What the New Liberal Government Should Know About "Public Property and the Public Trust in New Brunswick"

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In his rightly famous 1968 article "The Tragedy of the Commons," human ecologist Garrett Hardin provides an important examination of the fate of common property resources. He asks the reader to imagine "a pasture open to all," with individuals trying to graze as many of their cattle there as possible—in such a situation, Hardin states, a rational individual will continue to graze as many additional animals as possible because the positive utility of such decisions (the benefits to each individual alone) outweighs the negative utility (the damage of overgrazing, which is shared by all individuals using the commons). Therein lies the tragedy, as the depletion of common property resources leads to ruin for all (Hardin 1244). Two primary solutions to the tragedy of the commons emerged in response to Hardin's influential ideas: common property resources could be managed through the top-down avenue of government intervention, including taxes and subsidies, to ensure a balance of costs and benefits; or else through the privatization of the commons and its consequent internalization of both benefits and costs, the "invisible hand" of the market could act to ensure sustainable management (McCay and Acheson 5; Ciriacy-Wantrup and Bishop 714). Either course, it is thought, will allow society to avoid the tragedy of the commons.

The government of New Brunswick's management of Crown lands (understood broadly to include forests and waters) reveals the potential for a tragic outcome for our commons, but not exactly as Hardin envisioned it. In our case, the commons of the citizens of New Brunswick—our Crown lands—are subject to a combination of government management and de facto private property rights in the form of long-term contracts awarded to large corporations. Based on the conventional reading of Hardin, one might surmise that this combination would result in the least tragic management of the commons, as the natural resources of the commons are kept away from the mass of users who thoughtlessly exploit common property through their own individual self-interest, and are instead protected by government intervention and the inherently conservative forces of market capital. This reading, however, relies on the assumption that both government and private industry will act sustainably in their management of our Crown lands. If not, we are faced with another kind of tragedy—but one no less tragic.

Are Crown lands "common property?" According to Ciriacy-Wantrup and Bishop, the term "common property"

> refers to a distribution of property rights in resources in which a number of owners are co-equal in their rights *to use* the resource. This means that their rights are not lost through non-use. It does *not* mean that the co-equal owners are necessarily equal with respect to the quantities (or other specification) of the resource each uses over a period of time. In other words, the concept as employed here refers to resources subject to the rights of common use and not to a specified use right held by several owners. (714–15)

In the sense that all New Brunswickers are equal in their rights to use Crown lands, those lands seem clearly to be examples of common property. This sense of co-ownership of Crown lands is underscored by the idea that the government is a trustee over these lands rather than an owner. Writing in 1882 about a case involving the beds of inland waterways, the Supreme Court of Canada in *R.* v. *Robertson*

determined that these "are, by common law, vested in the State as a trustee for the public, and are inalienable without legislative authority" (*R.* v. *Robertson* [1882] 6 S.C.R. 52, cited in Glenn 503). Crown lands, then, are common property resources held in trust for the people of New Brunswick by their elected government, and that government has a responsibility to manage those lands and waters responsibly for the benefit of all New Brunswickers.

When common property resources are given over to private ownership, we speak of a process of "enclosure." Enclosure originated to describe the process whereby the open field system of common agricultural land was increasingly encroached upon by private property interests in Britain (Fairlie). This transformation of the peasantry from co-owners of the commons to landless workers on feudal estates has been described as the true tragedy of the commons (Ciriacy-Wantrup and Bishop 720). In its original sense, "enclosure" meant the actual building of fences and planting of hedgerows to physically enclose what had previously been jointly managed open fields (Fairlie). However, ideas concerning the enclosure of the commons have been extended to many areas of concern beyond natural resources, including intellectual property and even traditional music (McCann).

These questions of common property resources and enclosure are integrally connected to the emergence of land as a commodity over the past several hundred years. Although commonly accepted today, the idea of land as property that can be privately owned is a relatively recent phenomenon, and one not shared in every society (Large 1041; Krueckeberg 302). Indeed, in many societies a wide variety of things, especially land, are considered to be inalienable property and are inherently connected with their owners (Weiner)—land, in fact, is considered the "ultimate" form of inalienable wealth (Gregory 163). This raises an important issue in the debate over the use of Crown lands in New Brunswick, namely the government's duty to negotiate with New Brunswick's First Nations, who never ceded their land rights to the British Crown. The Assembly of First Nations Chiefs in New Brunswick have strongly stated their opinion that the Alward government's decisions concerning the use of Crown lands for resource development are not lawful due to lack of informed consultation (Ginnish and Perley). It is not my place to speak on behalf of New Brunswick's First Nations, who are more than capable of speaking for themselves. I will merely point out that if questions of common property, and the enclosure thereof, are important for all New Brunswickers, they take on additional layers of complexity for our First Nations.

The philosopher John Locke believed that the products of one's labour were embodiments of one's identity, but this conception of property is distorted in the case of trading and selling money and capital investments for profit or loss, especially when the owners of such property are not individuals but corporations (Krueckeberg 303–4). In other words, according to Krueckeberg, "Property plays a role for individuals that is constitutive to them as persons and therefore…commands privileges that should not be granted to the same degree to corporate capital's property" (304). This distinction comes to a head in discussions of what is known in legal scholarship as the "taking issue," "the conflict between private and public interests in the use of a piece of land" (304). Krueckeberg cites the 1981 Poletown decision—in which the government used its powers of eminent domain to appropriate a poor neighbourhood in Detroit in order to give the land to General Motors to build an assembly plant—as a prototypical example of a conflict between the property rights of a community and those of the state and its support of corporate capital. Krueckeberg writes: "Several scholars have argued that the Poletown decision was wrong in that it failed to recognize a qualitative difference between the property needs of General Motors and the property needs of Poletown residents, and thus ended up privileging the wrong set of rights" (304).

The Situation in New Brunswick

Fast-forward thirty-three years to present-day New Brunswick, and similar conflicts between public interests and state/corporate interests are playing themselves out, with common property resources in the middle. Three issues are particularly prominent at this time: the drilling for natural gas through hydraulic fracturing ("fracking"); the proposed open-pit Sisson Brook tungsten and molybdenum mine; and the new Crown lands forest management strategy. Each of these involves a combination of private, global capital, government regulation and economic development, and potential or looming environmental impact on the common property resources of the citizens of New Brunswick.

In the case of shale gas development, there are a wide range of health concerns about the potential impact on air quality and quality of surface water, groundwater, private wells, and public drinking water, as well as light pollution, noise pollution, wastewater disposal, and heavy truck traffic (Office of the Chief Medical Officer of Health 2012). Concerns pertaining to the Sisson Brook mining proposal centre primarily on the potential for environmental contamination of the Nashwaak River watershed, a concern validated by the recent report by the ombudsman indicating that the minister of environment had not classified *any* watercourses for which applications had been received under the 2002 water classification regulation of the *Clean Water Act* (Office of the Ombudsman 3). In both cases, New Brunswick's water supplies and watercourses are the common property resources at risk through a combination of government's failure to act as a steward of our resources and private capital development. The potential for water contamination through industrial activities represents a kind of enclosure of the commons, in the sense that private industry's use of or encroachment upon the commons could result in those resources becoming unusable by their rightful co-owners, the people of New Brunswick.

The now-defeated Alward government's document *Putting Our Resources to Work: A Strategy for Crown lands Forest Management* (2014) reveals another case of potential conflict between private interest and public good. The Alward government's strategy called for the provision of increased softwood supplies for industry, the reduction of exclusive habitat areas, the increase of harvesting on steep slopes and difficult-to-access sites, the rearrangement of habitat areas to provide industry with "flexibility," and a devolving management of forested areas to industry (Government of New Brunswick). Analysis of the implications of this strategy reveals that it would result in a reduction in conservation forest on Crown lands from the recommended 31 percent to 23 percent, a reduction in old growth forest from 26 percent to 10 percent, an increase in the allowable size of clear-cuts from 75 ha to 100 ha, and no specific protection of the unique Acadian forest habitat (McAlpine, Dietz, and Mansz 2). Although a small number of global forestry corporations would benefit from this strategy (Wyatt 25), the memorandum of understanding between the government of New Brunswick and J.D. Irving Ltd. reveals additional details: J.D. Irving's commitment to a $513 million investment is contingent on "certainty of increased wood supply, competitive wood costs, and reduced costs in Irving's forestry operations in the Province"; the government agrees to increase J.D. Irving's allocation of timber by "permanently assigning an additional 410,000 m^3"; and the replacement of the forest management manual by one based on "outcome-based management" (Memorandum of Agreement, 7 February 2014). Although the Alward government's forest management strategy has been heavily politicized in this election year (2014), there is no doubt that it represents a controversial concession to private industry of our common property resources—in this case, our forests—in an act of enclosure. Although these tracts of Crown land remain Crown land, twenty-five-year leases with guaranteed wood supply amount to the privatization of forests rightly belonging to the people of New Brunswick.

New Brunswick's Crown lands are co-owned by the people of New Brunswick, with the government of New Brunswick acting as trustee. Not only that, but, as noted above by Krueckeberg, the nature of our co-ownership of Crown lands is central to our identity and constitutive of us as persons, and is therefore qualitatively different from the de facto ownership of the same lands by private industry treating them as a commodity. (Every generation of the province's writers, from Douglas Huyghue to Tappan Adney to Charles G.D. Roberts to Wayne Curtis, has decreed our New Brunswick identity to be so; to be bound, that is, to woods, waters, and streams.) Moreover, with its unique mixture of red spruce, eastern hemlock, cedar, white pine, sugar maple, yellow birch, and many other species of trees and associated flora and fauna, the Acadian forest, once typical of our province, is now a rarity (Simpson 29). The Nashwaak River watershed drains a large area entirely within New Brunswick and is relatively pristine. Groundwater is an essential public good that must be carefully managed for the entire population. To a significant extent, New Brunswick's unique natural resources, and our relationship to them, define us as a society, and they are commodified at our peril.

What Are the Lessons for the New Government?

For these reasons, the new Gallant government (and all future governments) should manage Crown lands using the public trust doctrine, observing "a fiduciary duty to sustain the essence of renewable natural resources for the long-term use and enjoyment of the entire populace, not just the privileged" (Pentland 2). Donald W. Large's caution in that regard is advisable—the idea of the public trust doctrine being that "the state holds the public lands of the state in trust for the public and that any attempt to sell these lands to private interests, or to otherwise divert them to private use, will be viewed with skepticism" (1067).

Large goes on to state that a public trust doctrine that "holds the legislature to a standard of public interest is a legitimate check on the legislature's power to deal with public lands" (1069), and notes that

> the use of public lands—whether for mining, timbering or grazing purposes—is an area unusually susceptible to partisan pressures and corruption. Not only are vast and highly valuable lands under the control of a few bureaucrats, but most public lands decisions are made in an atmosphere of low administrative visibility. (1069, n. 122)

Ciriacy-Wantrup and Bishop write that in terms of natural resources policy, the public trust doctrine is advantageous because it forces government bureaucracies to take into account the broader public interests of all common owners (726). According to legal scholars, Canadian courts may eventually adopt a public trust doctrine in respect to public environmental rights (Gage 10; Pentland 6; also see Smallwood).

The adoption of some version of the public trust doctrine in the management of New Brunswick's Crown lands would be an important recognition of the centrality of the commons to our identity as New Brunswickers, as well as a concrete measure to fulfill the obligations that we all have to our children and grandchildren to pass those commons along to them in better shape than we received them. Following Naomi Klein in her article "Reclaiming the Commons," the government of New Brunswick needs to recognize the right of the citizenry to stand up for our Crown lands and declare that "this is going to be public space" (Klein 82).

At the end of his stimulating article, Krueckeberg rather wistfully reflects on the idea that "in the absolute sense of owning things, of full liberal ownership, we own nothing…whatever we 'own' is not completely ours" (308). He writes:

> My parents were always fixing up the house, improving this, redoing that; it seemed endless. But I just wanted to live there. That house was my home, my sanctuary, too personal to be improved for sale and profit. I belonged to it and it belonged the way it was. What could possibly be more important? And who controlled my parent's house? They did. Yet there was something instinctively wrong with their being able to sell something I loved so much. So I swore that when I grew up and had a house, I wouldn't do as they had done. But I did. Mine was a naive promise, mistaking ownership for having a home of one's own. What we own we cannot sell. And what we sell we do not own. This is the ultimate paradox of property. (308)

New Brunswick's Crown lands are not owned by the government of New Brunswick; they are owned by the *people* of New Brunswick—past, present, and future—with the government acting as a trustee. Governments cannot sell what they do not own—an act that would mark them as outsiders—and New Brunswickers will certainly reject such actions as violations of the trust that we place in them. To allow our Crown lands to be squandered would be the true tragedy of our commons.

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