WATER POLLUTION CONTROL IN ONTARIO

*Philip Anisman***

> I am a Grade 6 student who has just been to Centre Island. I am disgusted because the water around the island is full of garbage. We walked along the beach, and I saw many more things than just sand and stones. Some of the things I saw were dead birds, dead fish, old boards and car batteries.
>
> The smell of the air was just awful on the beach. Lots of people probably stay inland because of the air and water pollution. I think somebody should do something about it.
>
> Try to stop the pollution so it doesn't ruin the nice places in Toronto.
>
> Brenda Guillet
> Don Mills
> ("Letter to the Editor,"
> *The Globe and Mail,* November 15, 1967)

Lemuel Gulliver's first meeting with the Yahoos, the representation of the irrational, animalistic aspects of man, culminated in his being forced to place his back against a tree and hold them off with his sword; but this did not stop them. "Several of this cursed brood getting hold of the branches behind leapt up in the tree, from whence they began to discharge their excrements on . . .[his] head: however, . . . [he] escaped pretty well, by sticking close to the stem of the tree, but was almost stifled with the filth, which fell about . . . [him] on every side." [1] Gulliver's position under the tree might be taken as a symbol of twentieth century western civilization.

The development of an industrialized urban society and the advance of scientific knowledge have together overwhelmed to an apparently large extent "nature's self-regenerating system." [2] The increase in population, concentration of industry and of great numbers of people in the modern city has led to the need to dispose of vast amounts of sewage, refuse and industrial wastes. And modern man has been little more thoughtful than Swift's

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** B.A., 1964, University of Toronto; LL.B., 1967, University of Toronto; LL.M., 1971, University of California, Berkeley. Research Officer, The Law Reform Commission of Canada.

[1] J. SWIFT, GULLIVER'S TRAVELS 241 (A. E. Case ed. 1938).

[2] Goldman, *Pollution: The Mess Around Us,* in CONTROLLING POLLUTION: THE ECONOMICS OF A CLEANER AMERICA 3-4 (M. Goldman ed. 1967) [hereinafter cited as GOLDMAN.

Yahoos about how to dispose of his "excrement." [3] Industries, furnaces and cars belch, among other potentially poisonous gases, sulphur dioxide and carbon monoxide into the air. [4] It has been stated, for example, "that by breathing the air in New York City, one inhales an amount of cancer-producing benzyprene equivalent to smoking two packs of cigarettes a day." [5] Nor is the situation much better in Ontario; a recent report said that Toronto's atmosphere may be injurious to health, especially to the very young and the aged. [6] And several cases of fluoride poisoning that have occurred in the Dunnville area are said to have been caused by emissions from a fertilizer plant. The fluoride pollution is said to have killed cattle and damaged crops as well as endangering human health. [7] Nor is air alone affected. Modern techonlogy has developed disposable containers composed of indestructible aluminum and plastics which present a problem for the sanitation departments of North American municipalities. [8] It has been suggested that such garbage be ground and mixed with water so that it can be pumped to places where landfill is needed. [9] But it may be questionable whether the soil can absorb all of the refuse which must be buried in it. It seems clear that the effluent from sewage lagoons can be harmful to the productivity of the

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[3] A later experience of Gulliver with a three year old Yahoo whom he tried to befriend is, perhaps, a closer analogy to the habits of the twentieth century: "while I held the odious vermin in my hands, it voided its filthy excrements of a yellow liquid substance, all over my clothes; but by good fortune there was a small brook hard by, where I washed myself as clean as I could . . . ." *Supra* note 1, at 288.

A twentieth century counterpart to these episodes is shown in the penultimate stanza of Tom Lehrer's song, "That Was the Year That Was":

> Lots of things there [in an American city] that you can drink,
> But stay away from the kitchen sink.
> Throw out your breakfast garbage, and I've got a hunch
> That the folks downstream will drink it for lunch.

GOLDMAN at vii.

[4] The phenomenon is not peculiar to North America; see Webb, *Call for Common Standards on Car Safety and Pollution*, The Times, Jan. 11, 1972, at 18, col. 5.

Pollution from motors and motor vehicles is regulated under Part III of the Environmental Protection Act, 1971, Ont. Stat. 1971 c. 86, §§ 22-24 [hereinafter cited as the E.P.A.] *See also Fail-Safe Controls For Auto Emissions To Be Asked by EPA*, The Wall Street Journal, Jan. 14, 1972, at 14, col. 4. *And see 17 Airlines Agree to Cut Pollution*, The New York Times, Jan. 14, 1972, at 53, col. 6.

[5] GOLDMAN at 8. *See also Spanish Cancer Expert Blames Air Pollution*, The Times, Dec. 30, 1971. ("One out of every four cases of lung cancer is the result of air pollution . . . .").

[6] The Globe and Mail (Toronto), Nov. 3, 1967.

[7] The Globe and Mail (Toronto), Nov. 13, 1967.

[8] The Globe Magazine (Toronto), Nov. 11, 1967, at 21. *See also* GOLDMAN at 7.

[9] The Globe Magazine (Toronto), Nov. 11, 1967, at 17 and 19. The regulation of waste is dealt with in Part IV of the E.P.A., *supra* note 4, at §§ 22-48. Sewage or other works to which the Ontario Water Resources Commission Act, ONT. REV. STAT. c. 332 (1970), or the regulations thereunder apply are exempt from this part of the E.P.A., § 29. For a recent proposal concerning waste management see *The Plan to Dump our Garbage up North*, The Toronto Star, Dec. 24, 1971. *See also Union Carbide Claims Nonpolluting Process to Treat Solid Waste*, The Wall Street Journal, Jan. 12, 1972, at 13, col. 2; *St. Regis Made Paper With Fibre Reclaimed Out of Raw Garbage*, The Wall Street Journal, Jan. 14, 1972, at 6, col. 4.

soil. [10] Industrial and municipal wastes are not the only causes of air and soil pollution; nuclear explosions have polluted both. "Strontium 90, released through nuclear explosions into the air, comes to earth in rain or drifts down as fallout, lodges in soil, [and] enters into the grass or corn or wheat grown there . . . ." [11] And pesticides and herbicides composed of newly discovered and lethally dangerous chemical compounds used to protect crops may be breathed in when sprayed and pollute the soil as well. [12]

As might be expected, soil and air are not the only elements of the environment which are polluted. "Sewage and industrial wastes pollute rivers, lake shores and bays." [13] The decomposition of municipal sewage and industrial wastes in the watercourses into which they are discharged requires the oxygen dissolved in the water; the volume of sewage from urban areas is usually great enough to reduce the dissolved oxygen contained in the stream or river into which it is discharged to the extent that fish cannot survive. [14] In Lake Erie, for example, the "fish catch in 1956 of 6.9 million pounds of blue pike fell to 200 pounds in 1963." [15] Furthermore, a section of the old Welland Canal given to the municipalities of Thorold and St. Catharines when the new canal was opened and which flows into Lake Ontario has been described as a "stream of thick, frothy, yellow foam" with brown water. [16]

Municipal and industrial sewage discharged into a watercourse may also endanger the health of those who drink or swim in it. Waters polluted by sewage usually contain colon bacilli which indicate the presence of faecal matter, a potential cause of dysentery, hepatitis or typhoid. [17] Several judicial opinions have indicated that such pollution has long gone on in Ontario. In *Fieldhouse v. City of Toronto,* [18] an action for nuisance caused by odours

[10] *See generally* Brown v. Morden, 24 W.W.R. (n.s.) 200, 12 D.L.R.2d 576 (Man. Q.B. 1958) (effluent from lagoon damaging crops); Howrish v. Holden, 32 W.W.R. (n.s.) 491 (Alta. Dist. Ct. 1960) (effluent damaged soil by leaving sulphate deposit); B.C. Pea Growers Ltd. v. Portage La Prairie, 43 D.L.R.2d 713 (Man. Q.B. 1963) (effluent from lagoon destroying crops), *aff'd* 50 W.W.R. (n.s.) 430, 49 D.L.R.2d 91 (Man. 1964), and [1966] Sup. Ct. 150 (1965); Lawrysyn v. Kipling, 48 D.L.R.2d (Sask. Q.B. 1964) (land rendered permanently infertile from calcium sulphate solids contained in effluent), *aff'd* 50 W.W.R. (n.s.) 430, 55 D.L.R.2d 471 (Sask. 1965); Roberts v. Portage La Prairie, 2 D.L.R.3d 373 (Man. Q.B. 1968) (land waterlogged and overburdened by effluent from lagoon), *aff'd* 6 D.L.R.3d 96 (Man 1969), and [1971] Sup. Ct. 481.

[11] R. CARSON, SILENT SPRING 16 (1962) [hereinafter cited as CARSON].

[12] *Id.* at 24-43 and 56-63.

[13] W. DOUGLAS, A WILDERNESS BILL OF RIGHTS 10 (1965)[hereinafter cited as DOUGLAS].

[14] GOLDMAN at 59-64. *See also* B. GINDLER, WATER POLLUTION AND QUALITY CONTROLS 8-10 (1967) [hereinafter cited as GINDLER].

[15] GOLDMAN at 61. *But see* Rukeyser, *Fact and Foam in the Row over Phosphates,* Fortune, Jan. 1972, at 72 ("Lake Erie continues to produce as much fish as the other Great Lakes combined, and in 1970 yielded the biggest catch in its history.").

[16] The Globe and Mail (Toronto), Nov. 17, 1967.

[17] GOLDMAN at 61.

[18] 44 D.L.R. 392, at 393 (1918). No information is available as to what steps were taken to correct the operations of the plant.

given off by the city's sewage disposal plant, Mr. Chief Justice Mulock stated that the city had not attempted to repair a break in one of the pipes from which a steady stream of sewage was escaping into Lake Ontario at a rate of a half million gallons per day. There was, he said, a large quantity of faecal matter which in warm weather gave off sickening odours. A blatant example of the dangers created by such municipal negligence was shown in *Campbell v. Kingsville.* [19] The Town of Kingsville allowed its residents to connect their septic tanks and cesspools with its storm sewers. The storm sewers drained into a creek which carried the sewage into Lake Erie and contaminated its waters. The lake was further contaminated by industrial waste. In 1917 the provincial Board of Health ordered the town to install a chlorination plant for its water supply which was taken by pumping water through a pipe extending 1600 feet into Lake Erie. The Public Health Act required that in such circumstances the council of a municipality "forthwith pass all necessary by-laws for the establishment of [such] works . . ." and further provided that "the municipality shall immediately commence the work and carry the same to completion without unnecessary delay." [20] Despite this fact and despite repeated warnings by the Department of Health, the town did nothing. [21] Nor was anything done until 1927 when, because of a break in the pipeline from Lake Erie, the town dug a trench and opened the settling basin on the shores of the lake and drew water directly from the lakeshore. By this time a typhoid epidemic had broken out in Kingsville. A chlorination plant was finally installed by an officer of the provincial Board of Health. In an action for negligence brought by the husband of a woman who had died from typhoid, Mr. Justice Raney awarded damages and stated:

> the condition of Kingsville's water supply between 1917 and 1927 was a standing invitation to disease of one kind or another, and in the spring of 1927, a special invitation was extended to the typhoid bacilli. . . . The law did not mean much in Kingsville between 1917 and 1922. [22]

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[19] [1929] 4 D.L.R. 772 (Ont. High Ct.).

[20] ONT. REV. STAT. c. 218, § 96(2) (1914). § 97 required that every waterworks system "be kept in repair as may be necessary for the protection of the public health and as may be directed by any special order of the Provincial Board . . . ."

[21] The Act provided: "Any municipal corporation or body or person refusing or neglecting to carry out the provisions of the two next preceding sections, after notice from the Provincial Board so to do, shall incur a penalty of $100 for every day upon which such default continues." *Id.* at § 98. There is no indication that the town was prosecuted under this section. The chlorination plant cost only $400. In 1921 the Board of Health agreed to the town installing only a filtration plant. Moreover, § 93 of the Act prohibited the discharge of sewage which might impair the quality of a source of a water supply and imposed a penalty of $100 for each offence.

[22] [1929] 4 D.L.R. 772, at 779. *See also* Stephens v. Richmond Hill, [1955] Ont. 806, 4 D.L.R. 572 (High Ct.), and ONTARIO DEP'T OF LANDS AND FORESTS, POLLUTION OF THE SPANISH RIVER (1952). "One has to travel about twenty miles out of Cleveland, Ohio to find Lake Erie water that is safe for swimming." DOUGLAS at 10.

The incidence of municipal pollution of Ontario watercourses is less egregious today. [23] But the City of Montreal in 1967 still discharged raw sewage into the St. Lawrence River. [24] Recently the supervisor of the Water Quality Surveys Branch of the Ontario Water Resources Commission stated that the "farm animal population in southern Ontario produces an amount of waste equivalent to that from 45 million people." [25]

As with air and soil, municipal and industrial sewage are not the only causes of water pollution. The fallout from nuclear testing and radiation from the tailings of uranium mines and from the waste from uranium processing plants also pollutes the waters. [26] Miss Carson has indicated the effects caused by the pollution of watercourses by pesticides and herbicides. [27] Water is also more susceptible to harm from other sources; the dissolved oxygen content of water is higher at low temperatures. Thus the discharge of warm water into a river may raise its temperature and reduce the amount of oxygen available to the fish that inhabit it. It is feared, for example, that a new thermal power plant to produce electricity in Ontario may harm the game fish spawning areas in Lake Erie by the discharge of warm water. [28] And other industries also discharge warm water which they use for cooling processes. [29] Mr. Justice Douglas, speaking of the United States, has said that "Domestic water treatment plants have been imperilled by pollution, water being so heavily infected as to make the production of safe, palatable water almost impossible." [30] It does not seem unlikely that the same might be said of Ontario.

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[23] The Globe and Mail (Toronto), Nov. 3, 1967. But a very recent episode demonstrates that expediency is still more important to municipalities than potential harm from pollution, in this case chlorine from the salt in snow dumped into Lake Ontario by Metropolitan Toronto. See *Snow Dumped in Lake Threatens Water, Fish O.W.R.C. Warns Metro,* The Globe and Mail (Toronto), Jan. 4, 1972; Editorial, *With a Defiant Splash, id.; Salt Pollution to be Studied; Kerr Sees Prosecution Grounds over Dumping of Snow in Lake,* The Globe and Mail (Toronto), Jan. 5, 1972; *Controversy over Snow-Dumping Draws a Variety of Reactions,* The Globe and Mail (Toronto), Jan. 12, 1972.

[24] The Globe and Mail (Toronto) Dec. 5, 1967.

[25] *Id.* The prohibitory provisions of the E.P.A. exempt "animal wastes disposed of in accordance with normal farming practices." Ont. Stat. 1971 c. 86, §§ 5(2), 13(2), 14(2), 15(2).

[26] GOLDMAN at 63. *See also Re* Faraday Uranium Mines Ltd., [1962] Ont. 503, 32 D.L.R.2d 704.

[27] CARSON at 44-55 and 120-40; note especially the New Brunswick, at 120-25, and British Columbia, at 127-28, experiences. *See also* GOLDMAN at 7 and 63. The chief of Ontario's Fish and Wildlife Research recently said that "incidents accumulate continually" to support Miss Carson's thesis. The Globe and Mail (Toronto), Dec. 6, 1967. *See also* Rensberger, *Pesticides Head Scientist's List of Dangers to the Environment,* The New York Times, Jan. 2, 1971, at 34, col. 1. The use of pesticides in Ontario is regulated by Part VI of the E.P.A. §§ 49-55. *See also, infra,* text following note 373, and note 376. And *see* The Queen v. Forest Protection Ltd., [1961] Exch. 263.

[28] The Globe and Mail (Toronto), Dec. 6, 1967.

[29] GOLDMAN at 62; GINDLER at 14. *See also* Rensberger, *supra* note 27, at 34, col. 2.

[30] DOUGLAS at 13. Nor is the situation much better in the United Kingdom. See Editorial, *The Rivers Can be Made Cleaner,* The Times, Dec. 30, 1971.

It is clear that polluted waters may be an eyesore [31] and often give off offensive odors. [32] Thus they are unsuited for recreational activities. But the objections to water pollution are not only aesthetic and recreational; the fouling of water also causes what the economists call "external diseconomies." [33] The water must be purified before it can be further used. This fact necessitates the building of large water treatment facilities by municipalities and often by industry. [34] Nor is this all; flourishing fish industries have been destroyed many times by the pollution of the waters in which the fish spawn. [35] And the destruction of recreational facilities, of game fish and of swimming areas can destroy or substantially diminish a thriving tourist industry, an industry which Ontario is attempting to promote. [36] Economists are also attempting to evaluate the social cost of depriving the public of access to outdoor recreational facilities. Some have related this deprivation to the race riots in northern American cities; [37] and it has been suggested that air and water pollution might lead to increased drunkenness. [38] But the control of pollution is also expensive; small municipalities often cannot afford to install a proper sewage treatment plant and industry is often reluctant to do so. [39]

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[31] See text accompanying notes 16 and 22.

[32] *Id.*

[33] GOLDMAN at 11.

[34] And the costs of such facilities are large. In 1961, the Ontario Water Resources Commission spent $22,420,307 on ninety-three water works projects: ONT. WATER RESOURCES COMM'N, ANN. REP. 1966, quoted in J. MILNER, COMMUNITY PLANNING: A CASEBOOK ON LAW AND ADMINISTRATION 53 (1963) [hereinafter cited as MILNER]; in 1966, $7,143,252 was spent on the construction of water works projects, ANN. RLP. 7 (1966). In 1970, the Commission entered into water works contracts valued at $12,278,665, ANN. REP. 17 (1970). The amounts do not include expenditures by municipalities for their own water treatment facilities. Projects are discussed *infra*, text following note 402.

[35] CARSON at 120-40; GOLDMAN at 17. In 1966, an estimated 9,115,000 fish were reported killed by identifiable pollution sources in the United States. In 1965, the number was 11,784,000. The Globe and Mail (Toronto), Oct. 14, 1967.

[36] *See* Department of Tourism and Information Act, ONT. REV. STAT. c. 122 (1970), § 3 outlines the "object" of the Department. *Cf.* para. 9 of the statement of claim in The Queen v. Interprovincial Co-operatives Ltd., issued Dec. 10, 1970 in Manitoba.

[37] GOLDMAN at 14.

[38] The Globe and Mail (Toronto), Dec. 6, 1967.

[39] *See generally* GOLDMAN and CARSON. Miss Carson also points out that the chemical industry might lose a great deal of business if proper pesticide controls were applied. In 1961 the Ontario Water Resources Commission spent $56,282,175 in the construction of ninety-nine sewage projects. ANN. REP. (1961), quoted in MILNER at 53; in 1966, $4,143,041 was spent by the Commission on the construction of sewage projects, ANN. REP. 7 (1966). In 1970 the Commission entered into sewage projects valued at $43,859,285. ANN. REP. 17 (1970). These figures do not include expenditures by municipalities for their own sewage disposal facilities, nor by industry. A sewage treatment plant takes approximately three years to complete "from the preliminary report stage to the ribbon cutting." The Globe and Mail (Toronto), Nov. 3, 1967. Projects are discussed *infra*, text following note 402.

Nevertheless, it is clear that the pollution of the environment is a problem that must be dealt with. Swift's satirical attack on the Royal Society may now be becoming a reality. [40] It has been suggested that sewage treatment and water supply will in the future be closely integrated. [41] In fact there have been several experiments with reprocessing sewage water [42] and Mr. Justice Douglas has suggested this as the most reasonable solution. [43] The problem has been receiving increasing attention in Canada and especially in Ontario. The Ontario Department of Energy and Resources recently held a special conference in Toronto on pollution of the environment and the means of controlling it. [44] And the magazine *Civic Administration* has for several years been publishing a "Handbook of Environmental Pollution Control." [45]

This paper is a preliminary attempt to analyze one aspect of pollution control, that of the pollution of watercourses in Ontario. [46]

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[40] I went into another chamber, but was ready to hasten back, being almost overcome with a horrible stink.... The projector of this cell was the most ancient student of the Academy.... His employment from his first coming into the Academy was an operation to reduce human excrement to its original food, by separating the several parts, removing the tincture which it receives from the gall, making the odour exhale, and scumming off the saliva." J. SWIFT, GULLIVER'S TRAVELS 190-91 (A. E. Case ed. 1938).

[41] The Globe and Mail (Toronto), Nov. 14, 1967.

[42] GOLDMAN at 18.

[43] DOUGLAS at 125.

[44] The Globe and Mail (Toronto), Dec. 5, 1967; Dec. 6, 1967. In 1970, the Pollution Abatement Incentive Act, Ont. Stat. 1970 c. 62, now ONT. REV. STAT. c. 352 (1970), was passed. And in 1971 the legislature enacted the E.P.A. in an attempt to deal comprehensively with all aspects of the environment. The Ontario Water Resources Commission was set up in 1956 by Ont. Stat. 1956 c. 62. The act is discussed *infra*, following note 282.

[45] See *Handbook of Environmental Pollution Control* in CIVIC ADMINISTRATION 23 (1967). The *Handbook* is an exhortation to municipalities across Canada to attempt to control local pollution.

[46] The paper will discuss the way in which the pollution of rivers was dealt with by the common law and how the common law has been altered by legislation. As well it will outline the work of the Ontario Water Resources Commission. The pollution of ground waters will not be discussed. *But see* Hubbs v. Prince Edward County, 8 D.L.R.2d 394 (Ont. High Ct. 1957) (action for negligence and nuisance against municipality for the fouling of a well); Bennett v. Imperial Oil Ltd., 28 D.L.R.2d 55 (Nfld. Sup. Ct. 1961), Connery v. Govt. of Manitoba, 75 W.W.R. (n.s.) 289 (Man. Q.B. 1970), *aff'd* [1971] 4 W.W.R. 156, 21 D.L.R.3d 234 (Man. 1971). Legislation concerning ground waters will be referred to in footnotes. The Property and Civil Rights Act, ONT. REV. STAT. c. 367 (1970), adopts the laws of England as of Oct. 15, 1792, except insofar as altered by legislation having the force of law in Ontario. But in practice recent English decisions are considered to interpret the common law and continue to exert great weight in Ontario decisions. Nevertheless a reasonable body of jurisprudence on the subject here discussed has been developed in Canada. Because of temporal exigencies, only a few English cases will be referred to. Nor will the interrelationship of the Ontario Water Resources Commission Act, ONT. REV. STAT. c. 332 (1970), with other Ontario legislative enactments, be considered. For a summary of the provisions affecting pollution in other Ontario enactments see Landis, *Legal Controls of Pollution in the Great Lakes Basin*, 48 CAN. B. REV. 66, at 79-93

The common law as it existed in England in 1792 was early adopted as the law of Ontario.[47] Consequently, the doctrine of riparian rights has been consistently applied in Ontario to controversies concerning the use of water in watercourses. The general doctrine has, perhaps, been most succinctly stated by Lord Macnaghten:

> 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 entitled to the water in his stream, 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.[48]

The right to the natural flow of the river is founded not upon ownership of the stream bed but upon a right of access to the water.[49] Consequently, only owners of land touching upon a river are entitled to claim a right to the natural flow.[50] Thus the riparian right to the stream is a right of property.[51]

(1970). *See also* 3 REPORT OF THE ROYAL COMM'N. INQUIRY INTO CIVIL RIGHTS 2110-12 (Ont.) [hereinafter cited as the MCRUER REPORT].

It should be noted that the Lakes and Rivers Improvement Act, ONT. REV. STAT. c. 233 (1970), is substantially amended by the Civil Rights Statute Law Amendment Act, Ont. Stat. 1971 c. 50, § 50.

[47] *See* Consolidated Statutes of Upper Canada c. 9, § 1 (1859). *See also* ONT. REV. STAT. c. 367, § 1 (1970), which is substantially the same.

[48] Young and Co. v. Bankier Distillery Co., [1893] App. Cas. 691, at 698, 69 L.T.R. 838, at 839-40. This case was approved in Groat v. Edmonton, [1928] Sup. Ct. 522, [1928] 3 D.L.R. 725; Stephens v. Richmond Hill, [1956] Ont. 88, 1 D.L.R.2d 569; *Re* Faraday Uranium Mines Ltd., [1962] Ont. 503, 32 D.L.R.2d 704.

[49] *Re* Snow, 56 Ont. L.R. 100, 27 Ont. W.N. 66 (1924). The rights and duties of a riparian proprietor apply to owners of land on both navigable and non-navigable streams.

[50] Whelan v. McLachlan, 16 U.C.C.P. 102, at 110-11 (1865) ("only those who are interested in the land are entitled to recover"). *See also* COULSON & FORBES ON WATERS AND LAND DRAINAGE 128-30 (6th ed. S. R. Hobday 1952) [hereinafter cited as COULSON & FORBES], and WISDOM, THE LAW OF RIVERS AND WATERCOURSES 70-72 (1962). But a lessee has sufficient interest to maintain an action against a wrongdoer who impedes the natural flow and prevents his using the water to work his mill on non-riparian land. Austin v. Snyder, 21 U.C.Q.B. 299 (1861); Austin v. Dickson, 11 U.C.C.P. 594, at 599 (1861) (the right to the use of the water was "annexed to the lease of the premises, as a means of enjoying them profitably, and the right to the easement or appurtenance goes with the right to the principal subject."). So had the holder of an easement where the stream ran through the land of the grantor. Diamond v. Reddick, 36 U.C.Q.B. 391 (1874). *But see* St. John v. Barker, 3 N.B. Eq. 358, at 364 (1906).

[51] Crowther v. Coburg, 3 Ont. W.N. 490, at 491-92, 1 D.L.R. 40, at 42 (High Ct. 1912). But it is not a property right to the water itself; it is merely a usufructuary property right. McKie v. K.V.P. Co., [1948] Ont. W.N. 386, at 389, [1948] 3 D.L.R. 201, at 210 (High Ct.).

A riparian owner cannot divert [52] or place a dam on a stream to the prejudice of a lower riparian owner; [53] nor can a lower owner pen back the water to the prejudice of an upper owner. [54] However, the riparian owner's right to the natural flow is not absolute, but qualified; it is subject to the lawful uses of others, [55] such as an upper riparian's right to use the water for ordinary, that is, domestic, purposes, [56] and to use it reasonably for extraordinary purposes. [57] What is a reasonable use is a question of fact to be decided in the light of all the circumstances. [58] The "general rule . . . is that any user which inflicts punitive, repeated, and sensible injury upon a proprietor above or below is not to be considered a reasonable user." [59] In determining reasonableness the court will not consider the mere possibility that in the future evaporation and seepage might deprive a lower riparian of sufficient water where the upper riparian has built a dam as this might deprive the

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[52] McLean v. Crosson, 33 U.C.Q.B. 448 (1873); Maugh'n v. Grand Trunk Rwy., 4 Ont. W.R. 287 (1904) (diversion of water for use on non-riparian land to prejudice of lower riparian owner enjoined); Watson v. Jackson, 31 Ont. L.R. 481, 19 D.L.R. 733 (1914). Lockwood v. Brentwood Park Investments Ltd., 64 D.L.R.2d 212 (N.S. Sup. Ct. 1967), *varied* 1 N.S.2d 669, 10 D.L.R.3d 143 (1970). *But see* Corrigan v. Toronto, 18 Ont. W.N. 228 (1920), *aff'd* 20 Ont. W.N. 329 (1921) (city allowed to divert a stream feeding a private pond).

[53] Brown v. Bathurst Electric and Water Power Co., 3 N.B. Eq. 543 (1907) [hereinafter cited as Brown v. Bathurst]; Ellis v. Clemens, 21 Ont. 227 (High Ct. 1891); Watson v. Jackson, 30 Ont. L.R. 517 (High Ct. 1914); Stollmeyer v. Trinidad Lake Petroleum Co., [1918] App. Cas. 485, 118 L.T.R. 514 (P.C.).

[54] McLaren v. Cook, 3 U.C.Q.B. 299 (1847); McNab v. Taylor, 34 U.C.Q.B. 524 (High Ct. 1874); Guelph Worsted Spinning Co. v. Guelph, 5 Ont. W.N. 761, 18 D.L.R. 73 (High Ct. 1914). *See also* Saunby v. Water Comm'rs of London, [1906] App. Cas. 110, 93 L.T.R. 648 (P.C. 1905).

[55] Dickson v. Carnegie, 1 Ont. 110 (Ch. 1882).

[56] COULSON & FORBES at 144-45. *See also* Brown v. Bathurst, *supra* note 53 at 552:

> [A riparian owner has] . . . a right to the use of the water while flowing through his land for all ordinary and domestic purposes, and to a reasonable use of it for commercial or other extraordinary purposes as may be incident to the enjoyment of his property, and which do not work any material injury or annoyance to his neighbour below him who has an equal right to the subsequent use of the the water.

[57] Dickson v. Carnegie, *supra* note 55. In Cook v. Vancouver, [1914] App. Cas. 1077, at 1082, 111 L.T.R. 684 (P.C.), Lord Moulton expressed the principle thus: "Riparian rights are . . . of two kinds. First, there is the right to make use in certain specified ways of the water flowing by the land, and, secondly, there is the right to the continuance of that flow undiminished." The Privy Council has held that the latter right has been taken away by legislation in British Columbia. For a discussion of the doctrine of riparian rights in British Columbia see Armstrong, *The British Columbia Water Act: The End of Riparian Rights*, 1 U.B.C.L. REV. 583 (1962). For the law of water in Alberta, Saskatchewan and Manitoba, see P. GISVOLD, A SURVEY OF THE LAW OF WATER IN ALBERTA, SASKATCHEWAN AND MANITOBA (1956). Pollution control is discussed at 66-69.

[58] Brown v. Bathurst, *supra* note 53; Ellis v. Clemens, *supra* note 53; Gauthier v. Naneff, [1971] 1 Ont. 97, at 101 (High Ct. 1970).

[59] Ellis v. Clemens, 21 Ont. 227 (High Ct. 1891). But a diversion of water for the purposes of sale to non-riparian owners has been held to be unreasonable per se. Watson v. Jackson, 19 D.L.R. 733, at 745 (1914).

upper riparian of his reasonable use of the stream,[60] and where both riparian owners are using the water for extraordinary purposes the adequacy of the lower riparian's facilities may be an important factor.[61] The plaintiff need not suffer actual damages; it is sufficient if the use affects his right to the water by its ability to ripen into a prescriptive easement.[62]

A lower riparian owner is subject to a further use by an upper one. It has been consistently held that "it is the right of every landowner to drain his land into any natural watercourse accessible to him. Indeed, it is the principal function and purpose which a watercourse serves, to carry off to great lakes or to the sea, the surplus precipitation from the atmosphere, whether rainfall or melted snow, beyond what is required to support vegetation, and to supply the needs of mankind . . . ."[63] And riparian owners may do so artificially by constructing drains,[64] even collectively.[65] But this right must be exercised reasonably;[66] and it would appear that the drainage of a volume of water greater than the natural capacity of the watercourse, so that the lands of lower owners are flooded is an unreasonable use.[67] But a

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[60] Watson v. Jackson, *supra* note 52, *varying* Watson v. Jackson, *supra* note 53, which granted an injunction to the plaintiff on the basis that "with regard to the flow during the summer months, the percolation and evaporation to be expected as a result . . . [of the dam] would result in such a serious diminution of the flow as to be an unreasonable and improper use of the stream" (at 522).

[61] Dickson v. Carnegie, *supra* note 55 (injunction refused as lower owner's dam inadequate). The result in New Brunswick would appear to differ from that in Ontario. *See* Brown v. Bathurst, *supra* note 53, at 558. (The dilapidated state of the plaintiff's mill was held an important factor in assessing damages but it did not "affect his right as to the flowage or use of the water.").

[62] *See* Mitchell v. Barry, 26 U.C.Q.B. 416 (1887); Crowther v. Coburg, 3 Ont. W.N. 490, at 493-94, 1 D.L.R. 40, at 43 (High Ct. 1912). The issue of *injuria absque damno* will be further discussed below with pollution. See *infra*, text following note 144. The law in Quebec would appear to be the same in this regard. Frechette v. La Compagnie Manufacturière de St. Hyacinthe, 9 App. Cas. 170, at 179 (P.C. 1883) ("the right to resist interference with a natural flow of water . . . is independent of the actual user of the water."). In fact it has been held that the Quebec Civil Code "does not materially alter the common law" with regard to riparian rights generally. City of Quebec v. Bastien, [1921] 1 App. Cas. 265, at 269, 124 L.T.R. 104, at 106 (P.C.). *See also* Stollmeyer v. Trinidad Lake Petroleum Co., [1918] App. Cas. 485, 118 L.T.R. 514 (P.C.) [hereinafter cited as Stollmeyer v. Trinidad].

[63] *In re* Township of Orford, 18 Ont. A.R. 496, at 505 (1891) (Maclennan, J. A.). *See also* McGillivray v. Lochiel, 8 Ont. L.R. 446, at 449, 4 Ont. W.R. 193, at 194-95 (1904). *But see* Young & Co. v. Bankier Distillery Co., [1893] App. Cas. 691, at 696 (*per* Lord Watson) at 701 (*per* Lord Shand), 69 L.T.R. 838, at 839 and 840-41 [hereinafter cited as Young v. Bankier].

[64] McGillivray v. Lochiel, *supra* note 63.

[65] *Id.* at 451.

[66] *Supra* text accompanying note 58. *In re* Township of Orford, *supra* note 63, at 505 ("while the landowners exercise their rights reasonably, whether they do so individually or collectively, they are not concerned with the effects produced lower down the stream") (Maclennan, J. A.); McGillivray v. Lochiel, 8 Ont. L.R. at 449, 4 Ont. W.N. at 194-95 (1904); Groat v. Edmonton, [1928] Sup. Ct. 522, at 532, [1928] 3 D.L.R. 725, at 730 (*per* Rinfret, J., Anglin, C.J.C. concurring).

[67] McGuire v. Brighton, 4 Ont. W.N. 137, 7 D.L.R. 314 (Div. Ct. 1912); McGillivray v. Lochiel, 8 Ont. L.R. 446, at 449, 4 Ont. W.R. 193, at 194-95 (1904); Johnson v. Dundas, [1945] Ont. W.N. 646, [1945] 4 D.L.R. 624.

riparian owner is not compelled to allow surface water to drain into a watercourse; [68] nor can he confer the right to drain artificially on a non-riparian owner to the prejudice of a lower riparian owner. [69]

The doctrine that a riparian owner is entitled to have the stream come to his land in its natural flow applies to quality as well as to quantity. [70] The courts have recognized that pollution is relative to the use to which the water is to be put. Thus even where water which can be used for domestic purposes is discharged into a river and causes harm to a lower owner as by causing soft water to become hard, the persons who discharge it will be liable "just as they would be liable if they were to return water unchanged in its chemical constitution, but so changed in the temperature as to be injurious to a lower riparian proprietor." [71] This would seem to indicate that where there is no actual harm to the lower owner with regard to the use to which he wishes to put the water, there would be no action. But the recognition of the relativity of pollution seems to work only in favor of the plaintiff. A riparian owner has no right to pollute a stream in the smallest degree; [72] and "pollution" sufficient to found an action will occur when there is a sensible alteration in the quality of the water sufficient to found a prescriptive right. [73] Thus in *Stollmeyer v. Trinidad Lake Petroleum Company, Limited* the Privy Council granted an injunction to restrain pollution of a river despite the fact that the plaintiff had suffered no actual harm whatever, overturning a decision of the Supreme Court of Trinidad and Tobago which had refused to do so because the defendant was engaged in

[68] Groat v. Edmonton, [1928] Sup. Ct. at 531, [1928] 3 D.L.R. at 729.

[69] McGillivray v. Lochiel, 8 Ont. L.R. at 450, 4 Ont. W.R. at 195 (1904). The purpose of the Drainage Act, ONT. REV. STAT. c. 136 (1970) is to allow this to be done for both agricultural and municipal purposes. Letter by Judge S. L. Clunis, referee under the Drainage Act, Nov. 13, 1967. But drainage under the act must also be reasonable. McGillivray v. Lochiel, 8 Ont. L.R. at 450, 4 Ont. W.R. at 195 (1904). It should also be noted that the same rules do not apply with regard to artificial drainage of surface waters onto neighbouring lands. *See* Colchester North v. Anderdon, 21 D.L.R. 277, at 280 (Drainage Ct. 1915); Brown v. Morden, 24 W.W.R. (n.s.) 200, at 208, 12 D.L.R.2d 576, at 585 (Man. Q.B. 1958); Hayden v. C.N.R., 16 D.L.R.3d 544 (Sask. Q.B. 1971). *See also* Close v. Woodstock, 23 Ont. 99 (C.P. 1892) (allowing damages for trespass when town's drain carried filth onto plaintiff's land).

[70] Van Egmond v. Seaforth, 6 Ont. 599, at 608 (1884); Stollmeyer v. Petroleum Dev. Co., [1918] App. Cas. 498, 118 L.T.R. 518 (P.C.); Young v. Bankier, *supra* note 63; McKie v. K.V.P. Co., [1948] Ont. W.N. 386, at 387, [1948] 3 D.L.R. 201, at 209 (High Ct.); St. John v. Barker, 3 N.B. Eq. 358 (1906); Nepisiquit Real Estate and Fishing Co. v. Canadian Iron Corp., 42 N.B. 387 (1913); Gauthier v. Naneff, [1971] 1 Ont. 97 (High Ct. 1970).

[71] Young v. Bankier, [1893] App. Cas. at 700, 69 L.T.R. at 840 (*per* Lord Macnaughten) (defendants pouring hard water, pumped up from mine, into river to prejudice of plaintiffs who required soft water for the production of liquor in their distillery).

[72] Crowther v. Coburg, 3 Ont. W.N. 490, at 492-93, 1 D.L.R. 40, at 42 (High Ct. 1912) (defendant draining sewage into stream).

[73] Young v. Bankier, [1893] App. Cas. 691, at 698, 69 L.T.R. 838, at 839-40. See quotation in text, *supra* note 48. Prescription and other defences will be discussed below. See text following note 140, *infra*.

the only viable industry in the area. [74] Nor is it any defence to show that others have also been polluting the river. [75] But if the river is in its natural state polluted, as by oil seepage, then the upper owner is liable only to the extent that he adds to the pollution. [76]

The court's exercise of control over the quality of water with regard to the drainage of riparian lands requires, as with quantity, special attention. [77] The right to drain water from one's lands necessarily involves the right to alter to some extent the quality of the watercourse into which it drains. As has been said, riparian owners are "not bound to abstain from a normal use of their own ground merely in order that it may remain as clean as a catchment area for the rainfall as it was in its virgin state." [78] Thus in the *Stollmeyer* case the court stated that if the pollution occurred because rain water fell on the oily surface of the land and carried the oil to the river, the plaintiff would have no cause of action. [79] And this would seem to be the basis of the decision of the Alberta court in *Groat v. Edmonton.* [80] However, where the drainage is by artificial means it is unreasonable to collect and carry a pollutant into the stream; on appeal to the Supreme Court Mr. Justice Duff said that "the municipality is not at common law entitled, in its quality of riparian owner, to collect and discharge the filth of the streets through an artificial channel into a watercourse, where it is to settle and remain until the currents generated by the spring thaws carry the mass of it to the lands of lower riparians." [81] And artificial means would include

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[74] [1918] App. Cas. 485. Remedies and the consideration of economic factors will be discussed below. See text following note 170, *infra*. *See also* Stephens v. Richmond Hill, [1955] Ont. 806, at 810, [1955] 4 D.L.R. 572, at 576 (High Ct.); McKie v. K.V.P. Co., [1948] Ont. W.N. 386, [1948] 3 D.L.R. 201 (High Ct.); Gauthier v. Naneff, *supra* note 70, at 103.

[75] McKie v. K.V.P. Co., [1948] Ont. W.N. at 387, [1948] 3 D.L.R. at 213. The cases in Quebec seem generally to come to the same result. *See* Dame Bishop v. Sauvé, [1951] Que. B.R. 414, at 416 and 421; Dorval v. Drouin, [1957] Que. B.R. 838; Belanger v. Municipalité Scolaire D'Henryville, [1964] Que. C.S. 207, at 220. *But see* Claude v. Weir, M.L.R. 4 Q.B. 197 (1888), *aff'd* 16 Sup. Ct. 575 (1889).

[76] Stollmeyer v. Petroleum Dev. Co., [1918] App. Cas. 498, at 499, 118 L.T.R. 518, at 518 (P.C.). If in these circumstances the additional pollution is "insensible" the maxim *de minimis non curat lex* may apply. Stollmeyer v. Trinidad, [1918] App. Cas. at 496, 118 L.T.R. at 517. Crowther v. Coburg, *supra* note 72, might be distinguished on the basis that the defendant there was discharging a pollutant (sewage) which was not contained in the river in its natural state; therefore, the two cases might be reconciled by holding that the *de minimis* maxim applies only where the defendant is adding a pollutant which exists in the stream in its natural state.

[77] See *supra* text accompanying and following note 63.

[78] Stollmeyer v. Trinidad, [1918] App. Cas. at 496, 118 L.T.R. at 517.

[79] *Id.* Substantial pollution of the river was caused by oil wells prior to their being capped.

[80] [1927] 2 D.L.R. 886, at 890 (Alta.). That this aspect of the law is unsatisfactory in present circumstances is indicated by the potential pollution from the excrement of farm animals in Southern Ontario alone. See *supra* text accompanying note 25.

[81] Groat v. Edmonton, [1928] Sup. Ct. 522, at 527, [1928] 3 D.L.R. 725, at 726. *See also* Van Egmond v. Seaforth, 6 Ont. 599 (1883); Crowther v. Coburg, *supra* note 72.

water pumped up from beneath the earth's surface. [82] The House of Lords in the *Young* case may have slightly overstated when they said that even if the defendants had taken the water from the river to use for "secondary purposes" and returned it "so altered in quality or character as to be materially less serviceable for the reasonable use" [83] of the plaintiff, they would still be liable, even if it were "in a state fit for primary purposes." [84] It would make little sense to hold that rain water draining naturally through the earth and carrying dissolved minerals into the stream to harden it is permissible and that water taken from the stream to be used for irrigation could not be allowed to drain back into it. In order to reconcile this statement with the general right to drain, it must, therefore, be limited to the return of the water by artificial means. [85]

An assessment of the effectiveness of judicial control of water quality and of pollution cannot properly be made on the basis of only the decisions concerning riparian rights. Other legal doctrines have also been used to protect riparian owners from the consequences of pollution; most frequent among these is the doctrine of nuisance. But insoluble pollutants such as sewage are often carried down a stream and deposited on a lower owner's land; in such cases an action for trespass may lie. The courts have probably decided cases of water pollution on different bases simply because of the way in which the plaintiffs in their pleadings framed their causes of action. Since substantially the same defences and remedies are available for all actions concerning the pollution of watercourses, [86] they too will be discussed before an assessment is attempted.

No case involving the pollution of a watercourse has been decided on the basis of trespass. [87] Yet the courts have on occasion referred to a tres-

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[82] Young v. Bankier, [1893] App. Cas. at 700-701, 69 L.T.R. at 841. It would appear that if the water rose from beneath the earth's surface, after digging, by gravitational force alone rather than pumping, the lower riparian owner would have no cause of action (*per* Lord Shand).

[83] *Id.* [1893] App. Cas. at 700, 69 L.T.R. at 840 (*per* Lord Macnaughten).

[84] *Id.* [1893] App. Cas. at 696, 69 L.T.R. at 839 (*per* Lord Watson).

[85] So too must Rinfret, J.'s statement in Groat v. Edmonton, [1928] Sup. Ct., at 532, [1928] 3 D.L.R. at 730: "The right of a riparian proprietor 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 a stream." The issue in the case involved drainage by artificial means only, and, therefore, this statement must be limited to the facts. In fact, Rinfret, J., himself later limited his remarks to the artificial drainage of sewage as opposed to rain or snow.

[86] Wailker v. McKinnon Industries Ltd., [1949] Ont. 549, at 560, [1949] 4 D.L.R. 739, at 767 (High Ct.).

[87] An action brought for trespass in such a case might involve several complexities. It is questionable whether sewage discharged into a river ultimately finding its way onto riparian land downstream would be a direct or indirect invasion. It seems likely that the action would be for negligence rather than trespass on the basis that the "invasion" was indirect. See J. FLEMING, THE LAW OF TORTS 40 (4th ed. 1971) [hereinafter cited as FLEMING].

pass by the upper riparian. In *Weber v. Town of Berlin* [88] the defendant allowed tanneries within its precincts to use its drains to dispose of "hair, scrapings, flesh and hides"; [89] the drains emptied into a stream flowing past plaintiff's land and refuse, including the scrapings from the tanneries, which contained anthrax germs, was deposited on it and caused the death of one of the plaintiff's heifers. [90] In assessing damages Mr. Justice Street stated that the trespass to the plaintiff's land had harmed him and increased the award of the special referee. But the basis of the decision was nuisance. [91] In *Donovan v. Township of Lochiel,* [92] Street went even further and declared the pollution of a stream "leading *through* the plaintiff's farm" [93] a trespass. [94] Yet there was no indication that any matter was deposited on the plaintiff's land; the pollutant was only carried "into the plaintiff's watercourse." [95] It would seem that unless damages are claimed for the trespass itself there is little reason to use the term, other than for, perhaps, emotive reasons. The confusion of the two causes of action can only lead to confusion of thought. [96] And it is probably wiser for a riparian to bring an action to protect his right to the natural flow in order to prevent the pollution of the stream, thus necessarily causing the trespass to cease. [97] It is likely for this reason that such actions have not been brought for trespass.

As was said above [98] the most common basis on which actions resulting from pollution of waters have been brought is nuisance. The distinction between private and public nuisance must be made immediately. A public nuisance has been defined as "acts or omissions . . . in derogation of rights which the plaintiffs have in common with all His Majesty's subjects who

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[88] 8 Ont. L.R. 302 (High Ct. 1904).

[89] *Id.* at 303.

[90] Street, J., termed this a "direct invasion" stating that by means of the works the sewage and anthrax germs were carried "directly to the plaintiff's land." *Id.* at 305.

[91] The reason for the appeal was the defendant's contention that it was not liable for the harm caused by the refuse from the tanneries. Liability for the sewage was admitted. On this point *see also* Crowther v. Coburg, 3 Ont. W.N. 490 1 D.L.R. 40 (High Ct. 1912); Van Egmond v. Seaforth, 6 Ont. 599, at 602 (High Ct. 1883). It would appear that the notion of trespass here influenced Street to increase the award.

[92] 5 Ont. W.R. 222 (High Ct. 1905), *aff'd* 5 Ont. W.R. 785 (1905).

[93] *Id.* at 223.

[94] *Id.* at 224.

[95] *Id.* at 223. A possible explanation may be that the stream was private, flowing only through the plaintiff's land.

[96] And, perhaps, to unnecessary complexities. See *supra* notes 87 and 90. But note that the two actions are similar insofar as neither requires proof of actual damage.

[97] It should be noted that more recent cases have not fallen into this confusion. *See* Salvas v. Bell, [1927] 4 D.L.R. 1099 (B.C. County Ct.) (mine tailings obstructing river causing flooding of land onto which rubbish carried); Stephens v. Richmond Hill, [1955] Ont. 806, [1955] 4 D.L.R. 572 (High Ct.) (condoms and toilet paper deposited on plaintiff's land). But neither case fell back on the emotive force of "trespass."

[98] See *supra* text following note 85.

have occasion to exercise those rights," [99] that is, "upon all of a class who come within its sphere of operation," [100] whereas private nuisance is "confined to invasions of the interest in the use and enjoyment of land . . . ." [101] Pollution of waters may cause a public nuisance where the polluted body is a public navigable water such as a public harbor or bay, [102] a navigable river [103] or tidal waters, [104] the facilities of which are available to all the public. As well a public nuisance will be created when a polluter destroys the fishing rights of the public in a given river. [105] Where a public nuisance exists only the attorney-general can move to abate it unless the plaintiff suffers special or particular damage, [106] even if "no rights or privileges in land of his have been invaded at all." [107] Thus in *Clare v. Edmonton Corporation,*

[99] McKie v. K.V.P. Co., [1948] Ont. W.N. 386, at 389, [1948] 3 D.L.R. 201, at 216 (High Ct.).

[100] Attorney-General for Ontario v. Orange Prods. Ltd., [1971] 3 Ont. 585, at 589, 21 D.L.R.3d 257, at 261 (High Ct.), *citing* Attorney-General v. P.Y.A. Quarries Ltd., [1957] 1 All E.R. 894, at 902 (C.A.) (*per* Romer, L.J.); St. Lawrence Rendering Co. v. Cornwall, [1951] Ont. 669, [1951] 4 D.L.R. 790 (High Ct.). *But see* Atwell v. Knights, 61 D.L.R.2d 108, at 111 (Ont. High Ct. 1967).

[101] FLEMING at 340. And *see* Attorney-General v. P.Y.A. Quarries Ltd., [1957] 1 All E.R. 894, at 908 (C.A.) (*per* Denning, L.J.), *quoted in* Attorney-General for Ontario v. Orange Prods. Ltd., [1971] 3 Ont. 585, at 590-91, 21 D.L.R.3d 257, at 262-63 (High Ct.).

[102] *See* Watson v. City of Toronto Gas-Light & Water Co., 4 U.C.Q.B. 158 (1847); Hickey v. Electric Reduction Co., 21 D.L.R.3d 368 (Nfld. 1970); McRae v. British Norwegian Whaling Co., 12 Nfld. 274 (1929).

[103] *See* Fillion v. N.B. Int'l Paper Co., 8 Mar. Prov. 89, [1934] 3 D.L.R. 22 (N.B.); Attorney-General for Canada v. Ewen, 3 B.C. 468 (1895); Attorney-General v. P.Y.A. Quarries Ltd., [1957] 1 All E.R. 894, at 906 (C.A.).

[104] Hadden v. North Vancouver, [1921] 2 W.W.R. 808 (B.C. Sup. Ct.), *aff'd* 30 B.C. 497, 67 D.L.R. 669 (1922).

[105] This would apply to navigable rivers. *See* Fillion v. N.B. Int'l Paper Co., *supra* note 103; Attorney-General for Canada v. Ewen, *supra* note 103. But this would not be so at least in non-tidal waters where the bed of a navigable river is owned by an individual. *See* Attorney-General for British Columbia v. Attorney-General for Canada, [1914] App. Cas. 153, at 167-68, 110 L.T.R. 484, at 488 (P.C.); McKie v. K.V.P. Co., [1948] Ont. W.N. at 389, [1948] 3 D.L.R. at 216. In Ontario a grant by the Crown of land abutting a navigable water is deemed not to pass title to the bed of the stream unless expressly stated to do so. The Beds of Navigable Waters Act, ONT. REV. STAT c. 41, § 1 (1970). The common law rule is that such a grant is deemed to pass the title to the bed to the middle of the river. Stackhouse v. Moiin, [1948] Ont. 864 (High Ct.). *See also* COULSON & FORBES at 114; WISDOM, *supra* note 50, at 38. *Cf.* the action by the government of Ontario against Dow Chemical of Canada Ltd., *infra,* note 469.

[106] FLEMING at 340-42. It would appear that in Ontario the damage must differ "in nature and not merely in degree." St. Lawrence Rendering Co. v. Cornwall, [1951] Ont. at 673, [1951] 4 D.L.R. at 795. *See also* Hickey v. Electric Reduction Co., 21 D.L.R.3d 368, at 372 (Nfld. 1970); Plater v. Collingwood, [1968] 1 Ont. 81, 65 D.L.R.2d 492 (High Ct. 1967).

[107] FLEMING at 340. *See also* Attorney-General v. P.Y.A. Quarries Ltd., [1957] 1 All E.R. 894, at 908 (C.A.) ("a public nuisance is a nuisance which is so widespread in its range or so indiscriminate in its effect that it would not be reasonable to expect one person to take proceedings on his own responsibility to put a stop to it, but that it should be taken on the responsibility of the community at large."), *per* Denning L.J., *quoted in* Attorney-General for Ontario v. Orange Prods. Ltd., [1971] 3 Ont. 585, at 590, 21 D.L.R.3d 257, at 262 (High Ct.).

where the city discharged raw sewage into a river creating a danger to public health and precluding the plaintiff from use of the river for domestic and stock-watering purposes, it was held that the attorney-general did not have to bring the action as the plaintiff had suffered "some particular, direct and substantial damage over and above that sustained by the public at large . . . ." [108] And in *Watson v. City of Toronto Gas—Light and Water Co.* the non-riparian plaintiff using the water of Toronto Bay for his distillery was held to have standing to sue for an injunction to restrain the defendant's pollution on the basis that he had suffered "special or peculiar damage" in the exercise of his lawful rights from the unlawful pollution. [109] Nor can only the provincial attorney-general bring an action to abate a public nuisance; where the waters are within federal legislative jurisdiction the Attorney-General for Canada may do so. [110] But a municipality cannot bring a class action to abate a public nuisance on behalf of all of its citizens; the attorney-general must bring the action. [111]

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[108] 15 D.L.R. 514, at 516-17 (Alta. Sup. Ct. 1914). *Quaere* whether the interference with the plaintiff's riparian right to the natural flow was not in itself particular harm, thus becoming as against the plaintiff a private nuisance. *See also* St. Lawrence Rendering Co. v. Cornwall, [1951] Ont. at 673, [1951] 4 D.L.R. at 795 ("Private nuisance is maintainable when the injury differs in nature and not merely in degree."). Spence, J. was speaking here with regard to injury to land. See FLEMING at 340.

[109] 4 U.C.Q.B. 158, at 163 (1847) (*Held* that there was no ground on which to hold that "injury of this description done to the quality of the water which all have a common right to use, will not give a right to an action, as well as an injury occasioned to an individual by obstructing him in the use of the water for purposes of navigation."). *But see* Hadden v. North Vancouver, [1921] 2 W.W.R. 808 (B.C. Sup. Ct.) (Plaintiff had no standing to sue for the pollution of tidal waters preventing his carrying on business, because although he was in possession of the land affected, he had no title to it), *aff'd* 30 B.C. 497, 67 D.L.R. 669 (1922), McPhillips, J. A., dissenting on the basis that possession was sufficient title as against a wrongdoer. *See also* McKie v. K.V.P., *supra* note 105 (*Held* that only one of the five plaintiffs could recover for harm to the right of fishing, as he had suffered "special and peculiar damage" because he alone owned the river bed adjacent to his property and thus the pollution had interfered with his property right). And *see* Fillion v. N.B. Int'l Paper Co., 8 Mar. Prov. 89, [1934] 3 D.L.R. 22 (N.B.) (segregating the issues of harm to the fisheries in the river and harm to the plaintiff's nets and holding that plaintiff was harmed no more than any other member of the public concerning the former as he had no right of property in the fishery and that he could not recover for harm to his nets on the basis of negligence as the damage was too remote). *But see* Suzuki v. "Ionian Leader," [1950] Exch. 427, [1950] 3 D.L.R. 790, distinguishing *Fillion*. *See also* Hickey v. Electric Reduction Co., 21 D.L.R.3d 368 (Nfld. 1970). For a discussion of the standing limitations and recommendations for broadening them, see Smith, *Private Action for Obstruction to Public Right at Passage*, 15 COLUM. L. REV. 1 (1915).

[110] Attorney-General for Canada v. Ewen, 3 B.C. 468 (1895).

[111] St. Lawrence Rendering Co. v. Cornwall, [1951] Ont. 969, [1951] 4 D.L.R. 790 (High Ct.) (in counterclaim city alleged creation of nuisance by emission of fumes). It may have been for this reason that in Rex v. Capilano Timber Co., 96 Can. Crim. Cas. 141 (Vancouver Mag. Ct. 1949), the magistrate used the criteria of private nuisance to determine if there had been a violation of a municipal by-law. (The defendant company was charged with air pollution causing a nuisance). *But see* McKnight v. Toronto, 3 Ont. 284, at 286 (C.P. 1883) ("municipal enactments are made . . . for preventing and abating public nuisances . . . .").

Most actions concerning water pollution have involved private nuisance. Even pollution of a watercourse creating a public nuisance would probably be considered private as against a riparian owner. [112] But the courts have further distinguished between a nuisance causing "material injury to property" and one causing only "sensible personal discomfort." [113] If the latter is produced the standard for nuisance will be that of the neighborhood; if the character of the neighborhood, for example, were industrial, the standard would be lower, that is, a greater degree of offensiveness would be necessary to find nuisance. [114] And trifling discomforts and small inconveniences which are only temporary will not be sufficient for the court to interfere; but the court will do so where the injury is permanent and serious. [115] Where the nuisance produces substantial interference with property, it will usually be found to be a nuisance requiring relief. Thus in *Walker v. McKinnon Industries Ltd.* [116] and *Russell Transport Ltd. v. Ontario Malleable Iron Co.* [117] pollution of the air from defendant's factories causing harm to the plaintiffs' use of their property for their businesses was restrained.

As the riparian right to the natural flow is a right of property, albeit usufructuary, [118] pollution of a watercourse would bring a riparian, basing his action on nuisance, within the latter category. And it seems likely that where either a municipality is draining its sewage or an industry discharging its waste into a watercourse the harm will be a continuing one. [119] Thus in

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[112] *Supra* notes 106 and 108.

[113] Walker v. McKinnon Indus. Ltd., [1949] Ont. 549, at 555, [1949] 4 D.L.R. 739, at 762 (High Ct.). However, no such distinction is made in the E.P.A. which prohibits discharge into the natural environment of any contaminant that has an offensive odour, may endanger the health or safety of any person, or may injure or damage real or personal property or plant or animal life, § 14(1), and creates an offence for a violation of the provision subject to a fine of $5,000 for a first conviction and $10,000 per day for any subsequent conviction, § 102(1).

[114] *Id.* at 763; Godfrey v. Good Rich Refining Co., [1939] Ont. 106, [1939] 2 D.L.R. 115 (High Ct.) (Odours from oil refineries creating nuisance in residential area); Plater v. Collingwood, [1968] 1 Ont. 81, at 85, 65 D.L.R.2d 492, at 496 (High Ct. 1967); River Park Enterprises v. Fort St. John, 62 D.L.R.2d 519, at 521 (B.C. Sup. Ct. 1967). The word "offensive" in the E.P.A., § 14(1)(*a*) and § 15(1)(*c*), is subject to a similar interpretation.

[115] Walker v. McKinnon Industries, *supra* note 113, at 556, [1949] 4 D.L.R. at 763; Van Egmond v. Seaforth, 6 Ont. 599, at 608 (1884).

[116] [1949] 4 D.L.R. 739 (Ont. High Ct.), *aff'd* [1950] 3 D.L.R. 159 (Ont.) and [1951] 3 D.L.R. 577 (P.C.). Relief is discussed *infra*, text following note 170.

[117] [1952] 4 D.L.R. 719 (Ont. High Ct.).

[118] *Supra* note 51.

[119] An interference with a riparian right is much like a trespass in that both are actionable without proof of actual harm, and nominal damages will be granted. *See* Stollmeyer v. Trinidad, [1918] App. Cas. 485, 118 L.T.R. 514 (P.C.). FLEMING at 371, n.46 (3d ed. 1965) states that writers disagree on whether a continuing trespass constitutes a nuisance, but some Canadian courts seem to have held that it does. B.C. Pea Growers Ltd. v. Portage La Prairie, 49 D.L.R.2d 91 (Man. 1964), *aff'd* [1966] Sup. Ct. 150. *See also infra*, text following note 132. The prohibition in § 14(1) of the E.P.A. applies to a single emission or discharge as well as to continuing ones. *Quaere* whether interference with riparian rights will be considered injury or damage to real property within § 14(1)(*c*)(i) and § 15(1)(*e*)(i) of the E.P.A.

several instances relief has been granted to a riparian owner framing an action to restrain pollution in terms of nuisance. [120] A tenant at will is able to maintain such an action. [121] And it is no defence that others contribute to the nuisance. [122]

In *Groat v. City of Edmonton*, Mr. Justice Rinfret stated that pollution "is always unlawful and, in itself, constitutes a nuisance,"[123] and Mr. Chief Justice Anglin concurred. But this statement seems somewhat overly broad. Neither Mr. Justice Duff nor Mr. Justice Lamont went this far, although both agreed that the drainage of filth from the city's streets constituted a nuisance. [124] Rinfret's statement cannot, therefore, be taken as the *ratio* of the case; rather it should probably be limited to the facts involved. A continuous draining of the city streets by artificial means so as to substantially affect the quality of the water of the stream would undoubtedly constitute a nuisance on the basis of the opinions of all four members of the majority. Nor have later courts taken up Rinfret's statement; the Ontario Court of Appeal has held that "there might well be pollution of the water to a degree and of a character that would seriously interfere with its use for [domestic]

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[120] Van Egmond v. Seaforth, 6 Ont. 599, at 613 (1884) (holding the defendant was "bound . . . not to create a nuisance"); Weber v. Berlin, 8 Ont. L.R. 302, 3 Ont. W.R. 812 (High Ct. 1904) (appeal on assessment of damages by special referee; trial court had granted an injunction to restrain a nuisance); Butt v. Oshawa, 59 Ont. L.R. 520, at 521, [1926] 4 D.L.R. 1138, at 1142 ("What should have been restrained is the discharge of offensive matter into the creek so as to cause a nuisance"); Groat v. Edmonton, [1928] Sup. Ct. 522, [1928] 3 D.L.R. 725; Bright v. Niagara Racing Ass'n, 20 Ont. W.N. 46, at 47 (High Ct. 1921) (discharge of sewage into stream for two weeks each summer was a nuisance); Stollmeyer v. Petroleum Dev. Co., [1918] App. Cas. 498, 118 L.T.R. 514 (P.C.) (continuing violation of riparian rights in unpolluted flow of water a nuisance); Burgess v. Woodstock, [1957] Ont. 814, [1955] 4 D.L.R. 615 (High Ct.) (pollution of river a nuisance).

[121] Burgess v. Woodstock, [1955] Ont. 814, at 817, [1955] 4 D.L.R. 615, at 619 (High Ct.): "But the duration of the tenancy may be material in considering whether or not an injunction ought to be refused and . . . if an injunction is granted it may be limited to the period of the tenancy." In any event tenancy at will was a technical argument based on the terms of the Veteran's Land Act, CAN. REV. STAT. c. 280 (1952); the plaintiff was held to be a purchaser in substance.

[122] Attorney-General for Canada v. Ewen, 3 B.C. 468, at 471 (Sup. Ct. 1895) (Everyone who contributes to the nuisance is liable); Walker v. McKinnon Indus. Ltd., [1949] Ont. 549, at 560, [1949] 4 D.L.R. 739, at 767 (High Ct.) ("even if others are in some degree polluting the air, that is no defence if the defendant contributes to the pollution so that the plaintiff is materially injured. It is no defence even if the act of the defendant would not amount to a nuisance were it not for others acting independently of it doing the same thing at the same time . . . ."). *See also supra* text accompanying note 75. But the burden of proof on the plaintiff may be heavy. Manchester v. Farnworth, [1930] App. Cas. 171, at 196, 142 L.T.R. 145, at 152.

[123] [1928] Sup. Ct. 522, at 532.

[124] Smith, J., dissented, agreeing with the Alberta Appellate Division that the city had a right to drain and that there was no evidence to show a greater amount of pollution than would naturally occur.

. . . purposes and yet not amount to an actionable nuisance." [125] And this case has been followed by another Ontario court. [126] The question, therefore, arises as to when pollution will and when it will not constitute a nuisance. In the latter case the statement was made in the context of a discussion of the fact that no sewage disposal plant could completely eliminate all colon bacilli from escaping in the effluent, but that treatment would eliminate almost all septic conditions and chlorination reduce the toxic effects. [127] It would seem, therefore, that whether or not pollution of a watercourse creates a nuisance would depend on the degree of pollution rather than on its continuance. But Mr. Justice Middleton in *Crowther v. Town of Coburg* [128] relied on *Young & Co. v. The Bankier Distillery Co.* [129] in holding that "nuisance or no nuisance is not the question, but the right to the water in its natural condition." [130] And the *Crowther* case involved pollution by the discharge of raw sewage into the stream. Despite this fact, the *Burgess* case would seem, in effect, to indicate that "pollution" will not constitute a nuisance when it does not sensibly "pollute." [131] But if this were so, would there be any interference with riparian rights? [132]

If a continuing trespass may be a nuisance, there is no reason why a continuous interference with the natural flow by pollution or otherwise should not. [133] However, Middeton's "purist" view still seems preferable, if only from a tactical viewpoint. [134] The defences and remedies granted for both actions are the same; [135] and the question of when pollution will con-

[125] McKie v. K.V.P. Co., [1948] Ont. W.N. 386, [1949] 1 D.L.R. 39, at 41, *aff'd* [1949] Sup. Ct. 698. The statement was not *obiter* as the basis of the trial decision, [1948] 3 D.L.R. 201, had been the plaintiffs' riparian rights and on appeal the defendant had asked that the injunction be confined to alterations which could create a nuisance.

[126] Burgess v. Woodstock, [1955] Ont. 814, at 820, [1955] 4 D.L.R. 615, at 622.

[127] *Id.*

[128] 3 Ont. W.N. 490, 1 D.L.R. 40 (High Ct. 1912).

[129] [1893] App. Cas. 691 (H. L. Scot).

[130] Crowther v. Coburg, 3 Ont. W.N. 490, at 492-93, 1 D.L.R. 40, at 42 (High Ct. 1912).

[131] Burgess v. Woodstock, *supra* note 126. *See also* Young v. Bankier, [1893] App. Cas. at 698, 69 L.T.R. at 839-40.

[132] Despite the statement in Crowther v. Coburg, 3 Ont. W.N. at 491, 1 D.L.R. at 41, that there is no right to pollute a stream to the smallest degree, it is likely that if only the minimal amount of colon bacilli were allowed into the stream, they would decompose as a result of nature's processes prior to reaching a riparian owner who was any appreciable distance downstream. And presumably there would be no violation of § 14(1) of the E.P.A.

[133] The two Ontario cases, *supra* notes 125 and 126, would seem to indicate that a continuous trespass may not, in Ontario, constitute a nuisance. And the *B.C. Pea Growers* case, *supra* note 119, may be distinguished on the basis that the effluent which flooded the plaintiff's lands gave off an odour. *But see* Brown v. Bathurst, 3 N.B. Eq. at 563 (1907).

[134] *Supra* text accompanying note 130.

[135] Defences and remedies are discussed below following notes 140 and 170 respectively.

stitute a nuisance has not definitively been answered. [136] Moreover, if an injunction is obtained in an action for nuisance, it may restrain only the nuisance, which may not remove all the pollution, [137] while an injunction obtained to protect riparian rights will prohibit all pollution. [138] Consequently, the fusion of the two doctrines may lead to some confusion, at least in the scope of the remedy granted: [139] moreover, it appears that the doctrine of nuisance as it applies to the pollution of watercourses is superfluous and a plaintiff choosing his cause of action carelessly may get, as a result, a less effective remedy than he otherwise might have.

A defence to an action for nuisance or for interference with riparian rights where the facts have been proved can be made only by showing some justification for the defendant's acts; and such justification may be shown by proving a grant or a prescriptive easement. [140] It seems clear that the owner of a servient tenement may grant a right to interfere with his riparian rights, [141] and presumably to create a nuisance. [142] And what can be given by grant can be acquired by prescription. Thus evidence of an open user of a stream as of right for the period of twenty years prior to the action will be sufficient to prove a prescriptive easement or to raise the presumption of a lost modern grant. [143] But the doctrine of lost grant will not apply as against

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[136] Thus in Stephens v. Richmond Hill, [1955] Ont. 806, at 810, [1955] 4 D.L.R. 572, at 576 (High Ct.), the plaintiff framed her action as an interference with riparian rights. The Court of Appeal stated that the cause of action was nuisance, [1956] 1 D.L.R.2d 569, at 579, but refused to alter the terms of the injunction which prohibited all pollution.

[137] Butt v. Oshawa, [1926] 4 D.L.R. 1138, at 1142 (Ont.); Burgess v. Woodstock, [1955] Ont. at 823, [1955] 4 D.L.R. at 625.

[138] McKie v. K.V.P. Co., [1949] 1 D.L.R. 39, at 41-52; Stephens v. Richmond Hill, [1955] 4 D.L.R. 572 (High Ct.). The terms of the injunction are stated at [1956] Ont. 88, at 93, 1 D.L.R.2d 569, at 570.

[139] *Supra* note 136. The intermingling of the two doctrines has also occurred in Quebec. *See* Belanger v. Municipalité Scolaire D'Henryville, [1964] Que. C.S. 207 (Defendant municipality had declared the stream a nuisance in 1932, but the action was based on the plaintiff's right to unimpaired water.).

[140] St. John v. Barker, 3 N.B. Eq. 358, at 361 (1906); Crowther v. Coburg, 3 Ont. W.N. 490, at 491, 1 D.L.R. 40, at 41 (High Ct. 1912); Stollmeyer v. Trinidad [1918] App. Cas. 485, at 496, 118 L.T.R. 514, at 517 (P.C.); Russell Transport Ltd. v. Ontario Malleable Iron Co., [1952] Ont. 621, [1952] 4 D.L.R. 719 (High Ct.); McKie v. K.V.P. Co., [1948] Ont. W.N. 386, at 388, [1948] 3 D.L.R. 201, at 209 (High Ct.); Gauthier v. Naneff, [1971] 1 Ont. 97, at 101 (High Ct. 1970). *See also* FLEMING at 367-68. *See generally* GALE ON EASEMENTS 177-218 (13th ed. 1959) [hereinafter cited GALE].

[141] *See* Lockie v. North Monaghan, 12 Ont. W.N. 171 (Div. Ct. 1917). The same would seem to hold true in Quebec, Chicoutimi Pulp Co. v. Price, 39 Sup. Ct. 81 (1907).

[142] B.C. Forest Prods. Ltd. v. Nordal, 11 W.W.R. (n.s.) 403 (B.C. Sup. Ct. 1954) (rectification of deed granting easement to create nuisance and to pollute).

[143] See GALE at 120-28 and 152-73. At common law a lost grant may be presumed where the enjoyment has not continued down to trial. In Ontario the period for both prescription and lost grant must be the twenty years prior to the bringing of the action. If the user is for forty years the right is indefeasible. The Limitations Act, ONT. REV. STAT. c. 246, §§ 31 and 32 (1970).

a *bona fide* purchaser for value without notice.[144] The real question with regard to riparian rights is when the prescriptive period begins to run; it would seem to run in some circumstances only when actual injury is suffered by the owner of the servient tenement.[145] But this would not seem to be so where pollution is concerned; the prescriptive period begins to run "only when some right to the use or flow of water different from that which the common law confers as incident to the property that the twenty years' uninterrupted user as of right is required to sustain it,"[146] that is, when a cause of action accrues to the lower riparian.[147] Thus the injury to a riparian's right by polluting would be sufficient to start the running of the prescriptive period.[148] As a result, because the jury had not considered the issue of nominal damages in *Mitchell v. Barry* where pollution of a stream was presently causing no actual damage to the plaintiff but was capable of ripening into a prescriptive easement, the case was sent back for a new trial.[149] In *Van Egmond v. Corporation of the Town of Seaforth* although the town had been draining street water into the stream for more than twenty years, foul water from salt factories had been drained for less than twenty, and the prescriptive period was held to run only from the time when the town began to drain the foul water.[150] When a prescriptive easement to pollute has been obtained, the owner of the dominant tenement is not entitled to increase the amount of pollution,[151] but a change in the quality, substantially increasing the degree of pollution to the servient owner, will not destroy the easement.[152] However, an easement to pollute where the pollution would create a public nuisance[153] or be contrary to a statutory proscription[154] cannot be acquired by prescription or the presumption of a lost grant.

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144 Watson v. Jackson, 30 Ont. L.R. 517, at 520 (High Ct. 1914). Constructive notice will be presumed if the easement is registered under the Registry Act, ONT. REV. STAT. c. 409 (1970).

145 McLaren v. Cook, 3 U.C.Q.B. 299, at 300 (1847) (period did not begin to run until upper owner actually built mill with which penned-back water interfered); Ellis v. Clemens, 21 Ont. 227 (High Ct. 1891) (user which was formerly reasonable becoming unreasonable because of change of conditions; period began to run only when dam actually impeded flow of water); Russell Transp. Ltd. v. Ontario Malleable Iron Co., [1952] Ont. at 632-33, [1952] 4 D.L.R. at 734.

146 Brown v. Bathurst, 3 N.B. Eq. 543, at 551 (1907).

147 Ellis v. Clemens, *supra* note 145, at 231 ("the plaintiff, for the first time finding himself injured, is not barred of his right to complain by reason of the fact that he made no complaint until he began to be injured . . .").

148 McKie v. K.V.P. Co., [1948] Ont. W.N. at 387, [1948] 3 D.L.R. at 210.

149 26 U.C.Q.B. 416, at 419 (1887).

150 6 Ont. 599, at 604 (High Ct. 1883). On the basis of the town's right to drain only street water, *supra* text accompanying note 65, the cause of action could be said to have accrued only when the salt water was added.

151 GALE at 172.

152 COULSON & FORBES 286-87.

153 FLEMING at 368; COULSON & FORBES at 283; WISDOM, THE LAW OF RIVERS AND WATERCOURSES 96-97 (1962).

154 GALE at 173, 211; COULSON & FORBES at 283; WISDOM, *supra* note 153, at 97.

A further defence is available to persons or entities which are authorized by statute to do the act causing the pollution. Although municipalities most frequently raise this defence, it would also be available to companies incorporated by a special act of the legislature. "In the absence of any . . . special authority . . . rights as to the use of water cannot be extended beyond that ordinary and reasonable use to which a riparian owner is entitled." [155] The general doctrine of the defence of statutory authority has been comprehensively stated by Viscount Dunedin:

> When Parliament has authorized a certain thing to be made or done in a certain place, there can be no action for nuisance caused by the making or doing so authorized. The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense. [156]

The application of this principle invariably involves an interpretation of the relevant statute and the issue has been framed by the Supreme Court of Canada in terms of four questions: (1) whether the act which occasioned the injury was authorized by statute; (2) whether the statute contemplated that the powers conferred might cause injury to others; (3) if so, whether the injury complained of was of a kind contemplated by the statute; and (4) whether the statute provided for compensation in respect of any injury sustained through the exercise of the powers conferred. [157] If all four questions are answered in the affirmative then the party injured is deprived of a right of action and is left to his remedy for compensation under the statute. [158]

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[155] Brown v. Bathurst, 3 N.B. Eq. 543, at 553 (1907).

[156] Manchester v. Farnworth, [1930] App. Cas. 171, at 183, 142 L.T.R. 145, at 148 (1929), *cited with approval* in Smiley v. Ottawa, [1941] Ont. 47, [1941] 2 D.L.R. 390; Burgess v. Woodstock, [1955] Ont. 814, [1955] 4 D.L.R. 615 (High Ct.); Stephens v. Richmond Hill, [1955] Ont. 806, [1955] 4 D.L.R. 572 (High Ct.); McKenzie Barge & Marine Ways Ltd. v. North Vancouver, 47 W.W.R. (n.s.) 30, 44 D.L.R.2d 382 (B.C. 1964); B.C. Pea Growers Ltd. v. Portage La Prairie, 43 D.L.R.2d 713 (Man. Q.B. 1963); Lawrysyn v. Kipling, 50 W.W.R. (n.s.) 430, 55 D.L.R.2d 471 (Sask. 1965). The shifting onus of proof has also been applied to the mitigation of damages by the plaintiff, Burgess v. Woodstock, [1955] Ont. at 822, [1955] 4 D.L.R. at 624, and to the question of amount of damage, that is, where others than the defendant have contributed to the nuisance, the defendant must show the basis for severing damages or he will be liable for all. Brown v. Morden, 24 W.W.R. (n.s.) 200, at 208-09, 12 D.L.R.2d 576, at 586 (Man. Q.B. 1958). It should also be noted that scientific evidence has been held to be only secondary. More weight will often be given to the facts proved than to the opinions of experts. McKie v. K.V.P. Co., [1948] Ont. W.N. at 386, [1948] 3 D.L.R. at 204; Stephens v. Richmond Hill, [1955] Ont. at 810, [1955] 4 D.L.R. at 576. But where the experts who testify are affiliated with a public authority, "they are in a different category from ordinary experts" in that each has "a heavy personal responsibility to the public . . . ." *Re* Faraday Uranium Mines Ltd., [1962] Ont. 503, at 514, 32 D.L.R.2d 704, at 715.

[157] North Vancouver v. McKenzie Barge & Marine Ways Ltd., [1965] Sup. Ct. 377, at 383, *citing* Marriage v. East Norfolk Rivers Catchment Bd., [1950] 1 K.B. 284.

[158] Id.

This would seem to cover all situations within the questions asked. But it leaves the issue open where no compensation is provided for by legislation. [159] And the question of when legislation contemplates such injury must also be answered. Since the *North Vancouver* case is really only directed to the means by which compensation is to be obtained [160] and since the lack of a provision for compensation is not conclusive of the legislature's intention, [161] the latter issue is the crucial one. The courts have devised several doctrines to answer it. The authority to create a nuisance or to interfere with the rights of others without liability will only be found where such harm must inevitably result from the authorized act, that is, when the act cannot be done without so causing injury. [162] Then the necessary implication of the statute would be that the legislature intended this result. [163] In this regard it matters not whether the legislation is "permissive," in that it gives the power to do an act or construct a work but leaves it within the discretion of the municipality as to how and where to do so, or "mandatory," in that it directs a particular kind of act to be done or work to be constructed. In either case only the necessary results of the work are exempt from an action. [164] Nor will the municipality be exempt from liability for damages due to negligence [165] or if the work is not done in compliance with all the

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[159] "If the very thing authorized necessarily interferes with the common law rights of others, then there can be no right of action, and one expects to find in the statute some provision for compensation; but the absence of such a provision does not create a right of action... But then the court will carefully scrutinize the statute to see if the legislature intended to grant power to interfere with private rights without compensation." Guelph Worsted Spinning Co. v. Guelph, 5 Ont. W.N. 761, at 762, 18 D.L.R. 73, at 80 (High Ct. 1914). *See also* FLEMING at 367.

[160] [1965] Sup. Ct. 377.

[161] *Supra* note 159.

[162] Manchester v. Farnworth, *supra* note 156; Burgess v. Woodstock, [1955] Ont. 814, at 818, [1955] 4 D.L.R. 615, at 620 (High Ct.); Stephens v. Richmond Hill, [1955] Ont. at 811-12, [1955] 4 D.L.R. at 578.

[163] Brown v. Bathurst, 3 N.B. Eq. 543, at 554 (1907). ("To establish any such implication it would at least be necessary to prove that the powers given to the company could not possibly be enjoyed without the implied one."); Stephens v. Richmond Hill, [1955] Ont. at 811-12, [1955] 4 D.L.R. at 578. *But see* Fieldhouse v. Toronto, 42 Ont. L.R. 491, 44 D.L.R. 392 (High Ct.) ("They have statutory authority to establish a sewage plant, but no authority to create a nuisance by its operation; and inability to operate it without causing a nuisance does not, in my opinion, furnish an excuse for creating a nuisance"); Groat v. Edmonton, [1928] Sup. Ct. 522, at 533, [1928] 3 D.L.R. 725, at 730 ("So far as statutory powers are concerned, they should not be understood as authorizing the creation of a private nuisance—unless indeed the statute expressly so states." (*per* Rinfret, J.).

[164] B.C. Pea Growers Ltd. v. Portage La Prairie, 49 D.L.R.2d 91, at 93 (Man. 1964) (*per* Freedman, J. A.).

[165] Smiley v. Ottawa, [1941] Ont. 47, [1941] 2 D.L.R. 390 (Ont.); Verbrugge v. Port Alberni, 48 D.L.R.2d 63 (B.C. 1964); Himmelman v. N.S. Constr. Co., 5 D.L.R.3d 56, at 65-66 (N.S. 1969). But it has been argued that the question of cost is relevant in deciding if reasonable care was exercised. McKenzie Barge & Marine Ways Ltd. v. North Vancouver, 47 W.W.R. (n.s.) 30, 44 D.L.R.2d 382 (B.C. 1964) (Sheppard, J.A., dissenting).

required statutory formalities. [166] But where the authority is only permissive the courts are more stringent; the undertaking itself is then within the discretion of the municipality, and must be exercised in strict conformity with the common law rights of others. [167] Then the courts may consider the location chosen [168] and the method of operation selected. [169] But it must be emphasized that the legislation itself is controlling. [170]

Remedies remain to be discussed; either damages or an injunction restraining further pollution (or nuisance), or both, are available to a riparian where a watercourse abutting his property has been polluted. [171] Nominal damages are recoverable where no actual damages have been suffered for both nuisance [172] and an interference with riparian rights. [173] If the action is brought for an interference with riparian rights the plaintiff can recover general damages as well, [174] but if framed in nuisance he can recover only for special damages which must, of course, be pleaded and proved. [175] And where an injunction is granted actual damages will be awarded as well; [176] but no general damages may be awarded along with an injunction to restrain an interference with riparian rights or nuisance. [177] And where an injunction is granted the plaintiff cannot recover for depre-

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[166] Van Egmond v. Seaforth, 6 Ont. 599 (1884) (power to construct drains and sewers not exercised by municipal by-law as required by statute); Donovan v. Lochiel, 5 Ont. W.R. 222 (High Ct. 1905) (no authorization from provincial board of health to create nuisance).

[167] Guelph Worsted Spinning Co. v. Guelph, 5 Ont. W.N. 761, at 762, 18 D.L.R. 73, at 80 (High Ct. 1914); B.C. Pea Growers Ltd. v. Portage La Prairie, 43 D.L.R.2d 713, at 729 (Man. Q.B. 1963). *See also* FLEMING at 367.

[168] Metropolitan Asylum Dist. v. Hill, 6 App. Cas. 193, 43 L.T.R. 225 (1881).

[169] Portage La Prairie v. B.C. Pea Growers Ltd., [1966] Sup. Ct. 150, at 154. *Quaere* whether a court would distinguish between the decision to undertake a work which is directed by a legislative enactment and the location chosen for the work or the method chosen to accomplish it, by declaring the former mandatory and the latter discretionary. If so, except for legislative direction to build a particular kind of work, in a particular place and in a particular way, the distinction created between permissive and mandatory legislation is illusory and its only use is for emotive purposes.

[170] *See* Stephens v. Richmond Hill, [1956] Ont. 88, 1 D.L.R.2d 569, discussed *infra* text following note 253.

[171] There have been no instances in Canada of abatement of pollution by self-help. See COULSON & FORBES at 720-23; FLEMING at 372-73.

[172] Bright v. Niagara Racing Ass'n, 20 Ont. W.N. 46 (High Ct. 1921). *See also* FLEMING at 369-70.

[173] Mitchell v. Barry, 26 U.C.Q.B. 416, at 419 (1887).

[174] Weber v. Berlin, 8 Ont. L.R. 302 (High Ct. 1904).

[175] Butt v. Oshawa, 59 Ont. L.R. 529, [1926] 4 D.L.R. 1138; Stephens v. Richmond Hill, 1 D.L.R.2d 539, at 583 (Ont. 1956).

[176] *See* Burgess v. Woodstock, [1955] Ont. 814, [1955] 4 D.L.R. 615 (High Ct.); McKie v. K.V.P. Co., [1948] Ont. W.N. 386, [1948] 3 D.L.R. 201 (High Ct.); Plater v. Collingwood, [1968] 1 Ont. 81, at 88, 65 D.L.R.2d 492, at 499 (High Ct. 1967).

[177] Stollmeyer v. Trinidad, [1918] App. Cas. 485, at 497, 118 L.T.R. 514, at 517-18 (P.C.) (declaration sufficient to safeguard plaintiff's rights); Stephens v. Richmond Hill, 1 D.L.R. 569, at 583 (Ont. 1956), *reversing* on the issue of damages [1955] Ont. 806, [1955] 4 D.L.R. 572 (High Ct.). Note that Stewart, J., based his decision on an interference with riparian rights while the Court of Appeal held the cause of action to be nuisance.

ciation in the value of his property unless an actual sale was lost because of the nuisance. [178] Finally, if the effect of the injunction is suspended, the court will require the defendant to pay for the actual damages occurring between the trial and the date on which the injunction takes force. [179]

An injunction will be granted when it appears to the court just or convenient to do so. [180] Since injunction is an equitable remedy the doctrines of acquiescence and lâches apply. [181] Moreover, as the granting of an injunction is discretionary, [182] one will issue only when damages are not a complete and adequate remedy. [183] An injunction has been refused where the injury was trivial, [184] and even where the defendants could with proper care dispose of their mine waste without injury to the plaintiff. [185] An injunction has been refused where the injury was only temporary and where there were no specific acts of the defendant to prohibit. [186] But where the

[178] Godfrey v. Good Rich Refining Co., [1939] Ont. 106, [1939] 2 D.L.R. 115 (High Ct.), *aff'd* [1940] Ont. 190; *Re* Faraday Uranium Mines Ltd., [1962] Ont. 503, at 516-17, 32 D.L.R.2d 704, at 717-18; River Park Enterprises Ltd. v. Fort St. John, 62 D.L.R.2d 519, at 524 (B.C. Sup. Ct. 1967); Plater v. Collingwood, [1968] 1 Ont. 81, at 87, 65 D.L.R.2d 492, at 498-99 (High Ct. 1967). But in *Re* Faraday, because no injunction was granted the commissioner's decision on damages was upset by the Court of Appeal and damages were awarded for depreciation in the value of the plaintiff's land. The injunction was precluded by The Mining Act, ONT. REV. STAT. c. 241, § 646(1) (1960).

[179] Stollmeyer v. Trinidad, [1918] App. Cas. 485, at 497, 118 L.T.R. 514, at 517-18 (P.C.); McKie v. K.V.P. Co., [1948] Ont. W.N. 386, at 390, [1948] 3 D.L.R. 201, at 220 (High Ct.). In River Park Enterprises Ltd. v. Fort St. John, *supra* note 178, Seaton, J., followed the same procedure, but also assessed the future damages, that is, those between the trial and the date on which the injunction was to become effective, at the time of the trial. Since only actual damages are allowed, the judge's speculation as to the amount of damages during the eight-month period of suspension seems highly questionable. *See* B.C. Pea Growers Ltd. v. Portage La Prairie, 43 D.L.R.2d 713, at 720 (Man. Q.B. 1963). *See also* Plater v. Collingwood, [1968] 1 Ont. 81, at 87, 65 D.L.R.2d 492, at 498 (High Ct. 1967) (no need to suspend injunction as defendant could stop nuisance without new equipment). *Contra,* Lockwood v. Brentwood Park Inv. Ltd., 1 N.S.2d 699, at 712, 10 D.L.R.3d 143, at 157 (1970), *reversing* on this issue 64 D.L.R.2d 212 (N.S. Sup. Ct. 1967).

[180] Stanford v. Imperial Oil Co., 56 D.L.R. 402 (N.S. 1920). *See also* The Judicature Act, ONT. REV. STAT. c. 228, § 18(1) (1970).

[181] McNab v. Taylor, 34 U.C.Q.B. 524, at 526 (1874); ONT. REV. STAT. c. 228, § 18(3) (1970).

[182] ONT. REV. STAT. c. 228, § 19(1) (1970).

[183] Close v. Woodstock, 23 Ont. 99 (C.P. 1892); Gross v. Wright, [1923] Sup. Ct. 214, at 227, [1923] 2 D.L.R. 171, at 182-83 (1922) (*per* Duff, J.); K.V.P. v. McKie, [1949] Sup. Ct. 698, at 703.

[184] Close v. Woodstock, *supra* note 183; Lockwood v. Brentwood Park Inv. Ltd., 1 N.S.2d 699, at 720, 10 D.L.R.3d 143, at 165 (1970).

[185] Salvas v. Bell, [1927] 4 D.L.R. 1099 (B.C. County Ct.). *But see* Attorney-General for Canada v. Ewen, 3 B.C. 468, at 472 (1895) (because the defendants were preparing to otherwise dispose of their waste the injunction would do them no harm and was granted). The fact that other means which would cause no injury to the plaintiff are available to the defendant is usually a factor favourable to the granting of an injunction. See text accompanying note 207 *infra.*

[186] Ellis v. Clemens, 21 Ont. 227, at 231 (High Ct. 1891). Street, J., also stated that it would be as easy to prove damages by *viva voce* evidence as to draw affidavits to have the defendant committed for contempt of court. *But see* Bright v.

injury is likely to be serious an injunction will be granted to prohibit a threatened or apprehended harm to the plaintiff. [187] And the burden of proving that special circumstances exist so that damages will be a sufficient remedy is on the defendant. [188]

An injunction will generally be granted when the activities of the defendant if continued may ripen into a prescriptive easement. [189] Thus it has been held that an interference with a riparian owner's right to the flow in its natural state is sufficient, without proof of actual damages, for an injunction to issue. [190] However, where the action is to restrain a nuisance actual damage is required. [191] But even if the damages are negligible an injunction will issue if the injury is continuous as the inconvenience involved in bringing an action for damages where a new cause of action is created each day the nuisance continues, is enough to swing the balance. [192] Nor need the court instruct the defendant as to the means to be taken to abate the nuisance. [193]

Niagara Racing Ass'n, 20 Ont. W.N. 46, at 47 (High Ct. 1921) (defendant polluting water during racing meetings for two weeks each summer, argued that the injury was only slight and temporary; Orde, J., stated that whatever force such an argument might have if the defendants were a public body whose undertaking was a benefit to the public, it could not be invoked where the defendant was engaged in a private enterprise.). The *action negatoire* in Quebec would seem to involve similar criteria. Chicoutimi Pulp Co. v. Price, 39 Sup. Ct. 81 (1907) (injunction dissolved because isolated acts of interference with plaintiff's right were adequately compensable by damages).

[187] Watson v. Jackson, 30 Ont. L.R. 517 (High Ct. 1914), *aff'd* 31 Ont. L.R. 481, 19 D.L.R. 733 (1914); Attorney-General v. P.Y.A. Quarries Ltd., [1957] 1 All E.R. 894 (C.A.). *See also* ONT. REV. STAT. c. 228, § 18(1) (1970). Similarly an interim injunction will issue where the injury done to the plaintiff prior to trial will be clearly greater, if he succeeds at trial, than the harm to the defendant by the injunction, if he should prove successful. Minnesota and Ontario Power Co. v. Rat Portage Lumber Co., 3 Ont. W.N. 502, 1 D.L.R. 95 (High Ct. 1912). But the interim injunction will be strictly limited to a protection of the plaintiff's interests so as not to cause unnecessary injury or inconvenience to the defendant. Eddy v. Booth, 6 Ont. W.R. 1001 (High Ct. 1905) (interim injunction modified to allow defendant to divert water of stream so long as it caused no harm to plaintiff). *See also* Attorney-General for Ontario v. Orange Prod. Ltd., [1971] 3 Ont. 585, 21 D.L.R.3d 257 (High Ct.).

[188] McKinnon Indust. Ltd. v. Walker, [1951] 3 D.L.R. 577 (P.C.); Russell Transp. Ltd. v. Ontario Malleable Iron Co., [1952] Ont. 621, at 636-37, [1952] 4 D.L.R. 719, at 739 (High Ct.). Nor is it a defence to say that the injury will occur even if an injunction does issue. Fisher & Son Ltd. v. Doolittle, 3 Ont. W.N. 1417, at 1419, 5 D.L.R. 549, at 553 (1912).

[189] McNab v. Taylor, 34 U.C.Q.B. 524, at 527 (1874). This despite the fact that nominal damages are sufficient to protect the plaintiff's right.

[190] McKie v. K.V.P. Co., [1948] Ont. W.N. 386, at 387, [1948] 3 D.L.R. 201, at 212 (High Ct.); Stephens v. Richmond Hill, [1955] Ont. 806, at 810, [1955] 4 D.L.R. 572, at 576; *Re* Faraday Uranium Mines Ltd., [1962] Ont. 503, at 517, 32 D.L.R.2d 704, at 718; Stollmeyer v. Trinidad, [1918] App. Cas. 485, 118 L.T.R. 514 (P.C.). *But see* Lockwood v. Brentwood Park Inv. Ltd., 1 N.S.2d 669, 10 D.L.R.3d 143 (N.S. 1970).

[191] *Supra* text accompanying and following note 172. And see FLEMING at 370.

[192] Brown v. Bathurst, 3 N.B. Eq. 543, at 566-67 (1907); Russell Transp. Ltd. v. Ontario Malleable Iron Co., [1952] Ont. 621, at 630, 641, [1952] 4 D.L.R. 719, at 728, 739 (High Ct.).

[193] Fieldhouse v. Toronto, 43 Ont. L.R. 491, at 493, 44 D.L.R. 392, at 395 (High Ct. 1918); Stollmeyer v. Trinidad, [1918] App. Cas. 485, 118 L.T.R. 514 (P.C.).

Nor will the court consider the economic benefits derived from an industry that is causing pollution of a watercourse. [194] Despite protestations that no harm is meant to the industry, [195] the "rights of riparian owners have always been zealously guarded by the courts." [196] Thus even where the provincial attorney-general argued on behalf of the defendant that the benefit to the public derived from a large industry was of greater importance than the plaintiff's use of its riparian right to fish for sport, an injunction was granted. [197] And when the *Pennsylvania Coal* case [198] was cited in *Young & Co. v. Bankier Distillery Co.*, Lord Shand stated that the Pennsylvania court made rather than interpreted law. [199] One strong dissenting voice to this principle has been thought to have appeared; in *Canada Paper Co. v. Brown*, [200] when, on an appeal from the Quebec court from an injunction granted to restrain the defendant's pollution of the air which caused discomfort to the plaintiff, the argument of public benefit was raised and vociferously rejected by Mr. Justice Idington. [201] Mr. Justice Duff stated:

> I am far from accepting the contention . . . that considerations touching the effect of granting the injunction upon the residents of the neighbourhood and indeed upon the interests of the appellant company itself are not considerations properly to be taken into account in deciding the question whether or not the remedy by injunction should be accorded the plaintiff under the law of Quebec. The court in granting that remedy exercises a judicial discretion not, that is to say, an arbitrary choice or choice based

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But see Claude v. Weir, M.L.R. 4 Q.B. 197 (1888) (failure of trial court to say what defendant must do to abate nuisance held ground for reversal).

[194] *See generally* Bright v. Niagara Racing Ass'n, *supra* note 186; *see also* Gauthier v. Naneff, [1971] 1 Ont. 97, at 103 (High Ct. 1970).

[195] Attorney-General for Canada v. Ewen, 3 B.C. 468, at 472 (1895) ("The object of the plaintiff will be attained if in the future operations of the cannery the offal is prevented from polluting the river and its banks — it is not the object to interfere with a valuable industry and prevent its successful working, but only to control its methods so as not to prejudice the public or to injuriously affect the industry [fishing] which the Government is anxious to protect.").

[196] K.V.P. Co. v. McKie, [1949] Sup. Ct. 698 , at 701 (*per* Kerwin, J.).

[197] Nepisiquit Real Estate & Fishing Co. v. Canadian Iron Corp., 42 N.B. 387 (1913).

[198] Pennsylvania Coal Co. v. Sanderson, 6 Atl. 453 (Pa. Sup. Ct. 1886).

[199] [1893] App. Cas. 691, at 702-03.

[200] 63 Sup. Ct. 243 (1922).

[201] *Id.* at 248-50. ("The invasion of rights incidental to the ownership of property, or the confiscation thereof, may suit the grasping tendencies of some and incidentally the needs or desires of the majority in any community benefiting thereby; yet such a basis or principle of action should be stoutly resisted by our courts, in answer to any such like demands or assertions of social right unless and until due compensation [is] made by due process of law . . . as long as we keep in view the essential merits of the remedy in the way of protecting the rights of property and preventing them from being invaded by mere autocratic assertions of what will be more conducive to the prosperity of the local community by disregarding such rights, we will not go far astray in taking as our guide the reasoning of any jurisprudence which recognizes the identical aim of protecting people in their rights of property when employing their remedy of perpetual injunction.").

> upon the personal views of the judge, but a discretion regulated in accordance with judical principles. . . . An injunction will not be granted where, having regard to all the circumstances, to grant it would be unjust; and the disparity between the advantage to the plaintiff to be gained by the granting of that remedy and the inconvenience and disadvantage which the defendant and others will suffer in consequence thereof may be a sufficient ground for refusing it. Where the injury to the plaintiff's legal rights is small and is capable of being estimated in money, and can be adequately compensated by a money payment, and where on the other hand the restraining or mandatory order of the court, if made, would bear oppressively upon the defendant and upon innocent persons, then although the plaintiff has suffered and is suffering an injury to his legal rights the court may find and properly find in these circumstances a reason for declining to interfere by exercising its powers in personam. [202]

Although this statement does nothing more than explicate in some detail the conventional rules concerning the granting of an injunction, [203] when it was cited in the *K. V. P.* case, [204] Mr. Justice Kerwin found in necessary to distinguish it by pointing out that it was *obiter* and that Duff had recanted in *Gross v. Wright* where he said that the only question was whether damages were a complete and adequate remedy for the wrong. [205] Although Duff was only elucidating the criteria as to when damages would be an adequate remedy, the position today seems clearly to be that the court will not consider either the economic necessities of an industry or its importance to the community. [206] The courts often use the emotive argument that the defendant

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[202] *Id.* at 252-53.

[203] *Supra* text following note 179.

[204] K.V.P. Co. v. McKie, [1949] Sup. Ct. 698, at 702-03.

[205] Gross v. Wright, [1923] Sup. Ct. 214, at 227, [1923] 2 D.L.R. 171, at 184. It would seem that it was unnecessary to rely on Gross v. Wright. In the first place, Duff, J., did grant the injunction in the *Canada Paper* case. Moreover, Anglin, J., with whom Davies, C.J., concurred, implicitly applied the criteria mentioned by Duff, J. Thus a majority of the Court seemed to agree on the factors involved in deciding "convenience." And Gross v. Wright dealt not with nuisance, but with a continuing trespass, because of a breach of contract involved in the improper building of a wall on the plaintiff's property. Thus the issue only involved the rights of two individuals and did not in any way affect the public. It might have been simpler to distinguish the *Canada Paper case* on the basis that it applied only to Quebec, or more reasonably, on the basis that it involved only personal discomfort whereas the *K.V.P.* case involved a physical interference with a property right. In fact no distinction was necessary; it need only have been said that, applying Duff's statement, damages would not have been an adequate remedy in the *K.V.P.* situation.

[206] McKie v. K.V.P. Co., [1948] Ont. W.N. 386, at 388, [1948] 3 D.L.R. 201, at 213-14 (High Ct.) ("If I were to consider and give effect to an argument based on the defendant's economic position in the community, or its financial interests, I would in effect be giving it a veritable power of expropriation of the common law rights of the riparian owners, without compensation.") *See also* Walker v. McKinnon Indus. Ltd., [1949] 4 D.L.R. 739, at 769 (Ont. High Ct.) ("The cases well establish that economic considerations do not enter into the matter, and I am not called upon to weigh the economic disadvantages to the defendant"), *aff'd* [1950] 3 D.L.R. 159 and [1951] 3 D.L.R. 577 (P.C.) (on the principle of concurrent findings of fact); Van Egmond v. Seaforth, 6 Ont. 599, at 602-03 (High Ct. 1883). *Cf.* Lockwood v. Brentwood Park Inv. Ltd., 1 N.S.2d 669, at 690, 10 D.L.R.3d 143, at 165 (1970) ("It may well be questioned whether the law pertaining to riparian occupiers which developed in England and

is capable of operating without causing injury to the plaintiff,[207] but it seems doubtful that this carries any great weight, that is, that the decision would be otherwise if the defendant could not.

The same rule would seem to hold true when the offender is a public body, despite the implication in the *Bright* case.[208] The courts have generally held that a municipality will not be allowed to expropriate without compensation despite the inconvenience to a great number of the public,[209] especially where it can avoid the injunction by instituting expropriation proceeding.[210] Perhaps the strongest statement of this position was made by Mr. Justice Stewart in the *Richmond Hill* case in reply to the argument that the municipality could not afford proper sewage treatment facilities:

> It is quite natural . . . [to] insist upon the importance of the welfare of the people at large, but I conceive that it is not for the judiciary to permit the doctrine of utilitarianism to be used as a make-weight in the scales of justice. In civil matters the function of the Court is to determine rights between parties . . . . Rights or liabilities so ascertained cannot, in theory, be refused recognition and enforcement, and no judicial tribunal claims the power of refusal . . . .
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> It is the duty of the state (and of statesmen) to seek the greatest good for the greatest number. To this end, all civilized nations have entrusted much individual independence to their Governments. But it must be

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became enshrined in its history of the past one hundred years or more, should be applied to a situation such as the present in an urban Canadian centre like the City of Halifax . . . . Alternatively, it may be asked whether legal rights of riparian occupiers, which were meaningful some fifty or more years ago, can have any real meaning in today's society".).

[207] Attorney-General for Canada v. Ewen, 3 B.C. 468 (1895); Brown v. Bathurst, 3 N.B. Eq. 543, at 567 (1907); Bright v. Niagara Racing Ass'n, 20 Ont. W.N. 46 (High Ct. 1921); Walker v. McKinnon Indus. Ltd., [1950] 3 D.L.R. 159, at 160 (Ont.); Godfrey v. Good Rich Refining Co., [1940] Ont. 190, [1939] 2 D.L.R. 115.

FLEMING at 371, n.35, cites two Ontario cases which, he states, have considered the economic factors, Bottom v. Ontario Leaf Tobacco Co., [1935] Ont. 205, [1935] 2 D.L.R. 699, and Black v. Canadian Copper Co., 12 Ont. W.N. 243 (High Ct. 1917). The former may be distinguished on the basis that it caused primarily personal discomfort and that the depreciation of the property due to it was held compensable in damages. In the latter, although obiter statements concerning economic consequences were made, the only question in issue was the quantum of damages, as the plaintiffs had dropped their claim for an injunction. In any event, these decisions would seem to go against the current of authority.

Claude v. Weir, M.L.R. 4 Q.B. 197, at 221 (1888), holds to the contrary. But modern Quebec decisions are in agreement with the Ontario practice. Dame Bishop v. Sauvé, [1951] B.R. 414 ("il est bien permis de s'étonner qu'on invoque ainsi l'intérêt général pour laisser subsister un état de choses qui menace la santé publique . . . .").

But see supra text accompanying note 185.

[208] 20 Ont. W.N. 46 (High Ct. 1921). See *supra* note 186.

[209] Crowther v. Coburg, 3 Ont. W.N. 490, at 491, 1 D.L.R. 40, at 42 (High Ct. 1912).

[210] Groat v. Edmonton, [1928] Sup. Ct. 522, at 540, [1928] 3 D.L.R. 725, at 743 (Lamont, J.); Saunby v. Water Comm'rs of the City of London, [1906] App. Cas. 110, at 115-16, 93 L.T.R. 648, at 651 (P.C. 1905).

> remembered that no one is above the law. Neither those who govern our affairs, their appointed advisors, nor those retained to build great works for society's benefit, may act so as to abrogate the slightest right of the individual, save within the law. It is for government to protect the general by wise and benevolent enactment. It is for me . . . to interpret the law, determine the rights of the individual and to invoke the remedy required for their enforcement. [211]

However, the court will not totally ignore such economic or public interest-oriented arguments whether the defendant be a public body or a private industry. Rather it will delay the effective date of the injunction so that the defendant may have time to abate the nuisance. [212] Thus time has been allowed where the harm to the plaintiff was not immediate, [213] and where a failure to do so would endanger the health of the city's inhabitants, [214] or would cause the defendant a loss out of all proportion to the benefits of the plaintiff. [215] And it may be granted simply to give the industry or city a chance to provide other means to dispose of its waste or to remedy the harm. [216] And occasionally the defendant will be granted leave to apply for a further extension of the injunction if he cannot do so in the allotted time. [217]

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[211] Stephens v. Richmond Hill, [1955] Ont. 806, at 812, [1955] 4 D.L.R. 572, at 578-79. As indicated the financial ability of the municipality to obey the injunction and still properly dispose of its sewage will not be considered. *See also* Burgess v. Woodstock, [1955] Ont. 814, at 823, [1955] 4 D.L.R. 615, at 624 (High Ct.). The legislature's response is discussed below, text following note 253.

[212] *See generally* Nepisiquit Real Estate & Fishing Co. v. Canadian Iron Corp., 42 N.B. 387, at 395 (1913) ("as the works of the defendant company are important and it may be that they can make such changes or improvements as will overcome the difficulty, I will give them time to do so . . . .").

[213] Maughn v. Grand Trunk Ry., 4 Ont. W.R. 287 (High Ct. 1904) (plaintiff's water supply would be sufficient during autumn, winter and spring freshets; therefore, allowed defendants until May to make other arrangements); Bright v. Niagara Racing Ass'n, 20 Ont. W.N. 46 (High Ct. 1921).

[214] Clare v. Edmonton Corp., 26 W.L.R. 678, at 680, 15 D.L.R. 514, at 517 (Alta. Sup. Ct. 1914).

[215] Stollmeyer v. Trinidad, [1918] App. Cas. 485, 118 L.T.R. 514 (P.C.); Stollmeyer v. Petroleum Dev. Co., [1918] App. Cas. 498, at 499, 118 L.T.R. 518, at 519 (P.C.).

[216] Weber v. Berlin, 8 Ont. L.R. 302 (1904); McKie v. K.V.P. Co., [1948] Ont. W.N. 386, [1948] 3 D.L.R. 201 (High Ct.); Burgess v. Woodstock, [1955] Ont. 814, [1955] 4 D.L.R. 615 (High Ct.); Stephens v. Richmond Hill, [1955] Ont. 806, [1955] 4 D.L.R. 572 (High Ct.).

[217] Stollmeyer v. Trinidad, [1918] App. Cas. 485, 118 L.T.R. 514 (P.C.); Stollmeyer v. Petroleum Dev. Co., [1918] App. Cas. 498, 118 L.T.R. 518 (P.C.); B.C. Pea Growers Ltd. v. Portage La Prairie, 43 D.L.R.2d 713 (Man. Q.B. 1963). *But see* K.V.P. Co. v. McKie, [1949] Sup. Ct. 698, at 705 (Reporter's Note). Almost two months after the Supreme Court affirmed the decision it refused a motion to allow the K.V.P. Company to apply to the Ontario High Court for a further suspension of the injunction if it could show special grounds. The Court did so without calling on the respondent.

The control of pollution in Ontario under the common law was in many ways unsatisfactory. Its incidence was rather haphazard as the regulation of polluters depended not on the supervision of a body concerned primarily with problems created by pollution or even with the allocation of water resources but on an action being brought by a plaintiff who was harmed. Thus it was likely that much pollution would pass unseen even though potentially harmful as a riparian owner would be unlikely to complain unless the water were substantially polluted. Moreover, when an action was brought the standards applied by the courts and the remedies available to them were rather rigid. Although the courts recognized that water quality was relative to the use to which it was to be put when the plaintiff was harmed, they refused to do so in favor of a defendant. [218] Moreover, only two remedies, damages and injunction, were available to the court. Thus the court was forced into the position of having to leave the pollution go unabated if it were to award damages or stop all pollution if it granted an injunction. [219] This combination of factors led the courts to refuse to enter into any balancing process once an interference with riparian rights or a nuisance was found. Instead it strictly protected the rights of the individual riparian no matter what the cost to the public. It would not consider the benefits from a vital industry as opposed to the convenience to a few businessmen of being able to fish when they wished to. [220] Nor would it consider the economic feasibility of a municipality installing new sewage treatment facilities even if the cost of failure meant that the municipality would not be able to dispose of its sewage. It is questionable whether a two-year suspension of an injunction was sufficient to overcome an economic obstacle. [221] Finally, in no case was the issue of other water supplies being available for domestic use even raised. Clearly if it had been it would not have been considered. [222] It would seem, therefore, that if the considerations ignored by the courts were to be considered, another form of control was necessary. The *K. V. P.*, [223] *Burgess* [224] and *Richmond Hill* [225] cases did, in fact, lead to legislation being passed in Ontario to meet the problem. Stewart's statement in the *Richmond*

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[218] *Supra* text following note 70.

[219] Of course, both could be awarded.

[220] *Supra* text following note 197.

[221] In any event, a sewage treatment plant takes approximately three years to complete. The Globe and Mail (Toronto), Nov. 3, 1967.

[222] Both here and throughout the paper the issue of nuisance from odours created by the pollution of a watercourse has largely been ignored. This was done because the courts often treated the pollution itself, rather than the odours, as the nuisance. But the fact that odours are created by water pollution may have been the cause this confusion.

[223] McKie v. K.V.P. Co., [1948] Ont. W.N. 386, [1948] 3 D.L.R. 201 (High Ct.), *aff'd* [1949] D.L.R. 39 (Ont.), [1949] Sup. Ct. 698.

[224] Burgess v. Woodstock, [1955] Ont. 814, [1955] 4 D.L.R. 615 (High Ct.).

[225] Stephens v. Richmond Hill, [1955] Ont. 806, [1955] 4 D.L.R. 572 (High Ct.), *aff'd* [1956] Ont. 88, 1 D.L.R.2d 569.

Hill case [226] might be seen as a direct challenge to the legislature to do something to meet the problem. And the legislature in 1956 passed, *inter alia*, the Ontario Water Resources Commission Act [227] in response.

It is, therefore, necessary to consider these three cases and the legislation resulting from them in some detail. The K. V. P. Company opened its pulp and paper mill on the Espanola River in 1946. In 1948 five lower riparian owners brought an action alleging that the wastes from the company's plant, which included both chemical and fibre wastes, interfered with their comfort and enjoyment of the land by causing foul odours to be given off by the river, precluded their use of the water for domestic purposes even after boiling and even, when the river was frozen over, of the ice which contained "black foreign matter," [228] that the water was unfit to bathe in and was repulsive to farm animals, that the fish in the river had either been killed or driven away and, finally, that wild rice growing in the river had been killed, thus decreasing the number of ducks in the area. Mr. Chief Justice McRuer found that the riparian rights of all five plaintiffs had been interfered with, that the odour did create a nuisance as it disrupted the tourist business in which each of the plaintiffs was engaged, and that the fishery rights of one of the plaintiffs had been interfered with. [229] Refusing to consider the benefit to the community and the economic necessities of the company itself, McRuer granted an injunction which he suspended for six months. [230] The decision was upheld on appeal on the basis of the plaintiff's riparian rights. [231]

In deciding the issue involved, McRuer had ignored an agreement between the Crown in the right of the Province and the K. V. P. Company. The agreement contained a clause to the effect that the company would discharge into the river "no refuse, sawdust, chemicals or matter of any other kind, *beyond that reasonably necessary for the operation of the Company* . . . which shall be or may be injurious to game and fish life . . . ." [232] The justice held that the agreement could not be construed as a permit to dis-

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[226] *Supra* text following note 211. Stewart's position does not seem wholly unreasonable; decisions such as those involved are, perhaps, best dealt with by the legislature. But in the absence of legislative action, the attitude conveyed by Stewart only compounds the abdication of responsibility by the legislature.

[227] Ont. Stat. 1956 c. 62.

[228] McKie v. K.V.P. Co., [1948] Ont. W.N. 386, [1948] 3 D.L.R. 201, at 208 (High Ct.).

[229] *Id.; supra* text accompanying note 105 and see notes 105 and 109.

[230] *Id.* at 220. The real basis of the decision was the protection of the plaintiffs' riparian rights, *id.* at 217.

[231] McKie v. K.V.P. Co., [1949] 1 D.L.R. 39 (Ont. 1948). The remarks of the Court of Appeal that there may be pollution sufficient to interfere with riparian's use of the water and yet not amounting to a nuisance may be limited, perhaps, to the nuisance created by the odours. Nevertheless, this is in conflict with the statement by Rinfret in Groat v. Edmonton, *supra* text following note 122.

[232] McKie v. K.V.P. Co., [1948] Ont. W.N. 386, [1948] 3 D.L.R. 201, at 218. The emphasis is added.

charge the company's wastes into the Espanola River and that even if it could, the province could not by this means affect the rights of the individual riparian owners downstream. [233] But it must have been clear that the provincial government felt the K. V. P. Company's business to be of some importance. Espanola, in fact, was a one-company town and the effect of the injunction would have been to force the company and thus the town as well to shut down. [234] While the appeal to the Supreme Court of Canada was pending the legislature passed an amendment to the Lakes and Rivers Improvement Act. [235] The Act had previously given the court a discretion to refuse an injunction where a mill or sawmill was discharging "sawdust or any other mill refuse" into a lake or river so as to affect the rights of riparian owners and directed the court to consider "the importance of the lumber trade to the locality in which the injury, damage or interference takes place, and the benefit and advantage, direct or consequential, which such trade confers on the locality and on the inhabitants of it" and to weigh this against the injury to the plaintiff. It further provided that having done so the court could either grant an injunction "on terms and conditions or subject to such limitations" or to take effect after a lapse of time "as may appear proper" or it could require the defendant to take proper measures to remedy the situation. [236] The section applied even if the injury were a continuing one and damages were to be awarded, [237] but if in the opinion of the court the injury could not be adequately compensated for by damages, the section did not apply. [238] In 1949, this section was amended; [239] "mill" was redefined to include a pulp mill and a pulp and paper mill and the discharge of chemical wastes was included. [240] As well the exempting section was removed. [241] Thus the court was required to consider the economic and public factors when an injunction was in issue. Moreover, the reenacted section was to apply not only to future actions but to pending actions "including every action or proceeding in which an injunction has been granted and in which any appeal is pending." [242]

On the appeal to the Supreme Court of Canada, Mr. Justice Kerwin, speaking for the Court, held that the Act did not apply because the Supreme Court Act [243] limited the Court to giving the judgment which the Court of

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[233] *Id.*

[234] Seymour, *Legal and Municipal Aspects of Water Pollution* 188, at 193 (Paper presented at the Second Ontario Industrial Wastes Conference 1955).

[235] ONT. REV. STAT. c. 45 (1937).

[236] *Id.* § 30(1).

[237] *Id.* § 30(2)-(4).

[238] *Id.* § 30(5).

[239] Ont. Stat. 1949 c. 48, § 6. The provision remains unchanged: *see* ONT. REV. STAT. c. 233, §§ 35, 37 (1970).

[240] *Id.* § 30(1), (2).

[241] *Id.* § 30. *Supra* text following note 238.

[242] *Id.* § 6(2).

[243] CAN. REV. STAT. c. 35, § 46 (1927).

Appeal should have given at the time of its decision. Since the amendment was not in effect then, the Supreme Court could not take notice of it as the province had no legislative authority to extend its jurisdiction. [244] In result the Supreme Court affirmed the lower court's decision and somewhat reluctantly stayed the operation of the injunction for a further six months. [245] And when the company moved for an order allowing it to apply to the Ontario High Court for a further suspension of the injunction if it could show grounds, the Supreme Court refused without calling on the respondent for argument, [246] and on January 12, 1950, a petition for special leave to appeal to the Privy Council was dismissed. [247] The only recourse was to the legislature. The company was apparently successful. The K. V. P. Company Limited Act, 1950, came into effect on April 31 of that year. [248] The Act dissolved every injunction "heretofore granted" against the company restraining it from "polluting the waters of the Spanish River" [249] but preserved the rights of the lower riparian owners to the damages granted at the trial [250] and to bring any subsequent action against the company for polluting the river. [251] It also provided an alternative remedy for damages by arbitration. [252] The Research Council of Ontario was directed to "endeavour to develop methods that, if applied by the Company, would abate or lessen the pollution of the waters of the Spanish River" by it. [253]

In 1955 two cases arose involving pollution of rivers because of the inadequacy of municipal sewage treatment plants. In the *Richmond Hill* case Stewart found that the municipality was polluting the river because its population had grown so that sewage beyond the treatment plant's capacity was produced and also because the chlorination in the plant was inadequate. [254] As a result fish and plant life in the river below the plant had been sub-

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[244] K.V.P. Co. v. McKie, [1949] Sup. Ct. 698, at 700-01.

[245] The reluctance was due to the fact that the company had notice of the injunction since the trial decision and had had complaints as early as 1946. *Id.* at 704-05.

[246] *Id.* at 705 (Reporter's Note).

[247] MILNER at 39.

[248] Ont. Stat. 1950 c. 33.

[249] *Id.* § 1(1).

[250] *Id.* § 1(2).

[251] *Id.* § 2.

[252] *Id.* § 3.

[253] *Id.* § 4(1). The costs of the research were to be borne by the company, § 4(2). The results of an investigation instigated by the Research Council were tabled in the legislature on March 31, 1952, MILNER at 41, and were subsequently published in ONTARIO DEP'T OF LANDS AND FORESTS, POLLUTION OF THE SPANISH RIVER (1952). The report recommended, *inter alia*, that the chemical wastes of the company were under no circumstances to be discharged into the river as fish were killed. The summary of findings and recommendations is at 1-4. In fact, the second "slug" of toxic wastes from the company's mill killed fish even one and one half miles out of the river into Lake Huron, *id.* at 98.

[254] Stephens v. Richmond Hill, [1955] Ont. 806, at 809, [1955] 4 D.L.R. 572, at 575 (High Ct.).

stantially removed. [255] Because a plant with increased capacity or a sewage lagoon was capable of handling the municipality's sewage, he held that Richmond Hill had not proved inevitability under statutory authority, despite the fact that the municipality would have had to go to great expense to do so. [256] Thus, although the Public Health Act [257] did give the municipality authority to operate a treatment plant, he held that this did not give it statutory immunity. [258] As well he refused to consider economic arguments. [259] Similarly in *Burgess v. City of Woodstock,* [260] Mr. Justice Maclennan, following the *Richmond Hill* case, held that the city's sewage treatment plant was inadequate for its population, that there was no statutory authority to create a nuisance, [261] that as a result of the pollution the plaintiff had suffered injury to his cattle, and, refusing to consider the city's ability to meet the costs necessary to improve the plant, granted an injunction. [262] In both cases the effective date of the injunction was stayed. [263]

The Public Health Act required that a municipality, before constructing or altering a sewer, sewage system or sewage disposal plant and before passing a by-law to raise money for any such purpose, obtain the approval of the provincial Department of Health for the work. [264] The Department was to inquire into the sanitary needs which the work was required to meet and into whether the work was "likely to prove prejudicial to the health of the inhabitants of the municipality in which it was to be constructed or of any other municipality" [265] and had power to impose conditions with regard to the construction of the work or the disposal of the sewage if necessary in the public interest, [266] and could modify the conditions as to the disposal of

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[255] *Id.*

[256] [1955] Ont. 806, at 811, [1955] 4 D.L.R. 572, at 578.

[257] ONT. REV. STAT. c. 306, § 106 (1950).

[258] Stephens v. Richmond Hill, [1955] Ont. 806, at 812, [1955] 4 D.L.R. 572, at 578 (High Ct.) ("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 theory could justify the deposit of condoms and toilet-paper upon neighbouring lands.").

[259] [1955] Ont. 806, at 812-13, [1955] 4 D.L.R. 572, at 578-79. See quotation *supra* text accompanying note 211.

[260] Burgess v. Woodstock, [1955] Ont. 814, [1955] 4 D.L.R. 615 (High Ct.).

[261] The interrelationship of nuisance and riparian rights with regard to pollution is discussed *supra* text following note 122.

[262] Maclennan, J., said that even if it were relevant there was no evidence that the recommended expenditures could not be met. [1955] Ont. 814, at 823, [1955] 4 D.L.R. 615, at 624.

[263] In *Stephens,* the injunction was stayed for thirteen months, [1955] Ont. 806, at 813, [1955] 4 D.L.R. 572, at 579, and in *Burgess,* for eighteen months, [1955] Ont. 814, at 823, [1955] 4 D.L.R. 615, at 625. In the latter case, the court also refused to incorporate the standards of the Department of Health in the wording of the injunction, [1955] Ont. 814, at 823, [1955] 4 D.L.R. 615, at 624-25.

[264] ONT. REV. STAT. c. 306, § 106(1), (2) and § 107 (1950).

[265] *Id.* § 106(4).

[266] *Id.* § 106(5).

sewage.[267] If the work were to extend into a second municipality, notice and a public hearing were required before the Department gave its approval.[268] On the appeal of the *Richmond Hill* case the Court of Appeal carefully considered these provisions in relation to the defence of statutory authority.[269] Mr. Justice Laidlaw held that the municipality had no authority to build the plant as it extended into a second municipality and the procedures required by the Act in these circumstances had not been followed; no notice was given and no public hearing held. Therefore, not only did the municipality not have the authority to construct the plant, but the Department of Health had no authority to approve.[270] He went on further in an *obiter dictum* to state that the nuisance was not, in any event, shown to be the inevitable consequence of the operation of the plant as one of the plant's designers had admitted that these consequences had not been contemplated in the design of the plant and could not explain how raw sewage was getting into the stream.[271] But Laidlaw went even further; he held, on the assumption that there had been statutory authority to construct the plant, that there could still be no such authority to pollute the stream. The Public Health Act also made it an offence to discharge any "garbage, excreta, manure, vegetable or animal matter or filth" into "any of the lakes, rivers, streams or other waters in Ontario."[272] The justice held that an approval by the Department of Health could not authorize the contravention of the statute giving the Department itself its powers, and must therefore be regarded as "subject expressly to the prohibition against pollution of the stream" in the Act.[273] In the result he refused to alter the terms of the injunction.

Once again the legislature intervened. Within a few months section 106 of the Public Health Act had been repealed and a new section passed to replace it.[274] The new section was substantially the same as the previous one with certain additions concerning compensation for expropriations or for injurious affection resulting from the construction, maintenance or operation of a sewage work and required that all such claims be heard and decided by

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[267] *Id.* § 106(6). Continuing information could also be required by the Department, § 106(7).

[268] *Id.* § 106(8)-(12).

[269] [1956] Ont. 88, 1 D.L.R.2d 569.

[270] [1956] Ont. 88, at 100-03, 1 D.L.R.2d 569, at 576-79. *See also supra* text accompanying note 268.

[271] [1956] Ont. 88, at 106, 1 D.L.R.2d 569, at 581-82. *Query* whether Laidlaw, J.A., was not here applying a subjective rather than an objective test. Surely the fact that certain consequences had not been previously contemplated does not make them any less inevitable or necessary. But it may indicate a possibility that the harm could have been avoided had they been considered.

[272] *Supra* note 264, § 103(1) and (4).

[273] [1956] Ont. 88, at 106, 1 D.L.R.2d 569, at 581.

[274] Ont. Stat. 1956 c. 71, § 6(1). The new § 106 became effective as of March 28, 1956.

the Ontario Municipal Board. [275] Moreover, the new section provided that except where a violation of any general or special act or of an official plan or a by-law was involved, any sewage work constructed, maintained or operated with approval of and according to the conditions imposed by the Department of Health, "shall be deemed to be under construction, constructed, maintained or operated by statutory authority." [276] But the right of any person to claim for compensation or damages for land injuriously affected, nuisance or negligence was retained. [277] The amending act also dissolved the injunctions against the City of Woodstock and Richmond Hill [278] while retaining the damages awarded to the plaintiffs [279] and ordered the Department of Health to have an investigation of the treatment plants of the two municipalities made. It could then alter the terms or conditions previously imposed upon them. [280] As well a provision was added to the Act exempting from the operation of the prohibition of pollution municipal sewage works constructed and operated in accordance with the approval of the Department. [281]

In the same year the legislature passed the Ontario Water Resources Commission Act. [282] The 1956 Act was skeletal; it created the Commission (O.W.R.C.) as a corporation without share capital and outlined its composition. [283] The Commission was to construct and operate systems for the disposal of sewage, [284] to enter into agreements for the disposal of sewage,[285] and to conduct research programs and prepare statistics for its purposes. [286] In order to accomplish its ends the Commission was given the power to borrow money and to issue securities, [287] and to acquire, lease or expropriate

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[275] *Id.* § 106(13)(*d*), and (21). The argument had been raised in both the *Stephens* and *Burgess* cases, *supra* notes 254, and 260, that the Ontario Municipal Board had exclusive jurisdiction on the basis of § 106(16) of the Public Health Act, *supra* note 264. The court held on a preliminary motion, approved in both of the above cases, that a provincial board could not be given the exclusive power to decide issues of damages as this was the function of a court and was therefore *ultra vires* the province on the basis of the B.N.A. Act, § 96. *See* Burgess v. Woodstock, [1954] O.W.N. 478. As well it was held that "conclusive" did not necessarily mean "exclusive."

[276] *Id.* § 106(22) and (23).

[277] *Id.* § 106(24).

[278] Ont. Stat. 1956 c. 71, § 6(2) and (3) respectively. § 6(3) was proclaimed effective on August 31, 1956, but § 6(2) was, apparently, never proclaimed. Both §§ provided that the works were deemed to have been constructed and operated at all times by statutory authority. It was clearly for this reason that § 6(4) was necessary.

[279] *Id.* § 6(4) (effective, March 28, 1956).

[280] *Id.* § 6(5) (effective, March 28, 1956).

[281] *Id.* § 5 (s. 103(5)).

[282] Ont. Stat. 1056 c. 62 (effective, March 28, 1956).

[283] *Id.* §§ 3-9. It has been held that the Commission is an agent of the Crown in right of Ontario, Local 804, I.B.E.W. v. Ont. Water Resources Comm'n (Unreported, Ont. 1965), *noted* in, Stockwood, *Comment*, 24 U. TORONTO FAC. L. REV. 162 (1966).

[284] *Id.* § 10(*b*).

[285] *Id.* § 10(*c*)

[286] *Id.* § 10(*d*). The O.W.R.C. also had similar powers concerning water supply.

[287] *Id.* § 11.

land.[288] Municipalities were given the power to apply to the Commission with respect to the disposal of sewage from the municipality and the O.W.R.C. was to furnish estimates of the cost and terms and conditions involved in its providing such disposal.[289] Thus the Commission was initially concerned only with the construction and improvement of works for sewage disposal (and water supply) but had nothing to do directly with water pollution. In fact at the time "the principal consideration was the economic and efficient supply of water to Ontario municipalities, and sewage disposal was a second concern."[290] But in 1957 the Act was repealed and a new one, giving the Commission greatly expanded powers, was passed.[291] At the same time the provisions in the Public Health Act concerning water supply and sewage disposal systems were repealed, as were the prohibitions against pollution,[292] and transferred to the new Ontario Water Resources Commission Act.[293] The 1957 Act provided the structural basis for the present one. Although there have been substantial amendments to it, the format of the Act and its basic provisions have not been substantially altered. Therefore the Act will be discussed as of 1971.[294]

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[288] *Id.* § 13. The O.W.R.C. was also given all of the powers conferred by any general act upon a municipality or local board concerning waterworks systems, § 12.

[289] *Id.* §§ 14 and 15.

[290] MILNER at 51.

[291] Ont. Stat. 1957 c. 88 (effective, April 3, 1957).

[292] Ont. Stat. 1957 c. 97, § 8, *repealing* ONT. REV. STAT. c. 97, §§ 101-08, 111 and 112 (1950) *as amended* by Ont. Stat. 1956 c. 71. The provisions allowing the Department of Health to require a municipality to establish or improve a water supply or sewage disposal system, §§ 109 and 110, were maintained.

[293] Ont. Stat. 1957 c. 88, §§ 27, 30-38; § 38 was substantially similar to § 109 of the Public Health Act which was not repealed.

[294] The E.P.A. is an attempt to deal comprehensively with environmental protection in one statute and largely supplants the Ontario Water Resources Commission Act, ONT. REV. STAT. c. 332 (1970), at least insofar as the enforcement of standards of water quality is concerned. *See, e.g.*, Part *IV* of the E.P.A. at §§ 25-27, dealing with water. It is significant that the definition of "director" throughout the Act includes the chairman of the O.W.R.C. only "when so designated by the Minister" and especially that § 25 in Part IV dealing with water enables the Minister, alternatively, to designate the Director of a branch of the Department of the Environment to administer that Part of the Act. There has been no public statement concerning the designees under the Act. In the event of a conflict with any other act or regulation "in a matter related to the environment" or a matter specifically dealt with by the Environmental Protection Act, the latter statute prevails, § 96. *But see* 5 MCRUER REPORT at 2112.

The effectiveness of the E.P.A. depends to a great extent on the passage of regulations concerning water quality; *see, e.g.*, §§ 5(1), 6 and 7. Regulations prescribing "the maximum permissible concentration or level in water of any contaminant," "methods for determining the concentration or level in water of any contaminant" and "maximum permissible changes in temperatures of water" may be enacted by the Lieutenant-Governor-in-Council, § 94(1) (*l*), (*m*) and (*n*) respectively. However, as no regulations have been enacted under the E.P.A., discussion of it is relegated to footnotes.

The Department of Energy and Resources Management has been renamed the Department of the Environment; *see* Ont. Stat. 1971 c. 63.

The current Act continues the O.W.R.C. as a corporation without share capital, [295] not subject to the Corporations Act. [296] It is to consist of not less than five and not more than eleven persons appointed by the Lieutenant-Governor in Council to hold office during pleasure. [297] Except in two specified situations three members of the Commission constitute a quorum [298] and the Commission may, with the cabinet's approval, establish job classifications. [299] The Commission's functions with regard to sewage disposal are to: (1) construct, acquire, provide, operate and maintain sewage works and to receive, treat and dispose of sewage delivered by municipalities and persons; (2) to make agreements with municipalities or persons with respect to the reception, treatment and disposal of sewage; (3) to conduct research programs and prepare statistics for its puposes; (4) to perform other duties assigned to it by the cabinet; and (5) to disseminate information and advice concerning the collection, transmission and treatment of sewage. [300] The Commission may for its purposes exercise any power given a municipality by a general act for the construction, maintenance or operation of sewage works; [301] it or its employees may in its discretion enter any buildings or boats without consent or compensation for purposes of investigation or inspections, [302] and may also lay, maintain, repair or alter, on the same basis, pipes or appurtenances in the precincts of a highway. [303] The Commission may also in its discretion acquire by lease or purchase, or expropriate or use any land or waters in Ontario, but if it expropriates it must follow

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[295] ONT. REV. STAT. c. 332, § 3(1) (1970).

[296] *Id.* § 16. The Corporations Act is ONT. REV. STAT. c. 89 (1970).

[297] ONT. REV. STAT. c. 332, § 3 (1970). At present there are seven members of the Commission, ANN. REP. 1970. The annual report is required to be made to the minister designated under § 2 (the Minister of Energy and Resources Management has been designated) by § 7 and a copy filed with the Provincial Secretary and submitted to the Lieutenant-Governor-in-Council who is to lay it before the legislature, § 7(2).

[298] *Id.* § 8. The Commission may delegate the exercise of its adjudicatory powers on terms and conditions it considers proper "to any officer or officers of the Commission," § 9.

[299] *Id.* § 11(1). There are nine divisions of the O.W.R.C.: construction, finance, industrial wastes, laboratories, plant operations, project development, research, sanitary engineering and water resources. Their functions will not be individually discussed due to lack of time and information. As well, there are five administrative branches: information, legal, personnel, systems and E.D.P., and supply. Ann. REP. at title page (1966).

[300] *Id.* § 17(1). The Commission may charge fees for information or advice. The Act also empowers municipalities to enter into agreements for projects with the Commission, § 18. *Infra* text following note 402 for discussion of projects.

[301] *Id.* § 19.

[302] *Id.* § 20(1). It is an offence punishable by a fine of two hundred dollars for every day on which it continues to hinder or obstruct an employee or agent of the Commission in the exercise of his powers or duties under this subsection, § 20(4). *Compare* Part XI of the E.P.A., §§ 82-87, which provides for the appointment of provincial officers with broad powers of investigation.

[303] ONT. REV. STAT. c. 332, § 20(2) (1970).

certain designated procedures. [304] Moreover, it may acquire an easement or restrictive covenant in respect of sewage works even though the "right or interest or the benefit of the covenant or condition is not appurtenant or annexed to or for the benefit of any land of the Commission or the municipality." [305] The Commission in order to accomplish its ends may borrow money, [306] or may issue and sell debentures [307] which may be guaranteed or bought by the province. [308] All of the Commission's powers must be exercised by by-law or resolution. [309] Although the O.W.R.C. must deposit its moneys, it has discretion to invest in designated classes of securities. [310]

The Commission may also make regulations, subject to the approval of the Lieutenant-Governor in Council, to aid in its regulatory functions and their implementation. [311] It may make such regulations to regulate and control the location, construction, repair, removal or alteration of sewers,

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[304] *Id.* § 21. The procedures are those of The Public Works Act, ONT. REV. STAT. c. 393 (1970) and The Expropriations Act, ONT. REV. STAT. c. 154 (1970) applies. For a discussion of The Expropriation Act, see Morden, *The New Expropriation Legislation: Powers and Procedures*, L.S.U.C. SPEC. LECT. 225 (1970).

[305] *Id.* § 23(1). This does away with the common law requirement that there be a dominant and servient tenement. See GALE at 7-17.

[306] *Id.* § 25. The Lieutenant-Governor-in-Council must approve any borrowing.

[307] *Id.* § 26(1). The issue of debentures must also be approved by the Lieutenant-Governor-in-Council.

[308] *Id.* §§ 28, 29. The province may also guarantee loans of the Commission, § 25(3).

[309] *Id.* § 14. By-laws may be passed governing proceedings and the calling of meetings, specifying the powers and duties of its employees "and generally dealing with all matters within its objects," § 15. The by-laws of the Commission were not available.

[310] *Id.* § 24. Deposits and investments of the Commission are governed by §§ 57-59.

[311] *Id.* § 62. Only regulatory powers which relate or may relate to sewage works will be discussed. The O.W.R.C. also has power to make regulations concerning water works, § 62(1)(*a*), (*b*); for controlling the drilling of wells and their operations, § 62(1)(*q*), (*r*); for regulating and controlling the use of water from any source of supply, § 62(1)(*v*); and for the licensing of well drillers and prescribing qualifications therefor, § 62(1)(*s*). With regard to well drillers, *see also* § 40. The Water-Well Drillers Act, Ont. Stat. 1954 c. 104 was repealed by the Ontario Water Resources Commission Act, Ont. Stat. 1957 c. 88, § 49. The Commission may also prescribe forms and fees for their licensing, § 62(1)(*t*). In designated areas under § 62(1)(*q*), no person may make a well or a hole in the ground to obtain water, except by digging, without a permit from the Commission, which permit the Commission has discretion to issue, refuse to issue, cancel or issue under terms and conditions which may be altered, and the digging of a well without a permit or in contravention of the terms and conditions imposed is an offence punishable with a fine of up to fifty dollars, § 39.

A regulation concerning water wells, ONT. REV. REG. 648 (1970), enacted under the Act, provides for the licensing of the business of drilling, § 2, and boring, § 3, wells, upon specified conditions and prescribes qualifications for drillers and borers, § 5. A fee of ten dollars is charged for a license or its renewal, § 4. Standards for the construction and maintenance of wells are prescribed and a driller must test each well and file a return with the owner, §§ 5(1)(*c*) and 5(2)(*c*) and with the Commission, ONT. REV. STAT. c. 332, § 40(5) (1970) on a form (Form 7) provided in the Regulation, § 20.

drain pipes, all works on public property connected with sewage works, [312] the manner in which building sewers are to be connected with sewage works, [313] and the content of sewage entering sewage works, [314] and to prescribe operating standards for sewage works. [315] It may also require and regulate the storage, treatment and disposal of sewage in boats and ships, set standards for the equipment to be used for such purposes, require that its approval be obtained prior to the use of such equipment, and prohibit and regulate the discharge of sewage from boats and ships. [316] Locations where moorings or services are provided for boats or ships are also subject to regulation and control "for the purpose of preventing or reducing the pollution of any body of water or watercourse," as are the persons providing them. [317]

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[312] *Id.* § 62(1)(*c*).

[313] *Id.* § 62(1)(*d*).

[314] *Id.* § 62(1)(*i*). *See also* § 70. This § is discussed *infra* text following note 347.

[315] *Id.* § 62(1)(*m*). The Commission may also make regulations classifying and requiring and providing for the licensing of sewage work operators and prescribing qualifications therefor; it may also provide for the charging of fees and for revocation and suspension of licenses, § 62(1)(*j*).

[316] *Id.* § 62(1)(*n*). It may also define sewage for purposes of such regulations, § 62(1)(*p*). In light of § 62(1)(*l*), enacted Ont. Stat. 1970 c. 124, § 21(1), the provision is redundant.

A regulation entitled, "Discharge of Sewage From Pleasure Boats," has been enacted, ONT. REV. REG. 644 (1970). Section 1(*c*) defines "sewage" as "organic and inorganic waste, and includes fuel, lubricants, litter, paper, plastics, glass, metal, containers, bottles, crockery, rags, junk or similar refuse or garbage, and human excrement." Liquid wastes, free of solids, used for household purposes on and exhaust wastes, cooling water and bilge water from a pleasure boat are excluded from the definition. In 1967 only holding tanks which stored waste from marine toilets for subsequent shore disposal met with O.W.R.C. approval. However an undated publication by the Commission entitled, "Facts For Boaters on Sewage Control in Pleasure Boats," stated that a regulation to come into effect in June 1968 would allow the use of macerator chlorinators if a permit were obtained from the Commission. *See* Ont. Reg. 284/69, § 4, amended Ont. Reg. 236/70. However the present regulation permits only the use of holding tanks "of a type and specifications approved by the Commission" for the storage or the incineration and storage of human excrement in a pleasure boat, §§ 1(*a*) and 4, and only subsequent shore disposal is permitted, § 5 (*b*), (*c*). Two prosecutions under the regulation are cited in Landis, *supra* note 46, at 76, n. 28.

The E.P.A., § 94(3)(*a*), (*c*), empowers the Lieutenant-Governor-in-Council to make similar regulations. However no such regulations have been promulgated, *supra* note 294, and the Act explicitly states that the regulation discussed above remains in force until it is so revoked or amended, § 27(1)(*a*). *Infra* note 317.

[317] ONT. REV. STAT. c. 332, § 62(1)(*o*) (1970). Section 62(1)(*p*), *supra* note 316 also applies to this §. However in the regulation concerning marinas, ONT. REV. REG. 646, § 1(*g*) (1970), "sewage" is defined only as human excrement. *Cf.* Ont. REV. REG. 644, § (1)(*a*), "approved storage equipment", *supra* note 316. Regulation 646 provides that the operator of a marina must provide a "pump-out facility", defined in § 1(*f*) as equipment for the removal of sewage from pleasure boats in which a toilet is installed in accordance with Regulation 644, § 5(*b*), must ensure that it is in good operating condition and must dispose of the sewage removed from pleasure boats "in accordance with all applicable laws," § 3. A fee may be charged for the removal, § 3(*c*).

The regulation also requires an operator to provide sufficient containers to enable occupants of pleasure boats to conveniently use them for the disposal of their

As well, the Commission may regulate and control the construction, repair, renewal or alteration of plumbing, and the materials used, and may require municipalities to carry out inspections with respect to plumbing as may be prescribed. [318] The Commission may also make regulations "prescribing standards of quality for sewage and industrial waste effluents, receiving streams and water courses,"[319] and, finally, respecting any matter necessary or advisable to effectively carry out the Act's intent. [320] All regulations may be general or limited territorially, temporally, or otherwise, [321] and contravention of any regulation is an offence subject to a fine of up to $1,000. [322]

One of the problems directly leading to the establishment of the Commission was, as was shown above, the inadequacy of municipal sewage treatment plants. [323] It was, therefore, not surprising that the general supervision of

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litter, to maintain the containers "in sound and sanitary condition" and to dispose of the litter deposited "in accordance with all applicable laws," § 2. "Litter" is defined as "organic and inorganic waste, except sewage...." § 1(*b*). *Cf.* Reg. 644, § 1(*c*), "sewage," *supra* note 316.

Section 94(3)(*b*) of the E.P.A. also empowers the Lieutenant-Governor-in-Council to make similar regulations. However, no such regulations have been promulgated and, therefore, Reg. 646 remains in force, § 27(1)(*b*). *Supra* note 316. Part VIII of the E.P.A., §§ 63-68, is devoted to "litter" and § 94(7) enables the enactment of regulations concerning it.

[318] O.W.R.C. Act, § 62(1)(*f*). The Commission has the power to adopt the standards set by the Canadian Standards Association, § 62(1)(*g*) and it may define plumbing for the purpose of the regulations, § 62(1)(*h*). For a municipality's powers and obligations concerning such inspections *see* §§ 63-66. The latter provision nullifies all municipal by-laws within the scope of the Commission's power to make regulations concerning plumbing requirements.

The Commission has adopted a Plumbing Code, ONT. REV. REG. 647, (1970) *as amended*, Ont. Reg. 344/71, in which it has exercised most of the powers granted to it. The Code defines "plumbing," § 1(1)(55), and has adopted for some purposes the standards set by the Canadian Standards Association, *see, e.g.*, § 55(6). The Code applies to all plumbing in a municipality, § 2, controls the materials which may be used, Part I, §§ 6-22, and generally regulates the construction of plumbing. It also regulates the construction, repair and alteration of sewers, and drain pipes; *see* especially Part III, "Sewage Systems," §§ 49-155. See *supra* text accompanying note 312. Municipalities must inspect plumbing facilities before they may be used, §§ 4 and 5.

[319] O.W.R.C. Act, § 62(1)(*k*). This power seems quite wide. It may be questionable whether it could set a standard contrary to the prohibitions as to discharges in the Act. *See infra* text following note 380 for a discussion of prohibitions, penalties and their enforcement.

The Commission has promulgated no regulations under § 62(1)(*k*). However, it has published guidelines for the control of water quality; see O.W.R.C. GUIDELINES AND CRITERIA FOR WATER QUALITY MANAGEMENT IN ONTARIO (June 1970) in Chinook Chemicals Corp, ECO/LOG INFORMATION SERVICES, CANADIAN POLLUTION LEGISLATION at 8.447. The guidelines set out water quality criteria for agricultural uses, at 8.451, for the protection of fish, other aquatic life and wildlife, at 8.455, for industrial uses, at 8.480, for public water supplies, at 8.491, and for aesthetics and recreation, at 8.497. Water quality management is discussed *infra* text following note 363.

[320] ONT. REV. STAT. c. 332, § 62(1)(*y*) (1970).

[321] *Id.* § 62(2).

[322] *Id.* § 63(3). But there is a one-year limitation period on enforcement, § 72. The period runs from the date of the offence.

[323] *Supra* text following note 253.

the installation and operation of such works was transferred from the Department of Health to the O.W.R.C. [324] Thus, at present the plans, specifications, an engineer's report, the location of the discharge of the effluent and other information required by the Commission must be submitted to it "when any municipality or person contemplates" the establishment or extension of or any change in a sewage works; and unless the Commission's approval is obtained no such works shall be undertaken or proceeded with and no by-law for raising money to finance the works may be passed. [325] The Commission has a discretion to refuse its approval or to grant approval "on such terms and conditions as it deems necessary." [326] There are two forms of sanctions imposed for failure to comply with these requirements. If works are undertaken, proceeded with, extended or altered without prior approval of the Commission, the Commission may require that facilities be provided for an investigation of the works and the location of the discharge of the effluent, and may direct such changes as it deems necessary to be made in either. The costs of both the investigation and the changes are to be borne by the person who proceeded without the Commission's approval or by his successor or assignee. [327] As well, quasi-criminal offences are

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[324] *Supra* text following note 290.

[325] ONT. REV. STAT. c. 332, § 42(1) (1970). Similar provisions apply to water works, § 41. Before passing a by-law to raise money by the issue of debentures a municipality must obtain the approval of the Ontario Municipal Board, Ontario Municipal Board Act, ONT. REV. STAT. c. 323, §§ 64 and 65 (1970).

There is no information available on decisions of the Ontario Municipal Board concerning by-laws for sewage works since the passing of the Ontario Water Resources Commission Act. But in *Re* Oakville Local Improvements, [1954] Ont. W.N. 181 (O.M.B. 1953), the Board indicated that it required evidence of the approval of the Department of Health for a sewage works before it would give its approval to a by-law to raise money therefor. The provision in the Public Health Act, ONT. REV. STAT. c. 306, § 107(1) (1950), was similar to the present provision in the Ontario Water Resources Commission Act. It therefore seems likely that the Board would apply a similar requirement now.

[326] *Id.* § 42(4). The Commission may subsequently amend or vary any approval which it has given, § 43(4).

[327] *Id.* § 42(3). Section 42(3) says only "person" but could include a municipality or an incorporated local board as the Interpretation Act, ONT. REV. STAT. c. 225, § 30.28 (1970), defines "person" to include a corporation. The definition of "municipality," in the Department of Municipal Affairs Act, ONT. REV. STAT. c. 118, § 1(*f*) (1970), is adopted by the Act, § 1(1).

However the Ontario Municipal Board is empowered to order, on application by a person, the establishment or extension of whose sewage works has been approved by the O.W.R.C. under § 42, the amendment of any by-law passed under The Municipal Act, ONT. REV. STAT. c. 248, § 354(1)(116) (1970), or any by-law passed under The Planning Act, ONT. REV. STAT. c. 349, § 35 (1970), or any official plan in order to permit the use of the land for the establishment or extension of the approved work, §§ 43(11) and 44(4). The Board may condition the order by imposing "restrictions, limitations and conditions respecting the use of the land," consistent with the terms of the Commission's approval, where it thinks it "necessary or expedient to do so," §§ 43(12) and 44(5). But the by-law in the Municipal Act cannot apply to "the use of any land or structure by a municipality," § 354(1)(116)(*b*). Section 45 of the O.W.R.C. Act explicitly extends the above provisions "*mutatis mutandis* to a municipality that has obtained the approval of the Commission to the establishment or exten-

created for a violation of any of the above requirements or of any direction or condition imposed by the Commission.[328b] Sewage works which do not discharge or drain either directly or indirectly into a body of water or a watercourse, privately owned sewage works designed for the partial treatment of sewage that drain into a sanitary sewer, privately-owned sewage works serving five or fewer residences, sewage works which drain agricultural lands, and drainage works under specified statutes are exempted from the above provisions.[329]

When the Commission's approval is sought or where the Commission proposes to amend or vary any approval already given, it has a discretion to hold a public hearing.[330] If it decides to do so it must give at least ten days' notice to the clerk of the municipality and to "such other persons and in such manner" as it may direct.[331] But if a municipality or a person intends to establish or extend a sewage work into another municipality or if the Commission intends to vary or amend an approval for such a work, a public

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sion of its sewage works or . . . sewage treatment works" under § 42. Sections 43(11), (12), 44(4), (5) and 45 were added in 1970 by Ont. Stat. 1970 c. 124, §§ 14(3), 15 and 16 respectively. It seems clear therefore that "person" in this context does not include a municipality. The E.P.A., § 1 (*j*), however, does define "person" to include a municipality. It also includes "a corporation on behalf of Her Majesty in right of Ontario and an agent" of the Crown, thus negating the presumption in The Interpretation Act, ONT. REV. STAT. c. 225, § 11 (1970). *See* Local 804 I.B.E.W. v. O.W.R.C. (Unreported, Ont. 1965). For some of the consequences of this definition *see infra*, note 363.

[328] ONT. REV. STAT. c. 332, § 42(2), (5). A failure to obtain the approval of the Commission is subject to a fine of up to $2,000, § 42(2); a failure to comply with a direction of the Commission under § 42(3) or a contravention of a term or condition imposed under § 42(4) is subject to a fine of up to $500 for every day on which the offence continues, § 42(5). Again, there is a one-year limitation period, § 72. While § 42(2) applies to everyone, § 42(5) applies to "persons" but not to municipalities.

[329] *Id.* § 42(6). The drainage works exempted are those under The Drainage Act, ONT. REV. STAT. c. 136 (1970); The Cemeteries Act, ONT. REV. STAT. c. 57 (1970); The Highway Improvement Act, ONT. REV. STAT. c. 201 (1970), see text accompanying note 303 *supra;* and the Railways Act, ONT. REV. STAT. c. 131 (1950).

The Commission also has power to make regulations, with the approval of the Lieutenant-Governor--in-Council, exempting any sewage works or any class or type of sewage works from these requirements, § 62(1)(w). To date no such regulations have been promulgated.

Part VII of the E.P.A., §§ 56-62, applies to all private sewage disposal systems not subject to the Ontario Water Resources Commission Act and the regulations thereunder and its provisions are parallel, in effect, to those in the latter act. It imposes a requirement that a person who constructs, repairs, services, cleans or empties a private sewage disposal system, will be required to obtain a licence from the Director, § 61. The Director for purposes of Part VII is a director of the Department of the Environment designated by the Minister, § 56. *See supra* note 294. However, §§ 57 to 62 are the only provisions of the Act not yet proclaimed.

[330] ONT. REV. STAT. c. 332, § 44(1), (3) (1970).

[331] *Id.* § 44(1).

hearing must be held and the same notice requirements apply. [332] The Act provides that the public hearing may be held by "any member of the Commission," who shall then report to the Commission. [333] This provision might raise some problems. Its apparent purpose is to enable the Commission to make a decision whether or not to approve a sewage works without all (or a quorum) of the members attending the hearing. [334] Although the Commission is likely to base its decision on the report of the member, the Act does not explicitly limit its considerations to the evidence taken at the public hearing. Consequently, the question may arise as to whether a hearing must be held when the Commission makes its decision after the report. There can be little doubt that the rights of parties may be affected, especially where the approval is for the extension of a works into a second municipality, and the decision is final and might be considered "judicial." [335] The argument is

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[332] *Id.* § 43(1), (4). These provisions apply *mutatis mutandis* to a "person," § 43(10). The notice must be given "to the clerk of the municipality in or into which the sewage works are being established or extended and to the clerks of such other municipalities and to such other persons... as the Commission may direct." There are several provisions relating to the powers and obligations of a municipality which has obtained the approval of the Commission to so extend its sewage works. These concern expropriation and compensation therefor and compensation for injurious affection, § 43(3), (5) and (6). *See also* §§ 46, 47. And *see* 5 McRUER REPORT at 2118-20 and 2121. Taking and compensation problems will not be discussed here. As well there are provisions for the municipality through which the works of another municipality have been extended to avail itself of their use, § 43(7)-(9).

Where the Commission is *required* to hold a hearing, it will have to follow the procedure set out in the Statutory Powers Procedure Act, 1971, Ont. Stat. 1971 c. 47. It is arguable, therefore, that compliance with this Act is required when a hearing is held under § 43 of the Ontario Water Resources Commission Act but not when one is held under § 44. *See* text acccompanying note 330 *supra*; and *see* Statutory Powers Procedure Act, 1971, Ont. Stat. 1971 c. 47, § 3. The omnibus Civil Rights Statute Law Amendment Act, 1971, Ont. Stat. 1971 c. 50, makes no reference to the Ontario Water Resources Commission Act. Neither the Statutory Powers Procedure Act, 1971, nor the Civil Rights Statute Law Amendment Act, 1971, has yet been proclaimed. The Acts were proclaimed as of April 17, 1972, 105 Ont. Gaz. 955 (April 1, 1972). However, proceedings under the O.W.R.C. Act were exempted for one year from the operation of the Statutory Powers Procedure Act, 1971. See Ont. Reg. 162/72.

[333] *Id.* §§ 43(2), 44(2).

[334] *See* Mehr v. Law Society of Upper Canada, [1955] 2 D.L.R. 289. *See also* R. F. REID, ADMINISTRATIVE LAW AND PRACTICE 250-51 (1971).

[335] *See* R. F. REID, ADMINISTRATIVE LAW AND PRACTICE 4-51 (1971); S. A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 135-230, especially at 155-158 (2d ed. 1968). If the tendency displayed in Regina v. British Columbia Pollution Control Bd., 61 D.L.R.2d 221 (B.C. 1967), were followed, a hearing at this stage would be required. The majority held that a chance to hear opposing arguments and reply to them must be granted to an objector under the British Columbia Pollution Control Act, B.C. REV. STAT. c. 289, (1960) as amended, despite the fact that the Act seemed to preclude this (Tysoe, J.A. dissenting). Davey, J.A., for the majority even went so far as to explicitly ignore the statute:

> The express requirement of... [another section] that the Board may amend a permit after consideration of any objection filed suggests that the omission of similar language in... [the relevant section] is intentional and significant, but on reflection I have concluded that it is not. In my opinion the omission is the result of inartistic drafting... I am quite unable to see

stronger where the application is for a variation or amendment of a previous approval. However the problem can be avoided if the Commission, by resolution, delegates its powers of approval. [336]

Not only the establishment, but also the operations of sewage works are under the supervision of the Commission. The Act provides that sewage works must "at all times be maintained, kept in repair and operated in such manner and with such facilities as may be directed by the Commission." [337] To enable continuing supervision, owners of sewage works are required to make returns of matters required by it to the O.W.R.C. within thirty days of the request. [338] If the Commission reports in writing to the clerk of a municipality that "in its opinion it is necessary in the public interest" to establish, operate, alter or repair a sewage work, the municipality must "forthwith do every act and thing in its power to implement" the Commission's report. [339] Once again dual sanctions are available; the Commission may implement its own report [340] or direction [341] at the expense of the party who

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why the Board should be required to consider objections to amending a permit and be permitted to ignore objections to granting one. *Id.* at 224.

See also Re Pollution Control Act, 1967, *Re* Application of Hooker Chemicals (Nanaimo) Ltd., 75 W.W.R. (n.s.) 354 (B.C. Sup. Ct. 1970); Regina v. Venables, 15 D.L.R.3d 355 (B.C. Sup. Ct. Cham. 1970). *But see contra, Re* Piatocka & Utah Construction Mining Co., 21 D.L.R.3d 87 (B.C. Sup. Ct. Cham. 1971).

[336] Ont. Rev. Stat. c. 332, § 9(*g*) (1970), *enacted by* Ont. Stat. 1971 c. 124, § 5.

[337] *Id.* § 50(1).

[338] *Id.* § 49.

[339] *Id.* § 51(1). Again the question arises whether a hearing is required before the Commission may issue a report. See text accompanying note 335 *supra.* The Commission apparently does not believe that a hearing is required. *See* Erichsen-Brown, *Some Legal Aspects of Water Pollution Control in Ontario,* 77 MUNICIPAL WORLD 303, at 306 (1967). A detailed analysis of administrative law questions arising from the Act is beyond the scope of this article; *but see generally* R. F. REID, ADMINISTRATIVE LAW AND PRACTICE 111-159 (1971); S. A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 64-80 (2d. ed. 1968).

Where no hearing is required under the Act "or otherwise by law," the Statutory Powers Procedure Act, 1971, will not apply, Ont. Stat. 1971 c. 47, § 3. Nevertheless, the Statutory Powers Procedure Rules Committee will have power to require the Commission to devise procedural rules for such situations, § 29. The power exercised by the O.W.R.C. under § 51 of its Act is a "statutory power of decision" within the Statutory Powers Procedure Act, 1971, § 1(1)(*d*)(*i*). *See also* the Judicial Review Procedure Act, 1971, Ont. Stat. 1971 c. 48. This Act too has not been proclaimed. A right of appeal to the Appeal Board created under Part X of the E.P.A., §§ 77-81, exists from specified decisions of the chairman of the O.W.R.C. acting in the capacity of a Director.

[340] *Id.* § 51(3). But if the Commission chooses to implement a report made under § 51(1), it must get the approval of the Ontario Municipal Board. The Commission has required the separation of storm and sanitary sewers, the installation of equipment in treatment plants sufficient to treat the increased flow of wastes in combined storm and sanitary sewers when necessary and has required municipalities to install equipment for the removal of nutrients from sewage as part of the treatment process. Landis, *supra* note 46, at 75.

[341] ONT. REV. STAT. c. 332, § 73 (1970). This provision applies to anything which the Commission or an officer to whom it has delegated power under § 9 has authority to direct or require. The Commission may not delegate its powers under § 51.

failed to do so, and quasi-criminal penalties are imposed for a failure to make returns, [342] observe a direction, [343] or implement a report. [344] As well the contravention of a direction, order, approval, or notice may be restrained "by action at the instance of the Commission." [345]

Finally, the Act creates an irrebuttable presumption that works constructed, maintained or operated with the approval of the Department of Health or the Commission and according to the terms and conditions imposed by either are constructed, maintained or operated by statutory authority. [346] But a person whose lands are expropriated for sewage works or injuriously affected by their construction, maintenance or operation by a municipality is entitled to compensation. [347]

The Commission also has powers of compulsion over industrial wastes being discharged into a watercourse or a municipal sanitary sewer. Where an industrial or commercial enterprise fails to make arrangements or makes arrangements unsatisfactory to the Commission for the collection, transmission, treatment or disposal of sewage, [348] the Commission, with the approval of the Minister, [349] may require it to make investigations and reports, to install, construct or arrange facilities for sewage and to maintain and operate

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[342] *Id.* § 49. An offender is liable to a fine of up to $100.

[343] *Id.* § 50(2). Failure to comply with a direction is subject to a fine of up to five hundred dollars for every day on which such failure continues, except for municipalities. The Commission may impose requirements even on those sewage works exempted under § 42(6). See text accompanying note 329 *supra.*

[344] *Id.* § 51(2). Failure to implement a report is subject to the same penalty as failure to comply with a direction, *supra* note 343.

[345] *Id.* § 74. A one-year limitation period applies to all of these provisions, § 72. Since no article precedes "action" in the former provision, it is arguable that the Commission may physically restrain such violations. The Commission seems to regard this provision as giving it the power to move for an injunction as one of its solicitors has stated that two provisions of the Act give it power to do so. Erichsen-Brown, *Some Legal Aspects of Water Pollution Control in Ontario,* 77 MUNICIPAL WORLD 303, at 304 (1967). The other provision is discussed *infra* text accompanying note 372.

Every person who gives false information to the Commission in any application, return or statement in respect of any matter under the Act or regulations is also guilty of an offence and subject to a fine of up to $500, § 77.

Similar provisions are included in the E.P.A., §§ 100-102.

[346] *Id.* § 48. *See supra* text following note 154.

[347] *Id.* § 47. The provision was amended in the revision of the statutes to refer to the Expropriation Act, ONT. REV. STAT. c. 154 (1970). *See* The O.W.R.C. Act, ONT. REV. STAT. c. 281, § 34 (1960); The Expropriation Act, § 2(2) and the Statutes Revision Act, 1968-69, Ont. Stat. 1968-69 c. 120, § 3.

[348] Sewage includes drainage, storm water, commercial and industrial wastes and any other matter or substance specified by regulation, ONT. REV. STAT. c. 332, § 1(*p*) (1970). *See also* § 62(1)(*l*); and *see supra* note 316.

[349] *Supra* note 297.

such facilities as the Commission may from time to time direct.[350] As well, where the discharge of sewage into a sewage works may, in the opinion of the Commission, interfere with its proper operation, the O.W.R.C. may require the municipality or person to stop or regulate the discharge or deposit or take such measures as are required.[351]

Initially a question might have arisen as to whether an industry which had met the requirements of the Commission had obtained its approval within section 48 of the Act, so as to deem its waste disposal done by statutory authority. Section 42 requires that "any municipality or person" obtain the approval of the Commission for a sewage works and section 48 deems such works to be constructed, maintained and operated by statutory authority. "Person" would clearly include an industrial corporation as well as its officers and employees;[352] the issue turned on the definition of

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[350] *Id.* § 69(1). A contravention of any such order or direction is an offence subject to a penalty of up to $200 for every day on which it continues, § 69(2). *See also supra* note 345, § 77. Of course the limitation period applies here as well, *supra* note 322. Before the Commission makes such an order it must provide "a reasonable opportunity to be heard," § 35; *see supra* note 332.

In 1970, Ontario enacted legislation to encourage the construction of pollution control facilities by granting a rebate of the retail sales tax paid on the purchase of equipment to install or alter any such facilities. *See* The Pollution Abatement Incentive Act, 1970, Ont. Stat. 1970 c. 62, now ONT. REV. STAT. c. 352 (1970). The Act is deemed to have come into force on April 1, 1970 and is repealed on April 1, 1975, § 11. An accelerated tax depreciation allowance is also available to industries which acquire pollution control facilities. *See* Income Tax Act, CAN. REV. STAT. c. I-5, § 11(1)(*a*) (1970); Regulations, Part XI, § 1100(1)(*t*), P.C. 1966-115, S.O.R. 66-54, amended P.C. 1971-1036, S.O.R./71-257. The deduction is available for pollution control equipment acquired after April 26, 1965 and before 1971 and also for equipment acquired after 1970 and before 1974 to prevent pollution from operations carried on prior to 1973, and approved by the Minister of Fisheries and Forestry. An allowance similar to the latter one is included for air pollution control facilities.

[351] *Id.* § 70(1). The Commission must do so by notice to the municipality or the person discharging the sewage and a failure to comply with a notice constitutes an offence. The penalty is the same as under § 69(2), § 70(2). Similarly, the Commission usually includes a clause in its agreements to construct and operate projects for a municipality restricting its responsibility to sanitary sewage and reserving the right to refuse to accept anything else; but the Commission may consent to accept land drainage and industrial wastes. However, the agreement usually requires that no chemical wastes or substances which may, in the Commission's view, damage or hinder the processes, plant or equipment of the sewage project shall be deposited into any sewer connected with it. Erichsen-Brown, *Some Legal Aspects of Water Pollution Control in Ontario*, 77 MUNICIPAL WORLD 303, at306 (1967). An example of a model municipal by-law, of a draft agreement between a municipality and an industry and of an information form concerning industrial wastes discharged into municipal sewers is included in Chinook Chemicals Corp., *supra* note 319, at 8.523, 8.524 and 8.525 respectively. *See also* the guidelines concerning industrial pollution control in municipalities. *Id.* at 8.501.

The issue of a hearing might also arise with reference to the notice issued under § 70(1). Again, it is unlikely that the Act intended that a hearing be held before the issuance of notice. *See supra* note 335.

The regulation of water quality is discussed *infra* text following note 363.

[352] *Supra* note 327.

"sewage works." "Sewage works" was originally defined as "any *public* works for the collection, transmission, treatment and disposal of sewage or any part of such works." [353] Therefore, the sewage treatment facilities of a private industry were not subject to the approval of the Commission under section 42 and as a result were not deemed to have been constructed and operated by statutory authority. Thus riparian rights to the natural flow were restricted as to quality as against municipalities but not as against private enterprise. But the definition of "sewage works" was subsequently amended to omit the word "public." [354] Therefore, the definition of sewage works became solely dependent upon the definition of "sewage" which includes commercial and industrial wastes, [355] and industrial waste treatment facilities were brought within the scope of sections 42 and 48. This amendment, therefore, greatly improved the supervisory scheme of the Act by making the Commission's jurisdiction universal in Ontario with regard to approval of treatment facilities rather than limiting it to municipalities, [356] as presently the Commsison "may approve proposed private or municipal . . . sewage works which without the approval may not be undertaken." [357]

But the amendment raises new problems apparently not previously contemplated. Since the sewage work is deemed to be carried on by statutory authority, no action lies either for an injunction or for damages unless the statute so provides. [358] Despite this fact the compensation provisions of the Act were not amended to apply to industrial corporations the sewage treatment facilities of which have been approved by the Commission. The Act provides for compensation for harm done by municipalities. [359] The section

[353] ONT. REV. STAT. c. 281, § 1(*q*) (1960). The emphasis is added.

[354] *Id.* § 1(*q*), *as amended by* Ont. Stat. 1961-62 c. 99, § 1, now ONT. REV. STAT. c. 332, § 1(*q*) (1970). Plumbing was also excluded from the definition. The definition of "owner" was similarly dependent on that of "sewage works." *Supra* text accompanying note 338.

[355] *Id.* § 1(*p*). *Supra* note 348.

[356] It seems likely that this result was always intended and that the initial emphasis on municipal pollution may have misled the draftsman. If not, then it would indicate that the Commission was progressing with regard to municipal installations and thought that the requirements should be broadened to include industrial installations. In the light of the K.V.P. experience, *supra* text following note 227, the former hypothesis seems more likely. But the compensation provisions would indicate otherwise. *See infra* text following note 357.

[357] MILNER at 51.

[358] *Supra* text following note 154. An exemption from the major prohibition in the Act is also provided for approved works; text accompanying note 382 *infra*. *See also* 5 MCRUER REPORT at 2112-14.

[359] ONT. REV. STAT. c. 332, §§ 46 and 47 (1970). Section 46 allows an application to the Ontario Municipal Board for compensation where a municipality has failed to do anything required by the Act or the Commission or has done any such act improperly and injury has resulted to the property of the applicant; § 47 provides for compensation for expropriation by a municipality for sewage works and for injuriously affecting land by the construction, operation or maintenance of a municipal sewage works. *See* text accompanying note 347 *supra*. Thus, while jurisdiction under § 47 lies exclusively with the Land Compensation Board under The Expropriation Act, ONT. REV. STAT. c. 154, § 30 (1970), an application to the Ontario Municipal Board under § 46 of the O.W.R.C. Act is only an alternative remedy.

48 presumption of statutory authority applies only where the work is constructed and operated in accordance with the terms and conditions imposed by the Commission (or the Department of Health). And since there may be less public interest involved in allowing some pollution of a stream by industry than there is in allowing it by a municipality where the expense of new installations is great, it is arguable that the Commission should require complete treatment by a private enterprise where it would not do so of a public body. The Commission could condition the approval of an industry's treatment facilities on its not allowing any pollution of the river. [360] If this were the Commission's practice no problem would arise as any pollution would then be a breach of the condition and remove the industry from the presumption of statutory authority in section 48. But if the Commission does not impose such a condition, it is not beyond the realm of possibility that an industry with approved treatment facilities might still pollute the stream into which its effluent is discharged to some degree, in which case no remedy whatever would be available to an injured riparian owner. [361] In the light of the limitations placed upon the use of section 48 [362] it is clear that pollution-free discharges were never contemplated as practicable. Therefore it does not seem unreasonable to amend the Act to provide for compensation to injured riparian owners for actual harm suffered from approved works. [363]

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[360] For an indication of the potential costs involved if this approach were taken with all industrial polluters, see E. W. Kenworthy, *Capitol Dispute: Waste in Waters*, The New York Times, January 9, 1972, at NES 41, col. 1; G. Hill, *Pollution Fight Fogged by Costs*, The New York Times, January 9, 1971, at NES 41, col. 5.

[361] *Cf.* 5 McRUER REPORT at 2109. The harm to a downstream riparian owner does not fall within the definition of "injurious affection" in The Expropriation Act, ONT. REV. STAT. c. 154, § 1(1)(*e*) (1970). Nor would it be an "expropriation," *see id.* § 1(1)(*c*).

[362] *See* text accompanying note 346 *supra* and note 382 *infra*. *See also* ONT. REV. STAT. c. 332, § 62(1)(*k*) (1970).

[363] The omission of private sewage works from the compensation provisions of the Act is probably based on the fact that "injurious affection" depends on the expropriation of land; *see* The Expropriation Act, ONT. REV. STAT. c. 154, § 1(1)(*e*). It is also doubtful whether a downstream owner would be injuriously affected by discharges from a municipal sewage works, *id.* However, it is arguable that an approved polluting discharge in effect constitutes an expropriation beyond the scope of the Act in that it deprives a riparian owner of a property right. *See supra* text following note 47. *See* 5 McRUER REPORT at 2109.

Approval of pollution control facilities is also required under the E.P.A., § 8, and the Act establishes limitations on the scope of approval by a Director, §§ 9 and 11. Where there is actual harm from the discharge of a pollutant, for example, to the crops of a downstream riparian (or non-riparian) owner, the Minister may order that steps be taken to repair the injury or damage, § 17. And a negotiation procedure is provided for settlement of claims by injured parties, § 92. The E.P.A. does not contain a provision granting the defence of statutory authority to works approved under it. Moreover, all sewage works must now be approved under the E.P.A., rather than the O.W.R.C. Act, as the provisions of the former Act prevail in the event of duplication; see §§ 16 and 96. And approval of sewage works which do not remove all contam-

A recent amendment to the Act gave the Commission power to create standards for water quality management by order as well as by regulation. The O.W.R.C. is empowered to regulate (or prohibit) the discharge or deposit by any municipality or person of any sewage into any body of water [364] and it is an offence for each day's contravention [365] of such an order. [366] Moreover the Commission may require any municipality of industrial or commercial enterprise "to have on hand and available at all times such equipment, chemicals and other materials as the order specifies to alleviate the effects of any impairment of the quality of water which may be

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inants is "specifically dealt with" by the E.P.A., §§ 8, 9 and 11. Thus it is arguable that the defence of statutory authority will be unavailable to any work constructed or altered since August 11, 1971. Even discharges from works approved under the O.W.R.C. Act are likely no longer immune insofar as the negotiation procedure provided by the E.P.A. is now available to an injured downstream riparian owner; *see* §§ 92 and 96. Moreover as the E.P.A., § 1(*j*), defines "person" to include a Crown agent, works initiated and constructed by the O.W.R.C. itself require approval, under § 8, of the Director designated under Part II of the Act, who may be the chairman of the O.W.R.C., § 4(*c*), and the Commission is also subject to the negotiation provisions in § 92. And it is arguable that the negotiation procedure provides the exclusive remedy for a riparian owner who suffers harm from pollutants within the levels permitted by regulations, when enacted, under the E.P.A.

[364] ONT. REV. STAT. c. 332, § 33(1) (1970), *enacted by* Ont. Stat. 1970 c. 124, § 11. The approval of the Minister is required before an order can be made. Part IX of the E.P.A., §§ 69-76, gives a Director similar, but more precisely delineated, powers. A Director may issue control orders when the report of a provincial officer contains a finding that a contaminant discharged into the natural environment exceeds the level prescribed by regulation or contravenes § 14, § 6; *see supra* notes 113 and 302. A stop order may be issued when a Director believes, "upon reasonable and probable grounds" that the discharge constitutes "an immediate danger to human life, the health of any persons, or to property," § 7. A control order may require quality controls on discharges and procedures therefor, may specify the manner in which discharges must be made, may require the installation, replacement or alteration of equipment to control or eliminate the contaminant from discharges or may require that discharges of a contaminant cease permanently or temporarily, § 70; and a control order may be revoked or varied, § 72. The Act provides a fifteen-day period during which submissions may be made to the Director prior to the issue of a control order, § 73. *Cf.* Regina v. British Columbia Pollution Control Bd., 61 D.L.R.2d 221 at 223 (1967). A stop order is effective immediately and no prior hearing formal or informal is required by the Act, §§ 74-76. An appeal is available from either order and the effectiveness of all but stop orders is delayed until the final disposition of an appeal, § 79. *Se also infra* note 367.

[365] ONT. REV. STAT. c. 332, § 33(3) (1970).

[366] *Id.* § 33(2). The penalties are severe; for a first conviction an accused is subject to a fine of $5,000 and on each subsequent conviction to a fine of $10,000. Therefore if an order were ignored for two days it is possible that a fine of $15,000 could be levied even though the accused had never been previously charged. The E.P.A., § 102(1), provides the same penalties but does not create a separate offence for each day's contravention of an order; rather it enables the amount of the fine to be assessed for each day upon which the offence "occurs or continues." Thus in the example above there would be a conviction for only one offence and a maximum fine of $10,000.

caused" by them.[367] The Commission has published "Guidelines and Criteria for Water Quality Management in Ontario."[368]

The Commission's supervisory functions dealing with the abatement and control of municipal and industrial pollution of watercourses have been discussed. The Commission has the supervision of all surface and ground waters in Ontario[369] and may examine any surface or ground waters in the province to determine the degree of any pollution which may exist and its causes.[370] Although at one time the Commission's general supervisory

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[367] ONT. REV. STAT. c. 332, § 34(1) (1970). Contravention of an order is an offence punishable by a fine of $500 for every day on which it continues, § 34(2). The Commission must give "a reasonable opportunity to be heard to the municipality or person" to whom an order under § 33 or § 34 is proposed to be directed, § 35. *Compare* the Minister's power under the E.P.A., § 17, *supra* note 363.

The E.P.A., § 27(2) creates a presumption that orders made under §§ 33 and 34 of the O.W.R.C. Act are made under the former statute and provides that they continue in force until revoked, suspended or varied by the Director. *See also* the E.P.A., § 27(3).

[368] *Supra* note 319. On the utility of such practices *see generally* K. C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); Anisman, *Book Review*, 47 CAN. B. REV. 670 (1969). *See also* O.W.R.C., *Interim Province of Ontario Contingency Plan for Spills of Oil and Other Hazardous Materials*, May 1971, in Chinook Chemicals Corp., *supra* note 319 at 8.571.

The Canada Water Act, CAN. REV. STAT. c. 5 (1970 1st Supp.), is directed at water quality management. So far, however, only the power to make regulations granted by § 19 has been exercised; see the Phosphorus Concentration Control Regulations, P.C. 1970-1341, S.O.R./70-354, effective August 1, 1970. The first reading of Bill C-144, 2d Sess., 1969, is discussed and its interaction with the O.W.R.C. Act is considered in Landis, *supra* note 46, at 138-55; the article is an extended argument against federal involvement in water quality management based primarily on constitutional grounds and it suggests that the federal Act is *ultra vires*. *But see* Gibson, *The Constitutional Context of Canadian Water Planning*, 7 ALTA. L. REV. 71, at 86 (1969). *See also* B. LASKIN, CANADIAN CONSTITUTIONAL LAW 415-17, 534-36 (3d rev. ed. 1969). And *see* the statement of claim in The Queen v. Interprovincial Co-operatives Ltd., issued December 10, 1970.

[369] ONT. REV. STAT. c. 332, § 31(1) (1970).

[370] *Id.* § 31(2).

The Commission in an undated pamphlet entitled *Objectives for Water Quality Control in the Province of Ontario* has enunciated its general objectives:

> All wastes, including sanitary sewage, storm water, and industrial effluents, shall be in such condition when discharged into any receiving waters that they will not create conditions which will adversely affect the use of these waters for the following purposes; source of domestic water supply, navigation, fish and wild life, bathing, recreation, agriculture and other riparian activities. In general, adverse conditions are caused by:
>
> (a) Excessive bacterial, physical or chemical contamination.
>
> (b) Unnatural deposits in the stream, interfering with navigation, fish and wild life, bathing, recreation or destruction of aesthetic values.
>
> (c) Toxic substances and materials imparting objectionable tastes and odours to waters used for domestic or industrial purposes.
>
> (d) Floating materials, including oils, grease, garbage, sewage solids, or other refuse.
>
> (e) Discharges causing abnormal temperature, colour or other changes.

See also supra note 319.

powers were restricted to sources of water supply, no such restriction pertained to its supervision of water pollution.[371] Its remedial powers over pollution are also wide. The Commission may apply *ex parte* for an injunction prohibiting the discharge or deposit of any material "into or near any well, lake, river, pond, spring, stream, reservoir or other body of water or watercourse" which in the Commission's opinion may impair the quality of the water.[372] The discharge need not actually have impaired the quality of the water for an injunction to be granted.[373]

The Commission also has specific powers with regard to certain aspects of water pollution. The Act prohibits the addition of any substance to any body of water or watercourse "for the purpose of killing or affecting plants, snails, insects, fish or other living matter or thing therein" without a permit

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[371] *See* Erichsen-Brown, *Some Legal Aspects of Water Pollution Control In Ontario*, 77 MUNICIPAL WORLD 303, at 305 (1967). Prior to 1970 the Commission had supervision of all surface waters but only of ground waters "used as a source of water supply," ONT. REV. STAT. c. 281, § 26(1) (1960). The quoted words were removed by Ont. Stat. 1970 c. 124, § 9. *Cf.* The Environmental Protection Act, Ont. Stat. 1971 c. 86, § 1(*p*) (" 'water' means surface water and ground water, or either of them.").

[372] ONT. REV. STAT. c. 332, § 31(3) (1970). The injunction may be issued "on such terms and conditions as the judge deems proper" for a period of up to twenty-one days; but it is renewable "for such period and on such terms and conditions as the judge deems proper." The General Counsel of the O.W.R.C. has stated that "this provision is used only in an emergency." *See* Landis, *supra* note 46, at 73. *See also* § 74, *supra* note 345.

The application for an *ex parte* injunction is unnecessary under the E.P.A., in the light of the stop-order provisions, *see supra* note 364. But the Act retains in the Minister the power to "restrain by action" any contraventions, § 100. And orders issued under the O.W.R.C., Act § 31(3), are presumed issued under the E.P.A. and continue in force, § 27(2). An application may be made by the Director to continue, vary or revoke such an order, § 27(5).

[373] ONT. REV. STAT. c. 332, § 30 (1970) creates an irrebuttable presumption that "notwithstanding that the quality of water is not or may not become impaired," the quality of water is impaired if the material discharged or any derivative of the material "causes or may cause injury to any person, animal, bird or other living thing as a result of the use or consumption of any plant, fish or other living matter or thing in the water or in the soil in contact with the water." The presumption applies only to §§ 31, 32, 34 and 36. *See* text accompanying note 367 *supra*, and *infra* notes 377 and 381. *Cf.* E.P.A., § 26. And *see infra*, note 469.

Moreover, § 68 of the O.W.R.C. Act would apply to an application for an injunction; the § provides that in any proceeding in the Supreme Court under the Act the production of a report of a Commission analyst as to the quality of any water or of any material is prima facie evidence of the facts stated therein. It would seem likely that if this provision were read strictly the Commission would choose to apply to a judge of the Supreme Court rather than a district or county court under § 31(3).

from the Commission.[374] The Commission has discretion to refuse to issue, to cancel or to impose terms and conditions upon a permit and it may alter the terms and conditions after the permit has been issued.[375] An offence is created for using a pesticide or herbicide in the water without a permit or contrary to the terms and conditions of a permit.[376]

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[374] ONT. REV. STAT. c. 332, § 38 (1970). The Commission may also exempt any person, substance or any quantity or concentration of any substance from the application of this provision, § 38(2). Section 62(1)(*u*) empowers the Commission to enact such regulations. The Commission has exempted the addition of any substance by a person into a lake, well, pond, or reservoir located "wholly within the boundaries" of his own land and which does not discharge by any means other than percolation into any body of water outside of his land and the use of two named pesticides to control plants that emerge from or float on the surface of water in a drainage ditch. ONT. REV. REG. 645 (1970). It may be questionable whether this Regulation still has any effect, *see infra* note 375.

[375] *Id.* § 38(3). Once again, the question of a hearing may arise with regard to this provision. *Supra* note 335.

The provisions of § 38 are superceded by the E.P.A., § 26, which prohibits the addition of any substance to water that will or is likely to cause injury to any living creature as a result of the use or consumption of any plant, fish or other living matter or thing in the water or in soil in contact with the water, without a permit or licence issued by the Director under Part VI, §§ 49-55. The Director under Part VI, who may, but need not be, the chairman of the O.W.R.C., § 49(*a*), is empowered to issue stop orders to prevent the use of pesticides dangerous to the health of any person, § 53. However the act creates a presumption that any "order, direction, requirement and permit given or made" under § 38 of the O.W.R.C. Act is given or made under the E.P.A., and continues in effect until revoked, suspended or varied by the Director designated under Part VI, § 27(2). *See also* § 27(4); and *see supra* notes 27 and 294.

As § 26 of the E.P.A. supercedes § 38(1) of the O.W.R.C. Act, it is questionable whether Regulation 645, *supra* note 374, retains any effect. The Regulation would appear to directly conflict with § 26 of the E.P.A. and no regulations have been promulgated exempting any persons or substances from the provisions of the Part as permitted by §§ 50(2) and 94(5)(*g*). The effectiveness of the Regulation is not explicitly retained under § 27(2) as it is neither an "order, direction, requirement or permit," nor is it "given or made" under § 38, but rather under § 62(1)(*u*) of the O.W.R.C. Act. Nevertheless it is possible that the activities exempted by the Regulation would not violate § 26 of the E.P.A. if they are not likely to injure any living creature. Presumably the Commission would not have exempted them if they were. It may be significant in this regard that § 38 prohibits the addition of "any substance"; see text accompanying note 374 *supra*.

[376] ONT. REV. STAT. c. 332, § 38(4) (1970). Upon conviction an offender is liable to a fine of up to $500. Once again the one-year limitation period would apply, *supra* note 322. The fine under the equivalent provision of the E.P.A., § 55, is $1,000. The Commission apparently is involved in research into commercial pesticides. A recent publication by the O.W.R.C. Information Service, entitled *New Use for Mosquito Killer in Black Fly Control*, 77 MUNICIPAL WORLD 307 (1967), stated that the Commission is optimistic about the use of "a commercial mosquito killer," "Abate," for use in killing black fly larvae in streams. Apparently the Commission has frowned on the use of pesticides containing D.D.T. and "Abate" breaks down more quickly in water and is less harmful to aquatic life. Nevertheless, the article stated that the Commission would continue to keep a close watch on the use of the compound. *See also* O.W.R.C., ANN. REP. 1970 42. The Commission does not appear to have direct supervision of crop-spraying by airplane despite the fact that such spraying may affect water quality. See CARSON at 121. Nevertheless, such spraying would come within the general prohibitions of the Act. The main quasi-criminal prohibition of the Act is § 32(1), discussed *infra*, text accompanying note 381. Since the crop-spraying

The Commission also exercises a more specific jurisdiction over sources of public water supply. It may define an area which includes such a source [377] in which no person shall swim or bathe [378] and in which no material of any kind that may impair the quality of the water shall be "placed, discharged, deposited or allowed to remain," [379] It is an offence to do any of the prohibited acts, subject to a fine of up to $1,000 or to imprisonment for up to one year, or both. [380]

The major quasi-criminal prohibition of the Act states that every municipality or person that discharges, deposits or causes or permits the discharge or deposit of any material of any kind which is likely to impair the quality of the water of any well, lake, river, pond, spring, stream, reservoir or other water or watercourse in such water or watercourse or on any shore or bank thereof is guilty of an offence and subject to a fine of up to $5,000 for a first conviction and $10,000 on each subsequent conviction or to imprisonment for up to one year or both. [381] But the discharge into any

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would involve a "discharge or deposit" the Commission could also move for an injunction under § 31(3). *Supra* text accompanying note 372.

However, crop-spraying is covered by the E.P.A., § 50(1)(*b*). The Pesticides Act, ONT. REV. STAT. c. 346 (1970), is supplanted by the E.P.A. However, all applications, examinations, licences, permits, orders, bonds and regulations made under the former Act and all actions initiated under it before August 11, 1971, relating to Part VI of the E.P.A., continue in effect until revoked or amended, § 54(1). *See also, id.* §§ 54(2), 94(5), and 96. The functions of the Pesticides Advisory Committee under the Pesticides Act, § 5, will be performed by the Environmental Council under Part XII of the E.P.A., §§ 88-90.

[377] ONT. REV. STAT. c. 332, § 36(1) (1970). When the Commission designates such an area the municipality or person who is entitled to use the source as a public water supply must give such notice as the Commission deems necessary to protect the source of supply.

[378] *Id.* § 36(1)(*a*).

[379] *Id.* § 36(1)(*b*).

[380] *Id.* § 36(2). The provision with regard to the deposit of any foreign matter into a source of public water supply may seem superfluous in the light of the major penal provision of the Act, see text accompanying note 381 *infra*. However under § 36 the discharge from approved sewage works is not exempted as it is from § 32(1) by § 32(5). Moreover, § 32(1) prohibits only the discharge or allowing the discharge, whereas § 36 prohibits, as well, allowing any such matter to remain within a defined area. The latter provision would appear, prima facie, to require a lower standard of *mens rea* than the former; *but see infra* text following note 386. *See also supra* note 373.

[381] *Id.* § 32(1). *See supra* notes 373 and 380. Each day on which a contravention continues constitutes a separate offence, § 32(2); *see supra* note 366.

Pollution per se is not an offence within the Criminal Code; the only provision of the Code which applies to pollution is the offence of committing a common nuisance, CAN. REV. STAT. c. C-34, § 176 (1970). There has never been a prosecution for water pollution under this §; see Erichsen-Brown, *Some Legal Aspects of Water Pollution Control in Ontario*, 77 MUNICIPAL WORLD 303 (1967). *See also* Landis, *supra* note 46, at 121-22, concluding that the provision is of no real assistance. There are, however, other provisions in federal legislation which prohibit water pollution in specified circumstances; *see, e.g.*, The Animal Contagious Diseases Act, CAN. REV. STAT. c. A-13, § 39 (1970); The Canada Water Act, CAN. REV. STAT. c. 5, §§ 8 and 28 (1970 1st Supp.); The Fisheries Act, CAN. REV. STAT. c. F-14, §§ 33-33.4 (1970), *as amended by* CAN. REV. STAT. c. 17, § 3 (1970 1st Supp.).

body of water or watercourse of sewage from sewage works constructed and operated in accordance with the approval of the Commission or the Department of Health is exempted from the prohibition. [382] There have been only four reported decisions concerning the offence created by section 32(1). [383] Of these one was procedural. In *Regina v. Matspeck Construction Co.*, an appeal by way of stated case from the quashing for duplicity of a charge laid under section 32(1), it was held that the charge was not duplicitous as it was phrased in the words of the section and, therefore, charged the accused with only one offence. [384] But the three other cases attempted to explicate the requirements of section 32(1). In *Regina v. Matspeck Construction Ltd.* it was held that because the section included the words "causes or permits the discharge or deposit" it did not involve absolute liability but *mens rea* was a required element of the offence. [385] The case also held that because the section said "may impair," the Crown had to prove only that the material discharged "had the ability to do so and might have done so" but not that

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[382] ONT. REV. STAT. c. 332, § 32(5) (1970). *Quaere* whether the Commission could by regulations made under § 62(1)(*k*) permit discharges contrary to the express provisions of § 32(1). *See* text accompanying note 319 and note 374 *supra*. A similar provision is included in the E.P.A. § 102(2).

In 1970 the Act was amended to require that every municipality or person who discharges material of any kind other than in the normal course of events or "from whose control material of any kind escapes" into any water body or on any shore or bank or in any place that may impair the quality of any such body of water notify the Commission of the event forthwith, § 32(3), and an offence punishable by a fine of $5,000 was created for a failure to do so, § 32(4), *as amended by* Ont. Stat. 1970 c. 124, § 10(2). For one use of this provision see, O.W.R.C., *Interim Province of Ontario Contingency Plan, supra* note 368, at 8.574. Under the E.P.A., § 15(1) the notification is to the Department of the Environment.

[383] There have been numerous unreported decisions, *see* Landis, *supra* note 46, at 72, note 8. And *see infra* note 393. There has been only one reported decision dealing with another provision of the Act, *see infra* note 408. *See also supra* note 283 and Stockwood, *Comment*, 24 U. TORONTO FAC. L. REV. 162, at 163-64 (1966). *Re* Faraday Uranium Mines Ltd., [1962] Ont. 503, 32 D.L.R.2d 704, involved the Commission insofar as it appeared at the hearing before the Commissioner of Mines. The case indicates that the Commission does constantly test waters that may become polluted, at 716, it also seems to indicate that the Commission used the facilities and personnel of the Department of Health when water might have been polluted by radiation as it itself was not equipped, in 1962, to assess tests in connection with radioactivity, at 710. But it would appear to be so equipped now. ANN. REP. 1966, at 25. In 1967 the Commission was in the process of carrying out a three-year study of the water conditions in the uranium mining areas of Elliot Lake. *See also* ANN. REP. 1966, at 59, 78.

[384] [1965] 2 Ont. 730, [1965] 4 Can. Crim. Cas. 78, at 80-81 (Ont. High Ct. Cham.). Hughes, J., also stated that there could have been no doubt in the mind of the accused as to what he was charged with. Hughes, J. did not refer to § 67 of the Act which permits an information in respect of any contravention of the Act to be for more than one offence, as it was unnecessary to do so.

[385] 8 CRIM. L.Q. 455, at 460 (Ont. Magistrate's Ct., 1965).

it actually did so. [386] However, the most recent decision regarding the section, *Regina v. Industrial Tankers Ltd.*, [387] took judicial notice of the difficulties of attributing personal blame in light of the "impersonal nature of present day industrial operations" [388] and held that section 32(1) creates an absolute prohibition "in the sense that to succeed, the Crown does not need to prove that the accused had knowledge, a guilty or criminal intent, or *mens rea,* whichever way one desires to express it." [389] Nevertheless it is arguable that the decision does not impose strict liability; the judge went on to state that in order to succeed the Crown must prove that the accused or one of its employees "had the power and authority to prevent, and could have prevented, but did not prevent" the act or omission which is charged as the offence. [390] And it was found as a fact that the accused corporation had such power and had failed to exercise it. [391] Consequently, the decision might be read as imposing only a modified *mens rea* requirement analogous to negligence. [392]

That there are so few reported cases may, perhaps, be explained by the way in which the Commission operates. [393] In 1966 an injunction was ob-

[386] *Id.* This decision was followed in Regina v. Canadian Motor Lamp Co., [1967] 1 Ont. 484, [1967] 2 Can. Crim. Cas. 210 (Magistrate's Ct. 1966). The water in the watercourse after the discharge had not been tested but the effluent had. Magistrate Powell also concluded that because the statute said "may impair" the Crown had only to prove that the effluent was capable of impairing the quality of the water and convicted the accused. See a note on this case, J. P. Erichsen-Brown, *Control of Water Pollution,* 9 CRIM. L.Q. 284 (1966-67).

[387] [1968] 2 Ont. 142, [1968] 4 Can. Crim. Cas. 81, 10 CRIM. L.Q. 346 (County Ct.).

[388] [1968] 2 Ont. 142, at 147.

[389] *Id.* at 150. *Cf.* Regina v. Peconi, 14 D.L.R.3d 17 (Ont. High Ct. 1970) (Air Pollution Control Act, 1967, Ont. Stat. 1967 c. 2, § 16 does not require *mens rea;* The Air Pollution Control Act, ONT. REV. STAT. c. 16 (1970) is repealed by the Environmental Protection Act, Ont. Stat. 1971 c. 86, § 104); Regina v. Churchill Copper Corp., [1971] 4 W.W.R. 481 (B.C. Prov. Ct.) (The Fisheries Act, CAN. REV. STAT. c. F-14, § 33(2) (1970), *amended* CAN. REV. STAT. c. 17, § 3 (1st. Supp. 1970), prohibiting deposit of deleterious substances into water "frequented by fish," imposes strict liability). The latter case followed Regina v. Pierce Fisheries Ltd., [1971] Sup. Ct. 5, 12 Crim. Rep. (n.s.) 272, [1970] 5 Can. Crim. Cas. 193, 12 D.L.R.3d 591.

[390] [1968] 2 Ont. 142, at 150 (County Ct.). *But see* Regina v. Peconi, 14 D.L.R.3d 17, at 19 (Ont. High Ct. 1970) (*citing* Industrial Tankers Ltd. as holding that *mens rea* need not be proven).

[391] [1968] 2 Ont. 142, at 148-49 (County Ct.).

[392] *Supra* note 380.

[393] There is no question but that there have been several prosecutions under the Act which have not been reported. The ANN. REP. 1966 states that there was one prosecution under § 27(1), now § 32(1), that a second has not yet come to trial, and that authorization to proceed on a third charge was received from the Commission at the end of the year, at 24. As well convictions were obtained against three well contractors for carrying on the business of drilling wells without having obtained a licence from the Commission and one of them was convicted on two occasions and was charged for a third offence, at 74. In 1970 twenty-seven firms were charged under § 32(1). Convictions were gained on thirty-five individual counts, and fines totalling approximately $17,000 were levied. ANN. REP. 1970, at 33. In Regina v. Industrial Tankers Ltd., [1968] 2 Ont. 142, at 151-52 (County Ct.), a fine of $300 was levied because the accused corporation had attempted to establish a procedure to prevent the pollution. Other sanctions are mentioned in the text.

tained under section 31(3) [394] against a mining company and then withdrawn "when the company indicated that immediate measures and studies would be undertaken to correct the pollution problem." [395] Similarly, having obtained a conviction against a sand and gravel company for violation of a term of a permit to take water, additional charges were withdrawn "after the company demonstrated co-operation with the Commission." [396] And finally, a charge laid against a well contractor for a failure to properly seal a well was withdrawn "when the contractor returned to the well and sealed it in a manner satisfactory to the Commission." [397] It would appear, therefore, that quasi-criminal prosecutions are initiated by the Commission only as a last resort. The Commission would rather use the threat of enforcing sanctions against an offender as a means to obtain cooperation and "voluntary" remedial efforts. The same would undoubtedly be true with regard to the sewage facilities of both municipalities and industries. A report to a municipality would probably be used only after negotiations with the municipal officials and the threat of such a report had failed. [398] The same would undoubtedly apply to a use of section 69 to require an industrial or commercial enterprise to install sewage facilities. [399] Sections 51, 69 and 70 [400] in conjunction could be and apparently have been used to require a municipality and an industrial company to cooperate in the disposal of sewage. Thus the Commission could simply report to a municipality to provide a connection to its sanitary sewer to the industry and require the industry to provide preliminary treatment for its wastes so that they will not interfere with the municipal treatment processes. [401] But by the time the Commission is prepared to follow this course "it is extremely probable that both the industry and the municipality will be fully aware of the technical problems and costs of treatment

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[394] *Supra* text accompanying note 372.

[395] ANN. REP. 1966, at 24.

[396] *Id.* at 69. Permits to take water and the effect of the relevant provisions on riparian rights are discussed *infra*, text following note 447.

[397] *Id.* at 74. *See also* Parsons, *Salt pollution to be studied: Kerr sees prosecution grounds over dumping of snow in lake*, The Globe & Mail (Toronto), Jan. 5, 1972, at 1, col. 5 and 2, col. 6.

[398] *Supra* text accompanying and following note 339. The Commission feels that "if a report states that the public interest requires that the municipality receive the industrial wastes this cannot be effectively challenged by the municipal council." Erichsen-Brown, *Some Legal Aspects of Water Pollution Control in Ontario*, 77 MUNICIPAL WORLD 303, at 306. For another example of the Commission's ability to coerce compliance, see Landis, *supra* note 46, at 76.

[399] *Supra* text accompanying note 350.

[400] *Supra* text accompanying note 351. The quasi-criminal penalties following upon a failure to observe the Commission's requirements may be substantial. *Supra* text accompanying and following note 340, and see notes 350 and 351.

[401] The Commission itself would be able to require a special payment for the use of a project from the industry under § 54(3). A municipality may also do so under the Municipal Act, ONT. REV. STAT. c. 284, § 362(14) (1970).

in the sewage treatment plant, or of pretreatment on the property of the industry." [402]

The Commission may not only attempt to abate and control pollution of waters in Ontario by the exercise of the supervisory controls mentioned above, but it may do so by alleviating the financial burdens on municipalities which would not be able to finance sewage works themselves. The Commission provides and operates sewage works for municipalities and delays the capital payments for periods of up to five years allowing the municipality to attract industry "thus providing it with more taxes with which to meet the annual payments to the Commission when they commence." [403] Under the Act one or more municipalities may apply to the Commission for the provision and operation of sewage works. [404] The municipal council may then pass a by-law to enter an agreement with the Commission which may enter the agreement subject to the approval of the Lieutenant-Governor in Council. [405] Once an agreement has been made the municipality must pay the actual cost of the project in annual installments over a period prescribed by the agreement, but these payments may be delayed for up to five years after the proj-

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[402] Erichsen-Brown, *Some Legal Aspects of Water Pollution Control in Ontario*, 77 MUNICIPAL WORLD 303, at 306. This would seem to confirm the conclusion that the Commission uses these methods only as a last resort, subsequent to the failure of negotiations.

[403] MILNER at 51. The Commission may also act as agent for municipalities in obtaining loans for the construction of sewage works by municipalities themselves from the Central Mortgage and Housing Corporation under the National Housing Act, CAN. REV. STAT. c. N-10 (1970); ONT. REV. STAT. c. 332, § 71 (1970). Apparently municipal councils tend to distrust projects established by the O.W.R.C. and would prefer to establish their own works. Skelton, *Grant Would Aid Villages*, in [1967] CIVIC ADMINISTRATION 65. The Commission may also finance its own projects through the Central Mortgage and Housing Association. The provision does not apply in respect of any such sewage works constructed under an agreement entered into after September 1, 1964, § 71(2).

[404] ONT. REV. STAT. c. 332, § 52 (1970). Municipalities may also apply for the provision of water works. The Commission could undoubtedly force a municipality to so apply by sending it a report under § 51 (or threatening to do so) when it knows that the municipality cannot afford to establish sewage facilities. Whether or not it has actually done so its not known. Upon application the Commission may furnish the municipality an estimate of the cost of the project, a statement of the Commission's terms and conditions for undertaking the project, a form of the agreement to be used, and such other information as the Commission considers advisable, § 52(2).

[405] *Id.* § 52(3). The assent of the electors for the passing of the by-law, normally required by the Municipal Act, ONT. REV. STAT. c. 284, § 294 (1970), is not required, § 52(4). And if the Ontario Municipal Board's approval of the by-law is necessary, the Commission must apply to the Board on behalf of the municipality, § 52(5). The agreement is binding on any commission or local board controlling or managing sewage works in the municipality, § 52(7). See Landis, *Waterworks Commission Law in Ontario Reviewed*, 5 CAN. B.J. 221 (1962), which is basically an attempt to convince municipalities to use these provisions of the Act to avoid conflicts with local public utilities commissions. The argument could also apply to sewage works.

ect's completion.[406] As well, the municipality must pay annually its proportion of the total amount of interest and expenses payable by the Commission in the year in respect of the Commission's borrowings to meet the cost of all projects undertaken prior to 1966 or the cost of all projects undertaken since 1966 as adjusted by the Commission.[407] And the municipality may pass a by-law, subject to the approval of the Ontario Municipal Board, imposing a sewer rate on owners or occupants of land benefited by the project, sufficient to pay the portion of such debt specified by the by-law.[408] The municipality must also pay to the Commission the cost of operation, maintenance, repair, administration, supervision and insurance of the project,[409] and the lesser of the amount set aside by the Commission to provide for renewals, replacements, and contingencies in respect of the project, and for capital expenditures in relation to its operation and appearance, or an amount equal to 1½ per cent of the cost of the project.[410] The municipality may impose a sewage service rate by by-law on owners or occupants of land from which sewage is received by a project in order to meet either a part or the whole, as specified in the by-law, of such payments.[411] The Commission must by February 15 of each year estimate the payments to be made by a municipality in that year and the municipality must meet them by the date prescribed in the agreement.[412] The actual costs

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[406] *Id.* § 53(1)2. Compound interest at five per cent on the capital cost of the project must be paid by the municipality, Ont. Reg. 107/71, § 1, *enacted* under § 62(1)(*e*).

[407] *Id.* § 53(1)1(*a*) and 53(2). Apparently all projects subsequent to 1966 have been financed by the province of Ontario, § 53(2) and § 29. The former provision, *enacted* Ont. Stat. 1965 c. 91, § 5(2), would seem to indicate that this is so. *See also* § 71(2), *supra* note 403, *enacted* Ont. Stat. 1970 c. 124, § 23.

[408] *Id.* § 54(1). The terms used in the section are defined by the Municipal Act, ONT. REV. STAT. c. 284, § 362 (1970), which applies to such by-laws as well as to those imposing a sewage service rate under § 54(3). See text accompanying note 411 *infra*. The by-law may provide for commutation for a payment in cash of the whole or any part of the rate imposed, § 54(2). There is no similar provision for by-laws under § 54(3). *See* Langs v. Preston, [1970] 3 Ont. 365, 13 D.L.R.3d 129 (Rate by-law under § 54, O.W.R.C. Act subject to requirements of the Municipal Act, § 362(2); by-law invalid for failure to obtain prior approval of the Ontario Municipal Board); *see also* § 54(4). The decision was subsequently reversed. Preston v. Langs (Can. Sup. Ct., March 30, 1972, as yet unreported).

[409] *Id.* § 53(1)1(*b*).

[410] *Id.* §§ 53(1)1(*b*) and (*c*) and 57(1). The Commission is authorized to use the funds from a reserve account established in respect of one project for other projects for the same municipality, § 57(2).

[411] *Id.* § 54(3). *Supra* note 408. Where a municipality has made an agreement with the Commission for the provision of sewers, it may charge the owners of premises for which service drains are constructed the cost of the drain from the sewer to the line of the highway with interest at a rate and over a period determined by the municipality, § 55.

[412] *Id.* § 56(1). In the year in which the project is completed the estimate of costs by the Commission and payment by the municipality may be made at a time set by the Commission.

are to be assessed at the end of the year and the amount owing to or by the Commission is to be added to or deducted from the estimate in the following year.[413] All money collected by the Commission must be placed in designated accounts[414] and invested.[415] If after the expiration of the period named in the agreement the amount in cash or in investments attributable to the capital payments of any project[416] is greater than the actual cost of the project, the Commission must within one year repay the amount of the excess to the municipality; if the amount is less the deficiency must be paid by the municipality to the Commission within the same period.[417]

The Act does not state what occurs after the cost of the project has been paid by a municipality. It would appear that the agreement would come to an end after the costs have been paid as the Act provides that it is to remain in force for the period prescribed in it and "in any event until all obligations

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[413] *Id.* § 56(2). The municipality may make any annual payment in advance, as well as pay any sum to reduce the cost of the project, § 56(4). And a municipality may raise money to meet the periodic payments to the Commission by any method authorized by law as if the work were done by the municipality, § 56(5).

Any amount due and payable by a municipality or person to the Commission under an agreement and the interest and costs of debt service, if any, payable by the Commission to the Treasurer of Ontario are recoverable by the Commission as a debt due, § 78.

[414] *Id.* §§ 57 and 58. The accounts are to be administered by an investment committee appointed by the Lieutenant-Governor in Council, § 59. A "reserve account" must contain the payments received by the Commission to cover repairs and improvements of the projects. *Supra* text accompanying note 410. A separate reserve account must be kept for each project and the earnings from the consolidated fund and investments allocated proportionately to each account, §§ 57(3) and (4). *But see* § 57(2), *supra* note 410.

The payments under § 53(1)2, *supra* text accompanying note 406, are to be deposited in a "retirement account" as a consolidated fund and may be used by the Commission to repay its debts. But money for a particular project must be retained in the account and kept invested until the agreement comes to an end, § 58(1). The earnings from investments of this account are to be allocated and credited annually to each project proportionately, § 58(2). If the amount in the consolidated fund attributable to a given project is at any time, in the Commission's opinion, sufficient with estimated future interest to meet the actual cost of the project at the end of the period in the agreement, the Commission may authorize the discontinuance of such payments under § 53(1)2 by the municipality.

[415] *Id.* § 59(6).

[416] That is, in the "retirement account."

[417] ONT. REV. STAT. c. 332, § 58(4) (1970). Despite the intended emphasis on water works, *supra* text accompanying note 290, in the first few years of the Commission's activities expenditures for sewage works were greater. See MILNER at 51. In 1961 there were ninety-nine sewage works projects as compared with ninety-three water works projects. ANN. REP. 1961, quoted in MILNER at 53. The same would still seem to be true. In 1966 of twenty-six projects accepted by the Commission, fifteen were for sewage works. ANN. REP. 1966, at 42. And since 1966 the trend has continued. The ANN. REP. 1967, stated that, of thirty-one municipal projects accepted, nineteen were for sewage works, at 51. In 1968, fourteen of twenty-one accepted projects were for sewage works, ANN. REP. 1968, at 58. In 1969, seventeen water projects and nineteen sewage projects were accepted, ANN. REP. 1969, at 44. But in 1970, sewage works accounted for only fourteen out of thirty-three accepted projects, ANN. REP. 1970, at52.

to the Commission . . . have been discharged" to the Commission's satisfaction. [418] Moreover, the municipality is only required to make annual payments to the Commission during the currency of the agreement. [419] Therefore, once the cost of the project has been paid to the Commission, the work becomes the property of and is operated by the municipality and would then be subject to the Commission's supervision concerning operations and improvements. [420] But this fact may raise other problems. It would seem that only works for which an application has been received under section 42 can receive the approval of the Commission and thus be deemed to be constructed and operated by statutory authority under section 48. [421] Although it may seem foolish to require this, there is no provision in the Act whereby the Commission may "approve" its own work, that is, a project. [422] Presumably such a provision was not included as the Commission is likely to build efficient treatment works which will not pollute the water so as to injure a downstream riparian owner. [423] However, after the work has passed to a municipality it may, if not properly maintained, do so. It would then not be deemed to be operated by statutory authority, nor would the injured riparian owner be limited to the compensation provisions of the Act but could instead apply to the court for an injunction and damages. Although it may be doubtful whether a court would allow such an action, a strict reading of the Act in conjunction with judicial precedents might lead to this result. [424]

Before the Commission may construct a project it must receive an application from the municipality or municipalities desiring it to do so. [425] But a recent amendment has given the Commission the power to do so of its own initiative. [426] In 1966, the Act was amended to give the Commission the

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[418] ONT. REV. STAT. c. 332, § 52(6) (1970).

[419] *Id.* § 53(1), 1 and 2.

[420] *Supra* text accompanying and following note 337. It should be noted that the Commission has established courses to train operators for water and sewage works. Presumably this is necessary for projects which become the property of municipalities, assuming that the Commission's employees will not all remain with the project when it changes hands. By 1970, 640 sewage works operators and water works operators had received certificates. ANN. REP. 1970, at 61.

[421] *Supra* text following note 345.

[422] This may be another reason for the power to make the regulations provided by § 62(1)(*k*). *Supra* notes 319 and 382.

[423] If the Commission does allow some pollutants to escape from its own treatment works, for example, by adopting a water quality standard which permits some pollution to occur, it is arguable that it is subject to an action for damages by a downstream riparian owner. *See* Westlake v. The Queen, [1971] 3 Ont. 533, at 534-35 (High Ct.) (dictum). *But see* Local 804 I.B.E.W. v. O.W.R.C., (unreported Ont. 1965); and see R. F. REID, ADMINISTRATIVE LAW AND PRACTICE 415-16 (damages) and 410 (injunction) (1971). *See generally*, Molot, *Administrative Bodies, Economic Loss and Tortious Liability*, in STUDIES IN CANADIAN BUSINESS LAW 425 (G. Fridman ed. 1971); The Proceedings Against the Crown Act, ONT. REV. STAT. c. 365, §§ 5 and 18 (1970). In any event the Commission is subject to the negotiation provisions of the E.P.A.

[424] *See* text accompanying note 363 *supra*.

[425] *Supra* text accompanying note 404.

[426] ONT. REV. STAT. c. 332, § 61 (1970), *enacted* Ont. Stat. 1966 c. 108, § 10.

power, where in its opinion it is in the public interest, to make an order, with the approval of the Minister, defining and designating an area as an area of public sewage service.[427] Once an area has been designated a sewage service area, the Commission may by order, from time to time, "for the purpose of controlling, regulating, prohibiting, requiring, or providing" sewage service in the area, impose such terms and conditions in the area as it deems necessary, require the termination or amendment of any contract with respect to sewage service in the area, and fix and impose rates and charges on any municipality or person in the area for its provision of sewage service to them.[428] The Commission also has power to amend the terms and conditions in any order.[429] However, before making or amending an order the Commission must hold a public hearing and give at least twenty-one days notice to the clerk of the municipalities involved and to such other persons as the Commission may direct.[430] A public hearing may be held by two members of the Commission who shall report to it.[431] Once the order is made a copy of it must be sent to the clerk of every municipality and to every person named in it, and to such other persons as the Commission may direct.[432] A form of appeal is also provided; any municipality affected, any person who is a party to an amended or terminated contract, and any owner or occupant of land in an area of public sewage service who is affected in a different manner and to a different extent than all other owners or occupants in the area may file a petition with the Secretary of the Executive Council within twenty-eight days of the mailing of the copies of the order. The Lieutenant-Governor in Council may then confirm, vary or rescind the definition or designation of the area in the order and the decision is binding.[433] A similar "appeal" is

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[427] *Id.* § 61(2). It is doubtful that this power was intended to be used with regard to cities or even counties; rather it was probably meant to enable the Commission to totally take over and run sewage service for the designated area. Nevertheless, "sewage service" is defined as "the acceptance, collection, transmission, storage, treatment and disposal of sewage, *or any one of them.*" § 61(1)(*a*). (The emphasis is added.) Thus the Commission could designate an urban area and limit its direct intervention to "any one of them." But since the approval of the Minister is necessary, it is likely that the political repercussions from designating a large city would be such that he would not grant it except in emergency conditions. Since the Commission has the other powers of compulsion mentioned above it is unlikely that such an emergency would occur. *But see* Landis, *supra* note 46, at 76.

[428] ONT. REV. STAT. c. 332, § 61(2) (1970). Once an order is made by the Commission that a contract be terminated the contract is deemed to be so and is no longer operative or binding upon any municipality or person. A similar provision applies to amendments, § 61(3).

[429] *Id.* § 61(5). If the amendment concerns the definition or designation of a sewage service area, the approval of the Minister is required.

[430] *Id.* § 61(4) and (5). The hearing requirement would appear to apply to all orders, those designating the area and those issued subsequent thereto.

[431] *Id.* § 61(6). As to the requirement of a hearing by the Commission prior to its final decision, see *supra* text accompanying note 335. The Commission may not delegate its functions under §61 to its officers, § 9.

[432] *Id.* § 61(7).

[433] *Id.* § 61(8).

available to any municipality or person required by an order to pay a rate or charge.[434] (Although the Lieutenant-Governor in Council is the cabinet, there are grounds for arguing that a hearing according to the rules of natural justice is required. It is unlikely that the Act's intent is this, but there would seem to be a stronger case for a hearing here than before the decision of the Commission as there is a "lis" involved between the petitioner and the Commission and rights will undoubtedly be affected).[435] Where a contract is terminated or amended the Commission must compensate the parties to it "for any damage necessarily resulting from the termination or amendment . . . beyond any advantage" that may be derived from the sewage service provided under the order.[436] If the Commission and a party to such a contract cannot agree, the claim for compensation shall be determined exclusively by the Ontario Municipal Board.[437] The imposition of periodic charges on municipalities would appear to be contemplated, as the Act empowers municipalities to raise money by any authorized method to meet periodic payments to the Commission as if the work were that of the municipality itself.[438] Finally, an offence is created for contravention of an order made by the Commission punishable by a fine of up to $500 for every day on which the contravention continues.[439]

The powers and functions of the Commission have been discussed only with reference to the prevention of pollution through its supervision of municipal sewage and industrial waste disposal and through its enforcement of the major prohibition in the Act concerning pollution.[440] But as has been mentioned in passing, the Commission is also concerned with the supply of water. Although supervision of the sources and means of water supply must invariably involve pollution control to some extent,[441] the Commission has powers to regulate the use of water in ways related to its supply but unrelated to pollution.[442] Nevertheless, these powers must be considered in relation to their effect on the rights of riparian owners.

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[434] *Id.* § 61(14).

[435] See R. REID, ADMINISTRATIVE LAW AND PRACTICE 34-35, 144-59 (1971); S. A. DE SMITH, JUDICIAL REVIEW OF ADMINISTRATIVE ACTION 51-80 (2d ed. 1968).

[436] ONT. REV. STAT. c. 332, § 61(9) (1970).

[437] *Id.* § 61(10). The § is worded "shall be determined by the Board and not otherwise." *Supra* note 275.

[438] *Id.* § 61(11). A municipality may also, in its discretion, with the approval of the Board, define an area which will derive special benefit from the sewage service provided and may impose a rate or charge on all owners or occupiers of land in that area, § 61(12). Presumably the method prescribed to collect payments for projects would be used by the Commission for works constructed or operated by it under an "order." *Supra* text following note 405. But it does not appear that the municipality would here be required to pay the capital cost of the facilities or services provided.

[439] *Id.* § 61(3). The limitation period would also apply to this provision. *Supra* note 322.

[440] But note that § 50 also empowers the Commission to supervise all sewage works in the province. *Supra,* text accompanying notes 337 and 343.

[441] *See, e.g.,* § 36, *supra* text accompanying and following note 377.

[442] Such powers of the Commission are not affected by the E.P.A.

As was said above, the Commission may define an area which includes a source of water supply to prohibit certain uses which are primarily aimed at the prevention of pollution for purposes of the purity of the source of supply.[443] Within such a defined area the Commission may also prohibit any act which may unduly diminish the amount of water available in the area as a public water supply,[444] and it is an offence to do an act or to take water within such an area so as to unduly diminish the supply.[445] But it is a defence if the act or taking was commenced prior to the posting of notice.[446] Since the "taking" referred to in this last provision must apply not to a single act but to a regular use of the water, it would exempt not only a riparian owner from the prohibition but also a non-riparian owner who had been so taking prior to the posting of the notice. But it would abridge the rights of anyone who acquired property abutting the source subsequent to the posting of notice. Because of the vagueness of "unduly", a subsequent riparian owner would be virtually precluded from using the water. In effect, then, the section prospectively nullifies riparian rights to a source of public water supply within a defined area.

The Act also restricts riparian rights, in a more limited fashion, with regard to all waters in the province. It prohibits the taking of more than ten thousand gallons of water per day for extraordinary purposes[447] by means of an inlet or inlets, from a surface source of supply, installed or enlarged after the coming into force of the section,[448] or of any water by means of any structure or works constructed for diversion or storage after the coming into force of the section,[449] or by a combination of the two[450] without a permit from the Commission having been obtained.[451] As well

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[443] *Supra* text following note 376.

[444] ONT. REV. STAT. c. 332, § 36(1)(c) (1970).

[445] *Id.* § 36(2)(c). The section poses certain problems as there is no indication of what it means to diminish a public water supply "unduly." But it can be argued that the offence is one of strict liability; therefore, one would be wise not to take any water from it as the taking itself is sufficient to commit the offence if in the result the amount taken unduly diminishes the supply. Knowledge that the taking would do so is probably not required.

[446] *Id.* § 36(3). *Supra* text accompanying note 380.

[447] *Supra* text accompanying note 57.

[448] ONT. REV. STAT. c. 332, § 37(3)(*b*) (1970). The provision was originally enacted by Ont. Stat. 1960-61 c. 71, § 3, *amended* Ont. Stat. 1961-62 c. 99, § 6(1).

[449] ONT. REV. STAT. c. 332, §37(3)(*c*) (1970). Originally enacted by Ont. Stat. 1960-61 c. 71, § 3.

[450] *Id.* § 37(3)(*d*). The provision also applies to ground waters taken from wells, § 37(3)(*a*). The Commission also has the power to require the owner of any land to stop or regulate the flowing or leaking of water from a well, or the diversion, flowing or release of water from a hole or excavation in the ground where the flow, leaking, diversion, or release interferes, in the Commission's opinion, with any public or private interest in any water, § 37(7).

[451] *Id.* § 37(3). The Commission has a discretion to issue, refuse, or cancel a permit, or to apply such terms and conditions, which it may subsequently alter, as it deems proper, § 37(6). On the issue of whether a hearing is required, *supra* note 335. *See also infra* note 452.

the Commission may, by notice sent to a person taking or responsible for the taking of water which interferes with any public or private interest in any water, prohibit the person from so taking without a permit.[452] However, the taking of water for domestic or farm purposes, or for fire fighting by any person, except a municipality or "company public utility," is exempted from all of the above provisions.[453] Finally, anyone who contravenes any of the prohibitions, a notice, or the terms and conditions of a permit, commits an offence subject to a fine of up to $200 for every day on which the contravention continues.[454]

The effect of section 37 on riparian rights seems minimal. The Act in no way affects a riparian owner's right to the use of a stream for primary or ordinary purposes;[455] nor has the Commission power to do so by the issuance of a notice under section 37(4). Thus, subject to the other provisions of the Act, there is nothing to prevent a riparian owner from maintaining an action for an interference with the quality of the water. And a permit issued by the Commission would not entitle its holder to interfere with a riparian owner's right to the natural flow with regard to the quantity of the water.[456] The only effects of the Act are on the use of water by riparian owners for extraordinary purposes and then only prospectively and only if the amount of water taken exceeds ten thousand gallons per day.[457] Thus riparian rights have only been affected by the statute to the extent that if more than the specified amount of water is taken, the riparian owner who began to take it by the proscribed means after section 37 became effective[458] must obtain a permit from the Commission. Thus the riparian rights to the natural flow have primarily been altered to the extent that a sewage work, approved by the Commission, may by its effluent pollute the water with immunity.[459]

An assessment of the effectiveness of the Commission in abating and controlling water pollution is difficult. However, it is clear that the Commis-

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[452] *Id.* § 37(4). The Commission must give any municipality or person on whom it proposes to serve a notice a reasonable opportunity to be heard, § 35.

[453] *Id.* § 37(4) and (5). Domestic or farm purposes are defined as "ordinary household purposes or ... the watering of live stock, poultry, home gardens or lawns," but do not include "the watering or irrigation of crops grown for sale," § 37(1). And in § 37(4) the taking of water for the watering of live stock and poultry "does not include the taking of surface water into storage for the watering of live stock or poultry." § 37(2). *Supra* text accompanying note 452.

[454] *Id.* § 37(8). The limitations period would apply also to these provisions. *supra* note 322.

[455] *Supra* text accompanying and following note 57.

[456] The approval of a water works by the Commission under § 41 does not create a presumption that water is taken by statutory authority.

[457] But the ten thousand gallons is computed on the basis of the total taken by all three methods mentioned in § 37(3). See *supra* text accompanying notes 448 and 449 and note 450.

[458] Section 37 became effective as of March 30, 1962.

[459] *Supra* text following notes 345 and 351 and note 358.

sion is diligently attempting to control water pollution in all its aspects. Research is being conducted into the effect and control of pesticides and herbicides, [460] of radioactive materials, [461] and of algae [462] on water quality and aquatic life. As well it is investigating questions involved in the supply of water and sewage disposal on a regional as well as a local basis, [463] and is conducting research into means of abating the pollution of the Great Lakes in conjunction with the International Joint Commission. [464] It is also giving increased publicity both to its activities and the problems of water pollution and water quality generally. [465] As well it has "two travelling displays on show throughout the year at local fairs and community events." [466] It conducts an annual conference on industrial wastes and other seminars on water quality control. [467] Industrial pollution would seem to be one of the prime targets of the Commission, [468] when mercury was detected in fish in the St. Clair River in 1970, the Commission issued orders to six chlor-alkali plants and mercury losses to the environment were "virtually eliminated." [469] And the recent oil spills led the Commission to adopt a surveillance and

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[460] *See, e.g.,* ANN. REP. 1966, at 30 and 34; O.W.R.C., undated pamphlet, at 13; 77 MUNICIPAL WORLD 307 (1967); and ANN. REP. 1970, at 41.

[461] *See* ANN. REP. 1966, at 25, 59 and 78 and ANN. REP. 1970, at 35.

[462] *See* ANN. REP. 1966, at 29 and ANN. REP. 1970, at 41 and 58.

[463] *See* ANN. REP. 1966, at 1, 42 and 60; The Globe and Mail (Toronto), Nov. 15, 1967.

[464] *See* ANN. REP. 1966, at 1; ANN. REP. 1970, at 6 and 36. *See also Treaty may be signed by spring: Kerr cites U.S. concessions in talks on cleaning up of Great Lakes,* The Globe and Mail (Toronto), Jan. 12, 1972, at 3, col. 3. On the treaty concerning pollution in the Great Lakes, *see* Jordan, *Great Lakes Pollution: A Framework for Action,* 5 OTTAWA L. REV. 65 (1971).

[465] *See* ANN. REP. 1966, at 2-3; Caverly, *Checks for Start-up, in* CIVIC ADMINISTRATION 48 (Nov. 1967). *See also* ANN. REP. 1970, at 10.

[466] Fisher, *What Kind of P.R. Program?,* in CIVIC ADMINISTRATION 67 (Nov. 1967); ANN. REP. 1966, at 2. The Commission also has a permanent exhibit at Niagara Falls. In 1970, 878,000 pieces of literature were distributed by the Commission, ANN. REP. 1970, at 11.

[467] *New Use for Mosquito Killer in Black Fly Control,* 77 MUNICIPAL WORLD 307 (1967). The papers delivered at the Conferences on Industrial Wastes are published. *See, e.g.,* O.W.R.C., 18th Ontario Industrial Waste Conference, June 13-16, 1971, Niagara Falls, Ontario. PROCEEDINGS (1971).

[468] *See* ANN. REP. 1966, at 19-24; ANN. REP. 1970, at 29-33. The 1970 ANN. REP. appears optimistic in the battle against industrial pollution. The Commission uses "routine surveillance visits and unannounced spot checks," at 28.

[469] ANN. REP. 1970, at 6 and 35. On March 15, 1971, the Government of Ontario issued a writ against Dow Chemical of Canada Ltd. and its U.S. parent in respect of mercury pollution emanating from Dow's Sarnia plant claiming $25,000,000 general damages for damage to the "natural environment, the fisheries and wildlife," and $10,000,000 in lieu of successful attempts to remove the mercury from the beds of the St. Clair and Detroit Rivers and Lakes St. Clair and Erie and seeking an injunction restraining the defendants from depositing more mercury or mercury compounds into the St. Clair River. Ontario claims that it owns the beds of the above-mentioned rivers and the rights of fishing above them. The Globe and Mail (Toronto), Mar. 16, 1971. *Cf.* the statement of claim in The Queen v. Interprovincial Co-operatives Ltd., issued December 10, 1970.

notification system for spills of hazardous materials.[470] However there may still be matters to be dealt with.[471] Where several plants of the same corporation discharge wastes the Commission's practice has been to require them to provide treatment facilities in order of priority, the plants discharging the most waste being attended to first.[472] The Commission is still attempting to clean up municipal sewage. In 1967, D. S. Caverley, the general manager of the Commission, stated that there would be an end to municipal pollution in the province within three or four years.[473] And a recent article stated that Ontario, through the efforts of the Commission, "is able to cope with much of its water problems."[474] It would appear, at least, that serious efforts have been and are being made in Ontario to control water quality and pollution.

Thus the Ontario Water Resources Commission Act[475] has enabled the province of Ontario to deal with problems of pollution and water quality control in a way that recourse to the judicial process could not have produced. Whereas the courts refused to consider the economic necessities of municipalities and industries which created pollution of watercourses,[476] the Ontario Water Resources Commission is designed to do exactly that, at least insofar as municipalities are concerned.[477] Through the development of projects and the designation of sewage service areas the Commission is enabled to squarely face the problem which the courts avoided, that is, the financing of municipal sewage treatment works in order to abate pollution, without placing an unreasonable financial burden on poorer municipalities.[478] By its prohibitions and the powers given to the Commission,[479] the Act has enabled a more effective control of water pollution by both municipalities and industries than the vague threat of a possible action by a lower riparian owner was able to do. As well it has enabled the regulation of forms of water pollution for which it is highly unlikely that any action would have been brought.[480]

[470] ANN. REP. 1969, at 28. And see O.W.R.C., *Interim Province of Ontario Contingency Plan, supra* note 368.

[471] See The Globe and Mail (Toronto), November 17, 1967, at 3. And see D. H. Pimlott, C. J. Kerswill and J. R. Bider, SCIENTIFIC ACTIVITIES IN FISHERIES AND WILDLIFE RESOURCES (Background Study for the Science Council of Canada, Special Study No. 15, June 1971) at 151 and 154. *But see* ANN. REP. 1970.

[472] The Globe and Mail (Toronto), Nov. 17, 1967, at 3. Only municipalities can apply to the Commission for the construction of projects. *Supra* text following note 402. It might be useful to amend the Act to allow private enterprises to do so (with, of course, Commission pressure) and repay the commission at a higher rate of interest.

[473] The Globe and Mail (Toronto), November 3, 1967, at 5. *But see supra* note 23 and *infra* note 485.

[474] Morgan, *Leaders, Money, Men and Research*, in CIVIC ADMINISTRATION 33, at 74 (Nov. 1967).

[475] ONT. REV. STAT. c. 332 (1970).

[476] *Supra* text following note 188.

[477] See note 472, *supra*.

[478] See text following notes 188 and 402, and accompanying note 473, and note 39 *supra*.

[479] See text following note 323 *supra*.

[480] See, for example, text accompanying and following note 374. *But see* The Queen v. Forest Protection Ltd., [1961] Exch. 263.

The Act, by setting up the Commission to deal exclusively with water quality control, with regard to both supply and disposal, has also enabled the continuing supervision of water quality in the province and in doing so has provided the machinery for enforcing the prohibitions against the pollution of watercourses by various methods. [481] Further, it has recognized the public interest, which the courts in a broad sense failed to do, [482] by eliminating the possibility of an injunction against an approved sewage work, [483] thus implicitly enabling the Commission to regulate the quality of water in various watercourses in accordance with the required uses to which it can be put. [484] Thus the Act has enabled the formulation of water quality controls in Ontario in the light of a consideration and adjustment of all relevant factors, from recreational to economic. In sum then it would appear that judicial reluctance to face societal issues in the courts has had the beneficial effect of forcing the legislature to directly face the problem of pollution and develop means for its effective control beyond the powers of which the judiciary is capable. [485]

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[481] See *supra* text following notes 374, 380 and 393.

[482] See *supra* text accompanying note 211.

[483] See *supra* text accompanying and following note 346.

[484] See *supra* text accompanying note 319.

[485] See *supra* text accompanying note 211. Nevertheless in recent years it has become increasingly apparent that it is not sufficient to deal with various aspects of environmental pollution in isolation. An example of this fact occurred as this paper was being revised, *see, e.g.*, Coleman, "Lonely little machine may have company: Metro ban on dumping salty snow may mean a fleet of melters," The Globe and Mail (Toronto), Jan. 14, 1972, at 5, col. 3. It appears that the E.P.A. is intended to provide coordination of all control of the environment within one department. See note 293 *supra*.

The Plumbing Code (O.W.R. Act) is amended by Ont. Reg. 209/72. As of Oct. 7, 1972 regulations under the E.P.A. concerning asphalt paving plants and disposable milk containers have been promulgated. See Ont. Reg. 183/72 & Ont. Reg. 368/72.

The Government Reorganization Act, 1972, Ont. Stat. c. 1 (1972), creates a Ministry of the Environment to replace the previous Department, § 67. The Act dissolves the Ontario Water Resources Commission, § 70(12), and repeals the provisions of the Ontario Water Resources Commission Act governing the powers and internal regulation of the Commission, § 70(48). All assets belong to, and the rights and duties of the Commission are binding on, the Crown, § 70(12). The functions previously performed by the Commission are to be continued by the Minister of the Environment and by designated officers within the Ministry, § 70; *see* especially § 70(2) (Minister), § 70(4) (Executive Director, Water Supply and Pollution Control), § 70(5) (Executive Director, Water Resources) and § 70(30), (33), (44) and (45) (Assistant Deputy Minister, Water Management). The title of the statute is now "The Ontario Water Resources Act," § 70(1), and the Commission Debt Retirement Account and Commission Reserve Account have become the "Ontario Water Resources Debt Retirement Account" and the "Ontario Water Resources Reserve Account," § 70(6), (9), (11), (35) and (38). The Act creates an Environmental Hearing Board to hold hearings, previously held by the Commission, at the request of the appropriate officers of the Ministry, § 70(9), (13), (24), (26), (27) and (42). New provisions have been enacted requiring hearings by officers of the Ministry and permitting appeals from their orders to the Environmental Appeal Board, § 70(50). *But see supra* note 332. Emergency orders are now permissible under the Ontario Water Resources Act, § 80, *id.* The Environmental Appeal Board replaces the Pollution Control Appeal Board under the E.P.A., Ont. Stat. c. 1, § 69(1) and (4) (1972). The Government Reorganization Act, 1972, is effective as of April 1, 1972, § 109(1).