

**USING NUISANCE AND OTHER COMMON LAW
TORTS TO PROTECT WATER, LAND AND AIR**

These materials were prepared by Chris Watson, lawyer, MacKenzie Fujisawa, LLP, Vancouver, BC for a conference held in Vancouver, BC by Pacific Business & Law Institute, March 7 & 8, 2007.

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KEY POINTS

1. A nuisance is an unreasonable interference with the use and enjoyment of water, land and air. The tort of nuisance is the primary workhorse of environmental lawsuits.
2. People may stop nuisances quickly by applying to court for an injunction.
3. A nuisance may be authorized by statute but courts read these statutes narrowly; the defence of statutory authority will succeed only when the nuisance is authorized and is practically impossible to avoid.
4. Anyone who occupies land adjacent to water has riparian rights. One of these rights is the right to ensure that the flow and quality of water are not interfered with.
5. While there is provincial legislation designed to protect the environment, this legislation may not apply to First Nations water, land and air because of constitutional limitations on the province and, in any event, does not offer First Nations the tools to quickly stop pollution; the law of nuisance is therefore a useful adjunct to government environmental controls.
6. First Nations should be vigilant in monitoring for and detecting pollution and be prepared at all times to go to court on an urgent basis to stop any form of pollution of their water, land and air.

I. INTRODUCTION

Pure water is an essential aspect of First Nations' existence. A spokesman for the Assembly of First Nations has explained:

Our wholesome respect for the land and water has not changed. And many of our people still depend, to a large degree, upon the renewable resource harvest. The spiritual affinity with our environment continues, and we still maintain a deep-rooted appreciation of water's life-giving and cleansing qualities.¹

¹ E. Benedict, paper delivered at "Canadian Waters" Conference, Resource Academy of Aquatic Science, Toronto, 1985, quoted in Barry Barton, "Water Resources and Native Peoples", in M.C. Healey and R.R. Wallace, eds., *Canadian Aquatic Resources*, Ottawa, Dept. of Fisheries and Oceans, 1987, 439 at 441, cited in R. Bartlett, *Aboriginal Water Rights in Canada*, (Saskatoon: The Canadian Institute of Resources Law) at 2.

Plentiful unpolluted water is a right belonging to all people whose land includes or borders streams, rivers, lakes or oceans. The way in which lands and resources are used, however, has often lead to conflicts between competing user groups.

The rights held by First Nations riparian owners to water that is free from pollution, and how First Nations people can use the law of nuisance and other torts to protect their riparian rights, is the focus of this paper.

II. HOW FIRST NATIONS CAN USE TORT LAW TO THEIR ADVANTAGE

There are two sources of environmental law – statute law and common law. Statute law is made up of various statutes and regulations passed by the Legislature in Victoria or Parliament in Ottawa. The common law is judge-made law. It fills the gaps left by legislation. It is based on hundreds of years of decisions made in court cases, first in the courts of England and now of Canada. The decisions in these cases tell us what the law will and will not accept. What passes as acceptable conduct changes over time but, normally, the underlying principles of the common law are very slow to change.

Environmental statutes have their weaknesses. They do not allow a person to quickly stop another from polluting his or her land. Nor do they provide well for compensation. These statutes are also, for the most part, provincial. Since pollution is a subject that usually relates to the use of land, provincial statutes may not apply to polluting activities on or to First Nations land.

Tort law has developed out of the common law to further protect our rights to a clean environment. The word ‘tort’ comes from the French word for wrong. It is a wrong done by one person to another. In law, a ‘tort’ is an activity for which the courts will order compensation.

For example, before you leave for work you ask your teenager to water the lawn. When some of his friends drop by he leaves the hose running and heads to the skateboard park with them. When you return from work you find there is a huge river of mud gushing from your flower bed onto your neighbour’s chicken coop. You can see feathers, eggs and a few corpses floating in

the mess. You have just committed a wrong. Your neighbour can sue you in tort law for the damage your hose caused to his property.

The first objective of tort law is to shift a loss from the shoulders of one person to another.² The injured person recovers for his loss from the person responsible for causing it. Another goal of tort law is to deter others through education. The optimistic view, using the above example, is that your teenager and his friends will learn from your lawsuit to think first before dropping the hose and running off. A more realistic outcome is that you will learn not to trust your teenager to water the lawn unsupervised.

While lawsuits can be unpleasant and expensive, as forums for dealing with claims concerning the environment, they have their advantages:

The tort system has a number of theoretical advantages over other methods of obtaining relief. The injured person can initiate action on his own, without the need to rely on any government agency to protect his interest. He controls the choice of lawyers, medical and other scientific experts to assist him. The parties themselves or their legal advisors maintain control over the timing and choice of strategies through every stage of the negotiations. Except in the case of infants and certain persons deemed by law to be incapable of making informed judgments without assistance, the decision of the plaintiff whether to accept a settlement offer need not be approved by any bureaucracy. Moreover, if the matter goes to trial, it is decided by an independent judiciary designed, at least in theory, to be above political or partisan pressures, and whose decisions are subject to appeal to higher courts.³

There are several torts that will apply in cases of pollution. A person should consider suing for negligence, trespass and in *Rylands v. Fletcher*. The primary workhorse of environmental lawsuits, however, is the tort of nuisance. In many instances these four torts overlap. In others, however, an act causing pollution may not have been carried out carelessly (thus eliminating the tort of negligence), may not have been done directly on the complainant's land (thus eliminating the tort of trespass) and may not have involved a dangerous non-natural use of land (thus

² A.M. Linden, *Canadian Tort Law*, 8th ed. (Markham, ON: Butterworths Canada Ltd., 2006) at 2.

³ J. Swaigen, "The Role of the Civil Courts in Resolving Risk and Uncertainty in Environment Law" (1991), 1 J.E.L.P. 199 at 208.

eliminating an action in *Rylands v. Fletcher*). In those instances, and these are the bulk of the cases, the tort of nuisance applies.

First Nations can use tort law to their advantage by being aware of their rights related to water, land and air and being on guard against pollution and other interferences.

First Nations should be prepared at all times to go to court on an urgent basis to stop any form of pollution. Injunctions are available. The purpose of an injunction is to preserve property so that an applicant will not find at the end of a successful trial that the subject matter is gone or destroyed. If there appears to be an emergency situation, the court may give an injunction after hearing only one side of the story (an *ex parte* injunction). These injunctions are only temporary, and the court will, within a matter of days, hold a hearing with both sides present. Eventually, there may be a full trial and a permanent injunction issued. Anyone ignoring the injunction may be held in contempt of court.

In deciding whether to order an injunction, a judge will consider:

- (a) whether there is a serious legal question;
- (b) whether there will be irreparable harm if the injunction is not granted; and
- (c) whether the balance of convenience favours granting the injunction.

It is important that First Nations proceed quickly with injunction applications. Delay can lead to the refusal to grant the injunction.⁴

To obtain an interim injunction the applicant must normally provide an 'undertaking to pay damages' to the Court. If the applicant obtains an injunction but subsequently fails at trial then the respondent would have been wrongfully prevented from doing something. If the respondent incurred losses as a result of the injunction then the undertaking forms the basis on which the respondent can later recover damages against the applicant.

The importance of injunctions is highlighted in the well-publicized *Meares Island* case. In that case, two First Nations Bands applied for a restraining order to stop MacMillan Bloedel from

logging Meares Island in Clayoquot Sound. A substantial body of evidence was presented which showed that the Bands' claim to aboriginal title was a serious question to be tried. In regards to the balance of the test for granting an injunction, the Court said:

It appears that the area to be logged will be wholly logged. The forest that the Indians know and use will be permanently destroyed. The tree from which the bark was partially stripped in 1642 may be cut down, middens may be destroyed, first traps damaged and canoe runs despoiled. Finally, the Island's historic value will be gone. The subject matter of the trial will have been destroyed before the rights are decided.⁵

The injunction was granted and MacMillan Bloedel was forced not to clear-cut, or even log, Meares Island. The Court excused the Bands from undertaking to pay damages. This was in 1985.

The trial did not commence until 1990. It was adjourned after one year of evidence to permit negotiations to take place between the Bands and Government. The trial is still adjourned. Two decades after it was granted, the interim injunction is still in place.

Pollution, or some other interference with water, land or air, does not need to have occurred for an injunction to be issued. Where somebody is doing something that you see is likely to cause pollution, that is, where environmental or other harm is anticipated, an application for a *quia timet* injunction should be sought. That will prevent the potentially harmful activity from occurring in the first place.⁶

How First Nations can use tort law to protect their riparian rights in particular is discussed in Part V below.

⁴ *Musqueam Indian Band v. HMTQ* (July 2, 1987) unreported (B.C.S.C.), appeal dismissed as moot, [1990] 2 C.N.L.R. 21 (B.C.C.A.).

⁵ *Martin v. R. in Right of B.C. and MacMillan Bloedel*, [1985] 2 C.N.L.R. 58 (B.C.C.A.) at 72.

⁶ *Matthew v. Guardian Ass'ce Co.* (1918), 45 D.L.R. 32 (S.C.C.) at 42.

III. HOW NUISANCE LAW INTERSECTS WITH THE PROTECTION OF WATER, LAND AND AIR

Nuisance law is a strong weapon against environmental pollution, including pollution to water,⁷ land⁸ and air⁹. The law of nuisance for this purpose goes back to the 12th century. In 1768 Blackstone wrote:

It is a nuisance to stop or divert water that used to run to another's meadow or mill; to corrupt or poison a water-course, by erecting a dye-house or a lime-pit for the use of trade, in the upper part of the stream; or in sort to do any act therein, that in its consequences must necessarily lend to the prejudice of one's neighbour. So closely does the law of England enforce that excellent rule of gospel, morality, of doing to others, as we would they should do unto ourselves¹⁰.

Actions in nuisance have supported prosecutions, fines, abatement orders, injunctions and actions for damages.

There are two kinds of nuisances – private nuisance and public nuisance.

A. Private Nuisance

A 'private nuisance' is defined as a substantial and unreasonable interference with an occupier's use and enjoyment of land which he or she occupies. To sue for private nuisance, the plaintiff must occupy land. The plaintiff must either own the land or have an interest in the land that is being interfered with.¹¹

There is a 'live and let live' quality to the law of nuisance. Annoyances can be detected almost everywhere if close enough attention is paid to them. Legally, an annoyance only becomes a 'nuisance' when it is unreasonable. This means that the ordinary person would not tolerate the activity. "Elegant or dainty" lifestyles are not protected. In determining whether the activity is

⁷ *Connery v. Manitoba*, [1971] 4 W.W.R. 156 (Man. C.A.) [action in private nuisance for salination of well-water]; *Gagnier v. Can. For. Prod. Ltd.* (1990), 51 B.C.L.R. (2d) 218 [action in public nuisance by commercial crabber against pulp mill for discharging dioxins in Howe Sound].

⁸ *Doucette v. Parent* (1996), 31 C.C.L.T. (2d) 190 (Ont. Gen. Div) [tree falling].

⁹ *MacNeill v. Devon Lumber Co.* (1987), 42 C.C.L.T. 192 (N.B.C.A.) [action in private nuisance against cedar mill for dust invading home].

¹⁰ W. Blackstone, *Commentaries on the Laws of England*, 1768, Bk III, p. 218.

unreasonable, the court examines all the circumstances, including the type and severity of the interference, its frequency and duration, the character of the neighbourhood in which it occurred, the sensitivity of the plaintiff's use and the utility of the defendant's conduct.¹²

A pair of cases dealing with highway annoyances shows the line that is drawn by courts between those cases where the activity is a nuisance or merely irritating. The first example is a case started by two Ontario fruit farming families. Their orchards were partially destroyed as a result of the heavy application of salt to the highway beside their land. They sued the Ontario Government to recover their losses. They met with difficulty because the damage to their orchards was the result of an activity that is of considerable social value and importance – safe and convenient winter travel on public highways. The interference, however, was found beyond that which ordinary people should tolerate. The Court said:

The invasion of their proprietary interest is not comparable to the types of interference normally associated with or to be expected from a major highway, such as noise, dust, fumes, smells and the like. Actual physical injury is being inflicted here and that injury is unique to the plaintiffs (and perhaps other similarly located fruit farmers) in the sense that no other owners are being deprived of useful possession of their lands as the result of the application of salt to neighbouring highways.¹³

The Court concluded that it would be unreasonable for them to continue to suffer damages without compensation. The Court said, frankly, that payment of their damages was a “cost of highway maintenance”.

The second case was brought by the owner of the Coast Westerly Hotel in Courtenay. He sued the government for nuisance, claiming that the noise from vehicles passing over a metal grid on a nearby bridge disturbs the Hotel's patrons, some of whom complained and some of whom perhaps never returned. The Court reviewed the factors that relate to whether a nuisance has been committed. The Court said there was no physical injury to the property, only an unusual sound that is created when vehicles pass over the metal grid. The Hotel was in an industrial

¹¹ *Gleneagles v. BCFC*, 2001 BCSC 512, para. 76.

¹² *Royal Ann Hotel Co. Ltd. v. Village of Ashcroft* (1979), 95 D.L.R. (3d) 756 (B.C.C.A.) at 761; *Ward v. Magna International Inc.* (1994), 21 C.C.L.T. (2d) 178 (Ont. G.D.).

¹³ *Schenk v. The Queen* (1981), 131 D.L.R. (3d) 310 (Ont. H.C.) at 319-320; aff'd [1987] 2 S.C.R. 289.

area. While the metal grid is irritating it comprised just 11 of 124 complaints made to the Hotel and therefore only the sensitive guests were annoyed enough to complain about it. Finally, the bridge provided an essential public service.¹⁴

The Plaintiff argued that the peculiarity of the bridge-deck noise is analogous to the salt used in the *Schenk* case that ruined the orchards. But that analogy was rejected. The nature of the damage was very different. In *Schenk*, it was the destruction of the orchards. In *Osler*, it was the disturbance of only sensitive guests. In the end, the Court in *Osler* held that the noise, although unusual and perhaps irritating, in all the circumstances was not unreasonable. The lawsuit was dismissed.

As you can see, while the basic principles of private nuisance are well-established, the cases are very fact-specific. Success depends on the type of loss suffered and the gathering of the evidence.

B. Public Nuisance

A ‘public nuisance’ is a substantial and unreasonable interference with a public right. A public right refers to a motley group of activities, but includes the right to fish in public waters, the right to navigate waters free from obstruction and the right to travel on highways unimpeded.¹⁵

Historically, only the Attorney General as official guardian of public rights could sue for public nuisance. This was problematic because the Attorney General was not expected to sue other Crown agencies. And although private individuals may exert pressure on the Attorney General to sue Crown agencies or other people, the decision to sue was entirely up to the Attorney General.

The law has evolved so that now a person or a group of people may sue for public nuisance. To do so, however, unlike in private nuisance, special damage must be shown.¹⁶ To show ‘special damage’ a person has to demonstrate that the activity has placed him or her in a substantially

¹⁴ *Osler Development Ltd. v. British Columbia* 2001 BCSC 129.

¹⁵ *Ware v. Garston Haulage Co. Ltd.*, [1944] 1 K.B. 30 at 31; *R. v. Gladstone*, [1996] 2 S.C.R. 723 at 770 (*per* Lamer J.).

¹⁶ *Ryan v. Victoria (City)* (1999), 168 D.L.R. (4th) 513 (S.C.C.) at 537.

different position beyond other members of the public; that his or her damage was somehow peculiar and unique.¹⁷

If special damage cannot be shown then the person may only proceed if the Attorney General lends his or her name to the lawsuit. In an example of civil proceedings by the Attorney General for a public nuisance, the Attorney General sued prostitutes that were plying their trade in a residential area of Vancouver, and argued, successfully, that their presence offended public morals and interfered with the residents' use and enjoyment of their property.¹⁸ The prostitutes were forced to move from that area, presumably to another. In another case the Attorney General obtained a *quia timet* injunction restraining the defendants from staging a rock concert in a city park because it would constitute a health hazard and the noise and traffic would unreasonably interfere with the comfort and enjoyment of residents.¹⁹

An example of a public nuisance brought at the instance of a private person able to show special damage is the 1914 case of *Little v. Smith*. In that case the defendant, Ms. Smith, who was in the ice cutting business, removed a 150 feet long and 8 or 9 feet wide chunk of ice from a lake in Quebec. She did not provide any protection around the opening. Mr. Little was proceeding along a well-trodden path with his horse, attached to a sleigh. For a reason unknown, the horse ran off, and in the course of its flight it fell through the thin ice that had formed over the opening and drowned. Mr. Little sued Ms. Smith on the basis that the opening in the ice, which was not guarded, was a public nuisance. The defence that Mr. Little was driving the horse under the influence of alcohol was not accepted. Nor was the defence that her right to put holes in the ice was more important than his right to travel across the lake (Ms. Smith actually found case law from the State of Maine to support her in this argument).

Ms. Smith was found to have had the right to cut the ice, but the court said her right was subordinate to the right of the public to use the water as a highway. Contrary to American law, it was held that in Canada, “[t]he safety of human life and limb is paramount to the right of the ice-cutter”. The Court concluded that it has “no doubt that a hole, opening, aperture or place, left unguarded ... in a public highway, as the Bay of Quintè is, is a nuisance; and if it be a nuisance,

¹⁷ *Hickey v. Electric Reduction Co. of Canada* (1970), 21 D.L.R. (3d) 368 (Nfld S.C.) at 372.

¹⁸ *British Columbia (Attorney General) v. Couillard* (1984), 59 B.C.L.R. 102 (S.C.).

¹⁹ *Ontario (Attorney General) v. Orange Productions Ltd.* (1971), 21 D.L.R. (3d) 257 (H.C.).

the [plaintiff], having suffered damage different in kind from that which was suffered by the public at large, is entitled to maintain an action for the recovery of the damages he has sustained.”²⁰

Defining the types of nuisance assists in understanding how, when, and by whom the law of nuisance may be used to protect water, land and air. When the activity becomes so unreasonable, taking into account all the surrounding circumstances, that an ordinary person cannot stand it any longer, a nuisance is being committed. When that activity has the effect of polluting private land (or adjacent water or surface air) then the occupier of that land may sue for private nuisance. If the activity has the effect of polluting public property, then either the Attorney General or a person peculiarly harmed by the pollution may sue for public nuisance.

The precise point where pollution becomes unreasonable will likely be very low; but wherever an ordinary person finds it unreasonable and sues to restrain it is the point that the law of nuisance intersects with the protection of water, land and air.

IV. DOES THE DEFENCE OF STATUTORY AUTHORITY APPLY TO FIRST NATIONS?

Some nuisances are permitted by statute. When this happens, the defence of ‘statutory authority’ may be available.

The defence of statutory authority exists where (a) the government authorizes the activity, either expressly or by necessary implication, and (b) the nuisance is the “inevitable result” of carrying out that activity.²¹ For example, apart from accidental spills, most water pollution in British Columbia is authorized by a discharge permit or waste management plan issued pursuant to the Environmental Management Act.²² The classic example is effluent from municipalities. This is the main source of water pollution today.

²⁰ *Little v. Smith*, (1914), 20 D.L.R. 399 (Que S.C.) at 401.

²¹ *Ryan v. Victoria (City)* *supra* at 537-538.

²² S.B.C. 2003, c. 53.

The defendant must prove that it was practically impossible to carry out the work any other way. That is a tough test to meet. The difficulties faced by municipalities in proving statutory authority lead to the creation of the defence of ‘statutory immunity’. In 1987, the Legislature passed a law protecting municipalities from suits in nuisance.²³ The Local Government Act now provides that “a municipality ... is not liable in an action based in nuisance ... if the damages arise, directly or indirectly, out of the breakdown or malfunction of (a) a sewer system, (b) a water or drainage facility or system, or (c) a dike or road.”²⁴ This self-serving legislation is being carefully scrutinized by the courts which, understandably, will only allow the defence of statutory immunity when the language clearly covers the situation complained of.²⁵

Whether the defence of statutory authority applies to First Nations depends on several factors. If the legislation is federal, and it does not “unjustifiably infringe” on aboriginal rights and title, then it should apply. That is, a polluter of First Nations land may rely on the defence of statutory authority to a claim by the First Nation in nuisance if the activity is authorized by Parliament, the activity does not unjustifiably infringe on aboriginal rights and there was no practical alternative way to carry out the activity. A situation where the defence of statutory authority may apply to defeat a First Nation claim in nuisance is where Parliament has passed special legislation authorizing a railway to construct a railway adjacent to First Nations land.

If the legislation is provincial, it will apply only if it is of general application throughout the province and does not unjustifiably infringe on aboriginal rights.²⁶ It is difficult to conceive of legislation that expressly authorizes an act on a piece of land that could be of general application. Provincial laws may not be directed to the use to which First Nations land may be put.²⁷ In regards to First Nations land, pollution and waste control is a matter of federal jurisdiction since it affects the use of the land.

Difficult questions arise. For example, would a contractor expressly authorized by provincial legislation to build, and building in the only practically possible manner, a mine adjacent to aboriginal land that causes the First Nations people harm by intolerable dust on their land, have a

²³ *Municipal Amendment Act (No. 1)*, 1987, c. 14, s. 7.

²⁴ R.S.B.C. 1996, c. 323, s. 288.

²⁵ Linden, *supra*, at 589.

²⁶ *William et al. v. HMTQ et al.*, 2004 BCSC 610 at para. 46.

²⁷ *Surrey v. Peace Arch Ent. Ltd.* (1970), 74 W.W.R. 380 (B.C.C.A.) at 387.

valid defence of statutory authority to a claim by the First Nations in nuisance? I am not aware of any cases that have dealt with this or any analogous situation. I submit, however, that the legislation authorizing the activity would be invalid on the basis that it effects the use of First Nations land and is not of general application. If the legislation is invalid, the defence of statutory authority would not apply.

Conversely, can a First Nations person who causes a nuisance on First Nations land rely on the defence of statutory authority when his or her Band's legislation authorizes the nuisance? Again, I am aware of no cases directly on this point. It is submitted, however, that if the legislation upon which the First Nation person relies is valid, then so too will be the defence of statutory authority.

V. HOW FIRST NATIONS CAN MAKE THE MOST OF RIPARIAN RIGHTS

A. Riparian Rights

The lawful occupier of land adjoining water, referred to as a 'riparian owner', has certain rights in regards to the water. These rights arise by virtue of his ownership of the bank, and from the latin word for bank, *ripa*, they derive their name of riparian rights.²⁸

In common with all riparian owners, First Nation riparian rights include access to and from the water, protection of land from erosion, ownership of naturally accreted material, and use of water of undiminished flow and quality.²⁹ While the alteration of the character of water must be appreciable to maintain a claim, it need not amount to pollution in the ordinary sense of the word. Thus, if the operations of an upper riparian owner make soft water hard, as for example by adding hard water from a mine, even if it is pure, this will be actionable.³⁰

These rights were created long ago by courts in legal proceedings in England and were adopted in Canada.

²⁸ G. V. La Forest, "Riparian Rights in New Brunswick" (1960), 3 Can Bar. J. 135 at 136.

²⁹ *Riparian Rights and Public Foreshore Use in the Administration of Aquatic Crown Land*, B.C. Occasional Paper No. 5, March 1995, p.1.

³⁰ G.V. La Forest, *Water Law in Canada – The Atlantic Provinces* (Ottawa, Information Canada, 1973) at 219.

The Province, however, has removed many of our riparian rights. By way of example:

- the Water Protection Act³¹ removes our right to property in the use and flow of all the water in any stream and any groundwater in British Columbia;
- the Water Act³² removes our right to use or divert water in any lake, river or stream in British Columbia without the consent of the Crown; and
- the Land Act³³ removes our right to own the bed of certain waters.

Such legislation has been upheld. The riparian rights that remain are therefore the rights to protect waterfront property from erosion, to receive water in its natural state - unpolluted, and to access the water.

There exists, however, a hefty constitutional question: does the province have the legislative power to deny riparian rights to the federal Crown in connection with an Indian reserve, or to First Nations in respect of their traditional lands? I refer the reader to the next paper in this collection for the answer. I also refer the reader to the next paper for a discussion on water rights that First Nations may hold in addition to their riparian rights.

B. Using Tort Law to Protect First Nations' Riparian Rights

First Nations people can rely upon the law of torts to protect their riparian rights.³⁴ As contrasted with lands under provincial jurisdiction governed by extensive statutory schemes, the protection of First Nations lands from pollution is left primarily to remedies available from tort actions.³⁵

This raises the role of the nuisance action as a complementary mechanism for enforcing First Nations' riparian and foreshore rights. Whoever lawfully occupies riparian land may sue to enforce his or her riparian rights.

³¹ R.S.B.C. 1996, c. 484, s. 3.

³² R.S.B.C. 1996, c. 483, ss. 4, 5. See also *Riparian Rights and Public Foreshore Use in the Administration of Aquatic Crown Land*, Occasional Paper No. 5, March 1995, p.5.

³³ R.S.B.C. 1996, c. 245, s. 55.

³⁴ G.V. La Forest, "Riparian Rights in New Brunswick", *supra*.

³⁵ It should also be noted that some Bands have passed pollution control by-laws under s. 81(1)(a) [health] or (d) [nuisance] of the Indian Act but there have been no court cases to test the effectiveness of such enactments: J. Woodward, *Native Law* (Toronto: Thomson Carswell, 1994), pp. 274.8-274.9.

A riparian owner whose rights have been infringed may apply for an injunction and seek damages. An example of a case involving a First Nations Band seeking an injunction in a nuisance action to protect its riparian rights is *Pasco v. Canadian National Railway Co.*

In that case the Chief of the Oregon Jack Creek Band in British Columbia, following quickly on the heels of the *Meares Island* case, asserted rights in the riverbed and the water of the Thomson River arising from the location of his reserve on the lands bordering the river. The Chief argued that “that right is a riparian right arising from the ownership by the federal government, in trust for the Oregon Creek Indian Band, of reserve land bordering the river.”³⁶ The Band was described as the “beneficial owner” of this land and the Chief sought an interim injunction to restrain the C.N.R. from proceeding with its construction program along a riverbank near the Band’s reserve. The Court concluded that there was a “serious question to be tried insofar as the claim of the band to riparian rights in the Thomson River is concerned”. The Court issued an injunction restraining construction of double-tracking of the railway on the bed and banks of the river in the Fraser Canyon and Thompson Valley.

VI. CONCLUSION

Lawsuits based in tort serve as a useful adjunct to government controls to stop pollution of our water, land and air. First Nations people can use tort law to their advantage by, first, being aware of their riparian and other rights and, second, by being prepared to go to court on short notice to obtain an injunction to stop pollution that is either anticipated or that has occurred.

The injunction remedy was a strong weapon for First Nations in the 1980’s, at the time of the *Meares Island* and *Pasco* cases. They are not sought or successfully sought as much today as in those years. Fundamentally, however, there is no reason why, with a clear understanding of First Nations’ riparian and other water rights, and with a clear case of actual or anticipated pollution, a court will not grant an injunction to First Nations applicants.

The law of private and public nuisance is the primary workhorse of environmental lawsuits. These torts are available to First Nations occupying land that is polluted or otherwise interfered

³⁶ [1986] 1 C.N.L.R. 34 (B.C.C.A.).

with, in the case of private nuisance, or who suffer a loss while doing such things as navigating water, highways, or fishing, in the case of public nuisance.

The defences of statutory authority and statutory immunity exist to protect certain people causing nuisances, but this is a thin shield to stand behind. Courts strain to protect the rights of lawful owners and occupiers of private land and users of Crown land to use and enjoy that land free from interference and will only apply the defence of statutory authority if they must.

Our natural resources are precious. We are all responsible for protecting our water, land and air. We are the environmental stewards of the land we own, occupy or use to protect it from spoilage. Sometimes, the best way we can do that is by suing.

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