

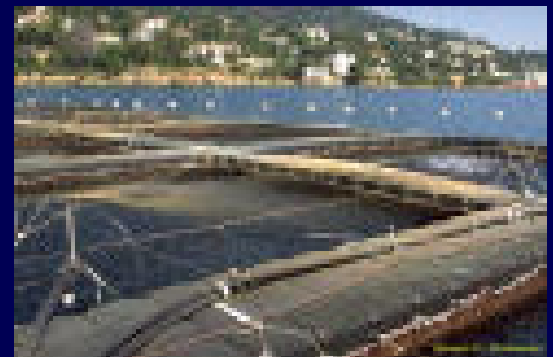
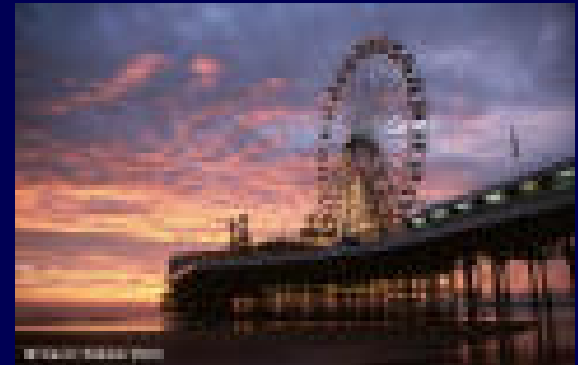
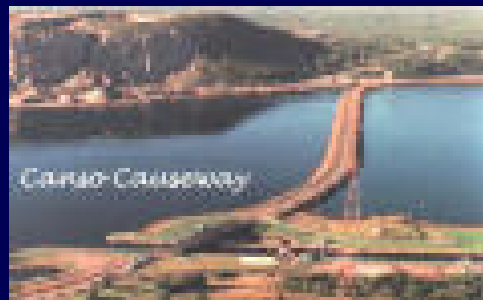


# Canada and the “Public Trust” – A Comparative View

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## Common Origins in the Common Law

- Roman Law: the *Institutes of Justinian*
- Seashore and submerged areas the common property of all
- Where state ownership: subordinate to certain public rights





## ....And after the fall of the Roman Empire

- Concept of public rights over these areas in decline
- But In England: *Magna Charta* (1215) introduced new scheme of rights over seashore, foreshore and other waters





## English Law

- Allowed for Crown ownership of foreshore (later out to 3 and 12 nautical miles)
- BUT: Crown ownership – and any grants made by Crown – subordinate to public rights of fishing and navigation
- Exceptions:
  - Pre-*Magna Charta* grants of fisheries
  - Removal by explicit Act of Legislature



## CANADA

- Pre and post Confederation (1867) – adopted the essence of the English approach
- Some refinements to deal with provincial v. federal jurisdiction: i.e. which parliament could extinguish.
  - But fisheries and navigation federal heads
- Remedies for interference in the action for public nuisance



## “Public Trust” In Canada?

- *Green Case* – rejected (but a “statutory trust”)
- *Mann Case* – referred to; but not applied and case never decided
- *Canadian Forest Products* (2004 SCC) – discussed – but not applied
  - Assumption that it was US doctrine
- In sum: never fully denied – never really applied or developed outside limited statutory eggs



## The United States

- Continued protection of public rights of fishing and navigation
- Late 19<sup>th</sup> century: developed public trust doctrine
- Leading case: USSC: *Illinois Central Railway* (1892)
  - Certain lands not same as other state lands
  - Limits on how they might be disposed/alienated



## Fundamental Concept

“It is a **title held in trust for the people of the state** that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.”



- Subsequent Litigation developed this state by state – some key issues:
  - Geographic extent
  - Number and nature of interests protected (expanded and made quite broad)
    - Recreation, conservation etc.



## Central Characteristics

- Title to public trust lands consists of two elements: a *jus publicum* (public interest) and a *jus privatum* (private or proprietary interest).
- States are able to convey the *jus privatum* interest, but the *jus publicum* interest is inalienable (though it may be terminated in some cases)
- The ability of States to alienate even the *jus privatum* interest will be subject to limitations imposed by the court



- Courts will interpret any grant of public trust lands so that ambiguous terms are construed in favour of the trust.
- In general, private title to trust lands remains subject to the public trust (variations from State to State in the extent of interests).
- Any conveyance of trust lands must be at least be subject to later revocation by the legislature.



## Key Differences

- “Trust” Obligation entirely different from protected “rights”: higher duties on executive; new duties on legislature
- Removing action from public nuisance eases standing, removes obstacles
- “Trust” approach has allowed for redefinition and expansion of protected public interests and uses



## Should Canada Get in Step?

- Remember the context is different:
  - “Regulatory takings” in US – not an issue here
- Concerns of 19<sup>th</sup> century: corruption; loss of public resources; all in closed doors - and no statutory scheme to protect



- Public Trust responded to all of this:
  - Increase the number of uses which are seen as public interest (substitute for legislation)
  - give standing to members of the public to bring these issues into court;
  - force the decisions into the open forum of the legislature to put a brake on private interests;
  - push governments to develop and apply rational allocation criteria (to justify acting against trust)