

Common Law Tools for Protecting the Environment

Environmental Law Toolkit Workshop
Richard D. Lindgren
Counsel, Canadian Environmental Law Association
www.cela.ca

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Overview of Presentation

1. Introduction: Common Law Basics
2. Common Law Causes of Action: The Top 5 Torts
3. Statutory Causes of Action: Some Canadian Examples
4. Remedies: Damages & Injunctions
5. Pros/Cons of Using the Common Law to Protect the Environment

Introduction: Common Law Basics

- Predominant form of environmental law is **statutory** (legislation passed by Parliament or provincial legislatures)
- However, the **common law** (judge-made law) is still available & still used to sue polluters in Ontario & across Canada



Introduction: Common Law Basics

- Common law was developed by English, American & Canadian courts decades (even centuries) before the enactment of specialized environmental statutes
- Over time, common law doctrines were refined, amended & followed by other courts, eventually becoming binding precedents (*stare decisis*)
- However, it is open to legislatures to enact statutory laws which supplement, change or overturn the common law (e.g. Ontario EBR, section 103)

Common Law Causes of Action

- “Cause of action” = right to sue
- In a typical tort action, plaintiff alleges loss, injury or damages caused by defendant’s acts/omissions, & plaintiff seeks compensation, injunctive relief, etc.
- On the facts, plaintiff can plead various causes of action in a single Statement of Claim
- Common law has developed 5 “torts” (civil wrongs) that are often used in environmental litigation

Tort #1: Nuisance

Plaintiff alleges defendant caused **substantial** interference with property interest (e.g. physical injury to land, interference with use/enjoyment) that is **unreasonable** in the circumstances (see *Antrim* decision of SCC); depends on nature of impact, neighbourhood, etc.



Tort #2: Trespass



Plaintiff alleges defendant caused a direct/deliberate physical invasion or intrusion of something upon plaintiff's property without his/her consent

- Actionable without proof of physical harm or contamination

Tort #3: Strict Liability (*Rylands*)

Plaintiff alleges defendant brought/stored/created a dangerous substance on its property (non-natural use of land), & this substance escaped off-site & caused harm (but now see *Inco* decision of ONCA); no need to prove fault or neglect by defendant



Tort #4: Negligence



Plaintiff alleges that:

- (a) defendant owed a duty of care to plaintiff
- (b) defendant breached that duty of care
- (c) breach caused harm to plaintiff
- (d) the harm was foreseeable & not too remote

Tort #5: Riparian Rights

Plaintiff alleges upstream defendant interfered with natural quality/quantity of surface water flowing past or through plaintiff's property

- Inapplicable to groundwater; "statutory authority" defence may be available to defendant



Statutory Causes of Action

- Some Canadian legislatures have enacted **statutory** causes of action for environmental harm; these can be pleaded alongside common law causes of action in the same Statement of Claim
- Two Ontario examples:
 - (a) *Environmental Protection Act*, section 99 (loss or damage caused by spilled pollutants)
 - (b) *Environmental Bill of Rights*, section 84 (harm to public resource caused by non-compliance with an environmental law, regulation or instrument)

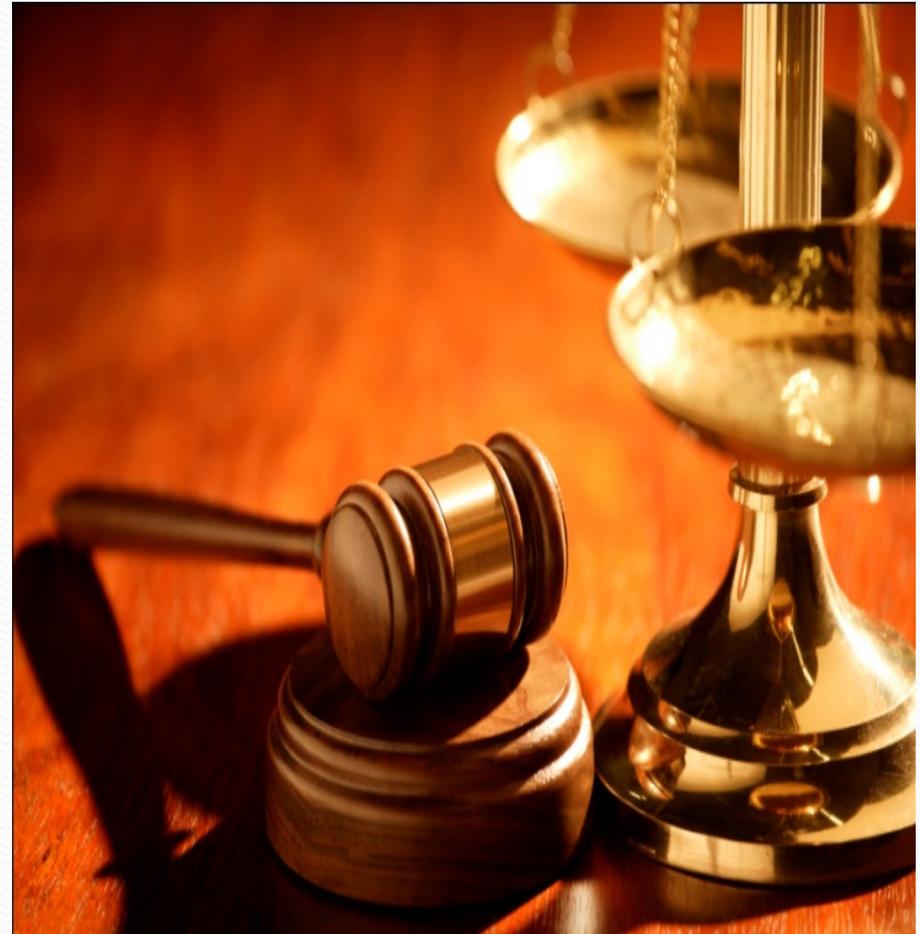
Statutory Causes of Action (cont.)

- Other examples exist at the federal level (e.g. section 22 of CEPA 1999 - “enviro protection action”)
- Other statutory mechanisms for obtaining compensation for enviro harm/remediation costs exist at the provincial & territorial level (e.g. Yukon, Nunavut, NWT, BC, Alberta, etc.)
- Civil liability for environmental harm can also be imposed under the Civil Code of Quebec (CCQ codifies societal rules; no doctrine of *stare decisis*)

Remedies: What can the Court Order?

Environmental plaintiffs typically ask the Court for:

- (a) damages (general, special, punitive)
- (b) injunction order (prohibitory/mandatory)
- (c) costs (legal & expert fees/disbursements)
- (d) other appropriate relief



Pros of Using the Common Law

- If successful, environmental plaintiff may obtain judicial redress against current/future harm
- Plaintiff is faced with a lower standard of proof (balance of probabilities) than what is required in criminal prosecutions (beyond reasonable doubt)
- Rules of Civil Procedure are designed to encourage settlement without trial (e.g. production/disclosure, examination for discovery, offers to settle, etc.)

Cons of Using the Common Law

- Civil litigation in the environmental context is complex, slow-moving, uncertain, & expert-intensive
- Expensive & risky: plaintiff bears own legal/expert costs & likely pays defendant's legal/expert costs if the action is dismissed (“costs follow the event”)
- Difficult to prove causation, especially if health-based claims are being advanced by plaintiff
- Standing (status to sue): common law causes of action designed to protect private property/interests