



Creating a Blue Dialogue: Canadian Water Governance into the 21st Century Webinar Summary Document

Protecting the Public Interest in Water: The Public Trust Doctrine

December 8, 2010

Introduction

The fourth webinar of this series focused on the Public Trust Doctrine, a powerful legal mechanism used to give property rights to public land, and to protect valuable public resources for use by current and future generations.

Our first guest, Randy Christensen, discussed British Columbia water law, and legal precedents to the Public Trust Doctrine. Sarah Jackson, our second guest, focused on the foundational statutes already in place in Canada, and the legal and public interest considerations of further action. Our third guest, Oliver M. Brandes, approached the Public Trust Doctrine as a tool to help establish a sustainable water management paradigm.

Over 70 individuals participated in the online seminar, providing questions and discussion in a multimedia setting.

Guest Speakers

Randy Christensen is a Staff Lawyer with Ecojustice

Sarah Jackson is an Articling Student with Ecojustice

Oliver M. Brandes is the Associate Director of the POLIS Project on Ecological Governance

Presentation Summary

Building on the “Public Trust and a Modern BC *Water Act*” legal issues brief (available www.poliswaterproject.org/law), our three speakers discussed the legal concept of the Public Trust Doctrine (PTD): how it has evolved, the values behind it, the rationale for implementing it, relevant Canadian statutes, and the opportunity in British Columbia for its implementation. The following summarizes the speakers’ key points:

About the Series:

The POLIS Project on Ecological Governance and the Living Water Policy Project have organized an online seminar series, “Creating a Blue Dialogue: Canadian Water Governance into the 21st Century,” about key issues facing water policy and decision making in Canada. The purpose of these webinars is to engage Canadian water policy and management experts in emerging opportunities, trends and challenges as they relate to water governance.

By offering insights into the evolving and complex concepts related to Canada’s governance framework, the Living Water Policy Project is helping to empower the water community to understand the challenges ahead and, ultimately, better manage freshwater resources into the 21st Century.

The goals of the webinars are:

- to build a stronger understanding between research and on-the-ground implementation;
- to share perspectives and expertise on the latest water issues, best practices, and policies across the country; and
- to join a network of expert practitioners and thinkers from across the country to create a more robust community that crosses sectors and jurisdictions.

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Historical Precedent: First developed in Ancient Rome to legally protect common land and water from infringement by private interests, the PTD is now used in some common law nations around the world as a legal framework for safeguarding the environment on behalf of the public. Although not yet a well-established doctrine in Canada, the PTD is common in the United States, where it has been tested in the courts. A key example is the 1983 Mono Lake Case in which the City of Los Angeles was ordered to cease overdrawing water from Mono Lake, an ecologically productive reservoir it had legal access to. Evoking the PTD, the Supreme Court noted the ecological value of the lake, and instructed Los Angeles to reduce its draw in order to bring the lake level up to an environmentally sound threshold. The reduced water capacity forced Los Angeles legislators to adopt water efficiency and conservation efforts which, ultimately, more than compensated for the reduction in water supply.

Need for Fiduciary Duty: Codifying the PTD would make the conservation of crown land (and water) a fiduciary duty, meaning that government officials would be legally entrusted by the courts to manage and preserve natural spaces on behalf of the long-term public interest. The PTD’s overarching principle of stewardship-for-the-public-interest utilizes the interpretative capacity of common law, giving policy- and decision-makers the discretion to establish localized best practices that meet the governance aims of the legislation. In effect, the PTD is a flexible, coordinated governance framework that would establish enforceable public rights to the environment and its resources.

Existing Policy Foundation: Statutes related to the public trust are increasingly common in Canada, and include principles common in Canadian law, such as protecting the right to navigate waterways, and the protection of parks and wildlife. Implementing a legal doctrine, however, would allow for an overarching statutory interpretation by the courts and restrain the ability of legislators and private interests to remove, or otherwise impair, public rights to crown land placed “in trust.” Bill C-469, a private members bill being discussed in Parliament, titled *An Act to establish a Canadian Environmental Bill of Rights*, is one example of the PTD in action. It aims to implement many aspects of the PTD in Canada by enshrining public rights to the environment.

The PTD in British Columbia: In 2008, the Province of British Columbia introduced the Living Water Smart Plan which established the collaborative Water Act modernization process between government and stakeholders. The process aims to modernize the century-old *BC Water Act*.

The policy and environmental law community is now discussing the opportunity for codifying the PTD into the new Act, along with other changes such as ending the “first-in-time, first-in-right” principle for guiding water allocations, and establishing a Resource Practices Board for independent oversight.

Currently, natural resource and environmental management decisions are highly discretionary and divorced from ecological function. The historical trend in British Columbia has been to manage our resources from the perspective of resource extraction. Because of this bias, there is limited public participation, inadequate recognition of Aboriginal concerns, and no independent oversight.

Practical Benefits for British Columbia: The PTD has real potential to assist the government in achieving the goals of the *Water Act* modernization process. The PTD improves water governance

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arrangement by bringing an ecosystem perspective to the process and by providing means for members of the public and local residents to become involved in the decision-making process. The flexibility and adaptability that the PTD provides protects the priorities of the public interest over time. The ongoing supervisory nature of the doctrine allows government officials to revisit previously made decisions if there have been unforeseen impacts or new environmental stressors. The PTD also provides an avenue for protecting groundwater, including taking into account environmental or future water needs by limiting the over-drafting of aquifers.

Analysis of Discussion

POLIS has drawn out potential policy actions based on the content of the presentations, discussion, and questions during the webinar session:

Recommended Actions	Benefits
Governments should adopt the Public Trust Doctrine as a government accountability measure.	As a fundamental legal mechanism of a supervisory nature, the Public Trust Doctrine helps avoid decision-making silos and mandates statutory decision-makers to protect the public interest in natural resource management. Whereas the public is given rights over common water resources through the Public Trust Doctrine, a wider range of stakeholders can be permitted influence in decision-making.
Legislation should affirm that individual water rights are strictly rights of use—not of ownership. Governments should recognize the Public Trust Doctrine’s capability to legislate the superiority of the public interest over private ownership.	The Public Trust Doctrine can protect communal water resources from degradation caused by the pursuit of private activities. By putting the public interest first – not conditioned on individual water rights – society can help bridge many existing gaps in national and environmental and natural resources law.
Any Public Trust Doctrine provision must address both surface water and groundwater in order to ensure complete protection of water resources and to accurately reflect the hydrologic cycle.	Standard water regulation often fails to adequately address the over-drafting of groundwater. In British Columbia, there is currently no licensing requirement in place for groundwater as well as surface water withdrawal.
A list of public trust uses or criteria for determining public use should accompany any public trust provision.	A protocol for decision-makers can help ensure that the best uses are always prioritized, and help us move away from the arbitrary “first-in-time, first-in-right” water allocation practice.
Legislation should include the financial, personnel, and institutional resources for implementation.	Capacity is essential – even the strongest legal foundation will falter without sufficient resources.

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For more information, or to participate in future webinars, please contact:

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