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Article

# Highways, Parks and the Public Trust Doctrine

**Andrew Gage** [a1]



*While the common law doctrine of dedication and acceptance is most well known as a means of creating public highways, Canadian courts have also applied it to the creation of other public spaces, including "playgrounds, greenbelts, [and] parks."* [1] *This doctrine, which applies equally to private and government actors, has huge implications for understanding both private and public actions in relation to lands used by the public. Under the Doctrine, a private property owner's actions (or in some cases inaction) may result in the creation of legally enforceable public rights of use of lands for recreational or other public purposes. Similarly, the Doctrine provides an important tool in understanding the legal effect of government actions that set aside lands for public purposes--including, but not limited to, designations under parks and other protected spaces legislation.*

*The cases discussing the public rights created in this way often describe them in terms of a trust owed to the public. A review of the case law suggests that governments hold public spaces subject to a fiduciary obligation to the public, likely arising from the relationship between the creation of such rights and the creation of charitable trusts as well as from the nature of fiduciary duties generally.*

*The consequences of such public rights depend upon the specific public use for which the land has been dedicated, but generally prevent a property owner from using his or her property in a way that infringes upon the public use (thereby creating a public nuisance). For government the trust-like obligations are still broader, including a positive obligation not to allow others to infringe on the public's right, and possibly an obligation to take positive steps to prevent infringement of the public rights from occurring. While there are barriers for a member of the public seeking standing to bring such a claim, these rights may still be asserted in a number of contexts.*

## *2 1. INTRODUCTION

The old common law concept of public rights--rights that are "vested in the public generally, rights that any member of the public may enjoy" [2] --is receiving renewed attention.

Public environmental rights--rights of the public to the sustainable use and/or the conservation of environmental features--have a real appeal for the environmental movement and the lawyers who represent environmental interests. At a philosophical level, the environmental movement ***3** sees itself as defending not individual interests, but the interests of the general public, and of future generations. At a practical level, the concept of public rights may represent a tool to counter the legal system's traditional preoccupation with private rights. Most recently the Supreme Court of Canada, in *British Columbia v. Canadian Forest Products Ltd.*, noted the potential for public environmental rights to help meet the fundamental value of environmental protection. [3]

In an article on the importance of public rights in interpreting environmental statutes, the author touched briefly on several different types of public rights that might be used to protect the environment. [4] Three paragraphs were devoted to rights arising from "land dedicated for public use," which the author noted could include public rights to use land for recreation or other public purposes. Although the focus of that article prevented a more detailed discussion of this type of public right, the author

  

noted that: “As [public environmental] rights become better articulated in the future, it will become easier for the courts to apply them as an effective tool for environmental protection.” [5]

This article, then, examines the potential to use the common law rules surrounding the dedication of land for public use, and the associated public rights, as a tool for environmental protection. The common law doctrine of dedication and acceptance (the Doctrine), which arose in the context of the public's right to use highways, has been extended by Canadian courts to include lands dedicated for recreational use and other public purposes (possibly including conservation purposes). This Doctrine, and the associated case law, represents a powerful tool for asserting environmental interests on lands-- public or private--that have been set aside for environmental purposes.

Under the Doctrine, past decisions (explicit or implied) of land owners to set aside land for a public purpose can result in the creation of legally enforceable rights of the public to pass through or even use private lands; rights capable of standing against the otherwise largely unfettered private property rights of land owners.

Moreover, since the Doctrine also applies to public lands, it is crucial in understanding government decisions to set aside lands for not just highways, but also parks and public trails, and arguably conservation areas. Consequently, government pronouncements setting aside land may ***4** have a legal effect even in the absence of legislation. Moreover, absent a contrary legislative intent, the Doctrine should inform the interpretation of parks statutes, and other legislation setting aside land for a public purpose.

Finally, with renewed legal interest in the potential for a Canadian version of the public trust doctrine--an American doctrine holding that certain lands must be managed for the benefit of the public--it is instructive that Canadian courts have described the dedication of lands by public authorities in trust-like terms. This trust-like relationship provides support for the development of a Canadian version of the public trust doctrine, particularly in relation to parks and other public spaces.

Part 2 of this article reviews the creation of public rights arising from the intention of a property owner to set aside land for a public purpose. This discussion begins with a review of the common law Doctrine of dedication and acceptance, first as it relates to highways and then as it relates to the dedication of land for recreational and other public purposes. It will consider the limitations of the Doctrine in addressing public conservation purposes and suggest ways that the courts could address these problems. The author will then examine the creation of public rights through government action, policy and legislation. By applying the approach suggested by the Doctrine to the interpretation of statutes, legislation that creates Parks or sets aside lands for other public purposes can result in the creation of public rights.

Part 3 then explores a series of cases that describe highways and other dedicated lands in terms of trust-like obligations held by the Crown or local government. These trust obligations are owed to the public when publicly held lands are dedicated for a specific public use. It suggests possible explanations for the existence of such a “public trust” in respect of dedicated public spaces. There is strong authority for the existence of a public trust over park lands and similar public spaces.

Part 4 will consider the causes of action and possible remedies that exist as a result of public rights created under the Doctrine, both at common law and in equity. At common law there are obligations on the owner of property on which public rights exist. While there are significant barriers to bringing a claim for public nuisance for violating a public right, there are nonetheless potential legal consequences arising from such a violation, including the potential for the rights to indirectly affect liability for other tortious actions. At equity, there are additional consequences for the Crown arising from the existence of a public trust obligation in respect of dedicated lands; there is a resulting equitable obligation to manage such land for the public's benefit.

## ***5 2. AN OVERVIEW OF THE LAW OF DEDICATION AND ACCEPTANCE**

In an era of local government planning and provincial highways ministries, it is easy to forget that the creation of public highways didn't always involve carefully thought out mapping, property purchases and other conventions of modern transportation law.

At common law, the creation of public highways, including public trails, was carried out through the Doctrine of dedication and acceptance. Public rights-of-way created in this manner resulted in the public at large acquiring legally enforceable rights

  

to use and enjoy the highways. Since the Doctrine is well developed in this context, this Part will begin with a discussion of the Doctrine as it applies to highways. This will be followed by consideration of the use of the Doctrine to create public recreational rights and other types of public rights over dedicated lands.

Finally, this Part will conclude with a discussion of the application of this Doctrine to decisions of the Crown and public authorities in setting aside land for public purposes.

**(a) Doctrine of Dedication and Acceptance--Highways**

With most modern highways created and regulated under statutory authority, the Doctrine is relatively unknown in Canada. In brief, it holds that a land owner may dedicate a portion of his or her property for use by the public--most often as a public right-of-way, or highway; if the public then indicates its acceptance of the dedication, a legally enforceable public right to use the land for that public purpose is created.

This Doctrine is better known and more often applied in the U.K., where there continues to be a well established system of public footpaths. Most of these footpaths cross private property and were created under this Doctrine, [6] sometimes as modified by statute. [7] Throughout the U.K., these footpaths are jealously guarded by their users, and by non-profit organizations such as the Scottish Rights of Way Society, [8] the Rambler's ***6** Association [9] and equivalent organizations. As a result, the case law concerning this type of public right is better established in the U.K. than in Canada.

Nonetheless, the Doctrine is well established in Canadian common law. There are “[t]wo essential elements”:

(1) [an] intention on the part of the owner of the land to dedicate, and

(2) an acceptance by the public of such road as a highway. [10]

To paraphrase the case law, the **dedication** of a public highway can occur when a land owner indicates an intention to dedicate a right of way on his or her property for use by the public. If the public proceeds to use the highway, this signifies the public's **acceptance** of the dedication and a public right in the right of way is created. Public highways in this context include all public rights of way, including public footpaths.

**(i) *Dedication***

An owner dedicates land by indicating an intention to set the land aside for the use of the public (*i.e.* as a public highway), not as a mere permission or licence, but for the public's permanent use. The dedication of land for a public highway may take place explicitly--when the owner directly invites the public to use the property--or it may be implied.

Dedication is based on the expressed or presumed intention of the owner; “Dedication must rest upon intention” (per Anglin J. in *Harvey v. Dominion Textile Co.* ... ) Any litigant alleging it has the burden of establishing it and this burden is not a light one, since dedication “necessarily implies ... an unequivocal decision on the part of the owner of the land to abandon this land to the public” (per Migneault J. in *Gauvreau c. Pagé* ... ) The evidence must not be ambiguous. It must be clear .... [11]

Obviously an explicit dedication is the simpler case: the owner explicitly invites the public to use the road, announcing his or her intention to turn the land over to the public, dedicating the land to the use of the public. ***7** This situation simply involves a property owner making a decision about how he or she wants to use the property.

At common law a property owner could make such an explicit dedication by preparing a plan which showed lands set aside as roads, particularly where members of the public bought property on the basis of the plan: “The common law rule is that when a tract of land is plotted into lots and streets, there is a dedication of the streets to the public ...” [12] An owner's approval of a plan, even if he or she did not prepare it, may also amount to a dedication. [13]

  

However, in many cases a land owner does not explicitly state an intention to turn land over for use as a highway. Under both Canadian and English common law, the intention to dedicate a public highway may be implied from the actions, or inaction, of the landowner, although, as noted above, the intention should not be implied lightly.

In particular, an intention to dedicate can be implied from the failure of a property owner, in the face of ongoing and longstanding public use of the land as a right-of-way, to communicate to the public that the land is private. Thus, the Supreme Court of Canada, in *R. v. Moss*, explained that evidence of such public use creates a presumption that a dedication should be inferred.

... [I]t is well established that an open user as of right by the public raises a presumptive inference of dedication, and when such user is proved the onus lies on the person denying that inference to rebut it, *e.g.*, by showing that owing to the state of the title there was no valid dedication. [14]

Therefore, in cases not involving an explicit dedication, the courts may be asked to consider whether longstanding public use of a right of way with the apparent consent or acquiescence of the landowner is sufficient to justify the court in implying a dedication. The assumption appears to be that if a property owner knows that the public at large is asserting a right over his or her property, and does not take steps to notify the public that the land is private and that any use of the road is at his or her pleasure, then the owner is accepting the existence of the public road.

***8** There is no hard and fast rule about the length of public use which will give rise to such a presumption. The courts have said that dedication of a public road is a question of fact (rather than law) and that each case must be considered on its own merits. [15] In England public use of a road may give rise to an implied dedication very quickly; there are cases in which dedication has been implied from as little as 18 months of public use, [16] although usually a longer period is required. Similarly, in Canada it has been said that dedication may be inferred from a far shorter period of public use than would be necessary to acquire rights under the common law doctrine of prescription (the acquisition of rights by virtue of longstanding use alone). [17]

In general, however, Canadian courts seem to be slower to imply dedication from longstanding public use than their English counterparts. There are cases in which 10 or 12 years of public use of a road was not considered sufficient to infer a dedication, [18] and it seems that the shortest time period in which a Canadian court has implied a dedication is about 20 years of public use, [19] although many cases typically involved 30-50 or more years of public use of the road. [20]

***9** The view that the courts should be slow to imply a dedication has resulted in a series of cases holding that dedication should not be implied where the public's use of the land could also be explained through the property owner's tolerance of the public use. Canadian judges have stated that courts should be particularly slow to infer that an owner intends to dedicate land in newly settled areas (which, at the time of these cases, included much of Canada) [21] or rural areas, [22] where property owners may be more likely to tolerate access by neighbours as part of good-neighbourliness. “The inference of neighbourly tolerance is the more likely when dedication is sought to be established at a period when the area is in a relatively early stage of its development.” [23]

To the extent that these cases merely indicate that a longer period of public use is required before a court should presume that a dedication was intended, they are entirely consistent with the longer (30 to 50 year) periods that Canadian courts look for in cases of implied dedication. However, there are cases which seem to hold that no matter how long the public has used a property, this use should, if at all possible, be assumed to be the result of tolerance, and not dedication. [24] As a result, while dedication is often inferred after 30-50 years of public use, there are also cases in which a much longer period of public use has been held to be insufficient to result in an implied dedication. [25]

It is difficult to reconcile this judicial reluctance to draw an inference of dedication with the statement of the Supreme Court of Canada in *Moss*, quoted above, that longstanding public use of a right of way gives rise to a “presumptive inference.” [26] Tim

  

Bonyhady points out that the view that ***10** dedication should not be inferred from use which could be attributed to the goodwill of the land's owner would effectively eliminate any implied dedication--a result which is clearly at odds with the case law:

The logical difficulty with this argument is that, if applied consistently, it would mean that rights of passage could never be created by implied dedication since dedication by definition involves a landowner in making a gift to, and hence in being charitable towards, the public. In terms of public policy, one may also prefer the opinion of the Court of Appeal in the *Dyer* case. [27] Adopting the view of Justice Cardozo that "property like other social institutions has a social function to fulfill", Evershed J. stated that where public use of a footpath has its origin in "the toleration and neighbourliness" of previous landholders, "it may be no bad thing that the good nature of earlier generations should have a permanent memorial." [28]

In addition to duration of public use, a variety of other factors are relevant in determining if a dedication should be implied. These factors, together with the considerable discretion given the trial judge in such cases, mean that it can be difficult to predict with certainty when a dedication will be implied. Some of the factors which may be relevant include: the expenditure of public funds on the road; [29] occasional gating or otherwise closing of the road, thereby restricting public access; [30] the use of the road not by the public at large, but only by some subset of the public; [31] the use of signage or other means to convey the owner's intent; [32] any private benefit ***11** received by the property owner arising from the public use of the road; [33] and any actions by the owner encouraging public use of the road. [34] Somewhat surprisingly, the fact that the level of public use was low, provided there was some public use, does not appear to a factor against implying a dedication, [35] although use must be by the public at large, and not merely local residents. [36]

In the end the main question is what intention the actions, or inaction, the property owner conveys. This intention, and not longstanding public use, results in dedication; public use is only evidence of the owner's intention. [37] Thus, a property owner can allow ongoing public use of a road without unintentionally creating a public right, provided that it is clear *to the public* that its use is not a right. As long as a property owner takes basic and ongoing steps to notify the public that their access to the road is by way of licence or toleration, the courts are unlikely to infer any dedication; even many decades of public use will not result in an implied dedication.

Similarly, the actions of someone who holds land, but who lacks authority to dedicate the land, can never result in an express or implied dedication. Thus if a property is rented to a tenant, the tenant's actions in inviting the public to use the road (or failing to keep them off) cannot give rise to a dedication (whether express or implied). [38] Likewise, it has been held that public use of a road on an Indian reserve does not result in dedication, due to the fact that reserves are not alienable except to the Crown. [39]

***12** Most provinces now have legislation that defines when public roads will be created. However, these statutory rules should not be taken as replacing, but rather supplementing, the Doctrine. [40] These statutory rules may or may not be relevant in cases involving the creation of streets, but will generally not apply to the dedication and acceptance of lands for footpaths and other public purposes, discussed below.

In summary, an owner may dedicate land to a public purpose explicitly, or implicitly, as implied from his or her actions or inaction. Dedication may be implied, most notably, from longstanding public use of the land as a right of way.

**(ii) *Acceptance***

The public indicates acceptance of a dedication of a right of way (whether explicit or implied) by using the land as a road or path: if there is public use of a dedicated public right of way then the public will be held to have accepted the dedication.

The requirements for establishment of a highway at common law [includes dedication] ... followed by "acceptance" by the public, which occurs when public use is made of the land so dedicated. In some of the reported cases dedication by the owner has been inferred from the fact of free public use of the land as a road over a substantial period of time with the owner's knowledge, from which acquiescence can be inferred. Where there has been express dedication, however, there is nothing in the cases to

  

suggest that lengthy public use is necessary in order to constitute “acceptance”, and thereby to establish the dedicated land as a public highway. That happens as soon as there is any clear use by the public of the dedicated right of way. [41]

In cases where the dedication is not implied, but is express, then, there is no requirement that the public use of the property be longstanding or continuous to indicate public acceptance. In cases where the dedication is implied from longstanding public use, that level of public use will generally be sufficient to also demonstrate public acceptance of the dedication. As long as there has been some level of public acceptance of a dedication, the courts should hold that the public right has been established. [42]

***13** The acceptance is by the public on behalf of the public. Consequently, at common law governments do not have the power to accept the dedication on behalf of the public. [43] Thus a local government's acceptance of the dedication of a public right of way does not result in the public right being created. Conversely, if the public has used the road, a local government's disavowal of the public right of way is irrelevant to determining whether acceptance has occurred.

The question is not whether the municipal government has accepted the dedication but whether the public has done so. It would appear that the learned trial judge misdirected himself as to the law when he said, “A road can only become a public highway by dedication by the owner, and acceptance thereof by the municipality.” ... In our view, the only reasonable inference to be drawn here is that the public has accepted this dedication even if in the recent past the municipal government has denied it. [44]

This common law rule can, of course, be modified by statute, and legislative provisions may allow local governments to accept dedication for public purposes on behalf of the public.

Since dedication is often implied from a history of public use, and acceptance is also demonstrated by public use, the doctrine of dedication and acceptance can bear a resemblance to other legal rules concerned with acquiring rights through longstanding use, such as prescription or adverse possession. However, the courts have been clear these are separate and distinct concepts in law. Such public use is not the source of the public right, but only evidence of the owner's dedication of the property and/or the public's acceptance of it. [45]

**(b) Doctrine of Dedication and Acceptance--Other Public Purposes**

In Canada, unlike in England, [46] the courts have generally held that lands can be dedicated for a wider range of public purposes including ***14** public recreation. Beginning in the late 1800s there were a number of cases holding that land could be dedicated as a public square or market-place. [47]

Then, in 1959, the Supreme Court of Canada was asked to consider whether a property which contained a public monument had been dedicated as a highway. In its decision in *Wright v. Long Branch (Village)* the majority ultimately found that a right of way had not been so dedicated. However, it held that a public right to access and maintain the monument had been created.

In so holding, the Court explained that the doctrine of dedication and acceptance, while originating in the context of highways, can be applied to the dedication of land for other public purposes, recognizing public rights in respect of other public spaces. Rand J. explained:

The principle determining the nature of the interest created by dedication is analogous to that of other modes of creating public interests, as, for example, where land is conveyed to a municipal body for the purpose of a market place; the user for that object cannot be changed except by legislation; and if by authorized action its use as a market is abandoned, the beneficial interest revives in the original actor or his successors. The question has arisen in a number of cases in Ontario, such as *Guelph v. The Canada Company*, [48] *Hamilton v. Morrison*, [49] instances of market places, and *Peck v. Galt (Town)*. [50] In this last a square dedicated “to remain always free from any erection or obstruction” excluded the power of the town to close and to dispose of it to the trustees of a church.

  

In *Lorne Park, Re*, [51] the Appellate Division, speaking through Clute J.A., at 59 referred to 13 Cyc. 444 (IV.A.):

***15** The doctrine expounded in the early English cases was applied to highways, but was gradually extended to all kinds of public easement, such as squares, parks, wharves, etc., ...

and to p. 448:

> The full applicability of the doctrine of dedication to parks and public squares and commons is now generally recognized, and where land is dedicated for a public square without any specific designation of the uses to which it can be put, it will be presumed to have been dedicated to such appropriate uses as would under user and custom be deemed to have been fairly in contemplation at the time of the dedication.

These references were not strictly necessary to the judgment but they are in harmony with previous authorities in the province and the extension given to parks, etc., is universally established in the United States. [52]

*Wright* was applied by the Ontario County Court in the 1951 case of *Carpenter v. Smith* to hold that a beach had been dedicated for public recreation. [53]

Despite the decisions in *Wright* and *Carpenter*, one leading text book on property law written as recently as 1985 concluded, without citing any authority, that the Canadian common law does not allow the public to acquire public rights over open spaces. [54]

However, in 1995, the Ontario Court of Appeal, in *Gibbs v. Grand Bend (Village)*, held that the public had acquired public recreation rights over a beach on the banks of Lake Huron through dedication and acceptance. That judgment provides some extremely useful direction as to the nature of public rights of recreation.

Brooke J.A., writing for a unanimous court on this point, rejected the trial judge's suggestion that the doctrine of dedication and acceptance was limited to public rights of passage. The trial judge had held that the Doctrine does not extend to recreation, as such use is not a “public necessity.” The Court of Appeal stated:

Perhaps such a proposition was tenable in other days, but today's attitude favouring playgrounds, greenbelts, parks ... is because facilitating public recreation is a matter of public necessity.

Furthermore, the authorities do not entirely support the trial judge's conclusions. [Brooke J.A. summarizes the Supreme Court of Canada's decision in *Wright v. Long Branch (Village)*] ....

Dedication of the use of beaches to the public for recreational purposes has been the subject of but one reported case in this country to which we were ***16** referred ... It is, however, an area in which there have been a number of decisions in the United States of America. An American body of case law has developed concerning the dedication of beaches and shoreline of public waterways to the public for recreational purposes. In many of these cases, the claim for such a declaration has succeeded. Of course, in considering those cases, care must be taken to discern the possible significance of the relevant state constitution or other statute. However, the same common law principles applicable in cases of dedication in the American cases are generally applicable here ....

Having regard to the foregoing, I do not agree with the learned trial judge on this issue. In my view activities described as recreational are indeed capable of giving rise to an inference of dedication. [55]

In another recent case, members of the public sought to apply the doctrine to an island in Nova Scotia which had a history of public use. While the judge ultimately held that the island had not been dedicated, Moir J. agreed that it was “it is at least arguable that an island could be dedicated to the public for recreational use.” [56]

  

Finally, in 2005 the Ontario Superior Court of Justice (in a decision since upheld by the Court of Appeal) applied the reasoning in Gibbs in relation to private lands that had been used by the public as a park for about 45 years. Weekes J. held: "I find that there has been open and unobstructed use of the land in question since the mid 1940's for park purposes. From that use and the behaviour of the owners from time to time, I infer both dedication of the land for public use and acceptance of that dedication." [57]

Between the Supreme Court of Canada's decision in *Wright* and the Ontario Court of Appeal's decisions in *Gibbs* and *Lake of Bays* there is strong authority for the view that lands can be dedicated for the purpose of public recreation under the common law in Canada.

The cases suggest that a wide range of public rights can be created to protect various public purposes. In addition to recognizing public rights in relation to beaches and public squares (related to the public purpose of "recreation"), the cases have seen the protection of marketplaces and wharves (both of which have a public economic benefit). In addition, the court in Gibbs referenced "playgrounds, greenbelts, parks" as being lands which were dedicated. While playgrounds and parks do have significant recreational functions, the word "greenbelt" generally refers to undeveloped ***17** lands reserved largely for ecological or urban planning purposes, while parks frequently have both an ecological and recreational purpose.

Although the precise limits of the Doctrine remain unclear, at least in Ontario the courts have accepted that the Doctrine is not limited to the creation of highways or other rights-of-way, but extends more generally to other public purposes. There is excellent authority for the courts in other provinces to do likewise.

This does not necessarily mean that the Doctrine will be applied in precisely the same way for all public purposes. While public recreation rights and other public rights may be created under the Doctrine, demonstrating dedication and acceptance in cases involving such rights may involve additional issues.

**(i)** ***Inferring Public Recreational Rights***

As is the case in relation to public roads, dedication of land for recreational purposes may be explicit. For example, in *Guelph v. Canada Company* the court held that a planning document setting out the boundaries of recreational properties amounted to an explicit dedication. "The laying out ... of squares, or other open spaces for public recreation or amusement, or for any other public purposes, renders them as sacred to such purpose as the streets themselves." [58]

However, also like public rights of way, the dedication of some or all of a property to more general public purposes, such as a public recreation right, can be inferred through longstanding public use of the property for that purpose. Thus, the Ontario Court of Appeal, in *Gibbs*, discussed above, had no difficulty inferring a dedication of a beach for recreational purposes from the past use of the beach. In doing so the Court expressly rejected the trial judge's finding that such an inference should not be drawn in cases involving public recreation, and applied the general rules of dedication and acceptance.

In that case there was a long history of undisputed evidence of public recreation on the beach, from about 1877 to 1940 (by which time the Court held that the public rights were well established). [59] This recreation took place with the full knowledge and acquiescence of the owner; indeed, the owner obtained some personal benefit from the presence of the public ***18** on the property. Given the history and level of public use, the fact that the owner erected some signs on the beach in 1928 and again in 1934 that stated "Private Property to the use of the public at my pleasure" was not a barrier to the inference being drawn; nor was the fact that the owner had been a party in court actions to hold accountable members of the public who had damaged the beach.

Similarly, in the *Lake of Bays* case, use of the land as a public park for 46 years resulted in the creation of public recreational rights. [60]

The Ontario Court of Appeal appears not to differentiate between the rules governing dedication of a public right of way and those governing the dedication of a property for public recreation. However, Tim Bonyhady suggests an alternate approach,

  

noting that public use of a defined right of way involves regular use of a small area, while a public recreational right takes place over an entire property. As a result, it may be more reasonable to expect a property owner to notice and respond to public use of a right of way at an early date, should he or she wish to exclude the public, than it would be to respond to occasional recreational use of an entire property. It is for this reason that Bonyhady suggests that "such dedication could be more difficult to imply than a right of way because of the greater right involved." [61]

This view may help to explain why two of the relevant Canadian cases, as well as many of the American cases concerning public recreation rights, [62] concern rights of access to beach areas. Beaches, which have a special recreational value, are often accompanied by a high level of public use; in addition, beaches generally represent a relatively defined area, rather than an entire property. For both of these reasons, it may be easier for the courts to infer the existence of a dedication in respect of a beach or other geographically confined area.

Nonetheless, it appears that a dedication of land for public purposes can be implied on a non-beach property. It is possible that the extent of a property affected may be one factor to be considered in deciding whether to imply a dedication of a private property for public purposes, where an ***19** explicit dedication is not present. But, in any event, there is no legal reason not to give effect to dedication of a property for public recreational purposes.

**(ii)** ***Dedication for Ecological Purposes***

While it may be arguable that the Doctrine of dedication and acceptance can be used to create public ecological or conservation rights, it clear that there are difficulties in applying the traditional "highways" version of the Doctrine to such purposes.

The courts are increasingly willing to recognize that the public has an interest in the continued existence of clean water, air, fish and other natural resources, and therefore would likely see conservation of resources as a "public use" in a broad sense. However, conservation does not involve actual human use, but rather an agreement to refrain from certain types of human use, so that ecological functions of the land can provide benefits to human and non-human populations. While there is no inherent contradiction in the idea that the public might acquire a legal interest in having land with particular ecological values protected, the Doctrine, as discussed above, is based on active public use of the land. A dedication for conservation purposes would presumably need to be explicit, or at least be inferred from the direct actions of the property owner, as active public use could never result in an inference of an intention on the part of the owner.

Even more problematically, since the Doctrine assumes that the public signifies its acceptance through public use, it is difficult to see how even an explicit dedication of land for conservation purposes could be accepted by the public at large.

The public rights discussed above primarily relate to the use of land or resources by the public. In some cases there will be a tension between such public use and the need to conserve natural resources. Certainly some level of conservation is necessary if the right to use a resource is to continue in perpetuity. Thus the public's right to use a public space may be compromised by inappropriate, or over-, use of the resource.

The question of whether private lands can be dedicated for conservation purposes and how the public should indicate its acceptance may require future consideration by the courts. If dedication and acceptance can only result in public rights that involve use of resources, and not in public rights to the conservation of resources, then an imbalance will ***20** result. [63] However, any revision to the doctrine would need to recognize the rights of the property owner and should not lightly infer an intention to turn lands over to the public for conservation purposes.

**(iii)** ***Dedication of Natural Resources***

The focus of this article is on the application of the Doctrine to land. However, there is also the intriguing possibility that natural resources-- generally owned by the government--can be dedicated to a public purpose.

  

***21** There is little case law on the dedication of natural resources. However, in *Caldwell v. McLaren*, an 1884 appeal from the Supreme Court of Canada concerning the public's right in Nova Scotia to float logs on a navigable river, the Judicial Committee of the Privy Council commented that the right to use a navigable river could be acquired "either by prescription or by dedication by the owner of the soil within time of legal memory." [64] While that case was ultimately decided on other grounds, the dicta supports the view that the doctrine of dedication and acceptance can apply more broadly than to land, extending to the use of water and possibly other resources.

The extent to which the doctrine of dedication and acceptance can be applied to natural resources remains to be seen.

**(c) A Word on the Torrens System**

In the Western Provinces, the law around public rights on private lands seems at first glance to be complicated by virtue of land title legislation implementing an approach to private property rights known as the "Torrens System." The idea behind the Torrens System is that any and all legitimate rights in respect of a parcel of property should be recorded on a registered title, filed with a central registry. [65] Since public rights created through dedication and acceptance will not usually be reflected in the title to the land in question, it might be assumed that public highways or recreation rights will not be recognized under the Torrens System.

However, a closer look at the provincial legislation reveals that the legislatures did not intend to extinguish public rights. Thus s. 23 of B.C.'s *Land Title Act*, which creates the general rule that only rights included in a title will be recognized, also provides for an exception in the case of "a highway or public right of way, watercourse, right of water or other public easement." [66] Highway is defined as including: "a public street, path, walkway, trail, lane, bridge, road, thoroughfare and any other public way." [67] The phrase "other public easement" suggests that the Act allows ***22** for the continued existence of public recreation rights and other public rights over and above those associated with highways.

Thus the British Columbia Court of Appeal, in *Maple Ridge (District) v. New West Minister Registrar of Land Titles*, held that:

... [P]ublic rights of way may be established either by statute or common law .... Except where required by a statute creating a statutory highway, no registration or plan notation under the *Land Title Act* is necessary in order for a highway to be created, or to be kept open ... because section 23 of the Act lists "a highway or public right of way" among exceptions from the indefeasible title provided by the statute. [68]

There are other sections of the B.C. *Land Title Act* which might arguably have affected the public's ability to acquire rights over private land. The better view, however, is that these sections are intended to limit the acquisition of private rights only. [69]

Thus it appears that the Torrens System, at least as adopted in the Western provinces, has in no way restricted the ability of the public to acquire public rights through dedication and acceptance. Indeed, courts in the western provinces have frequently held that public rights may be created in this way. [70]

***23 (d) Dedication and the Crown**

The Doctrine raises a number of questions in relation to government lands and resources, as well as in relation to the interpretation of statutes that set aside land for public purposes. Under what circumstances will government actions or legislation create public rights through dedication and acceptance?

Somewhat surprisingly, there are few cases in which Canadian courts have considered an explicit government dedication of public roads or other public spaces; rather the cases that consider the Doctrine of dedication and acceptance against the government involve implied dedication by virtue of longstanding public use of roads. This may be in part due to the fact that

  

public roads that are explicitly created by government are generally covered by the various provincial transportation statutes, and courts have not found it necessary to refer to the common law Doctrine in such cases.

**(i) *The Crown Can Dedicate***

Although there are few cases involving an explicit dedication against government, there are a number of cases in which such a dedication has been implied. [71] Consequently, it is well established that government may create public rights through dedication and acceptance: "It is not, I think, open to question that the Crown may dedicate as a private person any lands for use as a public highway ..." [72]

There is even a suggestion in the case law that the courts may be more willing to infer the dedication of public land against the Crown or other public bodies than against other members of the public. For example, in *R. v. Moss* the Supreme Court cited the following statement with approval:

> There may be a dedication by the Crown; and I think in these cases [involving the Crown] we ought not to inquire very nicely into the ownership of the soil or into the evidence of any precise intention to dedicate. [73]

However, the B.C. Court of Appeal has expressly rejected the idea that a dedication of a public highway should be more readily inferred against the Crown than against other land owners. [74]

***24** In relation to the dedication of public lands for recreational purposes, Bonyhady notes that one possible interpretation of the 1986 English case of *R. v. Doncaster Metropolitan Burrough Council* [75] would limit the inference of dedication of land for public recreation to situations where the land was owned by a public body, but suggests that the better view is that an inference is more easily drawn where there is a public agency owner:

> Yet so far as implied rights are concerned, it may be that the decision does not extend much beyond its own facts of long unchallenged use and land held by a local authority which "*had an interest in affording the amenity [of its land] to its residents* and a further interest in encouraging others from outside the borough to attend the races." ... However, the distinction between land held by private individuals and local authorities appears illogical if cast in this absolute form. Consequently, the better view appears to be that implied dedication should be possible regardless of the identity of the landowner, though such *dedication will be implied more readily if the land is in public ownership since a local authority is more likely than a private person to have received land on trust for local inhabitants (or the public) or to have dedicated rights to them*. [Emphasis added [76]

In Ontario, at least, the courts have recognized that recreational rights can be created on private properties. However, the question as to whether dedication of land for public recreational use should be more readily inferred against the Crown has not yet been considered by the courts.

While the Crown may dedicate lands to a public purpose, it is important to be aware of any statutory or constitutional constraints that exist on the Crown that might prevent it from dedicating a particular property. For example, it appears that, due to their nature, it is not possible for Indian reserve lands to be dedicated to the use of the general public. [77]

Nonetheless, as a general rule the Crown may dedicate its lands to public use, and such dedication can be inferred from longstanding public use.

**(ii) *Explicit Government Dedication***

We can then turn to an equally important question: when will the Crown be held to have explicitly dedicated land for public use? Put another way: what actions or statements by the Crown will constitute an explicit dedication of its lands?

  

***25** This is a critical question, as governments, being accountable to the public, are much more likely than private property owners to make public statements about the rights of the public to use their land. Indeed, the public expects that public lands will be managed for the benefit of the public.

The public policy questions are complex. On the one hand, the courts have been reluctant to hold politicians legally bound by political pronouncements. In addition, it at first seems problematic that a government official can impose legal obligations on future governments in this manner.

On the other hand, it seems absurd to hold that the government, which is responsible to the public, has a less onerous responsibility to the public than private property owners. Government can, and does, create private rights through both prerogative powers and statutory powers that bind future government, and it would be inconsistent to hold that only private rights can be so created. The public is entitled to rely upon government pronouncements, and it is arguably unfair, absent a decision of the Legislature, to restrict lands that the public has become accustomed to using on the basis of past government representations.

As we have seen, a private property owner may dedicate land through an explicit statement throwing the land open for a public purpose. [78] It seems, therefore, that a government must be able to do the same thing in respect of its lands. [79]

However, we have also seen that in relation to private lands, the dedication is not valid if the person making the dedication did not have the authority of the property owner to make the dedication (for example: a tenant, etc.). [80]

Therefore, any explicit dedication by government must be explicitly or impliedly made by the Ministry or government agents who are actually capable of disposing of interests in the land. It is not any government official that can dedicate Crown lands for some specific public purpose; it must be someone with sufficient authority that the public is entitled to rely upon their purported dedication.

Within this context, however, there are probably a number of ways for government to make an explicit dedication of lands for a public purpose.

***26** As with a private land owner, a plan identifying lands to be used for public purposes which has been adopted and publicized by the appropriate government agency should probably be viewed as an explicit dedication. [81]

It is also likely that cabinet level pronouncements setting aside land for a public purpose, or pronouncements by cabinet ministers responsible for the use of the lands in question, could constitute an explicit dedication, particularly if the government does not immediately retract such pronouncements. [82] It is reasonable for the public to rely upon such pronouncements as an indication of their collective rights.

Although not directly addressed by existing authority, it seems arguable that dedications can also be made through ongoing government policy, even when not originating at a ministerial level, particularly when in place for some time. Such policy may lead the public to legitimately expect to be able to use the dedicated land or resource in perpetuity, in absence of legislation to the contrary. The longer that such a dedication remains as a consistent feature of government policy, the more likely that a court will accept it as evidence of dedication. [83]

Also, in some cases government policy may simply be acknowledging longstanding and historic use of the land by the public. Thus, it may be that such policy can be viewed not only as an explicit dedication of public lands, but also as evidence of an earlier implied dedication.

It seems likely that the more specific a government pronouncement or policy is, in terms of the area affected and the public purposes involved, the more reasonable it will be for the public to rely upon the statement. Where a ministerial statement or a government policy covers large geographic areas, or where the statement or policy was issued by a government agency with a

  

questionable jurisdiction to grant public rights, the courts may be reluctant to accept that an explicit dedication has taken place. If it is abundantly clear from the government's statements that the Crown does intend to dedicate the land, the courts should not shrink from holding that the land has been so dedicated. [84]

***27** That being said, overly broad designations will not always result in the creation of public rights.

First, even where a dedication has been validly made, the dedication must be accepted by the public before a public right will be created. There may be cases in which the public does not make sufficient use of the dedicated lands to constitute an acceptance of a government dedication. [85]

Second, as with private dedications, it must be clear from the explicit dedication that the government intends to give the public rights in respect of the property. While explicit dedications should be given effect, there may be cases in which it is unclear whether the government intended overly broad or vague statements or policies to actually result in a dedication. ***28** It should be noted, however, that such a policy or statement, if not retracted (in the case of a policy) or if repeated (in the case of a statement), and even if imprecise, could be a highly relevant factor in determining whether a dedication should be implied against the government when accompanied by ongoing public use on the basis of that policy or statement. If government communications would lead a reasonable person to believe that lands have been dedicated to a public purpose, and the government does not move quickly to correct that impression but instead allows the public to make use of the property for that purpose for extended periods of time, the courts should hold that public rights are created in a relatively short period of time.

It is possible that this could be the case even if the policy or statement is made by a government agency which would not generally have the authority to make a dedication, but where the government agency that has the power fails to act to correct the impression of government policy conveyed by the actions of the other government agency.

Based on the fact that governments, as with private property owners, are subject to the Doctrine, it seems that governments must be able to dedicate lands for public purposes in a variety of ways. Consequently, public use of the land for a dedicated purpose will constitute acceptance of the government's dedication, resulting in the creation of public recreational rights or other public rights.

**(iii) *Dedication by Statute***

Increasingly government expectations around public use of public land and resources are indicated through statute or regulations made under statute, rather than through dedication at common law. If non-statutory actions by government can give rise to public rights, how are statutes that set aside land for public purposes to be treated? The Doctrine creates a useful legal approach to analyzing such legislation.

It should be clear from the above that there is no obvious reason why the Doctrine should be limited to dedications occurring outside of statutes. Public roads created under the authority of transportation legislation result in the same public rights that are associated with public roads created at common law. Moreover, the Crown, far more so than a private property owner, has a responsibility to provide for the needs of the public and to treat them fairly. [86]

***29** Statutes and other legislative instruments, as the clearest expression of the will of government, seem a likely source of evidence of an intention, explicit or implicit, to dedicate lands to a public purpose.

As noted above, a private land owner who files a plan under a statutory scheme can indicate an explicit dedication of roads included in the plan. Thus, in *Maple Ridge* the B.C. Court of Appeal suggested that the filing of a subdivision plan showing the location of the road under the provincial *Land Title Act* amounted to a dedication of that land, but that public use of the land would be required to demonstrate acceptance of the dedication. [87] It seems unlikely that government plans, whether indicated through the statute itself or through plans filed under a statute, would not have an equivalent effect.

  

To date there does not appear to have been judicial consideration of whether legislation creating parks, or public spaces other than roads, has the legal affect of dedicating those lands. However, there is every reason to hold that it does so, as long as the legislative intention to dedicate is sufficiently clear.

Indeed, the Ontario Court of Appeal suggested as much in *Gibbs* when it equated setting aside lands for public purposes in modern planning with dedication:

> ... [T]oday's attitude favouring playgrounds, greenbelts, parks, and the requirement in modern planning that land be set aside, or dedicated, for such recreational purposes is because facilitating public recreation is a matter of public necessity. [88]

Some parks or protected areas legislation does, in fact, explicitly refer to dedication, [89] while other statutes do not explicitly use dedication language, but nonetheless clearly set aside lands for public recreational or other purposes. There is no requirement at common law that an explicit dedication of land to the public actually use the word “dedication”--a clear intention that land be available to the public as a matter of right for a particular public purpose should be sufficient to amount to a dedication. [90]

***30** Although there does not seem to be case law on point, it is at least arguable that dedication through a statute may be different from common law dedication in that it should not require acceptance by the public to create a public right. If a legislator, who is presumed to represent the public, sets aside land through a legislative instrument, it seems that the courts should be able to infer public acceptance from the legislative dedication. If this is the case, the public rights associated with a highway or park created under legislation would come into existence on being dedicated, rather than after there has been sufficient public use to demonstrate public acceptance of the dedication. Certainly the case law concerning the creation of public highways hold that highways may be dedicated either through legislation or through dedication and acceptance, but that either result in the creation of equivalent public use rights. If the Legislature indicates a clear intention in statute to dedicate land for a public purpose, it is difficult to see why the legislation should not be presumed to accept the dedication on the public's behalf, as well as to make it. [91]

**(e) Summary of Part 2**

It is well established that the public may acquire rights over private or public land through the Doctrine of dedication and acceptance. While this is best established in the context of public highways, the Supreme Court of Canada's decision in *Wright*, together with a series of Ontario court cases, provide strong authority for the view that such rights can be created in respect of other public purposes, including public recreation.

The Doctrine holds that public rights will be created where a land owner demonstrates an intention to set aside land for a public purpose and the public, by using the land, demonstrates its acceptance of that purpose. The land owner's dedication may either be an explicit communication of an intention to throw the property open to a public use or may be implied from the actions of the land owner, including his or her failure to communicate a contrary intention in the face of ongoing public use of the property.

***31** The Crown also may bind itself in these ways; consequently, government policy, statements, actions and inactions may be looked to in determining whether the Crown has demonstrated an intention to set aside land for a public purpose, thereby creating public rights. Moreover, legislation, as the strongest expression of the will of the Legislature, may be the clearest indication of the intention of the Crown in dedicating land to a public purpose. This approach represents an important tool in interpreting parks legislation and other statutes which set aside land for public purposes.

**3. PUBLIC SPACES AND THE PUBLIC TRUST**

There has recently been a renewed Canadian interest in the Public Trust Doctrine, [92] an American legal doctrine that holds that certain resources or lands are held in trust for the public. [93] What has not been widely recognized is that the Canadian cases regarding trust-obligations in relation to highways and public lands may provide an important basis for developing a Canadian

  

version of the doctrine; indeed, one commentator has suggested that the case law surrounding public highways represents the "strongest Canadian expression of the public trust [doctrine] ..." [94]

Environmental law theorists have generally not focused on the case law surrounding highways as a possible source for a public trust doctrine, for obvious reasons. However, if, as suggested in Part 2, parks and other protected areas create a similar class of public rights, there is every reason ***32** to suppose that a similar trust-like set of obligations exist in respect of these lands.

Rather than attempting to import a public trust doctrine from American authority, this Part will review the body of case law that uses fiduciary or trust-type language in describing the government's obligations in relation to public spaces. It will then review two possible explanations for the existence of such a fiduciary relationship in equity: (1) the relationship between the Doctrine of dedication and acceptance and the rules surrounding the creation of charitable trusts; and (2) the general rules regarding the creation of fiduciary obligations.

**(a) Authorities in Support of the Public Trust**

As with any other owner of property, once the Crown has created public rights over its lands, it is bound by those public rights. It is subject to the same types of restrictions at common law as any other owner of dedicated land, as discussed in Part 4. [95] However, the case law concerning public highways and other lands dedicated to a public purpose strongly support the view that the Crown holds such lands, either directly or through municipal governments, subject to a fiduciary or trust-like obligation to the public. [96]

Beginning in 1861 with *Sarnia (Township) v. Great Western Railway*, [97] the Canadian Courts have generally held:

> The [highway] property vested in the municipality is a *qualified property, to be held and exercised for the benefit of the whole body of a corporation* ... [The municipality] may be said to hold the freehold, but *then it is only as trustees for the public*, and not by virtue of any title which confers a right of exclusive possession. [Emphasis added [98]

***33** In 1886 the Judicial Committee of the Privy Council, in considering whether a private company could claim ownership of lands which had been used for several years as a public market, affirmed that in Canadian law public highways carried with them a trust in favour of the public, a concept which it went on to apply in relation to a public market:

> There is a distinction between the Canadian law and the law of [England] as to public highways. The Canadian law agrees rather with the law of Scotland, which is founded on the civil law, namely, that when a street or road becomes a public highway *the soil of the road is vested in the Crown if there is no other public trustee, or, if there is a corporate body that fills the position of trustee, then in that corporate body in trust for that public use*. [Emphasis added [99]

In 1932 the Supreme Court of Canada made similar statements in the case of *Vancouver (City) v. Burchill*, [100] in the context of a vehicle accident resulting from the poor condition of a road in Vancouver. The municipality argued that the plaintiff's failure to obtain a required chauffeur's licence effectively made him a trespasser on city property. In rejecting this novel argument the Court stated:

> We are unable to accede to the proposition which would, in that respect, assimilate the municipality to an ordinary land-owner or make a trespasser of the unlicensed chauffeur. Under statutes where the fee simple is vested in them, the municipalities are in a sense owners of the streets. They are not, however, owners in the full sense of the word, and certainly not to the extent that a proprietor owns his land. The land-owner enjoys the absolute right to exclude anyone and to do as he pleases upon his own property. It is idle to say that the municipality has no such rights upon its streets. *It holds them as trustee for the public. The streets remain subject to the right of the public to "pass and repass"; and that character, of course, is of the very*

  

> *essence of a street*. So that the municipality, in respect of its streets, does not stand in the same position as a landowner with regard to his property. [Emphasis added [101]

There are a series of cases which use similar language. [102]

It seems likely that such fiduciary obligations can exist in respect of public lands other than public highways. In *Committee for the Commonwealth of Canada v. Canada*, the Supreme Court of Canada considered ***34** whether the government could prohibit the dissemination of political materials in public airports. The court unanimously agreed that such a prohibition violated the *Canadian Charter of Rights and Freedom's* guarantees of freedom of expression. Lamer C.J., in reaching this conclusion, stated that:

In my opinion, this analytical approach [which equates government ownership of land with private ownership] contains inherent dangers. First, it ignores the *special nature of government property. The very nature of the relationship of the relationship existing between citizens and the elected government provides that the latter will own places for the citizens' benefit and use*, unlike a private owner who benefits personally from the places he owns. *The "quasi-fiduciary" nature of the government's right of ownership* was indeed clearly set out by the U.S. Supreme Court in *Hague v. Committee for Industrial Organization* ...:

Wherever the title of streets and parks may rest, *they have immemorially been held in trust for the use of the public* and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions .... [Emphasis added [103]

Further support for a trust that can encompass recreational and even ecological purposes may be drawn from the 1979 decision of the Ontario Court of Appeal in *Scarborough (Borough) v. R.E.F. Homes Ltd*. While that case concerns damage to a public highway, the court found that the trust obligations in respect of the highway extended to the public's environmental interests, stating:

> In our judgment, the municipality is, in a broad general sense, a trustee of the environment for the benefit of the residents in the area of the road allowance and, indeed, for the citizens of the community at large. [104]

Moreover, the Supreme Court of Canada cited this passage with approval in both *Canfor*, [105] and *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)*. [106] In the former case the Court then went on to discuss the idea that public rights in respect of natural features might result in a fiduciary obligation on the part of the Crown. [107] That case was concerned with compensation for damage to timber found in protected areas (among other areas), and thus may provide some further support for the view that such a trust exists for lands dedicated for conservation and ***35** recreational purposes, although the Court did not seem to suggest that the trust was limited to the dedicated (protected) lands.

**(b) Authorities Against the Public Trust**

Against this body of case law stands one Alberta case which explicitly rejects the idea that governments hold public highways in trust for the public, as well as one Ontario case that rejects the idea of a public trust in relation to parks.

In *Sundance Beach (Summer Village) v. W.A.W. Holdings Ltd*. [108] the Alberta Court of Appeal considered the obligations of a municipality to keep designated footpaths clear. The trial judge had found that these footpaths were imprinted with a trust, holding that the decision to not allow the footpaths to be cleared arose from a desire to make it more difficult for the public to access the area, which was a violation of that trust. [109] On appeal, however, the Court held that these footpaths were not imprinted with a trust, and that the only obligations owed by the municipality were those conferred by statute.

I do not agree that [municipalities take such] lands impressed with a trust as that term is ordinarily used; rather, it took the lands subject to the duties imposed by statute. Similarly, the Summer Village of Sundance Beach, being a creature of statute

  

with a particular authority devolving upon it pursuant to an Act of the legislature ... would assume that authority subject only to whatever restrictions were spelled out in the Act itself or other legislation pertaining thereto. [110]

The Alberta Court of Appeal did not distinguish or explain the cases that the trial judge had relied upon in reaching the conclusion that a trust had been created (such as the Supreme Court of Canada's decision in *Vancouver v. Burchill*). The result is some confusion about the state of the law in Alberta, as may be seen from a subsequent decision of the Alberta Queen's Bench in *Cominco*. In that case, Egbert J. considered whether the City of Calgary had the power to convey a portion of a public right of way to Cominco Ltd. for private purposes. After reviewing many of the above authorities he attempted to reconcile *Sundance Beach* with the broader body of case law concerning trust responsibilities on public highways:

From a reading of the above cases, it would seem to be firmly established that ... municipal powers which relate to roadways are to be strictly construed. ***36** The municipality holds title to the roadways but it does so in trust for those who pass and re-pass over the roadways .... This appears to have been the state of the law applicable in this province until the decision of the Court of Appeal of Alberta in *Summer Village of Sundance Beach v. W.A.W. Holdings Ltd.*

[As a result of this decision], in Alberta, it can be said that the law in effect in other provinces, at least in Ontario, Manitoba and British Columbia, is not applicable in that a municipality does not hold lands impressed with a trust for the public but subject only to the duties imposed by statute. This appears to be contrary to the law as set forth by the Supreme Court of Canada in the *Burchill* case ... but it is respectfully suggested that the *Burchill* case and the *Sundance Beach* case can be reconciled by stating that, if there is a trust, it can only be exercised in accordance with the duties imposed upon a council by statute. [111]

While it is not clear that this reasoning is consistent with *Sundance Beach*, Egbert J. relied upon it to interpret the city's statutory powers narrowly, finding that the broad and general powers available to manage roads were only “applicable to the use of roadways as roadways,” and could not be used to transfer an interest in the road to Cominco.

This innovative attempt to bring the law of Alberta back into agreement with the case law in the rest of Canada serves to underscore the strength of the authority for the proposition that lands held by governments as public highways are imprinted with a trust.

The sole Canadian case considering the question of whether the Crown has a trust obligation to the public in respect of parks is a lower Ontario court decision from 1972: *Green v. Ontario*. [112] This case is sometimes cited for the proposition that the public trust doctrine does not exist in Canada, although the case is unsatisfactory in a number of respects.

In *Green*, the plaintiff argued that s. 2 of the *Ontario Provincial Parks Act* created a statutory public trust, and that consequently the government was required to take steps to prevent ongoing gravel excavation on an area of Crown land adjacent to the park. Lerner J. quickly dismissed the plaintiff's action on the narrow question of standing, but went on to make a number of *obiter* statements about the idea of a public trust.

First, Lerner J. held that s. 2 did not create a statutory trust, although he seems to have found that it did create public rights in respect of the park.

Notwithstanding the philosophical and noble intentions (my expression) of the Legislature to express in the pertinent section an ideological concept, no statutory trust has been created. It becomes necessary to break down the wording thereof: ***37** “All provincial parks are dedicated to the people of the Province of Ontario and others who may use them ...”. This simply makes it clear that all persons (and I presume that includes those lawfully in Canada) are entitled to make use of the parks without the inhibitions or restrictions of race, religion, creed or other prejudicial implications inimical to the welfare of society and particularly the people of Ontario. “... and the provincial parks shall be maintained for the benefit of future generations in accordance with this Act and the regulations” implies that the Province of Ontario is required to physically maintain the parks so dedicated. [113]

  

The judge does not consider whether the public rights or "entitlement" he identifies might give rise to a trust responsibility, but simply held that the language of s. 2 did not appear on its face to indicate an intention to create a trust. The narrow scope of this consideration, together with the fact that none of the case law discussed in this article is considered, suggests that *Green* has limited precedent value.

Lerner J. goes on to suggest that parks cannot be subject to a public trust because the provincial government had a clear statutory power to decrease the boundaries of, or altogether eliminate, a park. This statutory power to extinguish public rights, Lerner J. suggests, is inconsistent with a trust. However, Lerner J. ignores the fact that (absent constitutional considerations) it is always open to the Legislature to modify or eliminate either a trust (public or private) or a right (public or private), provided it uses sufficiently clear statutory language. A legislative power to extinguish a trust no way invalidates the trust, unless that power is exercised.

The facts in *Green* were less than ideal for a finding a breach of a fiduciary duty by the government, and it is possible that Lerner J. was correct in the result, if not his reasoning. The fact that the gravel operations in question were taking place outside the park and had been in existence since before the park was created raise questions as to whether a public trust in respect of the park could extend that far.

Nonetheless, in respect of highways it seems relatively clearly established that the government does hold such dedicated lands in trust for the public. There is every reason to believe that the answer is the same for other lands dedicated for public purposes, whether they be recreational, conservation or other purposes.

**(c) Explanations for the Trust**

Given the considerable judicial authority that the Crown holds public spaces in trust for the public, it is important to consider possible explanations ***38** for the existence of such trust obligations. Before doing so, however, it is worth considering the possibility that in using trust language, the judges are commenting on a political or moral, rather than a legal, trust.

This explanation may seem plausible, as there is authority that only express language in a statute will create a legal, as opposed to a political, trust. [114] However, this approach is not consistent with the case law concerning highways: as discussed below in Part 4, the case law is very clear that the trust owed to the public in relation to highways and squares does have very real legal consequences. These legal consequences would not occur if the "public trust" did not have the force of law.

More plausible, but still not entirely consistent with the statements made by the courts, is the argument, advanced by the author in his Statutory Interpretation article, that the effect of a strong common law presumption that legislation should be interpreted as upholding existing public rights resembles the public trust doctrine. [115] It is possible to argue, therefore, that the legal effects of the "trust" discussed in Part 4 are the result not of a trust-obligation, but of a common law principle of statutory interpretation. The problem with this approach is that in the cases discussed in this Part, the courts do not describe their reasoning in terms of principles of statutory interpretation, [116] but in terms of trust obligations.

It does appear, on the basis of the authorities, then, that a legally enforceable trust-like obligation does exist in respect of public spaces. Despite the volume of authority on the existence of this public trust, there is surprisingly little judicial comment on the origin and nature of these trust-like obligations. Although there will continue to be some uncertainty on this point until further case law develops, there are at least two plausible, and complementary, explanations for the existence of the Crown's trust-like obligations. First, the public trust may be related to the well ***39** established concept of the charitable trust; second, the public trust may arise from the general case law on fiduciary obligations and the Crown's power over the rights of the public.

The first explanation arises from the similarities between dedication and acceptance cases and cases involving the creation of charitable trusts. [117] Like a public right, a charitable trust arises when the owner of property (often land) indicates an intention to hold that property for a public purpose. [118] Charitable trust are unlike private trusts, which must be in favour of an identifiable individual (or group of individuals), but like public rights, in that they are for the benefit of the general public. Also like public

  

rights, the existence of a trust can be inferred from the actions of the owner of the property. [119] While there are differences between the two legal concepts, some of which are discussed below, the similarities are striking.

Indeed, since a key element in both the Doctrine and in the creation of charitable trusts in respect of land is an intention to dedicate land for a public purpose, it seems likely that one intention may simultaneously result in the creation both of public rights and of a charitable trust. The second key element of the two legal concepts is different: in the creation of a charitable trust, it is not the *public's* acceptance of the dedication that is critical, but rather the trustee's acceptance of the dedication. For example, if a municipal government accepts land subject to a trust condition, it is bound by the trust; however, absent a statutory power allowing the government to accept a dedication on behalf of the public, public rights under the Doctrine as traditionally formulated would not be created until the public itself has indicated acceptance of the dedication. However, ***40** where a donor explicitly dedicates land to a public purpose, and a trustee accepts that dedication, and the public actually uses the land for that public purpose, then all the constituent elements of both a charitable trust and a public right (under the Doctrine) are present.

The strong relationship between public rights created through the Doctrine and charitable trusts may be seen in a number of cases beginning with the 1881 case of *Peck v. Galt (Town)*. In that case the Ontario Queen's Bench considered whether the municipality of Galt had the power to transfer a portion of a public square to the trustees of a church. The municipality had general statutory powers to dispose of lands, but it was argued by Peck that the public square had been dedicated for public use, creating a public right in respect of the Square.

The municipality conceded that if the public square had been transferred to it subject to a charitable trust to use the land for a square, it would not be able to transfer the lands to the church. However, it maintained that no such obligation arose from the dedication of the land by the owner. In finding against the municipality, Osler J. seemed to hold that the two areas of law were either identical or inseparable, when government held land that was subject to public rights:

It was conceded that if the corporation had accepted a conveyance of this land in trust for the use of the public as a square, or for other public purposes, they could not have dealt with it in derogation of the trusts; but it was strongly urged that where they were merely passive, and the intention to dedicate was merely to be inferred from the owner's acts, *e.g.*, by selling lots fronting on a square, or registering a plan, they were not bound by any trust or charged with any obligation to preserve the property for the uses to which it might have been the intention of the owner to dedicate it.

I was referred to no authority, and have been unable to discover any, in support of this distinction, and I think no such distinction exists. Whether the dedication arises from the acts of the owner, or by express grant, or contract, the corporation, if they accept it at all, must do so on the terms imposed, or for the purpose indicated by the donor. [120]

In 1927 the Ontario Supreme Court, Appeal Division, considered the ownership of a piece of property which had been granted to the Township of Colchester “in trust for a public wharf and public purposes connected therewith.” The court analyzed the legal significance of the grant by discussing in depth the common law approach to highways created through dedication and acceptance, suggesting that the public's rights in respect of the wharf were analogous to the rights in respect of highways. “This trust is ... for all of her Majesty's subjects in the Dominion, and is in ***41** that respect similar to the position of a highway ... It is a public place.” [121] On appeal Duff J. of the Supreme Court of Canada expressly endorsed this view. [122]

Similarly, in *Wright*, discussed above, the Supreme Court of Canada noted that “the principle determining the nature of the interest created by dedication is analogous to that of other modes of creating public interests, as, for example, where land is conveyed to a municipal body for the purpose of a market place ...” [123] Other authority hints at a close relationship between the Doctrine and the law of charitable trusts, without discussing it. [124]

While it seems like there must be a relationship between these two legal concepts, there is some authority that a charitable trust in respect of ***42** land will not inevitably result in public rights. In *Bedford (Town) v. Guernsey Development Group Ltd.* [125] the Nova Scotia Supreme Court held that a charitable trust was created for the benefit of the residents of Bedford, but that a corresponding dedication was not to the public at large (since the dedication benefited only the residents and not the

  

public at large) and was not accepted through public use. The decision's discussion of the distinction between the public and the residents of an entire town is not entirely satisfactory. [126] However, even if correct, this case does not rule out the possibility that charitable trusts that are truly for the benefit of the public, rather than a single community, will generally result in public rights.

There are differences between the two concepts, [127] the significance of which will need to be explored in future research or jurisprudence. A more complete discussion of charitable trusts may be found in any good textbook on trust law. [128] However, although there is continued uncertainty about the relationship between charitable trusts and public rights created through dedication and acceptance, the existence of a trust-like obligation in respect of public highways (and presumably other dedicated land) seems well established. It seems likely that the doctrine of dedication and acceptance and the charitable trust share a close relationship; indeed, it is possible that they should be viewed as different aspects of a single legal principle. This relationship may help provide direction for the future ***43** development of both legal concepts (notably in relation to public rights of conservation). [129]

The second alternative, but complementary, explanation for the “trust-like” obligation of the Crown in regards to dedicated lands is the broader and still more flexible concept of fiduciary duty. Broadly a fiduciary has a duty to act for the benefit of another party. [130] While a trustee will inevitably owe a fiduciary duty to the beneficiary of the trust, there are other circumstances in which a similar obligation will arise.

Several commentators have noted that developments in Canadian law concerning fiduciary relationships, and in particular the Crown's fiduciary obligations to aboriginal peoples, could support the development of a variant of the public trust doctrine in Canadian law. [131] The Supreme Court of Canada's formulation of the types of relationships that may give rise to a fiduciary duty demonstrates the flexibility of this concept:

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

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

(3) The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power. [132]

While such fiduciary duties usually arise in respect to a particular person or small group, the example of the Crown's fiduciary obligations to aboriginal groups demonstrate that they can arise in relation to entire communities. [133]

***44** On its face, the relationship between the owner of property that is subject to a public right and the public can be analyzed in terms of fiduciary duty. In such a case:

(1) The property owner has discretion in how he or she manages the land;

(2) The exercise of this discretion has the potential to adversely affect the public in its exercise of its rights; and

(3) The public at large, subject to legal action by the Attorney General on behalf of the public, has little recourse if the property owner ignores or rejects the existence of the public right.

This approach seems even more compelling when it is the Crown, who has a unique ability and responsibility to act on behalf of the public, who holds the land in question, as is the case in relation to public highways and parks.

These two explanations do not, of course, determine whether a “public trust” duty to the public actually exists in respect of public rights; rather it supports the view that the relationship between the public and the Crown is the type of relationship that could give rise to such a duty. Nonetheless, in light of the strong judicial statements concerning the existence of “trust-like” duties in respect of public lands, it seems very probable that such a duty does exist.

  

## 4. CONSEQUENCES OF PUBLIC RIGHTS

As we have seen, public rights created under the Doctrine can be analyzed in terms of both legal rights and equitable obligations. Thus a public right may at once give rise to liability in law and, at the same time, (at least in relation to the Crown) create an obligation in equity.

The relationship between these two approaches is unclear, and it is possible, particularly in a legal system in which the courts of law and equity have been combined, as is the case in most of Canada, that they are best viewed as different ways of describing the same obligations.

This Part first reviews the legal implications of the existence of public rights on land. In the case of the dedication of land as a public highway, but apparently not dedication for recreational or other public purposes, ***45** the most significant consequence is the loss of ownership of the property in question, resulting from statutory provisions which vest highways in the Crown. For other public rights, however, the main consequence is possible liability for interference with the public right, either through public nuisance or indirectly through other claims in tort.

We then examine the consequences of public rights in equity--what a "public trust" approach may mean for parks and other public spaces in Canada. The implications of this public trust may be stated both positively and negatively. The negative formulation--that governments should not use lands in a way that interferes with a public use for which the property is dedicated--is analogous to the obligations on any property owner under the common law. The positive formulation--that the Crown must manage a property for the benefit of any public purpose to which it has been dedicated--goes further, preventing the Crown from divesting itself of the ability to manage the property for the public purpose and possibly requiring the Crown to take more proactive steps to prevent a public nuisance. There are also cases which seem to go even further, holding that all decisions concerning a public space, even when not directly relating to the public purpose for which it has been dedicated, must put the public interest front and centre.

Finally, this Part explores the difficulties that a party (other than one acting with the consent of the Attorney General) may have in obtaining standing to enforce public rights, whether through law or equity. The public nuisance standing rule requires an action for either public nuisance or the enforcement of a charitable trust (and therefore, presumably, a public trust) to be brought by a plaintiff who is affected in a manner that is different from other members of the public, or by the Attorney General or his or her designate. However, the cases related to highways appear to have adopted a relatively broad interpretation of when someone will be "specially affected" by a public nuisance. Moreover, there are other possible contexts in which the courts could consider public rights.

### (a) Legal Consequences of Public Rights

A review of the law of torts as it relates to highways, as well as various other legal principles, suggest a range of consequences arising from the existence of public rights on land--whether public or private.

The most serious of these (for a private land owner) is only relevant for public rights-of-way: in relation to the creation of highways, the doctrine of dedication and acceptance may result in the loss of the title of the land under the highway. While it is unclear whether this was the case ***46** at common law, [134] most jurisdictions have statutes stating that public highways vest in either the provincial Crown or a local government. [135]

However, this principle almost certainly does not extend to lands dedicated for recreational or other public purposes. In *Wright*, the Supreme Court of Canada held that a private property was subject to a public right to access and maintain a monument. [136] Similarly, in *Gibbs*, the Ontario Court of Appeal saw no contradiction between the public's right to use the property and its private ownership. [137] In *Lake of Bays* [138] the owner did actually lose ownership of the property. However, this was due to the operation of the separate legal concept of adverse possession, and not due to the Doctrine of dedication and acceptance.

  

Consequently, it does not appear that a property owner need fear the loss of legal ownership of a property dedicated for public purposes other than for a public right of way (although in some cases the public use may amount to a *de facto* loss of ownership).

However, where public and private rights coexist on the same property, the primary consequence is that any interference with the public rights, whether by the owner or others, will be considered a public nuisance. Since interference with a public right will be illegal even if the nuisance results from the pursuance of private property rights, the courts have said that public rights are "paramount" over private rights. [139]

This is not to say that the private land user has no private rights in respect of the property. However, any exercise of these rights that interferes with the public right will generally be unlawful. For example, in the ***47** case of public rights of way, recreational rights or other rights of access to land, the owner cannot legally exclude the public from the dedicated property.

Thus, at common law the ploughing of a public right of way, in the course of a farmer's ploughing of a field, would generally constitute a nuisance, since it removes the pathway and obstructs its use.

If an occupier ploughs a highway in these situations [where the common law is not modified by statute] it is both a public nuisance and an offence unless the highway was dedicated subject to a right to plough. The onus of establishing such limited dedication is probably on the occupier who must show that the ploughing of the land is coeval with the public's use of it. [140]

A broader public right, such as a right of recreation or of conservation, likely places further restrictions on the private owner; possibly to the extent of preventing interference with natural features which give rise to the recreational or conservation use. Indeed, one of the reasons that some courts have been reluctant to allow dedication of lands for recreational purposes was the effect that such expansive dedications would have on private property rights. Such a right could be viewed as "a claim so large as to be entirely inconsistent with the right of property ..." [141]

In actual fact there will almost certainly be private rights that are consistent with public recreation or conservation, although there will undoubtedly be restrictions; for example, even if the scope of the public use was unusually broad, the property could almost certainly be used for guiding, wildcrafting, camping, perhaps low density residential use and other low impact uses. [142] In each case the question is whether the private use substantively interferes with the public's use of the land.

***48 (b) Equitable Consequences of Public Rights**

As discussed in Part 3, Canadian courts have routinely used trust language to describe the government's obligations in relation to public spaces. This is not empty language; these trust-like obligations have been used to challenge various government decisions and the equitable consequences of public rights seem to supplement the consequences of the same rights viewed from a legal perspective.

This case law represents an important source of precedent when speculating on the existence and content of a Canadian version of the public trust doctrine. While Canadian commentators on that doctrine have sometimes drawn on American authorities to propose content for a Canadian public trust doctrine, [143] a review of the Canadian cases is equally useful.

The clearest consequence of the government obligation is that the trustee is prevented from using the public property in a manner inconsistent with the public purpose for which it was dedicated, absent legislation to the contrary.

This obligation can resemble the legal consequences of public rights, preventing the trustee from directly interfering with the public's use of the public space (which would also amount to a public nuisance). Thus in the 1932 case of *Burchill*, the City of Vancouver had no power to exclude taxi-drivers from driving on public roads (absent applicable legislation) and in the 1861 case of *Sarnia* the courts had no ability to set up obstructions on public roads. [144]

However, the trust also has positive content: the trustee is required to manage the property for the benefit of the designated public use. Thus, a trustee cannot allow the property to be put to some other purpose that is incompatible with the dedicated

  

public use. This is the case even where it is not the actions of the trustee which will cause the public nuisance, but the possible actions of a private third party.

Consequently, it is beyond the authority of a municipality to assign an easement to a private company over part of a public highway, [145] or to sell a public market to a church. [146] In these cases the trustees' actions in assigning or granting rights would not immediately or necessarily cause a public nuisance (since the new owners might choose to exercise their ***49** rights in a manner consistent with the public right). However, in both cases the land was not being managed with the public purpose as its primary aim, and the trustee's action would effectively grant a private party the right to act in a manner that might be incompatible with the public right.

Similarly, in *Hamilton* it was held that a municipal government that holds land dedicated as a public market cannot, either explicitly or impliedly, re-dedicate that land as a public highway or for some other public purpose. [147] Thus, it is not only the grant of private rights that may conflict with the public purpose, but other public rights as well.

Decisions that do not permanently bind the trustee may also attract the public trust. Thus a municipality, as trustee over a public highway, lacks authority to grant members of the public the right to shoot on that highway. [148] Also, in the trial judge's decision in *Sundance Beach* it was held that a municipal decision to refuse to allow a third party to clear vegetation that was obstructing public beach access was inconsistent with the trust owed to the public. [149]

These decisions are broadly consistent with the types of trust obligations that arise in cases involving charitable trusts. For example, in B.C. a trust document creating a park has prevented the city of Victoria from authorizing private activities that exclude the public from portions of the park. [150] However, in each case of this type the terms of the trust ***50** need to be examined to determine whether the trustee's actions actually constitute a breach of the trust. [151]

Some of cases appear to support a still broader trust-obligation, under which the trustee has a right and obligation to advance the public's interests even when not directly related to the public use for which the property is dedicated. This broader power to interpret the trust is particularly well established in relation to addressing environmental concerns.

Thus, in *Scarborough*, a municipality was held to have the capacity to sue in public nuisance for harm to environmental values on a public highway by virtue of holding the property in question in trust for the public. [152] It is not at all obvious that the removal of trees along the road amounted to a direct violation of the public's right of passage along the highway. [153] Similarly, in *Goudreau*, the Public Trust was sufficiently broad to allow the municipality to manage road right of ways for conservation purposes, even when this decision prevented the furtherance of the public's right to travel that property. [154]

There is a tension between these results and the decision of the Manitoba Court of Appeal in *McDonald*, in which the Court overturned a municipal decision not to authorize the laying of pipes under a road due to concern about the lake's water levels. In overturning the decision, the court emphasized that the “jurisdiction and authority [over highways] are conferred as public trusts to be exercised with regard to the interests of those who require the highway, or the airspace or subsoil, as well as the interests of the community.” [155]

The 1904 case of *Bell Telephone Company v. Owen Sound (Town)* also concerns the obligation of the trustee to focus on public use--even use not related to passage--of the highway lands, but additionally suggests ***51** that the trustee must act in good faith in advancing those interests. In that case the court struck down a decision of the municipal government to refuse to allow telephone lines to be installed under the highway (rather than through over-head wires). After finding as fact that the municipal council had not acted in good faith, Meredith J. explained:

> The defendants are in truth but trustees of the highways within their municipalities, the ways being vested in them mainly so that they may better perform their duties towards all of the King's subjects in respect of them; it is the interests of the public which mainly are to be protected under the powers given to municipal

  

> governments. Telephone communication ... is a thing beneficial to the public ... [T]he benefit and the convenience to the public are the first considerations and should be the main purpose of the ... municipalities in exercising their respective rights under the section in question. [156]

However, all four of these cases seem to suggest that the scope of the public trust over highways is not limited to considering public passage over the highway, but may include consideration of other public and private interests, including interests in other uses of the highway and environmental interests. Since this results in some lack of clarity about the overall scope of the trust obligations, and apparently contradictory results, some further judicial direction may be required.

Less clear from the cases is whether the trust-obligations associated with dedicated lands will require the Crown to take proactive action to protect those feature of the property associated with the dedicated public purpose. Does the trust require the Crown to take action against third party activities that impact on the public use of the property, or to undertake maintenance work to retain equipment or other features that facilitate the public purpose? There appears to be little Canadian case law on point, [157] and the American case law, and the attempts to speculate on its application to the Canadian common law, may be useful in answering this question. In addition, these American authorities may be useful in determining ***52** the extent to which the trust guarantees procedural protections for government decisions affecting public lands, as there appears to be little Canadian case law on this point.

On its face the trustee of a public space must, according to equity, manage the public space in order to ensure that the public use for which the property was dedicated can continue. While there continues to be uncertainty about the precise nature and extent of the “public trust” obligation, it appears that the Crown's obligations in relation to public spaces arising from equity are more extensive than those arising for a private owner in law.

**(c) A Word on Standing**

Despite the significant restrictions on a land owner that seem to exist both at common law and at equity, there is a major obstacle to these restrictions being enforced directly against the property owner: at common law, public rights and charitable trusts are both enforceable only by the Attorney General or by someone “specially affected” by the nuisance (or breach of trust) in a different manner than the public at large.

This restrictive rule of Public Nuisance Standing has made it extremely difficult for members of the public to enforce public rights, as demonstrated by John McLaren, in “The Common Law Nuisance Actions and the Environmental Battle.” [158]

At first glance, then, the restrictions on a property owner arising from public rights are only likely to be enforced if the Attorney General becomes involved either directly or by giving permission for a plaintiff to bring an action; since, in the modern era, government generally protects the public interest through the enforcement of legislation rather than through common law remedies, it may seem that the common law remedies are effectively sterilized.

While it is beyond the scope of this article to explore ways that public nuisance standing might evolve in the future, [159] there are a several ways ***53** that public environmental rights may be relevant in a court case even where the Attorney General declines to intervene.

First, there may be cases in which a person is “specially affected” and therefore has standing to bring a claim even without the Attorney General's approval. While there is some uncertainty as to what is meant by special harm, [160] it is worth noting that the cases concerning highways have generally interpreted the phrase broadly: special harm may be claimed by anyone who suffers a greater amount of harm than other members of the public, often in the form of a financial loss resulting from the interference with the public right; a different “type” of harm is not required. [161]

Indeed, some cases seem to take the principle still more broadly, holding that any individual who, in making a *bona fide* attempt to exercise the public right, suffers delay or other inconvenience, even if no financial loss is incurred, has suffered a special harm:

  

> A man traveling with asses is stopped and obliged to go by a circuitous route with an obvious loss of time and profit, what distinction is there in principle between such a case and that of a man who is carrying 10,000 pounds worth of goods to arrive by a given date and is deprived of his market by an individual obstructing the road. [162]

***54** Finally, there is also a series of cases, which further emphasize the broad approach to public nuisance standing taken in public spaces cases but which are difficult to reconcile with the "special harm" rule, in which community organizations or municipalities with a special interest in the nuisance complained of were granted such standing. [163]

While it is clear that the public nuisance standing rule does apply to charitable trusts, [164] the courts have occasionally expressed doubt as to whether it is fair to allow trusts held for the benefit of the public to be defeated by inaction by the Crown. [165] In addition, following the American jurisprudence, commentators on the public trust doctrine have suggested that a possible consequence of the trust is a relaxed standing requirement in relation to actions against the Crown. [166] While not directly addressed by any Canadian court, the fiduciary nature of public spaces may help ***55** explain the more relaxed judicial attitude to public nuisance standing discussed above. [167]

Second, although a member of the public may not have standing to bring a claim for public nuisance, he or she may be able to invoke the public right in the context of other litigation. Thus the existence of a public right to use a property is clearly a defence to a claim for trespass on that property. [168] Indeed, a defence may exist for an individual who acts to remove an obstruction to a public right of way (removing a fence or gate, for example), provided the removal of the obstruction was necessary to restore the public's use of the property. [169]

The right to abate is now clearly limited to the situation where the rights of passage could not otherwise be exercised with reasonable convenience, and it is possibly restricted to where passage would otherwise be altogether impeded. A member of the public abating a nuisance is also required to exercise reasonable care so that he does as little damage as possible to the obstruction. [170]

There may be other circumstances in which private litigation may put the public's right to use a property into issue, either as a defence or in some other way.

Third, public rights may influence the interpretation of environmental and other statutes, which may, in turn, have legal consequences. If the question of the existence of a public right is raised in the context of a ***56** judicial review, rather than a claim for public nuisance, the petitioner can rely on the less restrictive public interest standing rule. [171] At the same time, as the author pointed out in his Statutory Interpretation Article, the public rights can influence the construction of the legislation at issue in a judicial review, as any government intention to interfere with public rights must be in clear statutory language. [172]

A property owner may get away with interfering with a public right for a time, provided the Attorney General is willing to turn a blind eye to the public nuisance. This does not mean, however, that the public rights have no legal consequences. As the law develops, there may be more avenues for the public to object to violations of public rights.

## 5. CONCLUSION

This article, like its companion article on Statutory Interpretation, is intended to summarize the existing case law concerning public rights and their legal effect, and to discuss the implications for environmental law. The Doctrine of dedication and acceptance, as applied to public spaces, is a key part of a new vision of the role of public rights in Canadian environmental law.

Private rights have long been front and centre in the jurisprudence, often at the expense of the natural environment and the rights of the public. The solution, surprisingly enough, is not to evolve new legal concepts, but to rediscover and build upon

  

old ones. As the Supreme Court of Canada noted in *Canfor*, public rights may provide an important basis for the common law to evolve to protect the "fundamental value of environmental protection."

Footnotes

a1 **Andrew Gage** is a staff lawyer with West Coast Environmental Law, an environmental organization based in Vancouver. The author would like to thank Scott Kidd, for his suggestions, and the Canadian Bar Association Law for the Future Fund, which supported the author in writing his earlier paper on public rights and statutory interpretation, the research for which also contributed greatly to this article.

1 *Gibbs*, below, note 55 at 482. *Gibbs*, ci-dessous, note 55, p. 482.

2 G. La Forest, *Water Law in Canada--The Atlantic Provinces* (Ottawa: Information Canada, 1973) at 178. Although written in the context of public rights on navigable rivers, the definition is more generally applicable. See also A.H. Oosterhoff *et al.*, *Anger and Honsberger's Law of Real Property* (Aurora, Ont: Canada Law Book Inc., 1985) Vol. 2 at 988: "... [P]ublic rights are intended to mean and are confined to those natural rights vested in the public generally that any member of the public may enjoy."

3 *British Columbia v. Canadian Forest Products Ltd.*, [2004] 2 S.C.R. 74 at 114, 141 [*Canfor*].

4 A. **Gage**, "Public Rights and the Lost Principle of Statutory Interpretation" (2005) 15 J.E.L.P. 107 at 113-14 [Statutory Interpretation Article].

5 *Ibid*. at 117.

6 For a comprehensive discussion of the law of dedication and acceptance in the U.K. see T. Bonyhady, *The Law of the Countryside: The Rights of the Public* (Abindon, Oxon, U.K.: Professional Books, 1987).

7 Under Scottish common law public rights of way are automatically created when the public has used the right of way for a period of 40 years or more: Bonyhady, *ibid*. at 29. Under statute public rights of way can now be created through 20 years public use: Bonyhady, Chapter 2, footnote 19. See also E.A. Lawson, ed., *Rights of Way--the Authority of Case Law* (Scottish Rights of Way Society: 1998).

8 For more information see <http://www.scotways.com>.

9 See <http://www.ramblers.org.uk/>.

10 *Schraeder v. Grattan (Municipality)*, [1945] 4 D.L.R. 351 (Ont. H.C.) at 356; see also *McCann v. Dugas* (1979), 27 N.B.R. (2d) 361 (Q.B.).

11 *Lachine (Ville) c. Industrial Glass Co.*, [1977] R.P. 313 (C.A.) at 317, affirmed (1977), [1978] 1 S.C.R. 988, quoted with approval in *Narbo Investment Corp. v. St-Léonard (Cité)*, [1978] 2 S.C.R. 864. The cases quoted are *Harvey v. Dominion Textile Co.* (1917), 59 S.C.R. 508 and *Gauvreau c. Pagé* (1920), 60 S.C.R. 181.

12 *Chiswell v. Alcrest Golf Club* (1937), 44 Man. R. 469 (C.A.) at 487. Note, however, that the court goes on to describe the public's acceptance of this dedication through the public's purchase of the laid out lots, rather than through public use, as is usually the case for the acceptance of dedication; see also *Guelph*, below, note 47, in relation to the dedication of public squares in this manner.

13 *Colleaux v. Cerfeuillet*, [1950] 1 W.W.R. 1124 (C.A.).

14 *R. v. Moss* (1896), 26 S.C.R. 322 at 333; see also *Fulton v. Creelman* (1930), 1930 CarswellNS 63, [1931] S.C.R. 221, [1931] 1 D.L.R. 733.

15 *Ottawa (City) v. Grand Trunk Railway* (1921), 64 D.L.R. 337 (Ont. C.A.) at 342. Bonyhady, *supra* note 6 at 33. As noted above, in Scotland, where public rights of way are not dedicated but created by prescription through longstanding public use, the common law has held that public use for 40 years will result in the creation of a public right of way. This figure has been reduced by statute to 20 years: *supra* note 7. To the extent that Canadian courts have suggested that public rights in Canada can be acquired by both

  

dedication and acceptance, and through prescription (see *Rideout v. Howlett* (1913), 13 D.L.R. 293 (N.B. K.B.), affirmed (1913), 15 D.L.R. 634 (N.B. C.A.); *Bourget*, below, note 17, the 40 year period used by the Scottish common law may have some force; but see *Good*, below, note 18, holding that public rights cannot be acquired by prescription.

16 *North London Railway Co. v. Vestry of St. Mary, Islington* (1872) 27 L.T. 672.

17 *Harrison v. Harrison* (1883), 16 N.S.R. 338 (N.S. C.A.), at 353; *Bourget v. R.* (1888), 2 Ex. C.R. 1 (Ex. Ct.), stated that a presumption of dedication should occur after the statutory period of limitation for asserting rights over the property, but that a lesser period of ongoing public use may be considered along with other circumstances as evidence of dedication.

18 *R. v. Good* (1826), 1 N.B.R. 35 (N.B. S.C.) (12 years of public use not sufficient to give rise to an implied dedication); *R. v. Rankin* (1858), 16 U.C.Q.B. 304 (Q.B.) (10 years of public use not sufficient even with expenditure of public funds); *Peters, Re*, [1931] 3 D.L.R. 89 (N.S. C.A.) (7 years of unrestricted public access insufficient).

19 *R. v. Gordon* (1857), 6 U.C.C.P. 213 (C.P.) (19 years of public use); *Rorabeck v. Sidney (Township)* (1977), 16 O.R. (2d) 296 (H.C.) (20 years of public use); *Morin v. New Brunswick* (1979), 26 N.B.R. (2d) 643 (Q.B.) (25 years).

20 *Gordon v. Trotter* (1920), 19 O.W.N. 354 (H.C.) (30 years of public use was evidence of a real intention to dedicate, notwithstanding occasional gating of the road to keep back cattle); *Parent v. Daigle* (1871), 4 Q.L.R. 154 (30 years public use sufficient); *Mytton v. Duck* (1866), 26 U.C.Q.B. 61 (Q.B.) (40 years public use "established conclusively a dedication"); *Rhodes v. Perusse* (1908), 41 S.C.R. 264 (more than 30 years sufficient to create a public highway); *Wright v. Sydney (City)*, [1944] 2 D.L.R. 133 (N.S. S.C. [In Banco]), affirmed (1944), [1945] S.C.R. 131 (30-40 years public use was evidence of dedication despite evidence of a prior intention not to dedicate the land); *Lake of Bays*, below, note 57 (Ont. C.A.) (approximately 45 years of public use is sufficient); *Foothills*, below, note 35 (50 years clearly sufficient).

21 *Good*, *supra* note 18; *Dunlop v. York (Township)* (1869), 16 Gr. 216 (Ont. Ch.).

22 *Reed v. Lincoln (Town)* (1974), 6 O.R. (2d) 391 (C.A.).

23 *Ibid*. at 396; See also *Dunlop*, *supra* note 21 at 222-23; *Macoomb v. Welland (Town)* (1907), 13 O.L.R. 335 (C.A.); *Taylor v. Clanwilliam (Rural Municipality)*, [1924] 2 W.W.R. 1153, 34 Man. R. 319, [1924] 4 D.L.R. 218 (C.A.); *Dunstan v. Hell's Gate Enterprises Ltd*. (1987), 20 B.C.L.R. (2d) 29 (C.A.), additional reasons at (1988), 1988 CarswellBC 1005 (C.A.).

24 *Dunlop, ibid*. (40 years of use presumed to be permissive); *Taylor, ibid.*; English courts have also made such pronouncements from time to time; see, for example, *Blount v. Layard* (1888), [1891] 2 Ch. 681 (note) (Eng. C.A.), 691n.

25 For example *Campbell v. Pond* (1915), 44 N.B.R. 357 (C.A.) (public use over 75 years, during which time the owner installed a gateway in a fence because he believed the right of way to be public, was not sufficient to result in an implied dedication).

26 *Moss*, *supra* note 14.

27 *Attorney-General and Newton Abbott R.D.C. v. Dyer*, [1947] Ch. 67 (C.A.), 85, 86.

28 Bonyhady, *supra* note 6 at 34.

29 This is a factor which automatically results in the creation of a public right of way under some highways statutes, (for example, *Transportation Act*, S.B.C. 2004, c. 44, s. 42(1)), but which appears to be relevant, but not conclusive, at common law where the property owner accepts public expenditures: *Rankin*, *supra* note 18; *Fredericton (City) v. Danielski* (2003), 261 N.B.R. (2d) 392 (Q.B.); *Rorabeck*, *supra* note 19, *Gibbs*, below, note 55 at 488; *Anger and Honsberger*, *supra* note 2 at 1002. However, see *Dunstan*, *supra* note 23, for a case in which the court dismissed public expenditures on a trail as mere "recognition of a public responsibility to, in the absence of roads, make travel over the trail a little easier." (at 42) This case appears not to recognize that a public foot trail is, in law, a public highway.

30 *Re Peters*, *supra* note 18; Bonyhady, *supra* note 6 at 31-32; but see *Gordon*, *supra* note 20, which states that gating, if done for convenience in controlling cattle, rather than as of right, does not necessarily displace the presumption of an intention to dedicate land.

 

31 *Adams v. East Whitby (Township)* (1882), 2 O.R. 473 (Q.B.); this factor seems to be significant in several cases in which a right of way leads to a particular private business or other place that the general public at large might not wish to visit. See for example, *Reed v. Lincoln, supra* note 22.

32 Signage may not be conclusive if not consistently displayed and depending upon the wording: *Gibbs*, below, note 55.

33 For example, *Gibbs*, below, note 55 at 487-88. This case involves the dedication of a property for recreational purposes, rather than for use of a road, a topic which is discussed below at notes 46 to 64. However, the court, in implying dedication, noted that the property owner had benefited from the public character of the beach (through the operation of a concession stand) and had been paid by a local business person to keep the beach clean were both held up as evidence of his intention to dedicate the beach.

34 *Ibid*. at 488-89.

35 *Foothills (Municipal District No. 31) v. Stockwell* (1985), [1986] 1 W.W.R. 668 (Alta. C.A.) at 671.

36 *Grand Trunk Pacific Railway v. Vincent* (1909), 2 Alta. L.R. 393 (Alta. S.C.).

37 *Baldwin v. O'Brien* (1917), 40 O.L.R. 24 (C.A.).

38 Bonyhady, *supra* note 6 at 35-37: Only an owner in fee simple can dedicate property; longstanding public use of a property occupied by a tenant or a public corporation whose purposes are inconsistent with dedication may not be evidence of implied dedication. On this point, the author recently became aware of the existence, in B.C., of non-profit organizations which lease land from private owners for use as public trails; it would seem that this arrangement would probably prevent the land from being dedicated, even if the land owner was only paid a nominal amount for the lease.

39 *Hopton v. Pamajewon* (1993), (sub nom. *Skerryvore Ratepayers' Assn. v. Shawanaga Indian Band*) 109 D.L.R. (4th) 449 (Ont. C.A.), leave to appeal refused (1994), 110 D.L.R. (4th) vii (note) (S.C.C.).

40 See below, at notes 65 to 70 for discussion of the continued existence of the doctrine under the Torrens system.

41 *Maple Ridge (District) v. New Westminster Registrar of Land Titles* (1994), 86 B.C.L.R. (2d) 359 (B.C. C.A.) at 365.

42 *Ibid*.

43 *British Columbia (Attorney General) v. Bailey*, [1920] 1 W.W.R. 917, 60 S.C.R. 38, 54 D.L.R. 50 (S.C.C.).

44 *Foothills, supra* note 35 at 671.

45 *Baldwin, supra* note 37.

46 Tim Bonyhady, in his classic discussion of public rights, the *Law of the Countryside*, reviews the case law and expresses the view that the public can acquire general recreation rights in respect of a property: *supra* note 6 at 129. However, Bonyhady acknowledges that there is considerable authority to the contrary, identifying a range of cases that "implicitly or explicitly [reject] the proposition that members of the public can acquire a *jus spatiandi*" (at 126)--or right over a space (as opposed to a right-of-way). Bonyhady is critical of these cases, only a few of which explicitly consider the question, and still fewer provide reasons for holding that the public cannot acquire such rights. Some of the cases identified by Bonyhady as rejecting the idea of a *jus spatiandi* include: *Earl of Coventry v. Willes* (1863), 9 L.T. 384 at 385; *Eyre v. New Forest Highway Board* (1892), 56 J.P. 517 (Eng. C.A.) at 518; *Attorney-General v. Sewell* (1918), 120 L.T. 363 at 368 and 370; *Attorney General v. Antrobus*, [1905] 2 Ch. 188 (Eng. Ch. Div.), at 198; *Ellenborough Park, Re* (1955), [1956] Ch. 131 (Ch. Div.) at 183, affirmed (1955), [1956] Ch. 153 (C.A.). Notwithstanding these cases, Bonyhady identifies a smaller number of cases expressing the contrary view--that recreational rights can be acquired over land: *R. v. Doncaster Metropolitan Burrough Council* (1986), 57 P. & C.R. 1 (Q.B.) at 15, The Times, 11 October 1986; *Maddock v. Wallasey Local Board* (1886), 55 L.J.Q.B. 267 at 270; *Sandgate Urban District Council v. County Council of Kent* (1898), 79 L.T. 425 (U.K. H.L.); *Tyne Improvement Commissioners v. Imrie* (1899), 81 L.T. 174 at 179.

  

47 *Guelph (City) v. Canada Co.* (1854), 4 Gr. 632 (U.C. Ch.); *Hamilton (City) v. Morrison* (1868), 18 U.C.C.P. 228 (C.P.); *Peck v. Galt (Town)* (1881), 46 U.C.Q.B. 211 (Ont. H.C.).

48 *Guelph*, *ibid*.

49 *Hamilton*, *supra* note 47.

50 *Peck*, *supra* note 47.

51 *Lorne Park, Re* (1914), 33 O.L.R. 51 (C.A.).

52 *Wright v. Long Branch (Village)*, 1959 CarswellOnt 75 [1959] S.C.R. 418 at 422; while the dissenting judges would have held that there was insufficient evidence of a dedication, they agree with the majority's statement of the law.

53 *Carpenter v. Smith*, [1951] O.R. 241, [1951] 2 D.L.R. 609 (Co. Ct.).

54 *Anger and Honsberger*, *supra* note 2 at 1006.

55 *Gibbs v. Grand Bend (Village)* (1995), 129 D.L.R. (4th) 449 (Ont. C.A.) at 482-83, additional reasons at (1996), 1996 CarswellOnt 626 (C.A.).

56 *Frank Georges Island Investments v. Nova Scotia (Attorney General)* (2004), 2004 CarswellNS 280 (S.C.).

57 *Lake of Bays (Township) v. 456758 Ontario Ltd.* (2005), 2005 CarswellOnt 2779 (S.C.J.) at para. 22, affirmed (2006), 2006 CarswellOnt 1744 (C.A.).

58 *Guelph*, *supra* note 47 at 654-55.

59 *Gibbs*, *supra* note 55 at 482. The court stated that the dedication and acceptance may have been complete as early as 1908, but held that it was established by 1940 “at the latest.”

60 *Lake of Bays*, *supra* note 57.

61 *Supra* note 6 at 123. Similarly, a County Court of Ontario ruled, in *Burden v. Sherbrooke (Township)*, [1956] O.W.N. 373 (Ont. Co. Ct.) that where the destination of a road is an “attractive picnic-spot”, rather than a thoroughfare, this should be taken as evidence against an intention to dedicate. This decision seems to be based on the idea that recreational use cannot result in a dedication, and is probably incorrect in light of *Gibbs*, *supra* note 55. However, it may provide weak support for the view that the standard for inferring dedication may be different in cases involving public recreational rights.

62 For example *Seaway Co. v. Attorney General*, 375 S.W.2d 923 (1964); *Gion v. City of Santa Cruz*, 465 P. 2d 50 (1970); *County of Los Angeles v. Berk*, 605 P. 2d 381 (1980).

63 Some observations may be made about the possible evolution of a doctrine of dedication and acceptance that recognizes conservation as a public purpose. First, a partial answer may be found in relation to legislation setting aside land for conservation purposes; as noted at note 91, below, it is arguable that where the Legislature has provided for the dedication of land to conservation purposes, no public acceptance should be required. Second, the courts have recognized the importance of conservation to the continued use of communal rights in the context of aboriginal rights. Conservation is a purpose for which government may legitimately limit aboriginal rights: *R. v. Sparrow*, [1990] 1 S.C.R. 1075. Moreover, the Supreme Court of Canada has gone further in relation to aboriginal title, holding that the nature of the right requires that aboriginal lands not be used in a manner that will severe the historic link between the First Nation and that land: *Delgamuukw v. British Columbia* (1997), [1997] 3 S.C.R. 1010 at para. 154. While arising in the context of customary communal rights, and not rights held by the public at large, these decisions emphasize that conservation is crucial to maintaining such rights over the long term. Third, it appears that a private land owner who has dedicated his or her land for public use may nonetheless retain some ability to prevent public use that may harm the property and the public's use in the long term. Thus in *Gibbs* the court held that it was not inconsistent with the public dedication that the owner had initiated actions against a local resident who was hauling gravel from the beach and an individual who had built and was operating a commercial merry-go-round on the beach: Gibbs, *supra*

 

note 55 at 487-88. It may be arguable that a public right to use land, arising through dedication, should be presumed to be limited to use that does not compromise long-term public use. Fourth, it is worth keeping in mind that the phrase "public" is broad enough to encompass future generations of the public, and not merely those using the property at the present time. This may be why Jerry DeMarco suggests that public rights are uniquely suited to raise questions of intergenerational equity: J. DeMarco. "Law for Future Generations: The Theory of Intergenerational Equity in Canadian Environmental Law" (2005) 15 J.E.L.P. 1. Intergenerational equity is increasingly being recognized by the Canadian Courts as a principle of international law and possibly of the Canadian common law: *Cie pétrolière Impériale c. Québec (Tribunal administratif*, (sub nom. *Imperial Oil Ltd. v. Quebec (Minister of the Environment)* [2003] 2 S.C.R. 624, at para. 19; DeMarco. Finally, the relationship between the Doctrine and the creation of charitable trusts for conservation purposes, discussed below at notes 117 to 129, which are not so limited, may be important in the development of a new approach. While none of the above points provide a complete answer to the dilemma of how to balance public use rights with the public's interest in conservation, they provide a starting point for this discussion.

64 *Caldwell v. McLaren* (1884), (1883-84) L.R. 9 App. Cas. 392 (Ontario P.C.) at 405.

65 For example, B.C.'s *Land Title Act*, R.S.B.C. 1996, c. 250, creates a land titles system in which the features of particular private properties are described in a "title", filed with the provincial Land Titles Office. As a general rule, if a person claims a right in respect of private property, but it is not reflected in the documents filed with the Land Title Office, those rights will not be recognized by the courts: s. 23.

66 *Ibid.*, s. 23(2)(e); see also *Land Titles Act*, R.S.A. 2000, c. L-4, s. 61(1); *Land Titles Act*, S.S. 2000, c. L-5.1, s. 18.

67 *Ibid.*, s. 1.

68 *Maple Ridge*, *supra* note 41 at 364; similarly, *Bailey*, *supra* note 43: "... [B]y section 22 of the *Land Registry Act* ... the title of the holder ... is made subject to any 'public highway', and it follows that ... the public right would prevail as against the registered interest." See also *Foothills*, *supra* note 35.

69 Section 23(3) of the B.C. *Land Title Act*, *supra* note 65, provides that a title that contradicts the title filed at the Land Title Office cannot be acquired through "length of possession", while s. 24 states that rights in or over land cannot be acquired by prescription and abolishes "the common law doctrine of prescription and the doctrine of the lost modern grant." Both of these provisions are intended to limit common law doctrines which allowed the acquisition of private property rights through the ongoing use of that property. In relation to s. 23, a public easement does not contradict or derogate from the indefeasible title guaranteed by s. 23, because, as noted, s. 23(2)(e) explicitly allows for the continuation of such easements. In relation to s. 24, which abolishes the doctrine of prescription, the common law has consistently held that the dedication/acceptance process described above is of a different nature than prescription: Bonyhady, *supra* note 6 at 39; *Rideout*, *supra* note 15; *Harrison*, *supra* note 17, and *Bourget*, *supra* note 17: "The question is not primarily one of prescription, but of dedication"; *Foothills*, *supra* note 35 at 672. Moreover, there is nothing to indicate that s. 24 intended to extend past private rights; when it was first enacted it allowed for the registration of existing private rights, but made no provision for the registration of public rights. These factors, combined with the Court's endorsement of the common law creation of public rights of way in *Maple Ridge*, *supra* note 41, and the exemption for public easements under s. 23(2)(e), support the view that the scope of s. 24 is limited to restricting the acquisition of private rights.

70 For example, from B.C. *Silverton (Village) v. Hobbs* (1985), 60 B.C.L.R. 288 (S.C.); *Brady v. Zirnhelt* (1998), 57 B.C.L.R. (3d) 144 (C.A.); *Maple Ridge*, *supra* note 41; *Delta (Municipality) v. Trim* (1982), 41 B.C.L.R. 58 (S.C.).

71 *Folkestone (Borough) v. Brockman*, [1914] A.C. 338 (U.K. H.L.), adopted by the majority in *Fulton*, *supra* note 14 at para. 10; *Moss*, *supra* note 14.

72 *Grand Trunk Railway*, *supra* note 15 at 342.

73 Patteson J. from *The Queen v. East Mark* (1848), 11 Q.B. 877, cited with approval in *Moss*, *supra* note 14.

74 *Dunstan*, *supra* note 23 at 40-41.

75 *Doncaster Metropolitan Burrough Council*, *supra* note 46.

  

76 Bonyhady, *supra* note 6 at 129.

77 *Hopton*, *supra* note 39.

78 *Supra* notes 10 to 13.

79 As discussed above, notes 71 to 77, and as per the quote from *Grand Trunk Railway*, *supra* note 72, to the effect that the Crown may bind itself in the same way as a private property owner.

80 *Supra* notes 38 and 39.

81 *Supra* notes 12 and 13.

82 Cabinet and cabinet ministers are the individuals within government with the clearest authority to speak for the government. Consequently, the pronouncements of such individuals in relation to public property are most likely to have an affect similar to those of a private property owner.

83 At a minimum, such an explicit statement, even if it is unclear if it was endorsed at a ministerial level, would be strong evidence on which to ground a finding of an implied dedication.

84 Although there are few cases considering such a dedication through policy, there are two B.C. cases which suggest that, either due to dedication by ministerial policy or for some other reason, the public may have recreational rights in respect of substantial amounts of that province's public lands. In *MacMillan Bloedel Ltd. v. Western Canada Wilderness Committee* (1988), 4 C.E.L.R. (N.S.) 110 (B.C. S.C.) at 112., Wood J. considered an application by the forest company MacMillan Bloedel for an injunction excluding the public from Crown land that it managed. Relying on a Ministry of Forests policy that stated that the public "has the right to recreational use of Crown forest lands", Wood J. concluded that there was nothing in the company's logging license "purporting to extinguish the public's right to recreational use ..." In this case Wood J. did not explicitly consider the doctrine of dedication and acceptance, and it is unclear whether he felt that the public's recreational rights could have been displaced through a change in government policy or through a licence granted under statutory provisions which made no reference to the extinguishment of public rights. However, according to the common law doctrine of dedication and acceptance, it is quite arguable that the Ministry of Forests policy has dedicated the use of Crown forest lands--which represents much of the province--to recreational use. Similarly, in *Fletcher Challenge Canada Ltd. v. Doe* (June 5, 1992), Doc. Vancouver C922732 (S.C.), Thackray J. accepted the existence of public recreational rights in respect of B.C.'s Crown lands, although he did not express an opinion as to the source of the rights. In rejecting an application by two logging companies for an injunction restricting public access to a sizeable area of Crown land, the judge noted that the requested order would include "the people who want to walk and enjoy the area for recreational purposes. It includes those members of the Western Canada Wilderness Committee [an intervenor in the case] who, for purposes of enjoyment and research, travel in and use the area." The judge also accepted that "the public has the right to use the road and enter the area." The court did not express a view about whether the Attorney General could have requested such an injunction, but did suggest that legislative amendments might be necessary before the public could be excluded from public lands or highways.

85 In the case of a general dedication of a large area, as in the case of the B.C. Ministry of Forests policy discussed at note 84, it may be that only certain of the dedicated areas, which have had a significant level of public use, have actually crystallized into a legally enforceable public right. As noted, *supra*, note 76, at least one commentator has suggested that the courts should be slow to infer public rights over extensive areas, because of the expansive rights and larger area involved. Although the Canadian case law appears to support the view that an explicit dedication will be sufficient to constitute legal, explicit dedication, it is possible that in cases of a broad dedication involving large areas, that the courts will simply consider the dedication as one factor in deciding whether the public's use of a particular area is sufficient to justify inferring that a legal dedication and acceptance has occurred.

86 See the quote referenced above at note 76 for a discussion of the significance of this responsibility.

87 *Maple Ridge*, *supra* note 41 at 365.

88 *Gibbs*, *supra* note 55 at 482.

  

89 For example, *Park Act*, R.S.B.C. 1996, c. 344, s. 5(3); *Provincial Parks Act*, R.S.O. 1990, c. 34, s. 2. Section 2 of the Ontario legislation has been considered in *Green v. Ontario*, which is discussed in greater detail below at note 112. In that case the court seemed to accept that the dedication created public rights, but rejected with only limited discussion the idea that these public rights resulted in a public trust or related obligation to ensure that these rights were protected.

90 A more difficult question arises from the question of whether or not land may be dedicated through the preamble to a Statute. Preambles do not generally have legal effect, but as a statement of the Legislature's will it is not obvious why it should be less binding on the government than Ministerial policy. At a minimum, like ministerial policy, it should be one factor for the courts to consider in evaluating whether, given the history of a parcel as a whole, the government has indicated an intent to dedicate land.

91 This provides a partial answer to the issue discussed above at note 63, about how the Doctrine may apply to the dedication of land for conservation purposes; in cases where the dedication is done under conservation legislation, the public's acceptance of such dedication should arguably be taken as demonstrated by the legislation.

92 The Supreme Court of Canada, in *Canfor*, noted with approval that common law public rights had, in American courts, evolved into the public trust doctrine and suggested that the common law in Canada might develop in a similar direction: *Canfor, supra* note 3 at 113. Rather remarkably, neither the parties nor the interveners in the appeal had raised the question of the public trust doctrine: DeMarco, *supra* note 63 at footnote 33; in terms of academic comment, see S. Kidd, “Keeping Public Resources in Public Hands: Advancing the Public Trust Doctrine in Canada” (2006) 16 J.E.L.P. 187; K. Smallwood, *Coming Out of Hibernation: The Canadian Public Trust Doctrine*, (Unpublished Masters Thesis, UBC: 1993); J. Maguire, “Fashioning an Equitable Vision for Public Resource Protection and Development in Canada: The Public Trust Doctrine Revisited and Reconceptualized”, (1997) 7 J.E.L.P. 1; C. Hunt, “The Public Trust Doctrine in Canada” in J. Swaigen, ed., *Environmental Rights in Canada* (Toronto: Butterworths, 1981) at 185; B. von Tigerstrom, “The Public Trust Doctrine in Canada”, (1997) 7 J.E.L.P. 379; **Gage**, *supra* note 4 at 136 to 139.

93 Smallwood, *ibid*. at 3: “In essence however, the public trust means that despite its ownership of natural resources, the government holds certain natural resources on trust, or in a fiduciary capacity for the public.”

94 Smallwood, *ibid*. at 93. The author is indebted to Ms. Smallwood's identification, in her thesis, of several of the cases discussed in this Part.

95 See below, notes 134 to 141.

96 Less clear is whether private property owners who hold land subject to a public recreational right (or other public right) are also subject to a public trust. Since public highways are owned by the Crown (or a municipal government) and not by private property owners (see below, notes 134 and 135), the case law concerning highways has generally commented on fiduciary obligations held by the Crown. Similarly, in the U.S. the public trust doctrine is held by the government, not by private parties. This may also be the case in Canada, to the extent that, as suggested in *Canfor, supra* note 3, the public trust is dependent upon the Crown's *parens patriae* role. However, as discussed below, at notes 117 to 129, the act of dedicating land (even by a private land owner) very much resembles the creation of a charitable trust. Where a private owner holds private property subject to a public right it may be possible to argue that the owner stands in a trust-like relationship to the public.

97 (1859), 21 U.C.Q.B. 59 (Q.B.).

98 *Ibid*. at 62.

99 *Octave Chavigny de la Chevrotière v. Montréal (Ville)* (1886), (1887) L.R. 12 App. Cas. 149 (Quebec P.C.) at 159.

100 [1932] S.C.R. 620.

101 *Ibid*. at 625.

102 *J.F. Brown Co. v. Toronto (City)* (1916), 36 O.L.R. 189 (C.A.) at 203, affirmed (1917), 55 S.C.R. 153, 37 D.L.R. 532; *Big Point Club v. Lozon*, [1943] O.R. 491 (H.C.) at 495; *McKillop v. Vancouver (City)* (1954), 11 W.W.R. (N.S.) 593 (B.C. S.C.) at 597;

  

*McDonald v. North Norfolk (Rural Municipality)* (1992), 98 D.L.R. (4th) 436 (Man. C.A.); *Goudreau v. Chandos (Township)* (1993), 16 M.P.L.R. (2d) 224 (Ont. Gen. Div.).

103 *Comité pour la République du Canada - Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 per Lamer C.J., with Sopinka J.A. concurring, at 154.

104 (1979), 9 M.P.L.R. 255, 10 C.E.L.R. 40 (Ont. C.A.) at 257.

105 *Supra* note 3, para. 74.

106 [2001] 2 S.C.R. 241, para. 27.

107 *Canfor*, *supra* note 3, para. 81.

108 (1980), [1981] 1 W.W.R. 581 (Alta. C.A.).

109 (1979), [1980] 1 W.W.R. 97 (Alta. Q.B.) at 113.

110 *Sundance Beach*, *supra* note 108 at 590.

111 *Calgary (City) v. Cominco Ltd.* (1982), [1983] 2 W.W.R. 320 (Alta. Q.B.) at 331 [*Cominco*]. This approach is essentially the same as that advocated by the author in **Gage**, *supra* note 4.

112 (1972), 34 D.L.R. (3d) 20 (Ont. H.C.).

113 *Ibid*. at 30-31.

114 The leading case is *Kinloch v. Secretary of State for India in Council* (1882), (1881-82) L.R. 7 App. Cas. 619 (H.L.), affirmed by (1880), LR 15 Ch. D. 1 (C.A.). See also Peter Hogg & Patrick Monahan, *Liability of the Crown*, 3d ed. (Toronto: Carswell, 2000) at 258 for general discussion of this principle.

115 **Gage**, *supra* note 4 at 138; see also L. Sossin, *Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law* (2003) 66 Sask. L. Rev. 129 in which Sossin argues that a political trust, while not independently enforceable, may nonetheless impose common law administrative law obligations.

116 There are cases which reach similar conclusions by relying on a presumption against statutory interference with public rights. In addition to the cases discussed in **Gage**, *ibid.*, *see Cardwell v. Graham*, (sub nom. *Cardwell v. Asphodel (Township)*) [1953] O.W.N. 967 (H.C.), in which it was held that there was no express power given to a municipal government to designate a portion of a road allowance as a public dumping ground, and that no such power should be implied.

117 In order to be charitable, a trust must be "of Charitable nature ... promote a public benefit ... [and be] wholly and exclusively charitable.": J. McGhee, *Snell's Equity* (30th Ed.) (London: Sweet & Maxwell, 2000) at 171. A charitable trust is generally subject to the same rules as a private trust, except that "the rules against perpetuity are modified; the trusts can be varied if they become obsolete; they are enforced and regulated by certain public authorities; they may be enforced by action notwithstanding the expiry of the ordinary limitation period; ... they are exempt from much taxation ... [and] they cannot fail for uncertainty of object.": McGhee, at 170.

118 In the case of charitable trusts, the public purpose must be one which has been recognized by the courts as being charitable in nature. While this has not explicitly been mentioned as a requirement for rights created through dedication and acceptance, most of the public rights the courts have considered provide a clear public benefit and can arguably be considered charitable in nature. Charitable purposes have been held to include general public recreation: *Anderson*, below, note 127, as well as conservation purposes: *Hogle Estate, Re*, [1939] O.R. 425 (H.C.).

119 D. Waters, *Law of Trusts in Canada* (2d. Ed.) (Toronto: Carswell, 1984) at 151. See also Canadian Encyclopedic Digest, Trusts, III, 1, §125.

  

120 *Peck*, *supra* note 47 at 218.

121 *Colchester South (Township) v. Hackett*, [1927] 4 D.L.R. 317 (Ont. C.A.) at 323, affirmed [1928] S.C.R. 255 (S.C.C.).

122 *Ibid*.

123 Wright, *supra* note 52.

124 There are a number of cases in which the transfer of land for a public purpose appears, without much discussion, to have resulted in the creation of both public rights and a charitable trust. In *Grand Trunk Railway v. Toronto (City)* (1910), (sub nom. *Canadian Pacific Railway v. Toronto (City)*) 42 S.C.R. 613, affirmed (1911), 1911 CarswellOnt 749 (P.C.), the Supreme Court of Canada considered lands granted to the city in trust for use as public highways; in addition to the trust, however, the court explicitly referred to the public's rights to use the highways and the presumption against interfering with such rights: "... we consider that a legislative concession of such a character as that must be clear before the public rights can be so invaded or such supposed to have been an intent of these so legislating" (at 645). See also *Hamilton*, *supra* note 47. In *Gibbs*, *supra* note 55, two judges of the Ontario Court of Appeal found that the Crown had created a charitable trust through its original grant of the property and that, in the alternative, the subsequent conduct of the subsequent property owner had created public rights through dedication and acceptance; neither judge commented on whether or how the two concepts were related. Similarly, Bonyhady, *supra* note 6, references a series of charitable trust cases in support of the view that public recreational rights may be created. However, he then notes that the judges "have focused on the range of permissible charitable objects for trusts rather than on the land law rules concerning the ambit of dedication": Bonyhady, at 125. In so doing he asserts a relationship between the two areas of law, but fails to discuss that relationship. Similarly, Hunt, *supra* note 92 at 171-73, discusses charitable trusts in relation to lands dedicated for recreational purposes as a possible grounds for a public trust, but does not examine the doctrine of dedication and acceptance. Also, in *Chavigney*, *supra* note 99, the JCPC's account of the facts in that case would also have supported a finding of the existence of a charitable trust, as it involved the transfer of land to a municipal government for a public purpose, but that the court instead chose to analyze the situation in terms of public rights. Finally, by way of an historical note, it seems possible that the link between charitable trusts and the U.S. public trust doctrine was argued as early as 1884. The bench notes of Chief Justice Begbie for the 1884 case of *Anderson*, below, note 127, contain the notation "charitable trust = public trust?": M.B. Begbie, *Bench Books, Supreme Court (Civil) 1884*, B.C. Provincial Archives at 280. However, the public trust doctrine is not discussed in the judgment.

125 (1986), 75 N.S.R. (2d) 49 (T.D.).

126 A charitable purpose must be "for the benefit of the public at large, or a sufficiently sizeable section of the community": *Laidlaw Foundation, Re* (1984), 18 E.T.R. 77 (Ont. Div. Ct.) at 113. It is unclear to the author how a "section of the community" could be sufficiently broad as to demonstrate a public, charitable, benefit, but too narrow to have land dedicated to them, and to indicate acceptance on behalf of the public.

127 One significant difference not discussed above is that charitable trusts are most commonly created when land is transferred between owners. For example, a trust may be created when land is donated to a government agency for a specific public purpose or where the use of the land for public purposes is a condition of the sale. It is unclear how significant this distinction is. In private trust law there is no requirement that property change hands in order to create a trust and in some circumstances a trust may be inferred from the actions of an owner: *supra* note 119. The absence of case law concerning charitable trusts created by the same owner who holds the property as trustee may arise more from the difficulty of enforcing a charitable trust in a case where the donor and trustee are one and the same: a charitable trust, like a public right, is for the benefit of the public at large. While the beneficiary of a trust can go to court to enforce it, as a general rule the courts have held that in the case of a charitable trust the public at large may only be represented by the Attorney General: *Anderson v. Victoria (City)* (1884), 1 B.C.R. (Pt. 2) 107 (S.C.). However, where there is a separate donor, he or she may also enforce the terms of the trust. Obviously this will not occur if the donor and the trustee (who is alleged to be breaking the trust) are one and the same.

128 For example, D. Waters, *supra* note 119.

129 As discussed above, note 63, in relation to public rights, it is unclear how the public may accept a dedication of land for a conservation purpose; no such problem exists in respect of the law of charitable trusts, since there is no requirement in either case that the public indicate its acceptance of the dedication.

 

130 *Guerin v. R.*, [1984] 2 S.C.R. 335 at 384.

131 von Tigerstrom, *supra* note 92; Maquire, *supra* note 92; Kidd, *supra* note 92, but see D.P. Edmond, "*Guerin v. R.* (1984), 20 E.T.R. 6 (S.C.C.)", case comment, (1986) 20 E.T.R. 61.

132 *Frame v. Smith* (1987), [1987] 2 S.C.R. 99 at 136.

133 K. Horsman in her paper "The Crown as fiduciary", at 4.1 of *Suing and Defending the Government--2006 Update* (Vancouver, BC: Continuing Legal Education Society of British Columbia, 2006), suggests that the Crown's fiduciary obligations to aboriginal communities are the only instance in which such community-wide fiduciary obligations can arise. However, Horsman notes that the Supreme Court of Canada, in *B. (K.L.) v. British Columbia* (2003), [2003] 2 S.C.R. 403, 2003 SCC 51, at para. 40, differentiates between private-law and public-law fiduciary duties, the latter being similar in nature to the fiduciary duty owed to aboriginal peoples. Horsman concedes that "K.L.B. has left the door open to future arguments that the Crown in some form of public law capacity owes a fiduciary obligation of a scope akin to that owed aboriginal peoples" (at 4.1.8).

134 In *Chavigny*, *supra* note 99, the Judicial Committee of the Privy Council states that the law of Canada resembles the law of Scotland in that the ownership of highways vests, in trust, with the Crown. By contrast, in *O'Connor v. Nova Scotia Telephone Co.* (1893), 22 S.C.R. 276 the Supreme Court of Canada seems to say that the English common law applies, in that a private property owner may retain title to the land under public highways.

135 For example, *B.C. Transportation Act*, *supra* note 29, s. 57; *Community Charter*, S.B.C. 2003, c. 26, s. 35 [am. 2003, c. 52, s. 533; 2005, s. 96]; *Municipal Government Act*, R.S.A. 2000, c. M-26, s. 16(1)-(3); *Municipal Act*, S.M. 1996, c. 58, C.C.S.M., c. M225, s. 286(2) [am. 1998, c. 33, s. 21]; *Highways and Transportation Act, 1997*, S.S. 1997, c. H-3.01, ss. 11, 35, 69 [am. 2000, c. 47, s. 13].

136 *Wright*, *supra* note 52.

137 *Gibbs*, *supra* note 55 at 488.

138 *Lake of Bays*, *supra* note 57.

139 *R. v. Hunt* (1865), 16 U.C.C.P. 145 (C.P.), affirmed (1867), 17 U.C.C.P. 443 (C.P.). One of the more important discussions of the paramountcy of public over private rights in Canada occurred in the Supreme Court of Canada decision in *Friends of the Oldman River Society v. Canada (Minister of Transport)* (1992), 88 D.L.R. (4th) 1 (S.C.C.) at 33-35, although this discussion is focused on this principle in the context of the public right to use navigable rivers. See **Gage**, *supra* note 4 at 118 to 121 for further discussion.

140 Bonyhady, *supra* note 6 at 59. According to Bonyhady a series of statutory instruments in England have replaced the common law rule on most highways, granting farmers the authority to plough rights of way that cross their land, provided that the rights of way are returned to a passable state (Bonyhady, at 60). Note also that at common law an owner who makes a dedication may reserve the right to plough the land in question: *Mercer v. Woodgate* (1869), L.R. 5 Q.B. 26 (Q.B.).

141 *Dyce v. Hay* (1852) 1 Macq. 305 (Scottish H.L.) at 309.

142 An analogy may be made to cases concerning regulation of private property for public purposes. Canadian courts have generally held that significant restrictions on the use of land for environmental or other purposes does not amount to an expropriation of land because there continue to be low-impact private uses of the land available to the land owner: *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* (1999), 177 D.L.R. (4th) 696 (N.S. C.A.); *Canada Mortgage & Housing Corp. v. North Vancouver (District)* (2000), 77 B.C.L.R. (3d) 14 (C.A.), leave to appeal refused [2000] 2 S.C.R. vi.

143 For example, Smallwood, *supra* note 92 at 127-28.

144 *Burchill*, *supra* note 100; *Sarnia*, *supra* note 97.

145 *Cominco*, *supra* note 111.

146 *Peck*, *supra* note 47.

  

147 *Hamilton, supra* note 47. In that case there was no evidence that the use of the portion of the market for a highway purpose in any way interfered with the public's use of the market (*i.e.* there was no evidence of a public nuisance). However, the trustee's obligation to manage the property as a market prevented it from making a permanent dedication of the land for some other purpose. A similar result was reached in *Affleck v. Nelson (City)* (1957), 23 W.W.R. 386 (B.C. S.C.) in a case concerning efforts to rededicate a portion of a highway as a public square/memorial site. That decision was reached through interpretation of the relevant statutory provisions, and without reference to trust language.

148 *Big Point Club, supra* note 102.

149 *Sundance Beach, supra* note 109; as discussed above, at note 108, this decision was overturned by the Alberta Court of Appeal in a decision which denies the existence of a trust owed to the public in respect of public highways. The Court did not dispute the trial judge's assessment as to the implications of the trust, if it does exist, but rather simply found that no such trust exists. In light of the case law in other jurisdictions, discussed above, and the Alberta Court of Appeal's failure to discuss that authority, the author believes the trial judge's decision to be sound.

150 *Anderson, supra* note 127; *Victoria (City) v. Capital Region Festival Society* (1998), 62 B.C.L.R. (3d) 143 (S.C.).

151 *Godden v. Toronto (City)* (1908), 12 O.W.R. 708 (C.P.); *Save Our Waterfront Parks Society v. Vancouver (City)* (2004), 28 B.C.L.R. (4th) 142 (S.C.).

152 *Scarborough, supra* note 104, cited with approval in *Canfor, supra* note 3, para 74.

153 While arguably the public's enjoyment of the road was impacted, the change in the environmental feature in no way affected the public's ability to use the highway for the purpose of passage. A municipality generally does not have the ability to bring a claim in public nuisance for environmental harm, but evidently gained it in this case by virtue of being trustee to the public for the highway.

154 *Goudreau, supra* note 102 at 228: “To rule that consent is not required would make available all of these road allowances for unregulated development .... Protection of wetlands and other areas of natural significance would be difficult, if not impossible, to ensure. With the consent of the municipality being required, there will be the control essential to ensure that proper environmental standards are adhered to, and that the opening of such road allowances is done after consideration is given to the greater public interest.”

155 *McDonald, supra* note 102 at 441.

156 *Bell Telephone Co. v. Owen Sound (Town)* (1904), 8 O.L.R. 74 (C.P.) at 78. The decision is troubling due to the apparent lack of evidence supporting the Judge's factual findings of bad faith against the municipality. However, the legal principle that good faith must be exercised by the trustee, and that the interests of the public are to be primary considerations in making decisions about the trust properties, is entirely consistent with the concept of a public trust.

157 As noted, *Green, supra* note 112, concerned the impacts of the operations of a gravel pit on the park. Lerner J., however, did not rule that a trust existed, but did not bind the Crown in its dealings with third party operations, but rather ruled that no trust existed. Consequently, this one case is of limited precedent value. Most jurisdictions provide a statutory responsibility to maintain highways, so this issue has not been canvassed in that context.

158 J. McLaren, “The Common Law Nuisance Actions and the Environmental Battle--Well-tempered swords or broken reeds?” (1972) 10(3) Osgoode Hall L.J. 505. Although an old article, McLaren's conclusions on the obstacles posed by the public nuisance standing rule appear largely unchanged by the passage of time.

159 The public interest standing rule has replaced the public nuisance standing rule in the context of, first, constitutional litigation (*Thorson v. Canada (Attorney General) (No. 2)* (1974), [1975] 1 S.C.R. 138), and subsequently in the context of judicial review generally. The Law Reform Commission of both B.C. and Ontario have recommended that the public nuisance standing rule be abandoned in light of the modern public interest standing rule: Law Reform Commission of B.C. Report on Civil Litigation in the Public Interest (Victoria: Ministry of Attorney General, 1980); Law Reform Commission of Ontario. Report on the Law of Standing, (Toronto: Ministry of the Attorney General, 1989).

 

160 The Canadian courts have applied two different, and inconsistent, approaches to public nuisance standing: *Gagnier v. Canadian Forest Products Ltd.* (1990), 51 B.C.L.R. (2d) 218 (S.C.). The more restrictive approach, generally adopted in cases concerning pollution or some other generalized nuisance, holds that "special harm" must involve harm that is substantially different not only in amount but kind from the rest of the public: *Hickey v. Electric Reduction Co.* (1971), 21 D.L.R. (3d) 368 (Nfld. S.C.). Other cases, below, note 161, have held that a different in amount is sufficient. It should be noted that in the highways cases municipal governments often have standing to bring claims for public nuisance; this is because the dedicated land in question is often actually vested in a municipal government, rather than the Crown. Consequently in the case of municipally owned highways or parks, municipal governments will generally have standing even under the more restrictive test: see *Fredericton*, *supra* note 29; *Silverton (Village) v. Hobbs*, *supra* note 70; see also *Scarborough*, *supra* note 104 for examples of cases in which municipal governments have brought claims in public nuisance arising from interference with highways.

161 *Grand Trunk Pacific Railway v. British Columbia Express Co.* (1916), 10 W.W.R. 583 (B.C. C.A.) (overturned on other grounds at (1916), [1917] 1 W.W.R. 961 (S.C.C.), affirmed (1918), [1919] 1 W.W.R. 497 (British Columbia P.C.)), per Martin J.A.; *Rainy River Navigation Co. v. Ontario & Minnesota Power Co.* (1914), 17 D.L.R. 850 (Ont. C.A.); *Crandell v. Mooney* (1873), 23 U.C.C.P. 212 (C.P.).

162 *Greasly v. Codling* (1824), 2 Bing. 263 (Eng. C.P.), cited with approval in *Rainy River*, *ibid.*; See also *Rainy River Navigation Co. v. Watrous Island Boom Co.* (1914), 26 O.W.R. 456, 6 O.W.N. 537 (C.A.): "It was ... contended that the plaintiffs not having shown what pecuniary loss they had sustained were not entitled to recover. But such a contention is no answer to the plaintiff's claim .... The difficulty, risk, trouble and delay caused to the plaintiffs on several occasions establish not merely accidental but a high-handed intentional interference by the defendants with the plaintiff's rights."

163 *Cook's Road Maintenance Assn. v. Crowhill Estates* (2001), 196 D.L.R. (4th) 35 (C.A.), leave to appeal refused (2002), 2002 CarswellOnt 250 (S.C.C.); *Canoe Ontario v. Reed* (1989), 69 O.R. (2d) 494 (H.C.) (note, however, that the issue of standing appears not to have been argued in the case); *Guelph*, *supra* note 47 at 655-56: "[i]t is true that the right here in question is not exclusively the right of the inhabitants of Guelph ... but the right and interest of the inhabitants of Guelph are peculiar; they are actual and real, while those of the general public are remote ..."; See also the Scottish case of *Macfie v. Scottish Rights of Way and Recreation Society Ltd.* (1884), 11 R. 1094 (Scotland Ct. Sess.), a digest of which in Lawson, *supra* note 7 at 88, Case No. 76 reports: "[The decision] seems to have been based upon the established principle of law that any member of the public is entitled to litigate as Pursuer or Defender in a Court Action regarding public rights of way, and a limited company is accordingly in a like position."

164 *Armstrong v. Langley (City)* (1992), 69 B.C.L.R. (2d) 191 (C.A.), per Southin J.A.; *Anderson*, *supra* note 127; *Green*, *supra* note 112. Note, however, that in the case of a charitable trust, the settlor/donor who created the trust has standing different from the rest of the public, and may bring an action to enforce the trust: *Armstrong*. This being the case, it seems likely that a person who played a direct role in the dedication of a public space (for example, past owners of the property who made the dedication) would have standing to bring an action.

165 As early as 1884 Matthew Begbie, Chief Justice of the B.C. Supreme Court, suggested that if an Attorney General were to "so far forget his duty" as to refuse permission to bring an action to a member of the public seeking to enforce a charitable trust, the court could step in and grant standing: *Anderson*, *supra* note 127.

166 Smallwood, *supra* note 92 at 130. More recently, the Supreme Court of Canada, in *Canfor*, *supra* note 3, para. 81, raised the possibility that the Crown might incur liability for a failure to protect a public trust, which seems to suggest that standing should be available to bring such a claim.

167 Another reason that a broad approach may be more attractive in cases involving highways and public markets than in cases involving pollution is that in the former cases it is comparatively simple to determine that the nuisance has resulted in harm and determine who has been actually excluded from the public use, while in pollution and similar cases causation and the amount of harm caused by the nuisance is often in dispute.

168 *Mytton*, *supra* note 20; *Brocklebank v. Thompson*, [1903] 2 Ch. 344.

169 *Harvey*, *supra* note 11; *Race v. Ward* (1857), 7 EL. & BL. 384. See also *Esson v. Wood* (1884), (sub nom. *Wood v. Esson*) 9 S.C.R. 239, cited with approval in *Friends of the Oldman River v. Canada*, *supra* note 139 at 35; and *Colchester (Borough) v. Brooke* (1845),

  

7 Q.B. 339 (Eng. Q.B.); *Dimes v. Petley* (1850), 15 U.C.Q.B. 276 (Q.B.), which affirm this concept of "self-help" in relation to public nuisances but which seem to suggest that the individual exercising the self-help must be specially affected by the nuisance. From a legal perspective, however, the property owner never had a right to interfere with the public right, and so it is unclear how he or she could claim any damages arising from the defendant's "self-help", unless the actions of the defendant went beyond what was necessary to restore the public's right. Moreover, since the public right is used as a shield (defence), and not a sword (claim), it is the plaintiff, and not the defendant, who has put the public right into issue, thereby affecting the defendant in a special manner, differently from the members of the public who have not been sued. Given the broad interpretation of "specially affected" taken by the courts in relation to cases involving public spaces, these views may be reconciled by holding that any defendant who is genuinely seeking to exercise the public right should be able to invoke the defence of self-help.

170 Bonyhady, *supra* note 6 at 67-68.

171 For example, in *Save Our Waterfront Parks*, *supra* note 151, the existence of a charitable trust in respect of a park was raised in the context of the judicial review of the issuance of a permit under the *Local Government Act*, R.S.B.C. 1996, c. 323, thereby bypassing any issue of standing.

172 **Gage**, *supra* note 4.

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