NOVA SCOTIA COURT OF APPEAL

Citation: *Bancroft v. Nova Scotia (Lands and Forestry)*, 2022 NSCA 78

Date: 20221213
Docket: CA 509589
Registry: Halifax

Between:

Robert Bancroft and Eastern Shore Forest Watch Association

Appellants

and

Nova Scotia Minister of Lands and Forestry, and the Attorney General of Nova Scotia representing His Majesty the King in right of the Province of Nova Scotia, and Lighthouse Links Development Company

Respondents

and

Ecojustice Canada Society

Intervenor

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	October 19, 2022, in Halifax, Nova Scotia
Cases Cited:	*Daigle v. Mark's Work Wearhouse Ltd.*, 2022 NSCA 5; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62; *The Canadian Civil Liberties Association v. Nova Scotia (Attorney General)*, 2022 NSCA 64; *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Canada (Attorney General) v. Bedford*, 2013 SCC 72; *Carter v. Canada (Attorney General)*, 2015 SCC; *Canada (Attorney General) v. Mavi*, 2011 SCC 30; *Sarnia (Township) v. Great Western Railway Co.* (1859), 21 UCQB 59 (QB); *Octave*

Chavigny de la Chevrotière v. Montréal (Ville) (1886), (1887) L.R. 12 App. Cas. 149 (Quebec P.C.); *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38;

Legislation Cited: *Provincial Parks Act*, R.S.N.S. 1989, c. 367; *Environmental Goals and Sustainable Prosperity Act*, S.N.S. 2007, c. 7; *Crown Lands Act*, R.S.N.S. 1989, c. 114;

Subject: Judicial Review – Procedural Fairness – "Public Trust" Doctrine – Moot Appeal – Fresh Evidence

Summary: Crown lands were described on a ministerial policy document as a public park. In fact, they had never been so designated. The lands were later removed from the policy document and the Province entered into a conditional agreement to sell the lands to a developer. The appellants applied to the Supreme Court of Nova Scotia for judicial review arguing, among other things, that the public was owed procedural fairness regarding removal of the park from the policy document and the decision to sell to a developer. Supported by the Intervenor, they argued the Court should adopt the American 'public trust" doctrine to augment their procedural fairness submission. The application was dismissed in part because no duty of fairness was owed in the circumstances. That decision was appealed.

Following the Supreme Court's decision, the lands were designated as a public park and the developer withdrew from the agreement. The Province sought to adduce this as fresh evidence on appeal and argued the appeal was moot.

Issues:

(1) Should the fresh evidence be accepted?
(2) Was the appeal moot?
(3) Were appellants owed a duty of procedural fairness?
(4) Should the Court adopt the public trust doctrine in this case?

Result: Appeal dismissed. The fresh evidence should be admitted. The appeal was moot because there were no live issues. Accordingly, issues 3 and 4 need not be fully addressed. The

Borowski exceptions allowing entertainment of a moot appeal were not present because there was no basis on the facts to extend procedural fairness to the public at large or to recognize the novel and uncertain doctrine of a public trust in a factual vacuum, lacking a live issue.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 37 parargraphs.

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Intervenor

Judges:	Beveridge, Bryson and Van den Eynden JJ.A.
Appeal Heard:	October 19, 2022, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bryson J.A.; Beveridge and Van den Eynden JJ.A. concurring
Counsel:	Jamie Simpson, for the appellant Jack Townsend, for the respondent James Gunvaldsen-Klaassen and Sarah McDonald, for the intervenor Richard Norman, for the respondent Lighthouse Links, not participating

Reasons for judgment:

Overview

[1] Robert Bancroft and the Eastern Shore Forest Watch Association appeal the decision of the Honourable Justice Christa M. Brothers who dismissed their application for judicial review of government decisions affecting Crown lands known as Owls Head on the Eastern Shore (2021 NSSC 234). The appellants are supported by the Intervenor, Ecojustice Canada Society. Unless otherwise indicated, the respondents will be referred to as the Province.

[2] Those familiar with Owls Head always assumed it was a Provincial Park because the Province said so. They were mistaken. Owls Head had never been formally designated as a park under the *Provincial Parks Act*, R.S.N.S. 1989, c. 367. However, Owls Head was listed as a Provincial Park in an appendix to a "Parks and Protected Areas" policy document issued in 2013 by the Ministers of Environment and Natural Resources. The purpose of the policy was to assist the Province in achieving a land mass protection goal of 12% of the total land mass of the Province in accordance with objectives set out in the 2007 *Environmental Goals and Sustainable Prosperity Act*, S.N.S. 2007, c. 7. That *Act* did not specify specific lands that would be protected nor did it discuss the process for doing so. That was left up to the Province.

[3] Notwithstanding Owls Head's inclusion in the policy document as a Provincial Park, it remained subject to the *Crown Lands Act*, R.S.N.S. 1989, c. 114, and the Province was free to dispose of the property in accordance with that *Act*.

[4] In March 2019, the Executive Council's Policy Committee, the Treasury and Policy Board, removed Owls Head from the Parks and Protected Areas policy document. In December 2019, the Minister of Lands and Forestry entered into a Letter of Offer agreement with Lighthouse Links which proposed to develop Owls Head as a residential and recreational area which would include at least one golf course. The agreement with Lighthouse Links was subject to Executive Council approval and public consultation.

[5] When a media report disclosed the agreement with Lighthouse Links and the removal of Owls Head from the Parks and Protected Areas policy document, public opposition quickly arose to the proposed development.

[6] The appellants' application for judicial review claimed they were denied procedural fairness because the public was not consulted about the removal of Owls Head from the Parks and Protected Areas plan. They argued that the "public trust doctrine" as understood in United States law should be incorporated into Nova Scotia law and would create a duty of procedural fairness that would allow them to attack the decisions of which they complained in this case. They wanted the Treasury and Policy Board's decision quashed and the agreement with Lighthouse Links "set aside".

[7] In dismissing the respondents' application, Justice Brothers found:

(a) The signing of the Letter of Offer was not justiciable (reviewable by the court) because it was not a final decision to sell Owls Head;

(b) The appellants were not owed a duty of procedural fairness regarding the Treasury and Policy Board's decision to remove Owls Head from the Parks and Protected Areas policy document;

(c) Importing the public trust doctrine would constitute a substantial and significant change to Nova Scotia law with complex and unknown ramifications. Such a change would more appropriately be achieved through legislation and not the common law;

(d) The Treasury and Policy Board's decision was substantively reasonable.

[8] The appellants no longer challenge the justiciability of the Letter of Offer, nor the reasonableness of the Treasury and Policy Board's decision to remove Owls Head from the Parks and Protected Areas policy document. Nevertheless, they insist that the Board's decision was procedurally unfair, and they encourage the Court to rely on the public trust doctrine to support their case.

[9] Since the appeal started, Lighthouse Links has withdrawn from the Letter of Offer and in June of 2022 the Governor in Council issued an Order in Council to designate Owls Head as a Provincial Park authorizing the Minister to execute documents required to implement the Order in Council. The Province seeks to admit fresh evidence to establish the foregoing developments and asks the appeal be dismissed because it is now moot.

[10] The appellants concede the fresh evidence should be admitted. Even if the appeal is moot, they request the Court exercise its discretion to consider the appeal in view of the important public issues involved. Accordingly, the issues are:

1. Should the fresh evidence be admitted?
2. Is the appeal moot and, if so, should the Court exercise its discretion to entertain the appeal?
3. Did the Treasury and Policy Board decision attract a duty of procedural fairness?
4. Should the Court import the public trust doctrine into Nova Scotia law in the context of procedural fairness?

[11] For reasons that follow, the fresh evidence should be admitted and the appeal should be dismissed because it is moot and does not meet the criteria for entertaining a moot appeal. Issues 3 and 4 are fully considered in Justice Brother's decision. Because the appeal is moot, they need not be fully considered by this Court, but they will be referred to under the second issue.

Admissibility of the Fresh Evidence

[12] The Province tenders as fresh evidence the affidavit of Leslie Hickman, Executive Director of Land Services, Department of Natural Resources and Renewables for the Province. The affidavit exhibits correspondence of November 23, 2021 from counsel for Lighthouse Links advising that his client gives notice to withdraw from the Letter of Offer. The affidavit also exhibits a June 14, 2022 Order in Council designating Owls Head as a Provincial Park and authorizing the Minister of Natural Resources and Renewables to execute such documents as will be necessary to achieve the purposes of the Order.

[13] The fresh evidence should be admitted because it meets the criteria described in *Daigle v. Mark's Work Wearhouse Ltd.*, 2022 NSCA 5:

> [27] *Civil Procedure Rule* 90.47(1) permits this Court to admit fresh evidence where there are "special grounds". As explained by Fichaud, J.A. in *Armoyan v. Armoyan*, 2013 NSCA 99:
>
> > [131] Rule 90.47(1) permits the Court of Appeal to admit fresh evidence on "special grounds". The test for "special grounds" stems from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Under *Palmer*, the admission is governed by: (1) whether there was due diligence in the effort to adduce the evidence at trial, (2) relevance of the fresh evidence, (3) credibility of

> the fresh evidence, and (4) whether the fresh evidence could reasonably have affected the result. Further, the fresh evidence must be in admissible form. *Nova Scotia (Community Services) v. T.G.* 2012 NSCA 43, paras 77-79, leave to appeal denied [2012] S.C.C.A. 237, and authorities there cited. *McIntyre v. Nova Scotia (Community Services)*, 2012 NSCA 106, para 30.

[14] The fresh evidence:

(a) postdates the decision of Justice Brothers and could not have been available for her consideration by exercising due diligence;

(b) is relevant to the issue of mootness;

(c) is credible, consisting of correspondence from legal counsel from Lighthouse Links to the Minister and an Order in Council;

(d) could reasonably affect the result of the appeal as it addresses whether this proceeding is moot, suggesting the appeal should be dismissed;

(e) is in admissible form, attached to a sworn affidavit that authenticates the documents in question.

Is the appeal moot and, if so, should the Court exercise its discretion to entertain the appeal?

[15] Both parties rely on the leading Supreme Court of Canada decision *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, where Justice Sopinka, speaking for the Court, described the doctrine of mootness:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. ***The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case.*** This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> [Emphasis added; p. 353]

The Appeal is Moot

[16] This case is moot because the controversy prompting the judicial review no longer exists. The appellants asked the Supreme Court to "set aside" the Letter of Offer with Lighthouse Links and the Treasury and Policy Board's decision to remove Owls Head from the Parks and Protected Areas policy. The appellants initially abandoned the first but sought the second. As the fresh evidence discloses, reinstatement of Owls Head under the policy is not necessary owing to its designation as a public park. What brought the appellants to court in the first place are no longer issues.

[17] The appellants concede the foregoing but say that they were really seeking "… a fair decision making process for decisions about the fate of Owls Head ***and other Crown lands with identified public values***" [emphasis added]. The emphasized language may represent the jurisprudential outcome for which the appellants hoped, but they sought no such declaration as a requested remedy before the Supreme Court. Since procedural fairness is contextual, it is difficult to see how the Court could make any such general declaration. In effect, the relief now sought concedes the mootness now argued by the respondents.

[18] But the appellants persist. They urge the Court to exercise its discretion as recognized in *Borowski* and later cases. They want the appeal heard.

Even though moot, should the Court consider the appeal?

[19] Assuming that a decision is moot as between the parties—that is to say there is no live issue between them—the Court may still entertain the appeal after considering three factors which guide the exercise of its discretion where no live issue endures:

(a) Whether there are collateral consequences of the outcome that may provide a necessary adversarial context;

(b) Whether entertaining the moot issues respects the need for judicial economy;

(c) Whether entertaining the moot issues respects and is sensitive to the Court's role as adjudicative, not legislative.

[20] Regarding the first criterion—adversarial context—*Borowski* recognized that an adversarial relationship may survive cessation of a live controversy. There may be collateral consequences of the outcome such as having an impact on other litigation or the potential liabilities of a party or parties. But the examples given for the latter point involved existing or foreseeable legal disputes (¶32-33). They did not extend to hypothetical cases like those raised here, which may never occur.

[21] Regarding the second criterion, judicial economy, *Borowski* noted that the reluctance to expend scarce judicial resources may be overcome if a decision would have some practical effect on the rights of the parties, although no longer determinative of the controversy that brought them to court. Sometimes the live issue has resolved by the time it gets to court, and so becomes moot. But if the issue is likely to recur, the court can exercise its jurisdiction and make a ruling (*Borowski*, at ¶34-36).

[22] A case may also be of such public importance that expenditure of judicial resources is justified in the public interest. The Court may consider the "social cost" of leaving something undecided. In *Borowski*, the Supreme Court gave as an example the constitutionality of patriation of the Constitution, notwithstanding occurrence of that event (*Borowski*, at ¶38, citing *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 S.C.R. 793).

[23] Finally, the third criterion is the constitutional need for judicial restraint in the absence of an existing controversy. Courts do not legislate. They adjudicate. A decision in the absence of a present dispute more resembles the former than the latter. But some flexibility is required. In *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, the Court had to consider the constitutional rights of Francophone parents' access to French language schools. Although the immediate issue was resolved between the parties, the Supreme Court nevertheless considered the appeal observing:

> [17] The doctrine of mootness reflects the principle that courts will only hear cases that will have the effect of resolving a live controversy which will or may actually affect the rights of the parties to the litigation except when the courts decide, in the exercise of their discretion, that it is nevertheless in the interest of justice that the appeal be heard (see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342, at p. 353). In our view, the instant appeal is moot. The parties attended several reporting hearings, presented evidence and allowed the deponents of affidavits to be cross-examined. The desired effect has been achieved: the schools at issue have been built. Restoring the validity of the trial

judge's order would have no practical effect for the litigants in this case and no further reporting sessions are necessary.

[18] Although this appeal is moot, the considerations in *Borowski*, *supra*, suggest that it should be heard. Writing for the Court, Sopinka J. outlined the following criteria for courts to consider in exercising discretion to hear a moot case (at pp. 358-63):

> (1) the presence of an adversarial context;
>
> (2) the concern for judicial economy; and
>
> (3) the need for the Court to be sensitive to its role as the adjudicative branch in our political framework.

[19] ***In this case, the appropriate adversarial context persists.*** The litigants have continued to argue their respective sides vigorously.

[20] ***As to the concern for conserving scarce judicial resources***, this Court has many times noted that ***such an expenditure is warranted in cases that raise important issues but are evasive of review*** (*Borowski*, *supra*, at p. 360; *International Brotherhood of Electrical Workers, Local Union 2085 v. Winnipeg Builders' Exchange*, [1967] S.C.R. 628; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46). The present appeal raises an important question about the jurisdiction of superior courts to order what may be an effective remedy in some classes of cases. To the extent that the reporting order is effective, it will tend to evade review since parties may rapidly comply with orders before an appeal is heard.

[…]

[22] Finally, the Court is neither departing from its traditional role as an adjudicator nor intruding upon the legislative or executive sphere by deciding to hear this case (*Borowski*, *supra*, at p. 362). ***The question of what remedies are available under the Charter falls squarely within the expertise of the Court and is not susceptible to legislative or executive pronouncement***. Furthermore, unlike in *Borowski*, *supra*, at p. 365, the appellants are not seeking an answer to an abstract question on the interpretation of the *Charter*; they are not "turn[ing] this appeal into a private reference". The Attorney General of Nova Scotia appealed successfully against an order made against it by a superior court. Although the immediate grievances of the appellants have now been addressed, deciding in this case will assist the parties to this action, and others in similar circumstances, in their ongoing relationships.

[Emphasis added.]

[24] *Doucet-Boudreau* was most recently applied by this Court in *The Canadian Civil Liberties Association v. Nova Scotia (Attorney General)*, 2022 NSCA 64, at ¶206-218.

[25] To persuade us we should hear the appeal, the appellants, supported by the intervenor, make two related arguments. First, they say the judge erred in finding no duty of procedural fairness arose in this case respecting the Treasury and Policy Board decision to remove Owls Head from the Parks and Protected Areas policy. Second, they say we should embrace the public trust doctrine to augment their procedural fairness argument. The appellants put it this way:

> 109. *Borowski, supra,* established several factors that may permit this Court to adjudicate moot issues. Applying these factors to the present case:
>
> a. The Court's decision will have a practical effect on the rights of the Parties. Owls Head Provincial Park was one of many Provincial Parks that are a park in name only and do not have legal status as parks. Some one-hundred named Provincial Parks (approximately half of Nova Scotia's parks) are in the same non-protected state as Owls Head Provincial Park was and thus are similarly vulnerable. Risks to these "parks" and to other public resources are the "collateral consequences" (*Borowski*, p. 359) that can be addressed by finding in favour of the Appellants. Clarifying that these "parks" cannot be delisted without first providing basic procedural fairness will help avoid controversies such as those which erupted over the secret delisting of Owls Head. The issues at the heart of this matter are not academic.
>
> b. Furthermore, requiring basic procedural fairness whenever the Province makes significant decisions concerning public resources is fundamentally in the public interest. Such an expectation would further democratic accountability by enabling those members of the public with an interest in public resources to participate in the decision-making process. The public benefit of furthering democratic accountability justifies the use of judicial resources in this case.

Procedural Fairness

[26] Taking into account the fresh evidence, the appellants acknowledge that Owls Head has now been designated as a Provincial Park, but they maintain many other "Provincial Parks" have the same status as Owls Head. They reason the "same issues" "could arise" for any of these other "parks" in the future. They elaborate that by "creating a common law expectation on government to provide notice and an opportunity to comment before making significant changes to the conservation status of such Crown lands" would defuse conflicts over Crown lands with "identified public values".

[27] The respondents reply that these are hypothetical responses to hypothetical questions, referring to the three *Borowski* criteria:

> 69. The Respondents submit that all three factors weigh against the Appellants' request that this Court hear their appeal. There is no adversarial context left between the Appellants and the Respondents. The issues that created that context – the [Treasury and Policy Board's] decision and the [Letter of Offer] – are now academic. A decision by this Court will have no collateral consequences to recreate that context. There is no related litigation, and there is no evidence of any potential liabilities which might be affected by such a decision.

[28] The respondents add that the absence of any practical effect on the rights of the parties raises concerns regarding scarce judicial resources. There is no evidence that what the appellants complain of here is of a "recurring nature but brief duration which will therefore evade curial review". There are no other disputes or litigation involving the Parks and Protected Areas policy.

[29] The appellants acknowledge there is no longer a specific dispute between the parties, but insist the larger issue is "… a recognition of a procedural fairness expectation on government in such circumstances". They concede the present state of the law does not accord them a right to procedural fairness because their individual rights, privileges or interests are not affected (*Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643, at p. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at ¶20).

[30] The appellants' proper concession that a duty of procedural fairness does not arise under the current state of the law compromises their argument that the Court should exercise its discretion to hear the case. There have been no significant developments of the legal framework of fair procedure or a fundamental change of circumstances which would justify reconsidering settled law (*Canada (Attorney General) v. Bedford*, 2013 SCC 72; *Carter v. Canada (Attorney General)*, 2015 SCC 5). The Court may entertain an otherwise moot appeal if the law is uncertain. But here, the appellants cannot argue the uncertain state of the law; rather, they ask for an extension or expansion of the law as it currently exists. Moreover, they do so in the absence of a live controversy. Respectfully, in a moot case the absence of legal uncertainty and a live issue do not support an exercise of discretion to consider the appeal.

[31] The appellants also argue there was a legitimate expectation of consultation in this case. But no legitimate expectation can arise if one's individual rights,

privileges or interests are not affected. Even then, there must be a clear representation supporting those expectations. In *Canada (Attorney General) v. Mavi*, 2011 SCC 30, at ¶68, the Supreme Court held that a legitimate expectation to be heard can only arise from "clear, unambiguous and unqualified" government representations. In this case, all the appellants can rely upon is the listing of Owls Head in an appendix to the Parks and Protected Areas policy document and some attendant publication of park status. That listing and publicity hardly constitutes a "clear, unambiguous and unqualified" representation that the public can be heard on any changes of status respecting properties so listed.

Public Trust Doctrine

[32] The appellants and intervenor argue there is a nascent "public trust" doctrine in Canada already. They cite historical cases where the public—or sections of it—have been granted specific access to, or consultation about, natural or built resources. They instance examples such as municipal holding of roads as constituting a "trust for the public", later extended to "a public marketplace" (*Sarnia (Township) v. Great Western Railway Co.* (1859), 21 UCQB 59 (QB); *Octave Chavigny de la Chevrotière v. Montréal (Ville)* (1886), (1887) L.R. 12 App. Cas. 149 (Quebec P.C.)). They refer to Justice Lamer's comments in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at pp. 33-34, where he describes the "special nature of government property". More recently in *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, Justice Binnie, in *obiter* comments, referred to the American public trust doctrine, but declined to apply it to support British Columbia's claim for environmental damage because the doctrine had not been fully argued in the courts below.

[33] The Province replies, quoting academic argument, that invoking the public trust doctrine to buttress a procedural fairness argument would result in significant change in Canadian administrative, trust and fiduciary law:

> When invited to adopt the American doctrine, Canadian courts and tribunals likely understand its limited utility and incredibly convoluted nature. A Canadian jurist might just decide to reject an environmental claim based in the doctrine outright, for the sake of clarity in the law. The public trust doctrine invites a veritable mishmash of private and public law… From the Canadian perspective, the doctrine is somewhat of a Frankenstein that should only be put together by statute so that its effect is limited to the review of governmental action in the environmental realm. This limitation would be necessary to maintain clarity in the law of trusts […]

> Arguably, whether procedural or substantive, a claim based on the public trust doctrine is, essentially, an invitation to legislate. This is because legislatures have already established functioning statutory regimes which, at least theoretically, take care of the environment… In each case where the public trust argument was brought to court, legislatures had their say. Invariably, the public trust doctrine would create a parallel system of environmental laws […] It seems judges are reticent to accept the common law doctrine because it would amount to an usurpation from the legislative branch of its policy making authority.[1]

[34] Respectfully, it is commonplace that public property is held for public benefit. In general, the benefits and obligations attending public ownership have their basis in legislation or property law. Private trust law with its attendant duties and rights of trustees and beneficiaries is an unsound basis for a *sui generis* public trust doctrine, illustrative of the uncertainty of which the Province complains.

[35] That uncertainty motivated Justice Binnie's recognition that "the existence or non-existence of enforceable fiduciary duties owed to the public by the Crown" would raise "important and novel policy questions" (¶81). Indeed so. For example, would a recognized public obligation to hold Crown lands for the benefit of the public in general give rise to a cause of action if the public disagreed with the action—or inaction—of the Crown with respect to any particular public property? Justice Binnie did not elaborate and neither should we. In the absence of a live controversy, this is not an appropriate case in which to speculate on such a novel and uncertain doctrine.

Conclusion

[36] This case is moot and discretion to consider the appeal should not be exercised because:

(a) No adversarial context persists between the parties. There is no longer any agreement between the Province and Lighthouse Links. The Province has designated Owls Head as a public park.

(b) The law with respect to procedural fairness is well-settled and the issue arising in this case has not recurred and may never recur.

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[1] Vladislav Lynsaght, "Canadian Public Trust Doctrine at Common Law: Requirements and Effectiveness", (2019) 32 J. Env. L. & Prac. 317, pp. 335, 345-346.

Accordingly, there is no animating reason to expend scarce judicial resources to opine in a factual vacuum.

(c) By acceding to the appellants' request to extend procedural fairness to include a "public interest" doctrine, the Court would be importing an ill-defined concept largely unknown to our law, of uncertain ambit and application, in a factual vacuum owing to the absence of an existing controversy.

[37] I would dismiss the appeal, without costs.

Bryson J.A.

Concurred in:

Beveridge J.A.

Van den Eynden J.A.