The Role of Property Rights in Protecting Water Quality

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Introduction¹

Property rights have a bad name with many environmentalists. Most prefer regulatory approaches to environmental problems. They place their faith in government, conveniently ignoring its role in destroying the environment. They mistrust property rights and the decentralized decision making that they permit. And they fear that property rights confer the right to pollute.

Environmentalists’ concerns largely reflect an ignorance of the law and of legal history. For centuries, property rights protections in the common law have empowered people to clean up – and to prevent – pollution. They have been particularly useful to those fighting water pollution.

This chapter describes the ways in which concerned citizens have used their common-law property rights to protect water quality. It chronicles the erosion of these rights by governments and courts. Finally, it recommends several approaches to restoring property rights.

The Common Law

In England, the United States, Canada, and much of the Commonwealth, property rights come from the English common law.² England passed the common law down to her colonies. Governments have often overridden it with their own statutes. But where they have not done so, the common law continues to apply.

The common law is court-made law. Judges, rather than politicians, created and refined it. In the Middle Ages, local custom often determined a judge’s decision. As decisions were recorded and made available to other judges, legal custom began to replace local custom. Judges followed previous decisions, or precedents, thus entrenching a number of legal principles. From this almost


² The English common law does not apply in Louisiana, which adopted the French civil law. Quebec is likewise governed by civil law rather than common law. Some former colonies have hybrid legal systems that blend the common law with civil, religious, or customary law.
seamless transition from ancient custom to the contemporary common law emerged a number of principles regarding property.

Under the common law, people have very strong property rights: They have the right to both use and enjoy their property. But they also have a responsibility not to interfere with their neighbours’ rights to use and enjoy their property. This principle is as old as the recorded law itself. A thirteenth-century legal scholar wrote that “No one may do in his own estate anything whereby damage or nuisance may happen to his neighbour.” The principle is embodied in a maxim that governs court decisions to this day: “Use your own property so as not to harm another’s.” Clearly, that maxim has profound environmental implications. Polluters may not, in using their own property, harm anyone else’s.

One whose property rights are violated may take a polluter to court, demanding an injunction and/or damages. An injunction requiring the defendant to refrain from acting in a particular way or, in some cases, requiring it to take specific action was, at one time, the default remedy in many courts. Although courts now have the authority to substitute damages for an injunction, this is an inferior remedy. In substituting damages for an injunction, a court forces the plaintiff to sell his property rights at its price. In contrast, an injunction allows the plaintiff to negotiate his own price or to reach a compromise that benefits both him and the defendant. Furthermore, only an injunction can prevent the recurrence of a property rights violation.

Both damages and injunctions achieve two primary ends: compensation and deterrence. Damages, when sufficient, make a polluter’s victims “whole.” They fully compensate victims for losses, shifting them instead to the perpetrator. In addition to correcting the balance of justice, internalizing costs in this way deters risky behaviour. Contemporary damage awards can be enormous. For example, BP expects a settlement of the consolidated claims of those who suffered economic losses, property damage, or medical problems as a result of the Deepwater Horizon oil spill to cost $7.8 billion. (This cost does not include the $6.1 billion the firm spent resolving more than 220,000 claims made through the Gulf Coast Claims Facility. Nor does it include damages resulting from the lawsuits by federal agencies, states, and local governments that remain before the courts.) The threat of such costs creates powerful incentives to take care.

**Common-Law Causes of Action**

Pollution usually violates people’s common-law property rights in one of three ways. It may be a trespass, a nuisance, or a violation of someone’s riparian rights.

**Trespass**

Under the common law, it is a trespass to place anything upon someone else’s property. It does not matter if the substance is toxic or perfectly harmless. Nor does it matter if there is a lot of it or just a tiny bit. As an English justice explained in 1765, “every invasion of private property, be it
ever so minute, is a trespass.” Today’s courts continue to quote this famous decision.

Landowners and tenants have often used trespass law to keep pollutants off their property. They have fought sawdust from a lumber mill, fluorides from an aluminum plant, and pesticide spray. Those living along rivers have used trespass law to prevent sewage discharges from littering the rivers’ beds and banks.

In one early-twentieth-century case, a New York farmer complained that upstream sewers polluted his creek. He argued that the filth piling up on the creek’s bed and along its banks constituted a trespass. The court agreed. It gave the polluting town a year to build a new sewage system. But after that, it ruled, the town would no longer be allowed to pollute the creek. The court acknowledged that its decision would inconvenience the public. Regardless, it said, ongoing trespasses have to be restrained.

In its defence, the town argued that its sewage was only one of many sources of pollution, including another town and several tanneries. Cleaning up its effluent would not clean up the creek. The court agreed that the town’s sewage constituted only a third of the pollution in the creek. But that made no difference. The farmer had the right to sue whomever he wanted. If he wished to take on all polluters, fine. If he wished to target just one, that, too, was fine. Higher courts agreed: The injunction would stand.

Clean water can itself constitute a trespass. A current Canadian trespass case concerns the operation of a dam. Landowners complain that rising water and ice have intruded on their land, eroding it and otherwise damaging their property.

**Nuisance**

Trespass law prevents direct, tangible invasions. For indirect invasions, and for those that cannot be seen or touched, a branch of the common law called nuisance law often applies. A nuisance is an unreasonable interference with the use or enjoyment of private property. Unlike a trespass, a nuisance is something that actually causes harm, be it physical damage, financial harm, annoyance, discomfort, or inconvenience. When determining if an interference is unreasonable, courts consider its severity, whether it would harm a person who is not unusually sensitive, and the character of the neighbourhood in which it occurs. In some jurisdictions, courts also consider who came first – the plaintiff or the nuisance.

Nuisance law has been of tremendous help to those fighting pollution. People have used it to protect themselves from smoke, steam, and fumes. They have used it to challenge road salt and leaking oil tanks. Foul smells are often nuisances, as are noise and vibrations. In the 1920s, one Canadian judge went so far as to say, “Pollution is always unlawful and, in itself, constitutes a nuisance.”

A famous nuisance case of the nineteenth century dealt with water pollution. The case concerned
Birmingham, England, which built a large public sewer in 1851. The sewer dumped the town’s filth into the local river. The owner of a downstream estate complained that the sewage caused disease, killed fish, and was unsuitable for watering cattle or washing sheep. Birmingham argued that the court should allow the pollution for the public good. It warned of disaster if it was not allowed to dump its sewage into the river. In its words, “The evil that must ensue if the Court should interfere would be incalculable.... Birmingham will be converted into one vast cesspool ... The deluge of filth will cause a plague, which will not be confined to the 250,000 inhabitants of Birmingham, but will spread over the entire valley and become a national calamity.” Private interests, it argued, “must bend to those of the country at large.”

The judge hearing the case dismissed Birmingham’s argument as an “extreme position ... of remarkable novelty.” He was not, he explained, a public safety committee. His job was simply to interpret the law and to define who had what rights. In this case, the plaintiff had a clear right to enjoy his river. Birmingham, in creating a nuisance, had violated that right. It was not allowed to do that. In the judge’s words, “Public works ... must be so executed as not to interfere with the private rights of individuals.” The judge concluded that he must grant an injunction, regardless of its consequences. As he explained, “It is a matter of almost absolute indifference whether the decision will affect a population of 25,000 or a single individual.”

A century later, another English case pitted a river-front landowner and a fishing club against a polluting local government, along with a chemical company and a power station. The court issued an injunction restraining the defendants from altering the river’s quality or temperature or interfering with the plaintiffs’ enjoyment of their fishing rights. Although the local government urged the court to substitute damages for an injunction, the court refused. Damages, one judge noted, “would be a wholly inadequate remedy,” since the plaintiffs had “not been incorporated in order to fish for monthly sums.” His colleague added, “The power of the courts to issue an injunction for nuisance has proved itself to be the best method so far devised of securing the cleanliness of our rivers.”

The court’s refusal to compromise an individual’s property rights for the convenience of society reflected common-law traditions. Indeed, in the eighteenth century, the famous English jurist William Blackstone wrote, “So great ... is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community.” Unfortunately, in the intervening centuries, many judges have abandoned this principle, and have instead weighed the private benefits of protecting property rights against the social costs of doing so. Courts often now attempt to balance private rights with the so-called public good, especially in deciding whether to issue an injunction or to award damages.

Almost 250 years after Blackstone’s commentaries on the common law, nuisance remains a useful tool for those fighting water pollution. In this century, to take but one example, people living near a Dupont chemical plant in New Jersey claimed that releases of perfluorinated materials contaminated their drinking water and constituted a nuisance. (Two class actions against Dupont were combined and settled for $8.3 million plus legal fees and expenses.)
Nuisance claims are often combined with other causes of action. In a series of recent lawsuits concerning the contamination of water and soil in Anniston, Alabama – where Monsanto had flushed PCBs into local creeks and buried them in landfills – the contamination was found to constitute both a trespass and a nuisance. Likewise, following the Deepwater Horizon oil spill in the Gulf of Mexico, many lawsuits against BP and other firms included both nuisance and trespass, along with a variety of other claims.

Riparian Rights

As noted above, both trespass and nuisance law have been used to stop water pollution. Most often, however, people wanting to protect water quality have used a branch of the common law called riparian law. Riparians are the people who own or occupy land beside lakes and rivers. Under the common law, they have the right to the natural flow of water beside or through their property. As one American judge explained in 1900, “every riparian proprietor is entitled to have the waters of the stream that washes his land come to it without obstruction, diversion, or corruption.”

Since the middle of the nineteenth century, riparian rights have played a crucial role in cleaning up lakes and rivers in England, Canada, and many other common-law countries. Riparians have fought coal mine discharges, pulp and paper mill wastes, other industrial effluents, storm-water runoff, and sewage discharges. They have used the prohibition against corruption to protect themselves from a wide variety of changes to water quality, from discoloration to thermal pollution to the hardening of water.

As with other common-law cases, riparian challenges have often been David and Goliath stories, enabling the common man to assert his rights against powerful economic interests. In one early-twentieth-century New York case, a farmer sued a pulp mill that fouled a creek. In affirming the injunction issued by a lower court, the Court of Appeals refused to balance the injunction’s great cost to the pulp mill (which represented an investment of over a million dollars) against the farmer’s relatively small injury: “Although the damage to the plaintiff may be slight as compared with the defendant’s expense of abating the condition, that is not a good reason for refusing an injunction. Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor litigant of his little property by giving it to those already rich.”

Riparians have also used their rights to protect river flows. A recent Canadian case was initiated by an electrical power generating company whose plant and equipment was harmed by an upstream municipality’s blasting of river ice – a blasting that caused ice to build up at the base of a downstream waterfall, which in turn caused water to back up and flood the generating station. The trial judge found that riparians have a right to the natural flow of water and that the municipality’s blasting had breached that right. The judge also determined that the flooding – a substantial and unreasonable interference with the plaintiff’s enjoyment of its property – constituted a nuisance.
Riparians have even used their rights to *prevent* pollution. In 1970, a riparian in Ontario went to court to prevent a speed boat regatta on a small lake. She feared that 60 racing boats would contaminate the lake. The judge issued an order forbidding the races. The plaintiff’s riparian rights, the judge explained, entitled her “to the flow of water through or by her land in its natural state.” By polluting the lake – regardless of whether the pollution caused any harm – the planned races would violate her property rights. In such a case, said the judge, the court should grant an injunction as a matter of course.

**The Erosion of Common-Law Property Rights**

Unfortunately, governments have, over the centuries, made it increasingly difficult for the victims of pollution to sue. They have diluted or extinguished property rights by passing laws that override or supersede the common law. As one English law lord explained, “The Legislature is supreme, and if it has enacted that a thing is lawful, such a thing cannot be . . . an actionable wrong.”

In order to promote growth, protect favoured industries, and create jobs, governments have limited the common-law liability of countless polluters. In some cases, they have instructed courts to consider the economic consequences of ruling against polluters. In others, they have overturned court-ordered injunctions, forbidden courts to issue injunctions, or imposed limits on the damages courts may award. In still others, they have taken disputes out of the courts entirely, moving them to administrative tribunals under political direction. In the nineteenth century, liability limitations commonly benefited railroads, whose noise, smoke, and sparks threatened neighbouring land owners. Mills that diverted or polluted water were another early beneficiary, followed in the twentieth century by smelters, pulp mills, sewage polluters, miners, and farmers. Examples of legislation limiting liability now abound. Even potentially catastrophic accidents, such as those related to oil and gas production or nuclear power generation, are covered by rules limiting liability.

In addition to laws that have blatantly weakened property rights, hundreds of more subtle regulations, permits, and licences have had the same effect. When a government licenses an activity, it generally licenses all of that activity’s inevitable results, including any inevitable pollution. To the extent that pollution is an inevitable result of their carrying on approved activities, the polluters are operating under “statutory authority.” Polluters often claim immunity from civil suits, using statutory authority as their defence. They argue that some activities inevitably produce pollution. Government authorization of such an activity, if it did not include its subsequent pollution, would be useless. A government does not knowingly do useless things. Thus, in authorizing an activity, a government must have intended to authorize its inevitable pollution.

Once a government has authorized an activity, those affected by it lose their rights to sue. The government, in its wisdom, has overridden the common law. It has replaced *legal* decisions with
political decisions. In other words, it has removed decision-making power from those directly affected by pollution, and placed that power securely in the hands of politicians and bureaucrats.

And what have successive governments done with their powers to control water quality? They have permitted pollution that no downstream riparian would tolerate. It is hardly surprising that remote governments have not made good decisions about the environment. They do not understand local priorities, and they do not share local values. How can a central government know about the many uses of a particular river? How can it estimate the value of those uses to local riparians? Without that information, how can it foresee the consequences of permitting pollution?

Almost any government has powerful political incentives to allow pollution. It is loath to take on industries that dump toxic metals and chemicals into our waters. It is loath to threaten jobs – even expensive, temporary, or ultimately counterproductive jobs. Jobs mean votes. The government thus does the expedient thing: It transfers the costs of pollution to its victims. If the effects – no matter how bad – are concentrated on a few riparians, the political costs are low. Nor need political costs rise if the effects are dispersed over many.

Governments also have economic incentives to permit some kinds of pollution. In many jurisdictions, they own and/or operate many of the sewage treatment plants that pollute the waters. Furthermore, they often finance improvements to plants they do not own or operate. A crackdown on sewage polluters would be very expensive for them.

Riparians, of course, also respond to incentives. In this, they are no different from governments. But their interests – economic and other – usually lie in clean water. Riparians’ livelihoods may depend on clean water. Clean water increases their property values. It improves their health and the quality of their lives. And unlike governments, whose time frames rarely stretch further than the next election, riparians are more likely to take a longer view of resource use and destruction. Riparians will fight for clean water if they have the tools to do so. History suggests that there are no better tools than property rights.

**Strengthening Property Rights**

How can we strengthen people’s property rights? How can we restore the pollution-fighting powers that citizens enjoy under the common law?

The most direct approach is to ensure that statutes and regulations do not override people’s common-law property rights. When authorizing activities, governments should specify that they are not legalizing trespasses, nuisances, or violations of riparian rights. Likewise, when drafting laws governing water quality, lawmakers should include “savings clauses” stipulating the continued application of the common law. Such clauses were common in the laws of nineteenth-century England and can be found in some contemporary laws. A section of the US Federal Water
Pollution Control Act, for example, specifies that it does not restrict the right of any person to seek relief under the common law. More widespread inclusion of such provisions in environmental legislation would provide both citizens and the environment with immeasurable protection.

Statutes and regulations can also be redesigned to incorporate principles of common law. Such principles – including the responsibility to use one’s own property so as not to harm another’s; the right to be free of harm from one’s neighbours; the importance of stopping (rather than merely fining) polluting activities; the direction of fines to victims rather than governments; the importance of internalizing the costs of pollution; and, above all, the value of decentralized decision making – would make statute law far more sustainable.

Another approach to strengthening property rights involves making sure that regulations that deprive people of their property rights are identified as “takings,” or expropriations. Under the US Constitution, takings require compensation. If governments must compensate people for regulatory takings, arbitrary regulation will become more expensive. The political costs will also be higher if governments must acknowledge that their actions violate entrenched rights. These increased costs should help deter the worst regulation. In countries, such as Canada, where property rights lack constitutional protection, compensation for regulatory takings could be required in legislation.

Perhaps even more important than specific constitutional protections or legislative measures is the nurturing of a culture of respect for property rights. As a US court recently noted, “Although the judiciary and the legislature define the limits of state powers, such as eminent domain, the ultimate guardians of the people’s rights … are the people themselves.” Only a citizenry committed to empowering individuals and to limiting the role of government – and the special interests that lobby them – can keep government abuses of property rights in check.

Conclusion

Armed with strong property rights, the victims of pollution will start to clean up the waters flowing by their land. Sometimes they will choose to prevent harmful developments. Other times the rights holders and polluters will reach a compromise: The polluters will install abatement equipment or change their operations. Occasionally polluters will simply buy out rights holders: If resources are more valuable to them than to others, they will be able to acquire rights to them. Such transactions will occur freely and fairly; they will reflect the values and circumstances of all directly involved parties.

It may be precisely this last possibility that frightens many environmentalists: Decentralized decision making allows for decisions that they may not like. What many environmentalists forget is that decision making by governments has resulted in hundreds of environmental disasters. Given their incentives, governments are likely to continue to make decisions that put growth and job creation before water quality.
While there will doubtless be cases in which individual rights holders allow pollution, experience indicates that they will be relatively rare, and that the resulting damage will be relatively confined. People have demonstrated time and again that they place a very high value on clean water. They have proven themselves to be responsible stewards. One need only look at the legal case books for reassurance. On page after page, they illustrate that armed with strong property rights, people can and do protect lakes and rivers.