The Concept of Parkland as a Public Trust.

By John Swaigen.

To understand the meaning of "owning" land, it is helpful to think of ownership as a bundle of rights. In the same piece of property, one person may own the right to live on it (a tenant), another may own the right to collect the rent (the landlord), a third may own the right to farm it, a fourth, to cut timber, and a fifth, the right to mine the minerals under it.

Although we usually think of the legal owner as having the right to do whatever he wants with his property, in fact, a legal owner's rights are often restricted by many different kinds of laws and by his obligations to his tenants, his neighbours, his co-owners, the agencies that supply utilities, his mortgagee and many others.

A trust is really a special way of holding property which grew up in feudal times in which the ownership is split into two different kinds of ownership. The legal owner - the man who has the deed to the land - is not the "real" owner as we usually think of an owner. The legal owner of trust property is merely the trustee for the beneficial owner. This trustee has a legal duty to use this property only for the benefit of the beneficial owner, although there may be an agreement giving him the right to a reasonable fee for his work in holding and managing the property.

This way of holding land has many advantages. It can enable someone to hold land who would be unable to manage the land himself, for instance a child, a person living far away from the land, or a spendthrift who might lose it to his many creditors. It can also relieve the beneficial owner of the burden of managing the land if this would be unduly time-consuming or require expert knowledge which the beneficiary does not possess. An example of the use of a trust to serve all these purposes would be a dying father, leaving his manufacturing company to his teen-age son in his will. The company would be more likely to prosper if left in trust for the son with an experienced manager as the trustee.

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If we understand these things about a trust, it becomes apparent why parkland should be considered a public trust. It would be impractical to give the legal ownership of all our parkland to "the public" at large, even though we want all the public to benefit from its preservation.

But it would also be wrong to give both the legal and the beneficial ownership to the government, so that the government becomes the sole owner and can do whatever it pleases with the parkland without consulting all segments of the public.

CELA believes that the best arrangement is to state in our legislation that the government is the trustee of our parkland and the citizens are the beneficiaries. Our present laws are in a state of confusion. As is explained on page 197 of Environment on Trial, the Provincial Parks Act states that the parks are to be used " for the benefit of future generations". This is the kind of language which usually creates a trust in law; but the judge in the Sandbanks case looked at the wide powers which the legal owner, the government, has and the cavalier way in which the government can use these powers to let certain interests exploit our parks to the detriment of the general public. After looking at this, he said, "This is no trust", and decided the government did not have to account to the public the way a trustee accounts to a beneficiary.

Now, I mentioned earlier the advantages of a trust, but I didn't mention the disadvantages. The trustee, holding the legal title, and doing all the work, sometimes begins to believe that he is the sole owner, and unless the beneficiary has good evidence that he also is an owner, he may find it difficult to prove this in court if the trustee tries to "squeeze him out" as sometimes has happened in the past. Also, if the property the trustee is holding, whether it be land or a company, produces profits, the temptation is always there for a trustee to funnel the use of the property and the profits to himself or to some third party.

The law has strict rules to prevent and punish this kind of behavior by a trustee, and if our parklands were recognized to be a public trust, the public could apply these rules to prevent our parklands from being used inappropriately.

Thus, in Ontario today, we are faced with a situation where our parks either are not trust lands, as the judge in Sandbanks declared, or they are trust lands but the trustee is getting away with so much and the public has so little evidence, that the Sandbanks judge was unable to recognize the public's share in the ownership.

Whichever is the case, it is clearly necessary to establish in law that the public has a right to untrammelled parkland, and the ability to enforce this right in court against the government and against private enterprise. One of the best tools for doing this is to declare all parkland a public trust. Other tools for park protection are also dealt with in the brief "Current Ontario Legislation and Trees", and Environment on Trial, available from the Canadian Environmental Law Association.

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