of Canada have reposed in him. A Judge can receive no greater compliment than to have members of the Bar and public say of him that he is just and fair.

—JOHN C. COUGHLAN*

*Judge of the Provincial Court of Alberta.

## MAINTENANCE OF WATER QUALITY—ALBERTA'S LEGISLATIVE SCHEME AND THE COMMON LAW

On the first of November, 1971, the Clean Water Act came into force in the Province of Alberta. It and the Clean Air Act which became effective at the same time marked one step in a program of governmental reorganization and legislative enactment aimed at providing an efficient, effective means of controlling and eliminating the problems created by exploitation and/or misuse of the environment. There can be little doubt that the impetus for such a program was provided by the ever-increasing public concern over pollution of both air and water by human and industrial contaminants, the adverse effects of which are most pronounced in those areas of industrial and population concentration having the greatest political influence. It is therefore probable that another aim of this program was to assuage these potentially powerful segments of the populace.

It is axiomatic that the powers conferred upon an agency by legislative enactment are only as effective as the agency which enforces these powers. Only future events can indicate how effective the Alberta legislation and the agencies which administer it will be and whether the primary aim of the legislators will be to deal with problems of pollution or simply to mollify the public. The purpose of this comment is to examine the legislation dealing with water pollution, to point out certain weaknesses inherent therein, and to outline the alternative means of dealing with water pollution available at common law to riparian owners should future events prove that placating the public was the true purpose.

### *Legislation*

Water pollution has been defined as:[1]

> . . . any alteration of the physical, chemical, biological, or aesthetic properties of waters, including change of the temperature, taste, or odour of the waters, or the addition of any liquid, solid, radio-active, gaseous or other substance to waters or the removal of such substance from the waters, which will render or is likely to render the waters harmful to the public health, safety, or welfare, or harmful or less useful for domestic, municipal, industrial, agricultural, recreational or other lawful uses, or for animals, birds or aquatic life.

In Alberta, the following eight acts[2] contain provisions dealing with water pollution as so defined:

[1] The Water Authority Act, S.P.E.I. 1965, c.19, s.2(g).

[2] Although other enactments contain provisions which indirectly affect water pollution, they do so only incidentally, while the enumerated statutes contain provisions directly concerned with the problem.

1. The Department of the Environment Act[3]
2. The Environment Conservation Act[4]
3. The Energy Resources Conservation Act[5]
4. The Oil and Gas Conservation Act[6]
5. The Clean Water Act[7]
6. The Public Health Act[8]
7. The Agricultural Chemicals Act[9]
8. The Water Resources Act[10]

The Department of the Environment Act which came into force on April 1, 1971 established a department of the same name under the Minister of the Environment who is charged with coordination of the policies, programs and services and procedures of various Government departments and agencies in matters pertaining to the environment.[11] "Matters pertaining to the environment" are defined in s. 2 of the Act as:

> (a) the conservation, management and utilization of natural resources;
> (b) the prevention and control of pollution of natural resources [curiously enough, "pollution" is not defined];
> . . .
> (d) economic factors that directly or indirectly affect the ability of persons to carry out measures that relate to the matters referred to in clauses (a), (b) . . .;
> (e) any operations or activities
> (i) that adversely affect or are likely to adversely affect the quality or quantity of any natural resource, or
> (ii) that destroy, disturb, pollute or alter or make use of a natural resource or are likely to do so;
> (f) the preservation of natural resources for their aesthetic value;
> (g) laws in force in Alberta that relate to or directly or indirectly affect the ecology of the environment or natural resources.

while "natural resources" are defined as "land, plant life, animal life, water and air."[12] The Minister is also empowered to liase with other governments in Canada and, with the approval of the Lieutenant Governor in Council, to enter agreements with those governments relating to any matter pertaining to the environment.[13] A general power to:[14]

> . . . do such acts as he considers necessary to promote the improvement of the environment for the benefit of the people of Alberta and future generations.

is also conferred upon the Minister of the Environment by the Act. These powers are to be exercised in consultation with the Natural Resources Co-ordinating Council which consists of Deputy Ministers of eight Government departments most directly concerned with the environ-

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[3] S.A. 1971, c.24.
[4] R.S.A. 1970, c.125.
[5] S.A. 1971, c.30.
[6] R.S.A. 1970, c.267.
[7] S.A. 1971, c.17.
[8] R.S.A. 1970, c.294.
[9] R.S.A. 1970, c.4.
[10] R.S.A. 1970, c.388.
[11] *Supra*, n.2, s.8(a).
[12] *Id.* s.1(f).
[13] *Id.* ss.88(b)&(c). These powers will enable Alberta to adhere to and agree to schemes established under the the Canada Water Act, R.S.C. 1970, 1st Supp., c.5, and to achieve agreements with neighbouring provinces concerning inter-provincial and inter-territorial water systems.
[14] *Id.* s.8(i).

ment and the chairman of the Energy Resources Conservation Board.[15] It can be seen that the Minister has considerable powers and that these are so generally defined as to enable him to act in virtually any situation where the environment might be affected. It is also to be observed from the Minister's powers and from the presence of the chairman of the E.R.C.B. on the Co-ordinating Council that the function of the Department is not only to preserve the environment but also to ensure sensible exploitation of it. Of particular note in this regard are the powers of the Lieutenant Governor in Council under the Act to declare a "state of emergency" where the Minister reports:[16]

> (a) that circumstances exist whereby a natural resource in any part of Alberta has been or is being destroyed or damaged or is being or is likely to be polluted, and
>
> (b) that urgent co-ordinated action is required for the purpose of preventing, alleviating, controlling or stopping the destruction, damage or pollution,

and to establish a "Restricted Development Area" for the purpose of:[17]

> (a) preventing, controlling, alleviating or stopping the destruction, damage or pollution of any natural resources in the Area, or
>
> (b) protecting a watershed in the Area, or
>
> (c) retaining the environment of the Area in a natural state or in a state suitable for recreation or the propagation of plant or animal life, or
>
> (d) preventing the deterioration of the quality of the environment of the Area by reason of the development or use of land in the Area incompatible with the preservation of that environment.

The ability to declare a state of emergency is obviously aimed at mobilizing maximum effort of all parties to combat such events as major riverine oil spills (but strangely it makes no provision for action where there is potential damage or destruction), while the latter is a preventative measure. The Minister himself has the power to issue a "stop order" to a person who, to the satisfaction of the Minister:[18]

> (a) has contravened or is contravening this Act or a regulation or order under this Act, or
>
> (b) has contravened or is contravening any other Act or regulation or order thereunder and the contravention, in the opinion of the Minister, is causing or is likely to cause the destruction, damage or pollution of a natural resource,

and such an order could be utilized where less drastic action is required to prevent such from continuing; however, the provisions of the section do not apply to contraventions of the Clean Water Act or the Clean Air Act.[19] There can be little doubt that the establishment of the Department of the Environment and of the Natural Resources Co-ordinating Council with the powers conferred on the Minister and the Lieutenant Governor in Council by the Act, coupled with the regulatory power under the Act, affords the government a means whereby water pollution can be kept to a minimum consistent with continued growth in resource utilization and general advancement of the Alberta economy. (To date no regulations have been made under this Act.)

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[15] *Id.* ss.8,10. The Act also provides for the creation of a Conservation and Utilization Committee which is to be composed, to a large measure, of representatives from the same Departments as are represented on the Co-ordinating Committee, and which is to consider matters referred to it by the Co-ordinating Committee. Beyond possibly applying more specialized knowledge to such matters, this Committee appears to be largely redundant.

[16] *Id.* s.14(1).

[17] *Id.* s.15(1).

[18] *Id.* s.16(1).

[19] *Id.* s.16(13). Provision is made in each of these acts for the issuance of stop orders but the Minister's discretion thereunder is more limited.

The Environment Conservation Act[20] provides for the establishment of the Environment Conservation Authority composed of three appointed members which will act in, what appears to be, an investigatory and advisory capacity to the Lieutenant Governor in Council independent of the Department of the Environment.[21] The Authority is empowered to deal with the same "matters pertaining to environment conservation" as is the Department of the Environment,[22] and several of its specific functions appear to overlap those of the Department, namely to:[23]

> (a) . . . conduct a continuing review of policies and programs of the Government and government agencies on matters pertaining to environment conservation and . . . report thereon to the Lieutenant Governor in Council;
>
> (b) . . . inquire into any matter pertaining to environment conservation and make its recommendations and report thereon to the Lieutenant Governor in Council;
>
> (c) . . . when required to do so by an order of the Lieutenant Governor in Council, inquire into any matter pertaining to environment conservation that is specified in the order and make its recommendations and report thereon to the Lieutenant Governor in Council;
>
> (g) . . . refer any matter pertaining to environment conservation to the Department of the Environment for its recommendations and report thereon;
>
> (i) in co-operation with and primarily through the medium of the Department of the Environment, . . . use its best efforts to achieve co-ordination of policies, programs and administrative procedures of the Government agencies relating to matters pertaining to environment conservation.

The Authority does however have the power to create public advisory committees on environment conservation[24] and to hold an inquiry on appeals from a stop order issued by the Minister of the Environment pursuant to the Department of the Environment Act[25] or The Clean Water Act.[26] Thus although some of its functions appear redundant, the Authority seems to function as an independent "watchdog" in the area—its independence being emphasized by its corporate capacity.[27]

Although the Energy Resources Conservation Act[28] is not directly concerned with pollution prevention but rather with conservation of energy resources, the functioning of the Energy Resources Conservation Board (formerly the Oil and Gas Conservation Board) is inextricably connected with the achievement of such an aim, and this is impliedly recognized by the membership of the chairman of the E.R.C.B. on the Natural Resources Co-ordinating Council discussed previously. "Energy resource", defined in the Act to be "any natural resource within Alberta that can be used as a source of any form of energy",[29] must include water. Amongst the specified purposes of the Act are:[30]

> (c) to effect the conservation of, and to prevent the waste of, the energy resources of Alberta,
>
> (d) to control pollution and ensure environment conservation in the exploration for, processing, development and transportation of energy resources and energy.

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[20] *Supra*, n.3.

[21] *See* creating section, *id.* s.4, and the function section, *id.* s.7(1), in support of this thesis.

[22] S.3 of the Environment Conservation Act defining "matters pertaining to environment conservation" is identical to s.2 of the Department of the Environment Act, *supra*, at

[23] *Supra*, n.3 s.7(1).

[24] *Id.* s.s.7(1), 11.

[25] Department of the Environment Act, *supra*, n.2 s.16(8)—(10).

[26] The Clean Water Act, *supra*, n.6 s.7(8)—(10).

[27] *Supra*, n.3 s.4(1).

[28] *Supra*, n.4.

[29] *Id.* s.1.

[30] *Id.* s.2.

and the Board, except as expressly authorized by the Act, has full discretion, subject to the approval of the Lieutenant Governor in Council, to issue whatever orders and directions it feels necessary to carry out these purposes.[31] The Act further provides for the creation of the "Energy Committee" to advise the government on policy matters concerning Alberta's energy resources, and befitting the environmental conservation consequences of such policy is the membership of the Deputy Minister of the Environment thereon.[32]

The Oil and Gas Conservation Act[33] is now administered by the Energy Resources Conservation Board which is charged with effecting the purposes of the Act which include:[34]

> to control pollution above, at or below the surface in the drilling of wells and in operations for the production of oil, gas and crude bitumen and in other operations over which the Board has jurisdiction.

To this end, the Board has a general regulatory power over the oil and gas exploration and production within the province with a specific power to regulate the location and methods of operations employed during exploration for and production from these wells for any purpose including the prevention of pollution. The Act also specifically provides:[35]

> If at any time an escape of oil or gas from a well . . . is not prevented . . . the Board may take such means as may appear to it to be necessary or expedient in the public interest to control and prevent the escape of oil or gas . . .

and under an amendment effective June 1, 1971:[36]

> Where oil escapes from a well, battery or pipe line or from an unidentified source and it appears to the Board that such oil may not otherwise be contained and cleaned up forthwith, the Board may
>
> (a) direct the licensee or pipe line operator, or such licensees or pipe line operators who appear to the Board could be responsible for a well, battery or pipe line from which oil escaped, to take steps it considers necessary to contain and clean up oil which has escaped and to prevent further escape of oil, or
>
> (b) enter upon the area where oil has spilled and conduct such operations as it considers necessary to contain and clean up oil which has escaped and to prevent further escape of oil.

The costs and expenses of cleaning up escaped oil are determined by the Board which also directs by whom and to what extent they are to be paid.[37] An interesting provision in the amendment is the prohibition it contains against the bringing of an action or proceeding against a person named in a direction pursuant to section 133.1(1)(a) in respect of any act or thing done in pursuance of that direction[38]—as worded this might preclude an adjoining property owner injured as a result of the directee's efforts from gaining redress *via* the courts should the Board fail to incorporate his injury in its evaluation of the costs and expenses of the cleanup. Contravention or default in complying with any provisions of the Act or regulations made thereunder or any order or direction of

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[31] *Id.* s.23. To date any regulations of the Board (other than Rules of Practice, Alta. Reg. 149/71) have been made under the Oil and Gas Conservation Act, discussed *infra*, at

[32] *Id.* ss.19, 21.

[33] *Supra*, n.5.

[34] *Id.* s.5(e).

[35] *Id.* s.40(1).

[36] *Id.* s.133.1(1).

[37] *Id.* s.133.1(3).

[38] *Id.* s.133.1(5).

the Board constitutes an offence punishable by fine or imprisonment.[39] Examples of regulations made pursuant to the Act to contain or prevent pollution of waters are:[40]

> No person shall
>
> (a) drill a well or cause or permit a well to be drilled, or
>
> (b) construct a pit for containing mud, oil, water and other fluid associated with the well or cause or permit such a pit to be constructed,
>
> closer than 150 feet, or such greater distance as the Board may direct, to the normal high water mark of a body of water or permanent stream unless he has obtained written approval from the Board of his plans to prevent pollution of the water.

and:[41]

> The licensee of a well or operator of a battery shall ensure that liquid waste is contained at all times, and
>
> (a) dispose of, or cause to be disposed of, all liquid waste on the well or battery site in such a manner that no air, soil, surface water or underground source of potable water is or could be polluted, or
>
> (b) where liquid waste is removed from the well or battery site, dispose of such liquid waste in a manner approved in writing by the Board or the Minister of Lands and Forests.

Further, where a well or battery is located closer than one hundred and fifty feet to the normal high water mark or where an oil spill or leak might reach the water, the Board requires special measures to be taken to prevent such a spill[42] and where the threat of water pollution is serious the Board may require that the well or battery be abandoned.[43] In light of the volume of activity in the petroleum industry in Alberta and the low incidence of water pollution resulting from such activity it must be concluded that the purposes of the Act have been to a great degree successfully carried out.

Some of the jurisdiction over water purity formerly exercised by the Department of Public Health has been transferred to the Department of the Environment by the Clean Water Act.[44] Under the Act, the Minister of the Environment is authorized to make regulations prescribing the maximum permissible concentration in water of water contaminants, defined as:[45]

> any solid, liquid or gas or combination of any of them, or heat, in water as a direct or indirect result of activities of man.

although such permissible level may not exceed that prescribed by the Provincial Board of Health for the same part of Alberta or for the same watercourse, and to prescribe maximum permissible changes in temperatures of surface waters.[46] To date no such regulations have been published. Under the Act, the Director of the Pollution Control Division of the Department must approve the plans or specifications of any plant, structure or thing designed to prevent or control water pollution or to

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[39] *Id.* ss.139(2), 141.

[40] Alta. Reg. 151/71 as amended by Alta. Reg. 241/71, s.2.120(1).

[41] *Id.* s.8.150(2).

[42] *Id.* s.8.060.

[43] *Id.* s.8.070.

[44] *Supra*, n.6.

[45] *Id.* s.1(1).

[46] *Id.* s.3.

regulate water quality prior to the commencement of its construction; failure of the operator to obtain this approval or failure to observe any conditions of the approval constitutes an offence.[47] Where such an operation is approved, the question arises whether an aggrieved riparian owner is precluded from gaining redress where he feels the operation admits excessive pollutants into the riparian waters—this may be particularly pertinent to the effluent of older facilities approved under less stringent standards, for section 11 deems previous approval under the Public Health Act or regulations thereunder to be approval of the Director issued under section 4.[48] The Director is further empowered to issue "water quality control orders" to owners or operators of any plant, structure or thing that he considers to be the source of water contaminants or changes in temperature where the contaminant levels exceed those prescribed or the temperature change is in contravention of regulations.[49] These orders may direct the person:[50]

> (a) to limit or control the rate of discharge of the water contaminant by the plant, structure or thing in accordance with the directions specified in the order;
> (b) to do any act to limit or control the source of the heat causing the temperature change . . .;
> (c) to refrain from discharging the water contaminant or causing the source of heat either permanently or for a specified period or during the times or in the circumstances specified in the order;
> (d) to comply with any directions specified in the order relating to the manner in which the water contaminant or source of heat may be discharged or the procedures to be followed in the control or elimination of the discharge of the water contaminant or the source of the heat;
> (e) to install, replace or alter any equipment or thing designed to control or eliminate the discharge of the water contaminant or the source of the heat.

and are mandatory in nature, as failure to comply may result in a "stop order" being issued by the Minister.[51] Failure to comply with a "stop order" is a summary conviction offence with a possible penalty of a fine of $10,000 for each day the offence continues or imprisonment for not more than 12 months or both.[52] This stop order is identical to one issued under the Department of the Environment Act in all respects other than it issues for a contravention of the Clean Water Act or, regulations thereunder, for failure to comply with a direction or order of the Director or where the operation in the opinion of the Minister constitutes an immediate danger to human life or property or both.[53] The Clean Water Regulations presently exempt from the approval requirements of section 4 of the Act:[54]

> (a) a private water supply system serving a single dwelling house,
> (b) the repair or maintenance of a water facility,
> (c) a connection to a waterworks system or a sewage project, and
> (d) a private sewage disposal system utilizing underground disposal.

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[47] *Id.* s.4.

[48] The Alberta case of *Howrish* v. *Holden (Village)* (1960) 32 W.W.R. 491 (District Court) is an example of the unsuccessful pleading of such a defence.

[49] *Supra*, n.6, s.6(1). Such an order could presumably be used to force the upgrading of older facilities.

[50] *Id.* s.6(2).

[51] *Id.* ss.6(3),7(1)(b).

[52] *Id.* s.7(4).

[53] *Id.* s.7(1). However as noted previously, the discretion in the Minister is more restricted than that provided under the Department of the Environment Act.

[54] Alta. Reg. 300/71, s.3.

while making:[55]

> Any type of plant, structure or thing that takes or uses water from any source for
> (a) heating or cooling purposes, or
> (b) production, manufacturing or processing purposes, or
> (c) cleaning purposes, or
> (d) transporting purposes, or
> (e) mining purposes, or
> (f) any other purpose,
> which results in the water being discharged by or from the plant, structure or thing with a change in temperature or with the addition of a water contaminant or with a change in temperature and the addition of a water contaminant . . .,

subject to section 4. The Regulations also make provisions governing discharge of pesticides,[56] the use of wells for disposal of waste,[57] and flouridation of water supplies.[58]

Although some of the functions of the Department of Health and Social Development in respect of water pollution are now exercised by the Department of the Environment,[59] the Department of Health and Social Development *via* the Provincial Board of Health retains certain powers in this area under authority of the Public Health Act.[60] Primary among these powers is the authority of the Board of Health to make and issue orders, rules and regulations, subject to the approval of the Lieutenant Governor in Council, in respect of:[61]

> 2. the prevention and removal of nuisances;
> 8. the construction, maintenance, operation, cleansing and disinfecting of all drains, sewers and sewerage systems, and systems of sewage disposal . . .;
> 9. the situation of and the methods of carrying on all noxious and offensive trades or businesses, and the summary abatement of any nuisance arising or likely to arise therefrom;
> 19. the prescribing of maximum permissible concentrations of water contaminants (as defined in The Clean Water Act) in water in all or any part of Alberta or in any specified watercourse or water body and the prescribing of the methods for determining the concentrations of such water contaminants;

"nuisance" being defined as:[62]

> any condition existing in any locality and that is or that might become injurious or dangerous to health, or that might hinder in any manner the prevention or suppression of disease.

Division 34 of the Provincial Board of Health Regulations provides that "no person shall create, commit or maintain any nuisance,"[63] and specifically, that no one can discharge chemicals, chemical substances or their residues, fuel oil or other inflammable substances into public sewers,[64] and that no one can discharge pollutants into water without the written consent of the Local Board of Health.[65] However the Regula-

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[55] *Id.* s.5.
[56] *Id.* Part 3.
[57] *Id.* Part 5.
[58] *Id.* Part 6.
[59] *Supra*, at 359.
[60] *Supra*, n.7.
[61] *Id.* s.7(1).
[62] *Id.* s.2(14). Of course, nuisance as defined here is not used in its tortious sense.
[63] Alta. Reg. 572/57, s.34-2-1. It is doubtful that such a provision gives rise to a private cause of action.
[64] *Id.* s.34-8-2.
[65] *Id.* s.34-8-3.

tions of the Board provide that the Board may waive the requirements of any of its regulations where in its opinion there is a significant reason to do so and where the intent of the regulations will be assured.[66] It would appear therefore that the Board might waive the limit on water contaminant concentration and give permission for the disposal of pollutants into riparian waters to the detriment of downstream riparian owners, and, arguably, any riparian owner may not be able to prevent such an occurrence nor obtain redress.[67] Such an argument might be strengthened by the provisions of section 10.1 of the Act:

> (1) The Provincial Board may inquire into and hear and determine any complaint made by or on behalf of any person in respect of a nuisance.
> (2) The Provincial Board may make a report upon such complaint and as to what remedial measures, if any, that it considers are required in respect of the nuisance complained of.
> (3) Where the report of the Provincial Board recommends the removal of any thing causing a nuisance or the abatement of a nuisance, the Minister or the complainant may apply to the Supreme Court or to a district court by way of originating notice of motion for an order
>  (a) for the removal of the cause of the nuisance or abatement of the nuisance in terms of the report of the Provincial Board, and
>  (b) to restrain the persons from continuing the nuisance, or any other persons from continuing the acts complained of, until the nuisance has been abated, or the cause of the nuisance removed, to the satisfaction of the Provincial Board.
> (4) The judge may, upon the report of the Provincial Board, or upon such further evidence as he thinks necessary, make such order and on such terms and conditions as he considers proper.

which, it could be argued, provide such a party with a remedy in lieu of his right of action in nuisance (at least as regards any nuisance encompassed within the definition of nuisance in the Act). The membership on the Board of the Director of the Pollution Control Division of the Department of the Environment[68] however would presumably militate against any such waiver.[69]

The use of agricultural pesticides can be a source of water pollutants and this is recognized by the Agricultural Chemicals Act[70] which contains a number of prohibitions and provides for a system of licensing pesticide applicators. Primary amongst these prohibitions are:[71]

> No person shall
> (a) wash or submerge in any open body of water any apparatus, equipment or container used in the holding or application of a pesticide, or
> (b) cause water from any open body of water to be drawn into any apparatus or equipment used for mixing or applying a pesticide unless such apparatus or equipment is equipped with a device which prevents back flow.

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[66] Alta. Reg. 572/57 as amended by Alta. Reg. 135/69, s.1-3-1(1). Prior to making such a waiver, the Board may make any investigation it deems necessary.

[67] This argument will be considered, *infra*, at 365 *et seq.*

[68] *Supra*, n.7 s.3(1).

[69] Performance of the Board in the past as well would indicate that such waiver is unlikely, *i.e.* the Board issued instructions to the townsites of Banff and Jasper to construct sewage treatment facilities by Alta. Reg. 378/69 and 379/69 respectively, and to Coleman Collieries Ltd., Building Products of Canada Ltd. and Canadian Sugar Factories to install waste water treatment facilities in operations at Coleman, Wabamun, and Picture Butte and Taber respectively (by Alta. Regs. 240/69, 182/70, and 140/70 (am. 355/70) and 141/70 (am. 356/70) respectively).

[70] *Supra*, n.8.

[71] *Id.* s.10.

and:[72]

> No person shall apply a pesticide in any open body of water unless he holds a permit to do so pursuant to the regulations under this Act or *The Public Health Act.*

The only regulations now governing permits are pursuant to the Agricultural Chemicals Act,[73] although in certain circumstances written permission of the Director of the Pollution Control Division of the Department of the Environment may be required before pesticides can be applied.[74] The Minister of Agriculture has the power to suspend or revoke a permit where in his opinion any breach of the Act or regulations has occurred[75] although each municipality is responsible for the administration of the Act and its regulations within the municipality,[76] and any breach may also result in a fine or imprisonment or both upon summary conviction.[77]

Although the provisions of the Water Resources Act[78] are not directly concerned with the control of water pollution by government agencies,[79] they are material to the later discusssion of the continued existence of common law riparian rights and to the question of whether a riparian owner can bring an action for breach of such rights against a polluter, as section 5(4), which states:

> The provisions of this Act do not affect the right of a person owning or occupying any land that adjoins a river, stream, lake or other body of water upon provincial lands, to use such quantity of that water as he requires for domestic purposes on the land.

can be used in support of the position that the common law right to pure water is still extant in the riparian owner in Alberta.[80] Every application for a diversionary licence must, unless otherwise directed, be referred to the Energy Resources Conservation Board for its advice,[81] and it thus appears possible for the Minister of Agriculture[82] or the Director of Water Resources,[83] as a condition of the granting of a licence, to specify the condition the water must be in following its use, should the Board so advise or should the Minister or the Director deem it necessary.[84] The Act authorizes the Lieutenant Governor in Council to enter into arrangements or agreements with other governments in Canada for the creation of a board to advise on the control and use of boundary waters,[85] and to pass regulations governing the utilization and

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[72] *Id.* s.7.

[73] *See* Alta. Reg. 89/70.

[74] *See* Alta. Reg. 300/71, s.7.

[75] *Supra*, n.8, s.12.

[76] *Id.* s.14.

[77] *Id.* s.22.

[78] *Supra*, n.9.

[79] The entire scheme of the Act and the regulations thereunder is directed toward the governing of water diversion and power schemes so as to provide water to those not adjacent to water sources and to enable energy to be derived from water power.

[80] *See infra*, n.98. The definition in the Act of "domestic purposes" as meaning:
> household requirements, sanitation and fire prevention, the watering of domestic animals and poultry, and the irrigation of a garden not exceeding one acre adjoining a dwelling house upon the land of a riparian owner.

impliedly supports this position.

[81] *Supra*, n.9, s.15.1.

[82] Regulations made under the Act indicate the Minister of Agriculture as being responsible for the administration of the Act.

[83] Section 22 of the Act empowers the Director to act in the place of the Minister.

[84] Section 16(1) expressly authorizes the Minister to grant an interim licence subject to such conditions as he deems necessary.

[85] *Supra*, n.9, s.75.

disposition of water by licensees,[86] while the Minister is authorized to direct or order:[87]

> that such steps be taken as he thinks necessary for the protection of the sources of water supply and the prevention of any act likely to diminish or injure the supply.

To date, regulations passed under the Act have dealt only with water power or diversion of waters,[88] and no attempt has been made to use it to control pollution although such would appear possible.

The scheme of water-pollution control displayed by the above enactments is somewhat patterned after that of the province of Ontario in that it utilizes a type of managerial authority backed by sanctions to achieve its aims. This method can be contrasted with the pollution permit system adopted by the province of British Columbia[89] and with the effluent charge system as envisaged by the Canada Water Act.[90] Both of these other systems have their advantages and disadvantages with the latter having displayed noticeable success when applied to the Ruhr Basin in Germany—one of the most heavily industrialized and populated areas in the world.[91] The effluent charge system is based essentially on the concepts that the polluter must pay to discharge pollutants and that any river system can only accept a limited amount of pollutants. Putting the two together and having established an acceptable level of pollution for the river system based upon a classification of its use, the polluter is then required to purchase "discharge rights"—theoretically the cost of such rights will be reflected in the cost of the products produced or in the cost of sewage disposal and, premised upon free market competition in the former case and upon pressures of ratepayers in the latter, it becomes economically advantageous for the polluter to reduce his output of pollutants. Because Alberta has jurisdiction over the headwaters of a number of inter-jurisdictional river systems, the adoption of the effluent charge system would have been effective to control pollution within her boundaries but it would probably have had the undesirable effect of having industries locate elsewhere where no charges were made. As well a pollution level acceptable to Alberta might result in a totally unacceptable level of pollution in downstream jurisdictions—particularly if the "rights" available in Alberta were based on the total ability of the whole river system to absorb pollutants. The permit system of B.C. allows for individual regulation of each polluter but the efficacy of such a system to control the totality of pollution is premised on the establishment of standards or water quality objectives for the total river system. As such, the use of permits in Alberta might have the same deficiencies as the effluent charge system. In addition, as indicated by Professor Lucas in his discussion of the use of permits:[92]

> . . . there are indications that the permit is considered to create a form of vested right. The danger posed may tend to be reinforced by the bureaucratic passion for

[86] *Id.* s. 76(1)(b)(iii).

[87] *Id.* s. 77(3)(a).

[88] *See* Alta. Regs 91/58 (am. 328/62, 187/65, 38/66) and 284/57.

[89] For a discussion of the B.C. permit system, *see* Lucas, *Water Pollution Control Law in British Columbia*, (1969) 4 U.B.C.L. Rev. 56.

[90] The Canada Water Act itself is discussed *in extenso* in Landis, *Legal Controls of Pollution in the Great Lakes Basin*, (1970) 48 Can. Bar Rev. 66. while a discussion of the effluent charge system envisaged thereunder is found in Lucas, *Legal Techniques for Pollution Control: The Role of the Public*, (1971) 6 U.B.C.L. Rev. 167.

[91] Lucas, *id.* at 182.

[92] *Id.* at 179-180.

> neatness in administration; efficient operation of the permit-issuing machinery itself may become the prime objective. The permit also can screen chronic polluters from public abuse . . .

as private citizens may not have standing to bring court actions against polluters and the polluter may raise the defence of statutory authority, and the expense of policing individual permit standards may be astronomical—presumably these difficulties would have been equally apparent in Alberta had such a system been adopted.

The managerial system adopted by Alberta avoids most of the above difficulties by reason of the flexibility inherent in the discretion available to the responsible bodies, however this same flexibility brings with it the increased possibility of abuse. There can be little doubt that the establishment of the Department of the Environment under the Minister of the Environment, an agency with environmental preservation as its primary goal, is a progressive step; that this agency has the potential, by reason of the powers vested in it, to take strong action against polluters; and that the potential effectiveness of the environmental maintenance scheme is greatly enhanced by the creation of coordinating bodies such as the Natural Resources Co-ordinating Council. Nevertheless the responsible authority is a government department rather than a semi-autonomous body such as the Ontario Water Resources Commission and consequently will be subject to divergent pressures which may result in decisions being made which are not in the best interests of the electorate. Furthermore the success of the management scheme in Ontario largely depends upon negotiation and the use of pressure upon polluters rather than upon application of sanctions and presumably the success of the Alberta scheme will be similarly dependent upon the willingness of the authorities to apply pressure and to utilize sanctions where required.[93]

*Rights of the Citizen*

Should the authorities created by legislation fail to carry out their duties in a manner satisfactory to the citizens, redress against a polluter by way of damages or injunction in tort or for interference with proprietary rights is theoretically available to the private citizen.[94] A private action lies in nuisance where property is physically damaged or where

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[93] The Federal jurisdiction in the area must not be forgotten. The Government Reorganization Act, 1970 which was proclaimed on June 11, 1971 established a Department of the Environment with responsibility over

> . . . all matters over which the Parliament of Canada has jurisdiction, not by law assigned to any other department, branch or agency of the Government of Canada, relating to
> (a) sea coast and inland fisheries;
> (b) renewable resources, including
> (i) the forest resources of Canada
> (ii) migratory birds, and
> (iii) other non-domestic flora and fauna;
> (c) water;
> . . .
> (e) the protection and enhancement of the quality of the natural environment, including water, air and soil quality;
> (f) notwithstanding paragraph (f) of section 5 of the Department of National Health and Welfare Act, the enforcement of any rules or regulations made by the International Joint Commission, promulgated pursuant to the treaty between the United States of America and His Majesty, King Edward VII, relating to boundary waters and questions arising between the United States of America and Canada, so far as the same relate to pollution control.

Some of these powers are of course exercisable in Alberta, and as well the following Federal acts dealing with water pollution are applicable here: The Canada Water Act, *supra*, n. 13; The Canada Shipping Act, R.S.C. 1970, c.S-9; The Fisheries Act, R.S.C. 1970, c. F-14; The Animal Contagious Diseases Act, R.S.C. 1970, c. A-13; and The Migratory Birds Convention Act, R.S.C. 1970, c. M-12. A discussion of the constitutional basis of such legislation being applicable in Alberta is found in Gibson, *The Constitutional Content of Canadian Water Planning*, (1969) 7 Alta. L. Rev. 71.

[94] For a detailed discussion, *see Salmond on Torts* (15th ed. Heuston 1969) or any other text or torts.

the use and enjoyment of property is substantially interfered with so that its value is reduced; breach of a duty imposed by statute upon a polluter may give rise to tortious liability at the suit of a party injured by such breach where such statute confers a private cause of action, or where no cause of action is conferred, the statute may impose a standard of care which if not met may support an action in negligence; or, an action may lie in trespass, or under the principle in *Rylands* v. *Fletcher*.[95] However, the difficulties faced by a private individual pursuing one of these actions against a polluter such as: proof of private injury beyond that suffered by the public at large, proof of the source of pollutants entailing expensive testimony, and absence of *locus standi* to bring actions in public nuisance, effectively preclude any but the most well-financed, persistent complainant from taking such action.[96] A riparian proprietor at common law was however in a somewhat less disadvantageous position in that he could bring an action to prevent interference with any right appurtenant to his land and he need not prove actual damage, only interference with one of these rights. One of these riparian rights was the right to pure water, and therefore the riparian proprietor, provided he still possesses this right in Alberta, is in a better position than the ordinary citizen to enjoin any polluter should the authorities created by statute fail to do so. If such is the case, the riparian proprietors in the province of Alberta can serve the function of watchdog on the legislators and their agencies to ensure that their responsibilities with respect to water pollution are not ignored and that the legislation is not used only as a sop to public opinion.

*The Right to Pure Water*

At common law a riparian proprietor of land had certain rights in respect of natural watercourses which ran through or touched his land. Such rights were independent of the actual use of the water, did not depend upon ownership of the soil of the stream and belonged to the proprietor of the riparian land as a natural incident of his ownership of the land, and not as an easement.[97] Lord Macnaughten in *Young & Co.* v. *Bankier Distillery Co.* defined these rights thusly:[98]

> A riparian proprietor is entitled to have the water of the stream, on the banks of which his property lies, flow down as it has been accustomed to flow down to his property, subject to the ordinary use of the flowing water by upper proprietors, and to such further use, if any, on their part in connection with their property as may be reasonable under the circumstances. Every riparian proprietor is thus entitled to the water of his stream, in its natural flow, without sensible diminution or increase and without sensible alteration in its natural flow, without sensible diminution or increase and without sensible alteration in its character or quality. Any invasion of this right causing actual damage or calculated to found a claim which may ripen into an adverse right entitles the party injured to the intervention of the court.

The Dominion North-West Territories Act[99] adopted the 15th of July, 1870, as the date for the reception of the English law "as applicable" into the province of Alberta, and in view of cases which will be discussed

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[95] (1868) L.R. 3 H.L. 330.

[96] *See* Lucas, *supra*, n. 90.

[97] In discussing the riparian owners right to the natural flow of a stream, the Supreme Court of Canada stated in *Leaky* v. *Sydney* (1906) 37 S.C.R. 406 that such a right was not an easement "because it is irreparably connected with an inherent in the property in the land."

[98] [1893] A.C. 691 at 698.

[99] 49 Vict., c.25, s.3. For an extensive examination of the reception of English law, *see* Cote, *The Introduction of English Law into Alberta*, (1964) 3 Alta. L. Rev. 262.

later it must be concluded that common law rights of riparian owners are "applicable" in Alberta unless eliminated by statute. There is little doubt that the right to have undiminished flow maintained has been abrogated in Alberta by the Water Resources Act but considering the totality of legislation in Alberta, it is submitted that nowhere in the existing legislation is there found a "clear, unambiguous" enactment specifically eliminating the common law right to pure water. In the absence of such a statement and in view of the attitude of the courts toward any attempted abrogation of the common law rights of the individual,[100] it must be concluded that the right of the riparian owner to pure water continues to exist in Alberta. Indeed section 5(4) of the Water Resources Act specifically recognizes the right of the possessor of riparian lands to such quantity of water as he needs for domestic purposes, and at common law an entitlement as of right to water was essential to a complaint based on interference with the quality of the water.

Quality of water, and the right to have it maintained is a very broad right and there is no rule for predicting when the court will decide that a certain action affects quality and when it does not. One can only look to the situations in which the court did decide that certain action constituted pollution. In *Moore* v. *Webb*[101] the plaintiff brought an action against the defendant for polluting a stream, by letting off water used in his tannery into the stream, rendering the water so foul that the plaintiff's cattle were unable to drink it. The case dwelt to some degree on the rights acquired by the defendant by long use but the plaintiff showed and the judges accepted the fact that within the preceding twelve years the pollution in the stream had increased "fourfold"; the defendant was found liable. Other cases have held that the letting off of dyewaters into a stream or sulphuric acid or arsenic or, as in the case of *Bidder* v. *Croydon*,[102] sewage such that the water became unfit for fish to live in all constituted pollution. In the case of *Tipping* v. *Eckersley*[103] the court held that raising the temperature of water constituted a material interference with the quality of the water to which the plaintiff was entitled and was, therefore, actionable. The examples and cases discussed so far tend to show the strictness of the early common law under what became known as the "natural flow" theory. In effect[104]

> the riparian owner [was] entitled to have the water in a pure condition and [had] a right to take the persons causing pollution one by one and prevent each from discharging his contribution to that which [became] in the aggregate a nuisance.

The riparian owner could maintain an action for pollution without proving actual damages but the suit could be dismissed if the damage was temporary or too minute, trifling and unsubstantial, not material, or isolated and accidental. Further, it was not necessary:[105]

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[100] Farnham in Volume One of the *The Law of Water and Water Rights* concludes, at 281, that the rights of the riparian owner are proprietary rights which do not depend upon the good will or acquiescence of the state and that such rights cannot be lost without adequate compensation. To this end, the courts, applying the same maxims cited *infra*, at 372, have strictly interpreted any statutes which may possible attempt this. None of the Alberta statutes when strictly interpreted deprive the riparian owner of the right to pure water, and it must therefore be concluded that such right is still extant in Alberta.

[101] (1857) 1 C.B.N.S. 673.

[102] (1862) 6 L.T. (N.S.) 778.

[103] (1855) 2 K + J. 264.

[104] *See Blair and Sumner* v. *Deakin* (1887) 52 J.P. 327.

[105] *See A.G.* v. *Birmingham, Tame and Rea District Drainage Board* [1908] 2 Ch. 551.

> to show deterioration of a stream in general, but that something has been added to the water which detracts from the purity and quality of the water at the point where the offending matter enters the stream.

And:[106]

> In order to ascertain whether the quality of the water of a stream has deteriorated, any polluting matter already present must not be taken into account; what matters is whether what is added would appreciably pollute the stream if its waters were otherwise pure.

Thus for all practical purposes the common law "natural flow'" theory imposed virtually strict liability for pollution of water and interpreted the right to receive water unaffected as to its quality very broadly. Reflecting the reluctance of the common law to countenance any excuse in regards to pollution of waters, the courts rejected the defences raised by polluters that:

1. the stream which he had polluted was also polluted by other persons;[107]
2. the trade causing the pollution was carried on in lawful and proper manner;[108]
3. the trade was being carried on for purposes which were necessary and useful to the community,[109]
4. the plaintiff suffered no practical damage because the water was already polluted;[110]
5. the pollution had been committed by a non-profit body corporate merely discharging its public duties.[111]
6. a large cumber of persons would suffer if the court restrained a nuisance created by sewage disposal;[112]
7. two substances each in themselves harmless have been added to the river, if in conjunction they caused pollution;[113]
8. the pollution was a consequence of the scarcity of water caused by a drought amounting to an Act of God;[114] or
9. the plaintiff was not making use of the water as a riparian owner, or that he had purchased the riparian land knowing the water was polluted.[115]

The common law did however recognize that an easement to affect or use the water of a natural stream in any manner not justified by natural right as to its quantity and quality could be acquired—in effect a right to pollute—and such a right could be acquired by prescription.[116] However, section 50 of the Limitations of Actions Act[117] precludes the acquisition of such a right in Alberta.

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[106] *See Staffordshire County Council* v. *Seisden R.D.C.* (1907) 5 L.G.R. 347.

[107] *See Crossley* v. *Lightowler* (1867) 16 L.T. 438; *St. Helen's Smelting Co.* v. *Tipping* (1805) 11 H.L.C. 642.

[108] *See Stockport Waterworks Co.* v. *Potter* (1864) 10 L.T. 748; *Hipkins* v. *Birmingham* (1860) 6 H. + N. 250.

[109] *See Bamford* v. *Turnley* (1862) 3 B. + S. 66.

[110] *See Pennington* v. *Brinksop Hall Coal Co.* (1877) 5 Ch. D 772.

[111] *See A.G.* v. *Basingstoke Corporation* (1876) 24 W.R. 817.

[112] *See A.G.* v. *Birmingham Corporation* (1858) 22 J.P. 561.

[113] *See Blair and Sumner* v. *Deakin, supra,* n. 105.

[114] *See Chesham* v. *Chesham* U.D.C. (1935) 79 S.J. 453.

[115] *See Crossley* v. *Lightowler, supra,* n. 108.

[116] *See Blackburn* v. *Somers* (1829) 5 L.R.IR. 1.

[117] R.S.A. 1970, c. 209.

The "natural flow" approach was somewhat modified by what has been termed the "reasonable use" doctrine which was enunciated in *Swindon Waterworks Co.* v. *Wilts and Berks Canal Navigation Co.*:[118]

> . . . there may be a use of the water by the upper owner for . . . manufacturing purposes, so reasonable that no complaint can be made upon the subject by the lower owner. Whether such a use in any particular case could be made for manufacturing purposes connected with the upper tenement would . . . depend upon whether the use was a reasonable use. Whether it was a reasonable use would depend, at all events in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water.

What constitutes reasonable use is a question which is dependent upon the evaluation of conflicting interests and thus the courts are allowed the greater degree of flexibility consonant with the needs of modern economic growth and increased populations. Nevertheless such a theory introduces a degree of uncertainty to the law, and one might expect that the theory has enabled the courts to be more lenient with polluters. As will be seen from the discussion of Canadian decisions, this has not been the case as the courts have tended to jealously guard the rights conferred on the citizen by the common law, limiting severely the ambit of what constitutes reasonable use.

The remedies available at the suit of the riparian owner for interference with his right to pure water are those of injunction or damages or both. Of course the more desirable remedy is the injunction as it halts the pollution, however it is a discretionary remedy and the courts have been loath to grant an injunction where economic loss or hardship is involved.[119] Nevertheless the injunction is not purely discretionary, for in the landmark case of *Pride of Derby and Derbyshire Angling Association and another* v. *British Celanese Ltd. and others,* Evershed M.R., in commenting on an application for an injunction for interference with proprietary rights, stated:[120]

> It is, I think, well settled that if A proves that his proprietary rights are being wrongfully interfered with by B, and that B intends to continue his wrong, then A is *prima facie* entitled to an injunction, and he will be deprived of that remedy only if special circumstances exist including the circumstances that damages are an adequate remedy for the wrong that he has suffered. In the present case it is plain that damages would be a wholly inadequate remedy. . . . The general rule which I have stated, in my opinion, applies to local authorities as well as to other citizens. Equally, of course, the court will not impose on a local authority, or on anyone else, an obligation to do something which is impossible, or which cannot be enforced, or which is unlawful. So the practice is adopted in the case of local authorities of granting injunctions, and then suspending their operation for a time, long or short.

The *Pride of Derby Case* was an action framed in nuisance brought by the owners of a fishery in the Rivers Trent and Derwent and by the riparian owner of land adjoining both rivers seeking an injunction and damages against three parties who polluted these rivers. It was alleged that one defendant, a commercial company, caused pollution by pouring injurious effluents into the River Derwent and by returning water

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[118] (1875) L.R. 7 H.L. 697 at 704.

[119] The classic statement of this attitude is found in *Shelfer* v. *City of London Electric Lighting Co.* [1895] 1 Ch. 287 where Smith L.J. at 322 stated what he considered to be a good working rule:
1. If the injury to the plaintiff's legal right is small,
2. And is one which is capable of being estimated in money,
3. And is one which can be adequately compensated by a small money payment,
4. And the case is one in which it would be oppressive to the defendant to grant an injunction;
then damages in substitution for an injunction may be given.

[120] [1953] 1 Ch. 149 at 181 (C.A.).

to the river at a temperature injurious to fish, that the Derby Corporation polluted the rivers by pumping insufficiently treated sewage into the Derwent, and that the British Electric Authority polluted it by discharging heated effluent. The court stated, in effect, that while the rights of the riparian owner may well have been more extensive than the claims of the other plaintiffs, it was unnecessary to discuss these rights for being more extensive they would obviously be satisfied by factors sufficient to satisfy a claim in nuisance. Of major importance is the recognition afforded the lower court finding that as the waters had been polluted by the combined effect of the activities of the defendants, an action could be brought against all the defendants without isolating the damage resulting from the activity of each.[121] The decision is important from a number of other perspectives as well: as a commentary on the practicalities of actions against polluters being framed in nuisance; as a commentary on remedies and on defences—particularly the defence of statutory authority and on the limitations on any action framed in negligence. The Court concluded that, in regards to nuisance, nonfeasance and misfeasance have no relevance, the question being only whether the nuisance was expressly or impliedly authorized by the statute which authorized the construction of the Derby sewage works or whether the nuisance was the inevitable consequence of that which the Act both authorized and contemplated. No statutory defence was found and an injunction was granted against all defendants subject to suspension for the time necessary to remedy the causes of the pollution.

The approach adopted by the Canadian courts is best illustrated by the case of *Mckie* v. *The K.V.P. Co.*,[122] a 1948 decision of the Ontario High Court, where rights existing at common law in riparian owners were recognized by the courts but subsequently were abridged by legislative action.

The case arose out of an action by three downstream riparian owners, one of whom held title to a portion of the bed of the Spanish River, against the K.V.P. Co., an upper riparian owner, which operated a pulp and paper mill and which dumped the raw effluent from its mill directly into the River. The lower riparian owners, operators of tourist camps, sought an injunction and damages, claiming that this effluent had so polluted the river as to make it discolored, odiferous and unpalatable such that it was unfit for human or animal consumption and such that it had largely destroyed the fish therein. They further claimed that the smell caused by the effluent was so offensive as to have adversely affected their tourist trade and that as such it constituted a nuisance. Having reviewed the evidence presented, McRuer C.J.H.C. found:[123]

> . . . that the waters of the Spanish River below the defendant's plant have been polluted in such a manner as to change their character and substantially affect the use to which the plaintiffs were entitled to put them and to interfere with the enjoyment of the plaintiffs as occupiers of riparian lands.

and,[124]

> . . . the pollution of the river has substantially affected the fishing therein and that the pollution is responsible for killing fish found in this river.

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[121] The lower court decision is reported at [1952] 1 All E.R. 1326.

[122] [1948] 3 D.L.R. 201.

[123] *Id.* at 208.

[124] *Id.* at 209.

Having determined the fact of pollution and destruction of fish, the court then considered what the rights of a riparian owner were. It found that a riparian owner had a usufructary right, incident to his land and independent of ownership of the *solum* to the free flow of water in its natural state, both in quantity and quality—that if this right were interfered with, as by pollution of the watercourse by an upper riparian owner (who had not acquired a prescriptive right to so interfere), the riparian owner could maintain an action without proof of actual damage and could claim an injunction. The Company had claimed in defence that the river was already polluted by sewage from the town of Espanola, that the pollution was the result of a normal business operation, and that the business was of importance to the community, but the court refused to support either of them as a defence. Assuming that a riparian owner had a right to fish in a navigable river, the court went on to find that his right was no higher than that of any other member of the public; and hence, where fishing was interfered with by reason of the pollution of the river by an upper riparian owner, a lower riparian owner has no remedy by action unless he suffered special and peculiar damage beyond that suffered by other members of the public.

With reference to the claim in nuisance, the court concluded that the riparian owner could maintain an action for nuisance where because of the pollution the river gives off a smell which renders their property much less desirable for tourist resorts. The Company had raised in defence that the *solum* was vested in the Crown and that it had an agreement with the Crown entitling it to carry on objectionable operations, but the court rejected these defences.

An injunction (its operation was stayed for six months to allow the polluter to remedy the cause) was granted and damages awarded to the lower riparian owners, with the decision being upheld on appeal to the Ontario Court of Appeal[125] and to the Supreme Court of Canada.[126] It thus appeared that the right of the riparian owner to pure water was substantially the same as that described previously in this note, however, McRuer, C.J.H.C. had warned in the course of the decision that:[127] "The plaintiffs' right may be taken from them by legislation . . .", and this the Ontario government proceeded to effectively do by the passage of *The K.V.P. Company Limited Act.*[129] This act dissolved the injunction granted by the court and while "preserving" the rights of the riparian owners to bring actions, provided for arbitration of any claims against the Company arising out of the pollution of the Spanish River. Landis[129] indicates that the act was passed only to overrule the court's finding that the economic importance of a mill to the community in which it operates is an irrelevant consideration in an action for an injunction and damages that is based on pollution caused by the mill. Regardless of the reason, the common law right of the riparian owner to pure water and the right of the owner of the *solum* to fishing were abridged by what amounted to a statutory grant to the Company of a right to pollute the river.

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[125] [1949] 1 D.L.R. 39.

[126] [1949] 4 D.L.R. 497.

[127] *Supra*, n. 122 at 218.

[128] S.O. 1950, c. 33.

[129] (1970) 48 Can. Bar. Rev. 66 at 92.

That the common law is similarly the basis of riparian rights with respect to water pollution in Alberta is illustrated by the decision of the Supreme Court of Canada in *Groat* v. *Edmonton,*[130] a dispute involving the polluting by the City of Edmonton of a stream flowing through the appellant's land by the runoff from storm sewers constructed under Provincial authority which drained into the stream and by the dumping of garbage in such a manner that runoff from it polluted the stream. Rinfret J. in delivering the judgement states:[131]

> The right of a riparian owner to drain his land into a natural stream is an undoubted Common Law right, but it may not be exercised to the injury and damage of the riparian proprietor below, and it can afford no defence to an action for polluting the water in the stream. Pollution is always unlawful and in itself, constitutes a nuisance . . . So far as statutory powers are concerned, they should not be understood, as authorizing the creation of a private nuisance, unless the statute expressly so states.

Further,[132]

> The appellants' established riparian rights have been and still are violated. They are entitled to an order forbidding the fouling of the water and abating the nuisance, as well as preventing the recurrence of the wrong and protecting them against the acquisition of prescriptive rights.

The plea of statutory authority as raised in *Groat* is the most common defence raised by plluters where their facility has either been expressly or tacitly authorized or approved by governmental agencies, and any future action by a riparian owner in Alberta can expect to be met with such a defence. The courts have however proven not particularly receptive to such a plea, chosing to interpret such statutes or authority strictly following principles such as:[133]

> Statutes which limit or extend common law rights must be expressed in clear, unambigous language . . .

and,

> Except insofar as they are clearly and unambiguously intended to do so, statutes should not be construed so as to make any alteration in the common law, or to change any established principle of law . . .

and further:

> Unless it is clearly and unambiguously intended to do so, statutes should not be construed so as to interfere with or prejudice established private rights . . . under title to property . . .

The case of *Stephens* v. *The Village of Richmond Hill*[134] is illustrative of such an approach. In this case the plaintiff brought an action for damages and an injunction to restrain the pollution of a sewage disposal plant, approved by the Department of Health and owned and operated by the defendant corporation, of a stream running through the plaintiff's land. The defendant argued along the lines of the *Derby Case* that the permissive legislation and the reasonable conduct of the defendant took the matter out of the realm of the common law, and that the process was the only economically feasible method of disposal. Stewart J. replied:[135]

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[130] [1928] 3 D.L.R. 725.

[131] *Id.* at 730.

[132] *Id.* at 731.

[133] 36 *Halsbury's Laws* 412-13 (3d ed. Simonds 1955).

[134] [1955] O.R. 806.

[135] *Id.* at 812.

> I have not been directed to any statutory authority which would by necessary implication permit the present defendant to interfere with the plaintiff's riparian rights. Counsel has said that an authority to operate implies an absence of liability to riparian owners. I do not think this follows at all. I should have thought that such a right implied an obligation to protect the rights of others and I find it difficult to understand how such a thing could justify the deposit of condoms and toilet paper upon neighboring lands.

Further:

> . . . I conceive that it is not for the judiciary to permit the doctrine of utilitarianism to be used as a makeweight in the scales of justice.

The *Derby* approach to statutory authority was accepted however by the Supreme Court of Canada in *City of Portage la Prairie* v. *B.C. Pea Growers Ltd.* where Martland J. stated:[136]

> . . . the appellant, having created a nuisance which caused damage to the respondent, is liable therefor, because that which is complained of as a nuisance was not expressly or impliedly authorized by the statute in accordance with which the [sewage] lagoon was constructed, and was not the inevitable consequence of that which the statute authorized and contemplated.

and it therefore must be assumed that such a defence is possible although the burden upon the polluter raising it is heavy.

Although an action based solely on interference with riparian rights is extremely rare (most being framed in nuisance) it is reasonable to conclude from the preceding examination that an action would probably lie in Alberta at the suit of a riparian owner without proof of damages where his right to pure water was interfered with and certainly where damage could be shown or where such interference was unreasonable; that the pollutants need not be traced to a particular polluter provided they can be traced to a group of polluters who are joined as defendants; and that no defence other than that of statutory authority can be raised by the polluter with any great expectation of success. Although the burden imposed by *B.C. Pea Growers* upon the polluter raising this defence is difficult to meet, the riparian owner, even if his suit is successful and he is awarded damages and an injunction (be it operative immediately or be it deferred), may be effectively thwarted by action of the legislature staying such an injunction or legitimizing the source of the pollutants.

*Conclusion*

No one would dispute that the problems created by water pollution because of their complexity and their size are best dealt with by the collective efforts of the people exercised through their elected representatives. The government of Alberta has devised a comprehensive legislative scheme which has the potential to remedy the existing problems and to control any future ones which might be presented by continued industrial and population growth. The scheme however is discretionary in its application and should the government for whatever reason attempt to evade its responsibility of protecting the waters, the private riparian owner still has the power to combat the results of such laxity *via* the courts. Although such efforts may prove to the quixotic, the resultant publicity may result in sufficient pressure by the electorate to trigger the desired response on the part of the government.*

—R. W. THOMPSON and M. WILD**

[136] (1965) 54 D.L.R. (2d) 503 at 508.

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