Id.* para. 53 (LeBel, J., concurring).

exercised for issues that are related to the interest of the community and fall within the territory of the local government.²³² Thus, the Court held that the by-law concerned the use and protection of the local environment within the community and the realm of local government activity and was therefore valid.²³³ Finally, the Court concluded that discrimination here was a necessary consequence of exercising the power delegated by the province to improve the health of the Town's citizens.²³⁴

In terms of fiduciary obligations, this case is helpful to understand the extent of the duty of loyalty that requires legislatures and governments to act in the best interest of their citizens.²³⁵ It tells us that, when the provincial legislature delegates powers to municipalities, these powers must be interpreted broadly when it comes to the environment.²³⁶ As “[l]aw-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity.”²³⁷ The duty to act personally, adapted in a public setting, would therefore allow such delegation when it is the favorable means of managing local issues.²³⁸

The other case from the Supreme Court of Canada that is relevant to discuss is *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*.²³⁹ In this case, Imperial Oil operated a petroleum products depot from 1920 to 1973.²⁴⁰ In the 1980s, a subsequent purchaser wanted to build a residential complex on the land, but discovered hydrocarbons in the soil.²⁴¹ The purchaser consulted the Ministry of the Environment, who required further studies and approved the decontamination method.²⁴² A few years later, the owners discovered other signs of hydrocarbons in the soil.²⁴³ The owners filed three actions in court against the seller, against the City of Lévis (which had issued the building permits), and finally against the Ministry, alleging that the Ministry had been negligent in supervising and approving

232. *Id.*

233. *Id.* paras. 27, 43 (majority opinion).

234. *Id.* para. 29.

235. *See id.* para. 27 (viewing the municipalities' actions as an attempt to fulfill its role as trustee for the environment).

236. *Id.* para. 3.

237. *Id.*

238. *Id.*

239. *Imperial Oil Ltd. v. Quebec (Minister of the Env't.)*, 2003 SCC 58, para. 8 (Can.).

240. *Id.* para. 3.

241. *Id.* paras. 3–4.

242. *Id.* para. 4.

243. *Id.* para. 5.

the decontamination work.²⁴⁴ In trying to find solutions that would satisfy the owners and the public, the city initiated discussions with the Ministry.²⁴⁵

The Minister issued an order under section 31.42 of the Environment Quality Act (EQA), that required Imperial Oil, as the former owner and operator of the site, to have a soil characterization study done by an independent expert at its own expense and to submit a report.²⁴⁶ Imperial Oil refused to do the characterization study and exercised its right of appeal to the Quebec Administrative Tribunal, provided for by the EQA.²⁴⁷ Imperial Oil argued that the Minister's decisions and actions, including the order, had lost any appearance of impartiality because of his involvement in the failed decontamination and the potential legal and financial consequences of that involvement for him.²⁴⁸ The Administrative Tribunal found that the legislation created overlapping functions for the Minister—to decontaminate the land and to issue orders of characterization and decontamination—that were exceptions to the rule of impartiality, and affirmed the Minister's order.²⁴⁹ The Superior Court set aside the Tribunal's decision and the Minister's order finding that the Minister had a conflict of interest.²⁵⁰ The Court of Appeal set aside the Superior Court's judgment and dismissed the application for judicial review, on the basis that the Minister alone could perform the functions and exercise the powers provided by the Act and had to ensure the obligations imposed upon the polluter were met.²⁵¹ This obligation created a state of necessity that justified an exception to the principle of impartiality applied to administrative decision makers.²⁵²

The Supreme Court of Canada affirmed this decision for different reasons.²⁵³ After reviewing the statutory framework and the general rules of procedural fairness to determine whether they were breached by the order,²⁵⁴ the Court emphasized that safeguarding the environment is a growing concern for society and legislatures.²⁵⁵ The Court noted that there is an “emerging sense of inter-generational solidarity and acknowledgement of an environmental debt to humanity and to the world of tomorrow.”²⁵⁶

244. *Id.*

245. *Id.* paras. 5–6.

246. *Id.* para. 6; *see also* Environment Quality Act, R.S.Q., c. Q-2, s. 31.42 (Can.) (providing the Minister the statutory authority to require Imperial Oil to conduct a soil characterization study).

247. *Imperial Oil Ltd.*, 2003 SCC 58, para. 7.

248. *Id.* paras. 8, 30.

249. *Id.* para. 9.

250. *Id.* para. 11.

251. *Id.* para. 13.

252. *Id.*

253. *Id.* para. 39.

254. *Id.*

255. *Id.* para. 19.

256. *Id.*

The Court also explained that the duty of procedural fairness necessarily varies based on a decision maker's activities, functions, and the legislature's intent.²⁵⁷ In this way, the extent of the duties imposed on the administrative decision maker will not necessarily be the same as those of an administrative tribunal, whose adjudicative functions are similar to those of a court.²⁵⁸ The Court then examined the EQA to determine the nature and scope of procedural fairness rules to apply in the case.²⁵⁹ The Court explained that "[t]he role assigned to the Minister by the legislation sometimes inevitably places the Minister in a conflict with those subject to the law he administers, in the course of the implementation of environmental legislation."²⁶⁰

According to the Court, the Minister had the obligation to carefully and attentively examine the observations submitted to him in order to make a decision, but this obligation was not equivalent to the impartiality that is required of a judge.²⁶¹ The Court recalled that "[t]he Minister has the responsibility of protecting the public interest in the environment, and must make his decisions in consideration of that interest."²⁶² The judges concluded that it was legitimate for the Minister to consider a solution that might save some public money.²⁶³ Therefore, the Minister's attempt to recover costs and compel necessary cleanup by Imperial Oil appropriately represented the public interest to protect the environment, an interest that the State has a duty to uphold.²⁶⁴ Hence, there was no conflict of interest or abuse of power.²⁶⁵

This case illustrates the extent of the duty to act fairly, which is a public component of the duty of loyalty.²⁶⁶ Indeed, the case shows that, when a public decision maker makes an environmental administrative decision in the public interest and exercises a power granted by law, the decision maker does not have the same duty to act impartially as would a court in relation to a judicial decision.²⁶⁷ Rather, the decision maker can act in order to protect the environment and save public money at the expense of a private actor.²⁶⁸ In other words, the public interest takes precedence over the private interest of the private actor.²⁶⁹ Here, it even took precedence

257. *Id.* para. 31.

258. *Id.*

259. *Id.* para. 33.

260. *Id.*

261. *Id.* para. 34.

262. *Id.*

263. *Id.* para. 39.

264. *Id.*

265. *Id.*

266. *Fiduciary Nature*, *supra* note 195.

267. *Imperial Oil Ltd.*, 2003 SCC 58, para. 34.

268. *Id.* para. 39.

269. *Id.* paras. 38–39.

over the interests of the Minister himself, who might have acted negligently and be sued personally.²⁷⁰

2. The Provincial Courts of Appeal

The jurisprudence of provincial appellate courts can also provide valuable lessons about the potential content of fiduciary duties. The *Wallot v. Quebec City* case of Quebec's Court of Appeal is interesting in this regard.²⁷¹ In 2006, the City was informed that chemical runoff in the river was causing blue algae—a proliferation of cyanobacteria—in some parts of Lake St. Charles, which is the principal potable water supply (with the River St. Charles) for Quebec City.²⁷² Quebec City thus adopted a by-law to limit the proliferation of algae and the pollution of the watercourse.²⁷³ The by-law prohibited construction or cutting trees within a 20-meter zone along the high-water line of the lake.²⁷⁴ It also required owners of land on the river's edge to plant a 10- to 15-meter-wide riparian strip on their property with plants, shrubs, and trees.²⁷⁵ This buffer strip was meant to prevent pollutants from reaching the lake.²⁷⁶ The lakeside residents asked the Superior Court and then the Court of Appeal to declare the by-law void and unenforceable on the grounds that their property rights over the land should take precedence in law.²⁷⁷ They argued that the regulation should be considered illegal possession of part of their land.²⁷⁸

The Court of Appeal confirmed the Superior Court's judgment that dismissed their claim, on the basis that the City was empowered to adopt the by-law and that it did not have the effect of entirely suppressing the owners' use of the land.²⁷⁹ Rather, the by-law's purpose was to control the use of property in the collective interest of Quebec City's residents.²⁸⁰ Therefore, the by-law was valid and applicable, and the Court of Appeal concluded by reminding the owners that the by-law was in their interest—both private and collective.²⁸¹ This case also illustrates the duty of loyalty and shows how acting in the best interest of citizens and future generations

270. *Id.*

271. *See* *Wallot c. Québec (Ville de)*, 2011 QCCA 1165, para. 28 (Can.) (mentioning the respondent-City's responsibility to protect the environment).

272. *Id.* para. 4.

273. *Ville de Québec, Que., Règlement de l'agglomération sur la renaturalisation des berges du lac Saint-Charles*, R.A.V.Q. 301 (June 3, 2008) (Can.).

274. *Wallot*, 2011 QCCA 1165, para. 5.

275. *Id.* para. 2.

276. *Id.* para. 10.

277. *Id.* para. 41.

278. *Id.*

279. *Id.* para. 60.

280. *Id.* para. 53.

281. *Id.* para. 62.

can imply a duty to limit property rights for the protection of watercourses.²⁸² Again, the public interest took precedence over the interest of private owners.²⁸³

The last case to be examined is *Castle-Crown Wilderness Coalition v. Alberta (Director of Regulatory Assurance Division, Alberta Environment)*, which was handed down by the Court of Appeal of Alberta.²⁸⁴ In this case, a ski facility, Castle Mountain Resort, had a planned expansion project and consulted with the Director of Regulatory Assurance and Minister of Environment of Alberta about the need to submit an environmental impact assessment (EIA) report.²⁸⁵ While the Director had the power to decide whether the project required submission of an EIA under the Environmental Protection and Enhancement Act, the Minister had an overriding discretion to direct the proponent of a project to prepare a report, even when the Director had not ordered such a report.²⁸⁶

After studying Castle Mountain's project, "the Director expressed a concern that some of the proposed expansion had a significant effect on the environment."²⁸⁷ She proposed that the Deputy Minister of the Environment require an EIA because of the potential effects the project would have on fish and wildlife, cumulative effect issues, and the adequacy of water and wastewater facilities.²⁸⁸ The Director later changed her mind after she consulted with the Department of Sustainable Resource Development.²⁸⁹ She decided that the potential impacts were manageable under the Public Land Act (license of occupation) and the Environmental Protection and Enhancement Act approval process, as well as under the public review of the Detailed Forest Management Plan.²⁹⁰ She concluded that the waterworks system and wastewater system should be exempt from the report, provided that they were subject to other regulations on potable water.²⁹¹ The Minister decided not to exercise his overriding discretion, explaining that a thorough review of environmental effects would be completed regardless of his determination.²⁹² Castle-Crown Wilderness Coalition challenged this decision through judicial review, asking the court to declare the Ministry's decision to be unreasonable and to force the

282. *Id.* paras. 59–60.

283. *Id.* paras. 53, 62.

284. *Castle-Crown Wilderness Coal. v. Alberta (Dir. of Regulatory Assurance Div.)*, 2005 ABCA 283, paras. 1–3 (Can.).

285. *Id.* paras. 2, 17.

286. Environmental Protection and Enhancement Act, R.S.A. 2000, c. E-12, ss. 44(1)(b), 47(a) (Can.).

287. *Castle-Crown Wilderness Coal.*, 2005 ABCA 283, para. 19.

288. *Id.*

289. *Id.* para. 21.

290. *Id.*

291. *Id.* para. 35.

292. *Id.* para. 21; Public Land Act, R.S.A. 2000, c. P-40, s. 20(1) (Can.).

Director and the Minister to submit the expansion of the resort to an EIA.²⁹³ The first judge quashed their applications.²⁹⁴

However, the Court of Appeal concluded both decisions were reasonable, as there were other regulatory authorities that could assess the impact of the proposed project.²⁹⁵ The Director had taken all the relevant steps to verify whether the environmental impacts would be manageable, after concluding some of these steps were exempt from environmental assessment.²⁹⁶ She did not conclude that concerns about environmental impacts would be eliminated with the other regulatory processes, and the court affirmed that she was not required to do so.²⁹⁷ The court also concluded that the other processes identified by the Director to manage some environmental concerns had the ability to address them.²⁹⁸ Finally, the purely discretionary nature of the Minister's decision commanded the highest level of deference, and the court concluded that the Minister's decision not to exercise his discretion was also reasonable.²⁹⁹

This decision is relevant to interpret the duty of loyalty and to act in the best interest of beneficiaries.³⁰⁰ The Court of Appeal said that the public decision maker must take all the relevant steps to verify whether the environmental impacts would be manageable according to the statute's requirements.³⁰¹ Furthermore, the decision demonstrates that the court cannot intervene to compensate for the legislation's weaknesses.³⁰² Here, the Director could not submit the expansion project to an environmental assessment report for some environmental impacts that the legislation excluded from the list of those requiring a report.³⁰³ Parliament could potentially have enacted a more protective statute, but the court cannot control the administration's action for Parliament's failure, unless the statute was deemed unconstitutional.³⁰⁴ The only way courts could control Parliament's failure to respect fiduciary duties to protect the environment would be to include these duties in the Constitution and demonstrate that an action infringed those duties.³⁰⁵

293. *Castle-Crown Wilderness Coal.*, 2005 ABCA 283, para. 22.

294. *Id.*

295. *Id.* para. 65.

296. *Id.* paras. 48, 65.

297. *Id.* para. 58.

298. *Id.* para. 59.

299. *Id.* paras. 57–66.

300. *Id.* para. 57.

301. *Id.*

302. *See id.* para. 35 (stating that the regulations establish what impacts are exempt from consideration).

303. *Id.* para. 54.

304. *Id.*

305. HOGG, *supra* note 23, at 15–1 (explaining the power of the judiciary to invalidate a statute contrary to the Canadian Constitution, whether on distribution of powers or Charter of Rights grounds).

3. Lessons on the Exercise of the Duty of Loyalty

The above four decisions teach us a number of things about the duty of loyalty. First, when the provincial legislature delegates powers to municipalities, these powers must be interpreted broadly when they relate to the environment, as law making and implementation are best achieved at a level of government that is closest to the citizens affected.³⁰⁶ Second, when a public decision maker makes an environmental administrative decision in the public interest, exercising a power granted by law, she does not have the same duty to act impartially as a court would have when issuing a judicial decision.³⁰⁷ Third, acting in the best interest of citizens and future generations can imply a limitation on property rights in order to protect a natural resource.³⁰⁸ Fourth, the public interest of the citizens can take precedence over the interest of individuals or private owners.³⁰⁹ Finally, loyalty requires the decision maker to take all relevant steps to ensure the impacts are prevented or manageable depending on the words of the statute.³¹⁰ If the latter is considered insufficient, there is no valid way for the court to intervene, unless those duties become constitutional.³¹¹

CONCLUSION

There is a growing literature discussing the trusteeship theory, how the public trust doctrine could be enhanced, and how the resulting model of governance could help achieve a paradigm shift from an anthropocentric to a more holistic legal system that internalizes an ethic of mutually enhancing human-Earth relationship.³¹² The trusteeship theory is especially relevant to American and Canadian public law, as it draws on legal concepts already in use in this area, such as public interest, accountability, fairness, impartiality, and reasonableness.³¹³ The Canadian case law in judicial

306. See *supra* text accompanying note 237 (declaring that “law-making and implementation are often best achieved at a level of government . . . closest to the citizens affected” (quoting 114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town), 2001 SCC 40, para. 3 (Can.))).

307. See *supra* text accompanying note 268 (identifying that when a public interest weighs on the side of one party it may lessen the need for adjudicators to show parties impartiality).

308. See *supra* text accompanying notes 282–83 (showing that private interests may often be outweighed by public interests).

309. See *Wallot c. Québec (Ville de)*, 2011 QCCA 1165, para. 60 (Can.) (concluding that a by-law that restricted property rights for the benefit of the public was permissible).

310. See *supra* text accompanying note 282 (characterizing as loyalty “acting in the best interest of citizens and future generations”).

311. See *supra* notes 303–05 and accompanying text (recognizing that Canada must amend its Constitution in order to impose fiduciary duties on Parliament and legislatures).

312. Garver, *supra* note 158, at 318–20 (surveying and summarizing various thinkers’ conceptions of ecologically holistic legal regimes).

313. See *generally Fiduciary Nature*, *supra* note 195, at 264–65 (examining the interplay of public interest, accountability, fairness, impartiality, and reasonableness).

review of environmental matters can make a valuable contribution to the nature and content of potential fiduciary duties, because it demonstrates that courts already impose obligations on governments to realize environmental preservation and promotion when they interpret concepts of public law that are analogous to fiduciary duties, such as *reasonableness in the circumstances*.³¹⁴ The cases analyzed in this Essay have demonstrated components of the application of the duty of loyalty, such as interpreting the delegation to a local government broadly as law making, and realizing that implementation is best achieved at the level of governance closest to citizens affected.³¹⁵ A broader study of the case law has yet to be done to suggest a comprehensive definition of the application, content, and scope of the fiduciary duties. Nevertheless, it remains to be seen whether property rights would have to be redesigned in order to adapt to a trusteeship framework. This redesign could mean that owners would act as stewards to protect the resources on their land and environmental resources would be considered to be common to all. The answer to this question will certainly be a necessary aspect of any solution to the greatest challenges of our time, those of the Anthropocene.

314. See *supra* Part II.B (outlining how the cases examined “illustrate how the work of judges can assist in defining the obligations of . . . governments”).

315. See *supra* text accompanying note 237 (drawing on the Supreme Court of Canada’s holding and dicta).