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2019-01

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Ingleson, A. (Ed.). (2019). Environment in the courtroom. Calgary, AB: University of Calgary Press.

<http://hdl.handle.net/1880/109483>

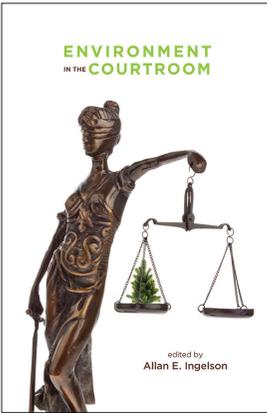
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## ENVIRONMENT IN THE COURTROOM

Edited by Allan E. Ingelson

ISBN 978-1-55238-986-7

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## Public Nuisance: Public Wrongs and Civil Rights of Action

ALASTAIR R. LUCAS, Q.C.

### Introduction

Historically, the common law developed doctrine to protect the health and safety of the general public. The Supreme Court of Canada (SCC) has summed up the concept of public nuisance as “any activity which unreasonably interferes with the public’s interest in questions of health, safety, morality, comfort or inconvenience.”<sup>1</sup> But this doctrine has not meshed smoothly as the modern law has evolved.

There are two principal problems. One is that though the concept of public nuisance was originally part of the domain of criminal law, a related civil right of action emerged. The concepts thus straddled somewhat uncomfortably criminal law and civil law. The second problem involves the question of who has this right. Who has standing to seek judicial remedies for public nuisance?

### The Crime

As common nuisance, it was an offence to endanger the lives, safety, or health of the public. It now appears in this form as subsections 180(1) and (2) of the *Criminal Code*, which states:<sup>2</sup>

180.(1) Every one who commits a common nuisance and thereby

- (a) endangers the lives, safety or health of the public, or
- (b) causes physical injury to any person,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

### *Definition*

(2) For the purposes of this section, every one commits a common nuisance who does an unlawful act or fails to discharge a legal duty and thereby

- (a) endangers the lives, safety, health, property or comfort of the public; or
- (b) obstructs the public in the exercise or enjoyment of any right that is common to all the subjects of Her Majesty in Canada.

What is the “public” appears to be a question of fact in particular circumstances. But it cannot be a single person or even a small group<sup>3</sup> of individuals. However, in principle, these individuals might still have a remedy in private nuisance.<sup>4</sup>

### **The Common Law Tort**

The common law has also recognized a civil right of action to remedy a public nuisance.<sup>5</sup> Initially in the 18th and 19th centuries, this appeared to function as a supplement to the criminal law in order to fully address common issues of the day such as disputes about access and passage on public highways. Thus, any rights flowed from establishment of an unlawful act. However, public nuisance has developed into an independent common law tort.<sup>6</sup> This has been recognized by the Supreme Court of Canada in *Ryan v. Victoria*<sup>7</sup> and acknowledged in *British Columbia v. Canadian Forest Products Ltd.*<sup>8</sup>

Public nuisance involves interference with the use and enjoyment of a group of properties. It differs from private nuisance in its scope. Harm must be sufficiently widespread.<sup>9</sup> There is no bright line test, but the scale of damage in relation to that suffered by others is an important factor.<sup>10</sup>

### **Standing for Civil Actions**

This brings us to the second fundamental problem associated with public nuisance. In general, actions cannot be initiated by individuals to remedy public nuisances.<sup>11</sup>

### **The Attorney General as Plaintiff**

The general principle is that actions in public nuisance can be brought only by the Attorney General acting as an officer of the Crown.<sup>12</sup> This means either the federal or the provincial Attorney General (A-G), depending on the

circumstances in the context of constitutional jurisdiction or perhaps inter-governmental arrangements. The theory is that the A-G acts as *parens patriae* to vindicate public rights vested in the Crown.<sup>13</sup> Sometimes the A-G has sued at the request of individuals. In other cases, the A-G has acted in a relator capacity, agreeing to a nominal plaintiff role at the request of a private party or parties.<sup>14</sup> In both cases, the decision whether or not to sue is entirely within the A-G's discretion.<sup>15</sup> There is little scope for judicial review. However, there is authority to the effect that the A-G must consider the issue in good faith and if he or she refuses leave, "in a proper case, or improperly or unreasonably delays in giving leave, or if the machinery works too slowly, then an action for injunctive relief by a member of the public may be entertained."<sup>16</sup>

### **Private Plaintiffs**

A private plaintiff may sue in public nuisance directly, without the A-G's consent, where that individual can establish that he or she suffered "special" or "peculiar" damage.<sup>17</sup> A key difference from private nuisance is that no interest in land must be shown.<sup>18</sup> What constitutes special damage for this purpose has been problematic for over a century and a half.

### **Special Damage**

The general principle is that special damage is extraordinary—in some way greater than that suffered by the general public. In 1874, Justice Brett in the English Court of Common Pleas expressed this idea in *Benjamin v. Storr* as follows:

[T]he plaintiff must show] a particular injury to himself beyond that which is suffered by the rest of the public. It is not enough for him to shew that he suffers the same inconvenience in the use of the highway as other people do (if the alleged nuisance be the obstruction of a highway).<sup>19</sup>

This injury, said his Lordship, must be particular and it must also be:

1. direct and not merely consequential,
2. of a substantial character, 'not fleeting and evanescent.'<sup>20</sup>

This definition of special damage has proven resilient in Canada.

It is worth noting that establishing special damage in cases of personal or property damage is relatively straightforward. In fact, in these circumstances

the elements necessary for a claim in private nuisance are likely to be present. It is where the loss asserted is to public lands or natural resources and the claim is concerned either with protecting the public or the fundamental ecological values of a natural resource, or with consequential economic loss, that establishing special damage is problematic. Thus in *McKie v. KVP Co.*<sup>21</sup> the owner of a common law right to fish, but not financially harmed resort owners, was held to have suffered special damage as a result of water pollution that killed fish.

For Canadian environmental law, the classic case is a 1970 decision of the Newfoundland Supreme Court Trial Division, *Hickey v. Electric Reduction Company of Canada Ltd.*<sup>22</sup> Hickey and the other plaintiffs fished commercially in Placentia Bay, Newfoundland. Fish life in the bay was largely destroyed as a result of discharges from an electric reduction company's phosphorus plant in Long Harbour. The plaintiffs alleged that this created a public nuisance that resulted in damage to their fishing livelihoods.

The court accepted that serious harm to the fishery had been caused. But Furlong C.J. concluded that the action should fail because, "while the pollution created a nuisance to all persons," it was not, he said, "a nuisance peculiar to the plaintiffs, nor confined to their use of the waters of Placentia Bay. It was a nuisance committed against the public."<sup>23</sup>

His Lordship rejected the argument that the plaintiffs should succeed because they had suffered "special" or "direct" damage. The "right view," he said, is that "a person who suffers peculiar damage has a right of action, but where damage is common to all persons of the same class, then a personal right of action is not maintainable."<sup>24</sup> The result was that all of the fishers had a right to fish in the area, but no remedy if the fish were destroyed as a result of activity acknowledged to create a public nuisance. Only proof of unique adverse effects would suffice, a requirement characterized by Klar as "illogical."<sup>25</sup> The Attorney General could initiate an action. However, unspoken was the reality that many factors may militate against the A-G choosing to pursue this remedy.

A further complication may be a negligence requirement. This may become an issue where the public harm is caused by inadvertent discharge of pollutants rather than operational discharge that can be characterized as intentional.<sup>26</sup>

There is ample authority for *Hickey's* requirement that standing founded upon public nuisance must be different in kind and not merely in degree from that of the remainder of the class. But even in 1970, there were inconsistent cases.<sup>27</sup> In particular, financial loss resulting from obstruction of access was considered to be special damage in several cases.<sup>28</sup>

In *Canfor*, Binnie J. commented on the efficacy of public nuisance in remedying environmental damage. He stated that “class actions will have a role to play,” but he quoted Klar’s assessment that “[w]hat has made public nuisance a particularly ineffective private law remedy is the special damages requirement.”<sup>29</sup> “The reality,” according to Binnie J.,

is that it would be impractical in most of these environmental cases for individual members of the public to show sufficient ‘special damages’ to mount a tort action having enough financial clout to serve the twin policy objectives of deterrence to wrongdoers and adequate compensation for their victims: *Bazley v. Curry*, [1999] 2 SCR 534.<sup>30</sup>

### **Statutory Modification**

The special damage requirement has been removed in varying degrees by statute in several Canadian jurisdictions. The most significant is provisions of the *Ontario Bill of Rights*,<sup>31</sup> which gives individuals standing to commence action in certain circumstances. These are: (1) a person has or will contravene an environmental law as defined; (2) the contravention causes or will cause significant harm to an Ontario public resource; and (3) the plaintiff has applied under the Act for an investigation into the matter and has received either no response or an unreasonable response. Remedy is limited to injunction, and courts may consider the potential efficacy of other processes and even government plans. It is apparent that this is a narrow right, but one that may alert and even mobilize relevant government agencies. Environmental rights of action of this general type are also found in Yukon<sup>32</sup> and the Northwest Territories.<sup>33</sup>

### **Availability of Damages**

Traditionally, public nuisance actions have involved the A-G seeking to enjoin activities that infringe public rights. The injunction was regarded as an appropriate public remedy. This has led to the assumption that injunction, but not damages, is the only available remedy.<sup>34</sup> However, to this narrow view there have been exceptions.<sup>35</sup> Binnie J. in *Canfor* made his “impracticability for individuals” comments quoted above. But he went on to acknowledge that Canadian courts “have not universally adhered to a narrow view of the Crown’s available remedies in civil proceedings for nuisance.” In addition to cases,<sup>36</sup> he cited reports by the British Columbia and Ontario law reform commissions.<sup>37</sup> His conclusion was that the Crown represented by the A-G could indeed “pursue compensation for environmental damage in a proper case.”<sup>38</sup>

Binnie J. then moved to create a broader context for this principle. He noted Canadian judicial reference to the idea of municipalities as trustees of the environment, citing L'Heureux-Dubé J. in *Spraytech v. Town of Hudson*,<sup>39</sup> and at least alluded to the older, deeper common law fiduciary idea of public trust, including US law where monetary compensation has been awarded.<sup>40</sup> These latter US cases were actions in which the government in a *parens patriae* capacity sought damages for harm to the trust in public natural resources.

The conclusion in *Canfor* was that “there is no legal barrier to the Crown suing for compensation as well as injunctive relief in a proper case on account of public nuisance or negligence causing environmental damage to public lands.”<sup>41</sup>

But his Lordship then noted that it was also open to the Crown to base the claim on its private law property rights in the forest lands in question. Further, the claim based on a broader public right was not fully argued in the lower courts. Consequently, the SCC majority considered the Crown’s claim only as landowner.

## Novel and Important Policy Questions

In *Canfor*, Binnie J. somewhat qualified his conclusion that the Crown could sue for damages in public nuisance and on other tort theories by stating that “there are clearly important and novel policy questions raised by such actions.” These include:

1. potential Crown liability for inactivity in relation to environmental threats,
2. whether or not there are enforceable fiduciary duties on the Crown,
3. limits to the Crown’s role, function and available remedies, and
4. the potential burden on private interests of this kind of ‘indeterminate liability.’<sup>42</sup>

However, the court concluded that it was not a “proper appeal to embark on a consideration of these difficult issues.”<sup>43</sup> Indeed, several of the questions are heavy with policy considerations difficult for courts to handle.

But it is question 2 that has caught the attention of environmental lawyers. It raised issues that have been debated since the beginnings of Canadian environmental law: Is the Crown subject to some kind of fiduciary duty to protect and perhaps to preserve public natural resources for the benefit and enjoyment of the public? If so, can this public duty be judicially enforced through actions

by citizens? Are relevant US authorities persuasive? This is the essence of a set of legal principles known as the public trust doctrine.

## Public Trust

The public trust doctrine has received much discussion and analysis but little judicial acceptance in Canadian environmental law. It is based on common law public rights of access, including fishing and navigation, with origins in Roman Law.<sup>44</sup> The modern concept, which involves fiduciary obligations on government to preserve public resources for public use, emerged in the United States in the late 19th century.<sup>45</sup> It was popularized in the early 1970s by several judicial decisions<sup>46</sup> and through scholarly writings, particularly the articles of Professor Joseph Sax.<sup>47</sup> Sax described the modern public trust doctrine as follows:

When a state holds a resource which is available for the free use of the general public, a court will look with considerable scepticism upon any government conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self interest of private parties.<sup>48</sup>

The concept is thus essentially a presumption. It can be qualified and even overridden by statute. However, it has been adopted explicitly in a number of US federal and state statutes. Since the 1970s, public trust has found its greatest expression in US water resources law.

Public trust has been considered in few Canadian cases. An early attempt to incorporate US doctrine foundered in *Green v. The Queen in Right of Ontario*<sup>49</sup> on difficult facts (the alleged harm occurred adjacent to but outside the Ontario Provincial Park alleged to be subject to a public trust) and apparent confusion between the fiduciary principles of public trust and the criteria for common law private trusts. Subsequently, while there was considerable academic writing,<sup>50</sup> with some scholars arguing the existence of a public trust doctrine in Canadian law,<sup>51</sup> some direct or apparent statutory incorporation, and allowance in Quebec of an analogous class action claim against government for failing to effectively enforce environmental laws,<sup>52</sup> there was no explicit judicial adoption.

Then in 2006, the thread was picked up by the Supreme Court of Canada majority in *Canfor*. The door has opened on potential government and, subject to what may be left of the special damage requirement, even private actions

for injunctions and damages for harm to public natural resources. But explicit judicial recognition must await fuller consideration, including assessment of the policy issues outlined by Binnie J. in *Canfor*. An intriguing possibility is connection with the fiduciary concepts in Aboriginal law. There is some indication of this in the US jurisprudence.<sup>53</sup>

## Conclusion

While public nuisance has clearly emerged from its criminal law beginnings to offer a tort with potential for remedying environmental harm, it remains an imperfect instrument, inconsistent and even irrational in its operation. Availability of damages in public nuisance actions received Supreme Court of Canada support in *Canfor*. But the core problem—extreme uncertainty of the special damage requirement—remains.

Binnie J's comments in *Canfor* may be a prelude to judicial rethinking of the special damage requirement. But perhaps more promising is the public nuisance concept serving as a springboard for development of other public remedies, particularly public trust and related theories of Crown fiduciary duties to protect and preserve the environment.

### NOTES

- 1 *Ryan v Victoria (City)*, [1999] 1 SCR 201 at para 32, cited with approval in *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38, [2004] 2 SCR 74 at para 66 [*Canfor*].
- 2 *Criminal Code*, RSC 1985, c C-46, s 180(1) (2).
- 3 Such as the Placentia Bay, Newfoundland, fishers in *Hickey v Electric Reduction Co of Canada* (1970), 21 DLR (3d) 368 (Nfld SC) [*Hickey*]. In *Rex v Lloyd* (1803), 4 Espinasse 200 (*Nisi Prius*), the inhabitants of three chambers of Clifford's Inn, London, were held not a sufficient public to maintain a public nuisance indictment against owners of adjacent tin works.
- 4 As the court noted in *Rex v Lloyd*, *ibid*.
- 5 *A-G Can v Ewen* (1895), 3 BCR 468 (SC) [*Ewen*]; *Benjamin v Storr* (1874), LR 9 CP 400 [*Benjamin*]. See John McLaren, "The Common Law Nuisance Actions and the Environmental Battle—Well-Tempered Swords or Broken Reeds?" (1972) 10:3 Osgoode Hall LJ 505 at 511–515.
- 6 See *Benjamin*, *ibid*.
- 7 [1999] 1 SCR 201 at para 52.
- 8 2004 SCC 38 at para 66.
- 9 *A-G v PYA Quarries Ltd*, [1957] 2 QB 169.
- 10 Keith Stanton & Christine Willmore, "Tort and Environmental Pluralism" in John Lowry & Rod Edmunds, eds, *Environmental Protection and the Common Law* (Oxford: Hart, 2000) ch 5 at 100.
- 11 *Stein v Gonzales* (1984), 14 DLR (4th) 263 (BCSC, McLachlin J).
- 12 *Ibid*; *Ewen*, *supra* note 5; *Canfor*, *supra* note 1 at para 67.
- 13 *Canfor*, *ibid*, citing Wilfred Estey, "Public Nuisance and Standing to Sue" (1972) 10 Osgoode Hall LJ 563 at 566, 576.
- 14 *British Columbia (AG) v Haney Speedways Ltd* (1963), 39 DLR (2d) 48 (BCSC).
- 15 *Ewen*, *supra* note 5.

- 16 *A-G ex rel McWhirter v Independent Broadcasting Authority*, [1972] 2 WLR 344 (Eng CA).
- 17 See *Hickey*, *supra* note 3 at 372.
- 18 *Hunter v Canary Wharf Ltd*, [1997] AC 655 (HL).
- 19 *Supra* note 5 at 438.
- 20 *Ibid* at 439.
- 21 *McKie v KVP Co*, [1948] 3 DLR 201 (Ont HC), aff'd [1949] 1 DLR 39 (Ont CA), aff'd [1949] SCR 698.
- 22 *Hickey*, *supra* note 3.
- 23 *Ibid* at 370.
- 24 *Ibid* at 372.
- 25 Lewis Klar, *Tort Law*, 4th ed (Toronto: Carswell, 2008) at 717.
- 26 *Ibid* at 720–721.
- 27 See, Robert Mansell, “Civil Liability for Environmental Damage” in Alastair Lucas, ed, *Canadian Environmental Law*, 2d ed (Toronto: LexisNexis, 2017) ch 18, para 18.15.
- 28 *Ibid*, para 18.16 n 2.
- 29 *Canfor*, *supra* note 1 at para 68; Klar, *supra* note 25 at 647.
- 30 *Ibid*.
- 31 *Ontario Environmental Bill of Rights*, SO 1993, c 28, Part VI.
- 32 *Environment Act*, SY 1991, c 5.
- 33 *Environmental Rights Act*, SNWT 1990, c 38.
- 34 *Canfor*, *supra* note 1 at para 68.
- 35 Including *The Queen v The Ship Sun Diamond*, [1984] 1 FC 3 (TD) (damages awarded to the federal Crown for oil spill cleanup costs); *A-G Ontario v Fatehi*, [1984] 2 SCR 536. (province entitled to damages for public highway cleanup cost). Both cases were cited by Binnie J in *Canfor*, *supra* note 1 at paras 69–70.
- 36 *Canfor*, *supra* note 1 at paras 69–70.
- 37 British Columbia Law Reform Commission, “Report on Civil Litigation in the Public Interest” (1980) No 46 at 70–71; Ontario Law Reform Commission, “Report on Damages for Environmental Harm” (1990) at 11–13.
- 38 *Canfor*, *supra* note 1 at para 72.
- 39 *114947 Canada Ltée (Spraytech Société d’arrosage) v Hudson (Town)*, 2001 SCC 40 at para 27.
- 40 *Canfor*, *supra* note 1 at paras 79–80.
- 41 *Ibid* at para 81.
- 42 *Ibid* at para 87.
- 43 *Ibid* at para 82.
- 44 *Ibid* at paras 74–75 and authorities cited.
- 45 *Ibid* at paras 78–79 and authorities cited, including *Georgia v Tennessee Copper Co*, 206 US 230 (1907), in which Holmes J at 237 spoke of the state having “an *interest independent* of and behind the titles of its citizens in all the earth and air within its domain” (emphasis added), and the leading case, *Illinois Central Railroad Co v Illinois*, 146 US 387 (1892).
- 46 Including *Gould v Greylock*, 215 NE 2d 114 (1966) (Mass SC) (Massachusetts statute purporting to approve development of a private ski resort in a state park held unlawful).
- 47 Joseph Sax, “The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention” (1970) 68 Mich L Rev 471; Joseph Sax, *Defending the Environment: A Strategy for Citizen Action* (New York: Knopf, 1971).
- 48 Sax, “The Public Trust Doctrine,” *ibid* at 484–485.
- 49 [1973] 2 OR 396 (HC).
- 50 See Constance Hunt, “The Public Trust Doctrine in Canada” in John Swaigen, ed, *Environmental Rights in Canada* (Toronto: Butterworths, 1981).
- 51 Robert Franson, “Legislation to Establish Ecological Reserves for the Protection of Natural Areas” (1972) 10 Osgoode Hall LJ 582, 589.
- 52 *Girard v 2944-7828 Quebec Inc*, [2003] JQ No 9105.
- 53 *Sierra Club v Department of Interior*, 376 F Supp 90 (1974) (US Dist Ct).