Public Environmental Rights

Last article introduced us to the doctrine of the public trust and its applicability to wildlife conservation. In my legal research, there are a number of articles on point. Articles such as Rescuing Wolves from Politics: Wildlife as a Public Trust Resource by Jeremy T. Bruskotter, Sherry A. Enzler and Adrian Treves (2011), The Public Trust in Wildlife Conservation by Paul Wilson (2005) and Variations on a Theme: Expanding the Public Trust Doctrine to include Protection of Wildlife by Gary Meyers (2003).

While these three articles explore wildlife conservation in the US, the concepts are universal and applicable to the Canadian legal system with small modifications. Horner (2001) stated that from ancient and feudal laws and American case law, the Public Trust Doctrine rests on these three principles:

- Wildlife can be owned by no individual but is held by the state in trust for all the people (Geer v. Connecticut)
- As trustee, the state has no power to delegate its trust duties and no freedom to transfer trust ownership or management of assets to private concerns (this principle stems from trust law that forbids a trustee to delegate the trustee’s responsibilities where it has to be performed personally. Delegatus non potest delegare.)
- The state has the affirmative duty to fulfill trust responsibilities – i.e. – it cannot sit by idly while trust resources are depleted or wasted. (see J. Binnie’s comments in Canfor v. BC)

All these three principles are valid in the Canadian legal context.

How do we as wildlife conservationists transition this academic doctrine (PTD) to win cases in court to protect wildlife? Currently, the legal system approaches wildlife conservation from a homocentric perspective. Wildlife has no standing in court because it does not possess intrinsic rights but is managed by wildlife agencies of the state.

This homocentric philosophy is a major hurdle because it denies legal rights to an object (animal). We need a new ethical framework that Professor Chris Stone suggests, “that natural objects would be recognized at law, could institute – through a legal guardian – legal action to prevent or redress harm to the natural objects, and receive direct injunctive or monetary relief.”

This new ethical framework is slowly finding acceptance in courts as Argentina’s appeal court in 2014, granted a writ of habeas corpus releasing an orangutan from an Argentine zoo to a sanctuary. This court recognized the ape as a “non-human person”. Recently a US court in NY State rejected this same argument in an attempt to release two chimpanzees. As with pioneering legal arguments, it takes some time to achieve success.
In the famous US Supreme Court case, *Sierra Club v. Morton* (1972), Justice William O. Douglas in his dissenting opinion tackled the issue of inanimate objects having legal rights. Justice Douglas stated, “the critical question of ‘standing’ would be simplified and also put neatly in focus if we fashioned a legal rule that allowed environmental issues to be litigated before federal agencies or federal courts in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage. Contemporary public concern for protecting nature’s ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation.”

Courts will not quickly grant non-humans legal rights but as the public articulates this desire to see legal rights be granted to wildlife, the jurisprudence will start to reflect that wish.

Other legal avenues that need to be developed are legislative initiatives such as an environmental bill of rights that is either enshrined in the constitution or as stand-alone legislation. Risk with stand-alone legislation is that these environmental rights can be emasculated by political interference or be relegated to secondary importance to economic policy.

The environmental bill of rights must include the precautionary principle as a guiding principle and the public trust doctrine to ensure that public resources stay in public hands.

As mentioned in my previous article, the *Yukon Environmental Act, R.S.Y. 2002*, in sections 6-8 enshrines the public trust doctrine into this legislation. A leading Canadian legal scholar stated this Act guarantees the right to a healthful natural environment to Yukoners, in addition the statute provides that every adult or corporate person resident in the Yukon can sue the government for failing to fulfill its trust obligations to protect the environment.

Most importantly, the plaintiff does not have to show personal injury. In all tort law cases, the plaintiff has the burden to show that they have been harmed or injured by the defendant. In wildlife conservation cases, a plaintiff suing the provincial or state government would find it impossible to show personal harm or injury because no individual owns wildlife and the government would easily argue that they are responsible for wildlife not the individual.

Even with the relaxed requirements of the Yukon legislation, the plaintiff would be well advised to select a compelling case to argue these advanced legal strategies. An example would be a species that is facing significant threats to its existence through habitat destruction or fragmentation.
The plaintiff would have to present cogent scientific evidence demonstrating this threat to the species and that the government as the public trustee is not fulfilling its trust duties under the public trust doctrine by allowing this species to be harmed. Andrew Gage, staff lawyer at West Coast Environmental Law Association, wrote an article, Public Environmental Rights: A New Paradigm for Environmental Law? (2007), where he states “there has been a long line of authority recognizing the existence of public rights in respect of the natural environment. These rights form the basis for a new way of looking at environmental laws.”

“Adopting such an approach to environmental law puts both environmental legislation and the public’s rights on a stronger legal footing, and could form the basis for a major shift in how environmental law is understood in Canada.”

I submit these public environmental rights must include the public trust doctrine be enshrined in all environmental legislation and an environmental bill of rights that guarantees a healthful natural environment to humans and non-humans alike.

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