Protecting First Nations Water Sources: The Aboriginal Interest is our Public Interest

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Introduction

One of the most glaring gaps of injustice in Canada today is that while the majority of Canadians have access to clean water, individuals in First Nations communities do not. The *Human Rights Watch* 2016 study revealed that 134 water systems across 85 First Nations reserves have drinking water advisories due to contaminated or at risk water systems, with some persisting over twenty years.[1] Other studies have shown that contaminants in drinking water on First Nations reserves include coliform, Escherichia coli, cancer-causing Trihalomethanes, and uranium.[2] These communities are more vulnerable to industrial pollutants because the majority of their water sources are ground and surface water.[3] In a country with one of the most abundant fresh surface water sources, this issue is particularly shocking. Not only is there a lack of access to clean drinking water, but exposure to contaminants has left individuals with a range of health impacts, from skin conditions to increased risks of cancer. The issue of safe drinking water is more than a public health concern – it is interference with a fundamental right to one of Canada's greatest natural resources.

The federal government has jurisdiction over the management of drinking and waste water on First Nations reserves.[4] Although there is a federal *Safe Drinking Water for First Nations Act*[5], many Indigenous communities lack the resources needed to enforce its regulations. Furthermore, provincial regulatory water standards do not apply

[1] "Make it Safe: Canada's Obligation to End the First Nations Water Crisis", *Human Rights Watch* (13 April 2016) <https://www.hrw.org/report/2016/06/07/make-it-safe/canadas-obligation-end-first-nations-water-crisis> .
[2] Bradford et al, "Drinking water quality in Indigenous communities in Canada and health outcomes: a scoping review" (2016) 75 Intl J Circumpolar Health 1.
[3] Jerry P White, Laura Murphy & Nicholas Spence, "Water and Indigenous Peoples: Canada's Paradox" (2012) 3:3 Intl Indigenous Policy J 1 at 11.
[4] "Water Governance and Legislation", *Environment and Climate Change Canada, Government of Canada* <https://www.ec.gc.ca/eau-water/default.asp?lang=En&n=E05A7F81-1> .
[5] *Safe Drinking Water for First Nations Act*, SC 2013, c 21.

to First Nations communities.[6] Clearly, there is a lack of adequate regulatory frameworks to govern drinking water in First Nations communities. Undoubtedly, more than government intervention is needed to protect Indigenous water sources.

I will argue that tort law, specifically public nuisance, can be used as a tool to stop and prevent the contamination of water in Indigenous communities. In the following discussion, I will examine the benefits and challenges associated with the use of tort law in environmental protection and how well the tort of public nuisance fits within this context. I will discuss both advantages and challenges of such an approach. Finally, I will discuss other alternatives in the law that may be relied on to protect water in Aboriginal communities.

A tort law approach to environmental issues: advantages and challenges

Although Canadian tort law differs significantly from Indigenous laws and legal orders, it has been argued that it may play a meaningful role in protecting Aboriginal environments.[7] Using a tort law approach to environmental issues such as water preservation has two significant benefits when compared to the traditional reliance on governmental statutes. First, the separation of powers keeps the judiciary independent and separate from the reach of the government. Litigation through this judiciary may be a better avenue for Indigenous communities to resolve claims without recourse to their difficult history with the Canadian government. Specifically, colonialism, the residential schools system, and the lack of recognition and respect for Indigenous laws and legal orders have all contributed to a complicated relationship between the Crown and

[6] Tonina Simeone, "Safe Drinking Water in First Nations Communities" (2010) Library of Parliament Background Paper No 08-43-E.

[7] Lynda Collins, "Protecting Aboriginal Environments: A Tort Law Approach" in Sandra Rodgers, Rakhi Ruparelia & Louise Belanger-Hardy, ed, *Critical Torts* (Markham: LexisNexis, 2009) 61 at 62 [Collins, "Protecting Aboriginal"].

Indigenous peoples. Litigation could allow Indigenous voices to be heard without resorting to difficult and lengthy governmental negotiations.

Second, the primary goals of tort law, compensation and deterrence, are well suited to resolving environmental issues. If an industrial polluter is found liable and ordered to pay damages, the polluter may seize to engage in such environmentally irresponsible behaviour and deter other industrial actors from doing the same. Further, compensation from such damages may allow communities to pay for costs associated with illnesses caused by water contamination or use the funds towards improving infrastructure related to water treatment and sanitation.

Although tort law may seem like the perfect solution, there are challenges associated with this approach. First, deterrence may be difficult to achieve if damage awards are not high enough to actually prevent industrial actors with deep pockets from continuing to pollute water sources in order to make profits. This challenge can be overcome by courts imposing injunctive relief, which would force industrial actors to change their behaviour. Second, compensation may be inadequate for the harms suffered. Monetary damages awards will not return victims to perfect health or reverse severe medical conditions caused by water contamination. For example, one cannot put a price on being cancer-free or reversing the effects of gastrointestinal damage to a young child's body. Finally, litigation often involves significant costs and may be time consuming.

Although these disadvantages are present, tort law may be an effective vehicle in mobilizing and challenging social power structures that exist between Indigenous peoples, the government, and industrial stakeholders. Although not all claims may succeed, recognition of the issue of water contamination in court may galvanize public

support of Indigenous communities. Finally, in allowing claims to succeed, the judiciary would enter into a dialogue with Parliament and reaffirm that change and greater protection of water sources is needed in the law.

The application of water contamination to public nuisance

Public nuisance is an unreasonable interference with the public's interest in matters of health, safety, morality, comfort or convenience[8] or an aggregation of private nuisances.[9] A claim can be brought in public nuisance if a group of individuals experience substantial and unreasonable interference with their use or enjoyment of property that is so widespread in its range that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it.[10] Although the right to bring an action in public nuisance presumptively belongs to the Attorney General, an individual can bring a private action in public nuisance if he or she can prove a "special injury". This "special injury" has been defined as one that differs in kind, not merely degree, from that suffered by the public as a whole.[11] Case law demonstrates that plaintiffs have experienced difficulty in proving such injury. In *Hickey v Electric Reduction Co*, where the definition of the injury was established, the court held that a commercial fisherman had no private right of action in public nuisance because he suffered no "peculiar" damage after the defendant had discharged poisonous material into fishing waters. The court held that interference with his right to fish was common to the whole community.[12]

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[8] *Ryan v City of Victoria,* [1999] 1 SCR 201, 168 DLR (4th) 513 at para 52 hereinafter [*Ryan*].
[9] *Smith v Inco*, 2010 ONSC 3790, 52 CELR (3d) 74.
[10] *340909 Ontario Ltd v Huron Steel Productions (Windsor) Ltd,* [1990] 73 OR (2d) 641, 21 ACWS (3d) 1242; *AG v PYA Quarries Ltd*, [1957] 1 All ER 894, [1957] 2 WLR 770.
[11] *St. Lawrence Rendering Co v The City of Cornwall*, [1951] 1 OR 669, 4 DLR 790 at 673; *Hickey v Electric Reduction Co* [1970] 21 DLR (3d) 368, 1971 CarswellNfld 30 at 372 [*Hickey*].
[12] *Hickey*, *supra* note 11 at 370.

In recent jurisprudence, there has been a recognition that environmental rights can be protected by a claim of public nuisance. In *British Columbia v Canadian Forest Products Ltd.*, the Supreme Court unanimously held that rights to "running water, air, and the shores of the sea" could be the basis of a claim for damages in public nuisance.[13] In that case, the majority disallowed the British Columbia government's claim for damages against Canadian Forest Products Ltd. after it caused a major forest fire. The majority held that the province had not put forward a "coherent theory of damages" that took into account its capacity as holder of the public interest in protecting the environment. The significance of the decision does not lie in the holding, but rather in the court's discussion of the viability of public nuisance in remedying environmental damage. Although Justice Binnie held class actions "will have a role to play", he stated that public nuisance claims may be difficult to pursue because of the challenge of reaching the "special damages" requirement.[14] Although this may be true for some Canadians, this may not be the case for Aboriginal claimants suffering health damage due to water contamination. Many members of such communities would be able to show personal injury as a "special" damage that differs in kind from that suffered by others, both within and outside their community. As noted earlier, many individuals in these communities suffer from a diverse set of detrimental health effects. A claimant could use expert testimony to show that they suffered a medical detriment such as a skin condition due to the consumption or use of unsafe water.

In addition to meeting the "special injury" test, Aboriginal claimants may also benefit from other aspects of public nuisance. Unlike plaintiffs pursuing a claim in

[13] *British Columbia v Canadian Forest Products Ltd*, 2004 SCC 38, [2004] 2 SCR 74 at para 74 [*Canfor*].
[14] *Canfor, supra* note 13 at para 68.

private nuisance, those pursuing a claim in public nuisance do not have to demonstrate interest in land.[15] This is particularly important for First Nations plaintiffs as they may not have recognized title to land or they may be pursuing a title claim, which can be a long and difficult process.

An environmental claim may also fit into the analysis of public nuisance articulated in *Ryan v City of Victoria.*[16] In that case, the Supreme Court held that the question of whether an activity is a public nuisance is a question of fact, "taking into account factors such as the inconvenience caused by the activity, the difficulty in lessening the risk and the character of the neighbourhood."[17] The contamination of drinking water is more than a mere "inconvenience" as it affects the health and safety of individuals, which courts are eager to protect. The "character of the neighbourhood", often a First Nations reserve, deserves protection from environmental degradation. Although viewing the "neighbourhood" in this way may perpetuate paternalistic notions of the Crown as "protector" of Indigenous territory, it does not negate the fact that the government of Canada owes Indigenous peoples environmental protection through the law, which it has failed to do in the past.[18] Specific legal protection of such Aboriginal "neighbourhoods" or environments is needed because Aboriginal peoples have a unique interdependent relationship with their lands and resources and their communities are more likely than non-Indigenous communities to experience environmental harm due to

[15] *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL), 2 WLR 684.
[16] *Ryan*, *supra,* note 8.
[17] *Ryan*, *supra,* note 8 at para 53.
[18] Lynda M Collins & Meghan Murtha, "Indigenous Environmental Rights in Canada: the Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish, and Trap" (2010) 47:4 Alta L Rev 1 at 4.

industrialization.[19] Thus, although government or an industrial actors may argue that there are difficulties "in lessening the risk", the vulnerability of these "neighbourhoods" weigh in favour of a court recognizing contamination of Indigenous water sources as a public nuisance. Furthermore, in *Ryan*, the court recognized that the defence of statutory authority only applies if the defendant proves it was impossible to avoid creating the nuisance.[20] Thus, even if an activity that contaminates water sources is authorized by statute, a government will not be able to rely on the defence to escape liability.

In addition to addressing harmful governmental action causing contamination of water sources, a claim in public nuisance may also address governmental inaction. The Supreme Court has recently recognized that public nuisance may raise novel policy questions, including "potential Crown liability for inactivity in relation to environmental threats" and "whether or not there are enforceable fiduciary duties on the Crown".[21] As the Crown owes a fiduciary duty to Aboriginal peoples and contamination of water is a serious environmental threat, it remains an open possibility whether the government's public duty may be judicially enforced by private claims.

Although the contamination of water would fit well within the elements of the tort, there are reasons why this may not be the best approach. Specifically, the fact that this would be a novel claim forms the greatest challenge. Recently, the Saik'uz and Stellat'en First Nations brought forth a claim in public nuisance against Alcan Inc., claiming operation of its Kenney Dam interfered with their use of the Nechako river as a

[19] Lynda Collins, "Protecting Aboriginal Environments: A Tort Law Approach" in Sandra Rodgers, Rakhi Ruparelia & Louise Belanger-Hardy, ed, *Critical Torts* (Markham: LexisNexis, 2009) 61 at 62 [Collins, "Protecting Aboriginal"].
[20] *Ryan, supra* note 8 at 59.
[21] *Canfor, supra* note 13 at para 87.

fisheries resource.[22] The British Columbia Court of Appeal held that First Nations did not have to prove Aboriginal title or rights before pursuing a nuisance claim against a third party. Although the Court held that unreasonable interference with the public's interest in harvesting fish was protected by the tort of public nuisance and interference with an Aboriginal right to fish may be sufficient to satisfy the special damage requirement, it did not explicitly recognize the claim as successful. This hesitancy to formally accept the public nuisance claim as successful was also seen at the Supreme Court as it did not provide leave to appeal. Thus, although jurisprudence shows development towards protection of Aboriginal interests, it still remains unclear whether a claim in public nuisance for water would succeed.

Other legal avenues of resolution

Despite the strengths of such a claim in public nuisance, Aboriginal communities may rely on other avenues to protect their water resources. Firstly, statutes such as the *Canadian Environmental Protection Act (CEPA)*[23] and the *Ontario Water Resources Act*[24] impose penalties for the discharge of contaminants into waters. Under the *CEPA*, Aboriginal claimants can bring about a civil cause of action against industrial or other actors who have contravened any provisions of the *Act* provided they show loss or damage as a result.[25] Again, many would be able to do so because of the detrimental health effects of contaminated water. Secondly, using constitutional law, Aboriginal

[22] *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc,* 2015 BCCA 154, 253 ACWS (3d) 251.
[23] *Canadian Environmental Protection Act*, SC 1999, c 33.
[24] *Ontario Water Resources Act*, RSO 1990, c O 40.
[25] *Canadian Environmental Protection Act*, SC 1999, c 33, s 40.

claimants may claim that rights to hunt, fish and trap within traditional territories require the government to protect resources related to these rights.[26]

Conclusion: The Aboriginal interest is our public interest

Tort law, and more specifically, public nuisance can protect Indigenous resources while achieving the objectives of tort law, deterrence and compensation. More importantly however, there is a strong possibility that such claims can create social change and destroy power imbalances both between Aboriginal peoples and industrial actors as well as Aboriginal peoples and the government. The protection of water sources used by Aboriginal peoples, whether through tort law or another legal avenue, is the judiciary's chance to implement this kind of social change while saving the public's interest in "matters of health, safety, morality, comfort or convenience." While a claim in public nuisance is in no way guaranteed to succeed, it is offered as a spark in the conversation that needs to happen: the Aboriginal interest is our public interest.

[26] Collins, "Protecting Aboriginal", *supra* note 19 citing *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388, 259 DLR (4th) 610 at 411-12.