

Three Arguments for First Nation Public Nuisance Standing

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Attempts to use the common law tort of public nuisance to protect the natural environment have generally been frustrated by the judicial rule that such a claim can only be brought by the Attorney General, his or her designate, or someone who has suffered a special harm from a public nuisance. Recent developments in Aboriginal law, however, present a number of compelling reasons to re-evaluate this rule of public nuisance standing. Assuming that these arguments are successful, a First Nation might choose to assert a claim in public nuisance as a less complex alternative to rights and title litigation, or as a means of avoiding the political controversy that might be generated by a title- or rights-based claim (for example, a claim in respect of private land).

The arguments in favour of First Nations public nuisance standing are three-fold. First, since the honour of the Crown is at stake in dealings with Canada's First Nations, the Attorney General may not be entitled to decline a First Nation permission to bring a claim in public nuisance. Second, since Aboriginal rights are defined in terms of activities which are "inherent" to the culture of the First Nation, any public nuisance which does or is likely to have a direct or indirect impact on those rights will, almost by definition, affect the First Nation in a manner different from the rest of the public. This will generally amount to "special harm", and consequently allow the First Nation to bring a claim in public nuisance. Third, a First Nation's own laws and rules governing who may speak for the nation and its public may provide standing to bring a claim in public nuisance. Taking these arguments together, it is likely that a First Nation will be able to establish standing to bring a claim in public nuisance related to environmental harm within its territory. They also represent a compelling reason to re-examine the public nuisance standing rule more generally.

I INTRODUCTION

While the law of torts is primarily focused on redressing private wrongs, the legal concept of public nuisance is a flexible tool designed to protect the rights of the public at large. Although commonly associated with the more frequently used tort of private nuisance, public nuisance has a very different history, originating as a common law criminal offence, and only subsequently evolving into an action that is enforceable through civil tort law.

While members of the public concerned with environmental harms, public morality, public health and other matters that affect a large section of the public have been drawn to the tort of public nuisance, the usefulness of the tort to the public-minded litigant has been undermined by the restrictions on who may bring a claim to redress a public nuisance. As a general rule, only the Attorney-General, or his or her designate, may bring a claim in public nuisance. The primary exception to this rule concerns persons who have

suffered a “special” harm—that is harm over and above harm suffered by the public at large.

However, Canada’s First Nations may have a claim to such standing where their traditional use of land or resources is affected. While a First Nation will often prefer to bring a claim based on Aboriginal rights, there may be cases in which a First Nation might choose to seek relief based on a claim in nuisance.

Part II of this article examines why a First Nation, assuming that it has standing to bring a public nuisance claim, might wish to do so. Lawyers advising First Nations should be aware of the advantages and disadvantages of such a claim, including the possible political benefits of identifying one’s claims with the rights of the public and the potentially simpler evidentiary burden in a public nuisance case.

Part III discusses the public nuisance standing rule, including its history. The rule provides that only the Attorney General, someone with his or her permission, or someone who has suffered “special harm” as a result of a public nuisance may bring a public nuisance claim before the courts. This rule has been abandoned in constitutional challenges, administrative challenges and other challenges of government decisions. Academic commentators have criticized the continued use of the more restrictive, standing rule in respect of public nuisance claims; however, to date, the courts have not relaxed their approach to standing in such cases.

Part IV then points out that developments in Aboriginal law might challenge this restrictive rule of public nuisance standing, at least as it is applied to First Nations litigants. First, since the honour of the Crown, and in some cases a fiduciary duty, is at stake in dealings with First Nations, it is unclear whether the Attorney General can refuse permission to a First Nation seeking to bring a claim in public nuisance where the First Nation’s interests are affected by the nuisance. Second, since Aboriginal rights are defined in terms of activities which are “inherent” to the culture of the First Nation, any public nuisance that has a direct or indirect impact on those rights will, almost by definition, affect the First Nation differently than the rest of the public. This will generally amount to “special harm”, thus allowing the First Nation to bring a claim in public nuisance. Third, the courts have held that the customary laws of an Aboriginal group can determine who has standing to bring a claim on behalf of that group. This, combined with the unique role of First Nations in Canada, suggests that Aboriginal customary practices and laws may themselves be able to provide a representative of a First Nation with standing to bring a claim in public nuisance. In combination these three arguments represent a potent challenge to the public nuisance standing rule, and a compelling reason to abandon the rule generally.

II WHY PUBLIC NUISANCE?

The Supreme Court of Canada, in *Ryan v. Victoria*, provides a working description of the tort of public nuisance based on the academic literature:

The doctrine of public nuisance appears as a poorly understood area of the law. “A public nuisance has been defined as any activity which unreasonably interferes with the public’s interest in questions of health, safety, morality, comfort or convenience.” Essentially, “[t]he conduct complained of must amount to ... an attack upon the rights of the public generally to live their lives unaffected by inconvenience, discomfort and other forms of interference.”¹

It may sometimes be difficult to apply these tests to determine whether a public nuisance exists in law. Fortunately, there is a large body of case law applying the tort of public nuisance to a wide range of environmental problems, and in many cases the easiest way to establish that a public nuisance exists may be by reference to earlier cases. Mario Faieta’s review of public nuisance cases reveals that “the common law has recognized a public right to clean air and to clean lakes, rivers and other watercourses.”²

It is obvious, given the emphasis on public rights in public nuisance claims, and the history of public nuisance claims as a tool for environmental protection, why the tort has been called an “obvious choice” from the perspective of a public interest environmental litigant.³ Against the private rights of a polluting company to carry on business, the public interest litigant seeks to assert the right of the public not to be exposed to pollution.

Notwithstanding the attractiveness of public nuisance claims, the tort has not, to date, lived up to its potential as a tool for environmental protection, primarily due to the limited, and somewhat uncertain, circumstances in which a public interest plaintiff can obtain standing to bring a claim. As Professor McLaren noted in 1972, the tort fails to provide environmental relief due to the “restrictive nature of the rules surrounding the private action in public nuisance, and the unsatisfactory state of Canadian case authority.”⁴ These limits are discussed in more detail in Part III of this article.

1 *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at 236, citing L. Klar, *Tort Law*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 525, and G.H.L. Fridman, *The Law of Torts in Canada, Vol. I* (Toronto: Carswell, 1989) at 168.

2 M. Faieta *et al.*, *Environmental Harm: Civil Actions and Compensation* (Toronto: Butterworths, 1996) at 46. Faieta also discusses cases in which public nuisance claims have been successfully brought in respect of soil contamination, harm to wildlife and other environmental matters.

3 J.P. McLaren, “The Common Law Nuisance Actions and the Environmental Battle—Well-tempered Swords or Broken Reeds?” (December 1972) 10:3 *Osgoode L.J.* 505 at 511.

4 *Ibid.* at 515. The Canadian courts have addressed one of the restrictions identified by Professor McLaren by holding that a nuisance may be both a private and public nuisance at the same time: *Sutherland v. Vancouver International Airport Authority*, (2002), 4 B.C.L.R. (4th) 205 at 215-16. The result is that the fact that a nuisance affects a large group of people will not

Advantages of Public Nuisance for a First Nation

In Part IV of this article I outline three arguments that a First Nation plaintiff could advance to overcome the limitations of the rules concerning who can bring an action in public nuisance. While it may be obvious why an environmental litigant might wish to bring a claim in public nuisance, it is necessary to address up front the question of why a First Nation, which could presumably ground a claim on Aboriginal rights or title, might choose to bring a claim in public nuisance.

At first glance First Nations have a wide range of legal options, and it may seem unnecessary to turn to public nuisance law for an additional tool. However, despite advances in Aboriginal law, there are still significant political, economic and legal limitations arising from such claims. Of course, public nuisance litigation also faces formidable barriers. However, these barriers are different from, although not necessarily less than, those posed by conventional Aboriginal law strategies: understanding the tactical advantages of one over the other allows counsel to best advise his or her clients. A First Nation may choose to advance their interests through a claim based on public nuisance or Aboriginal rights, or both.⁵

If the hurdle of standing in public nuisance cases—discussed in Parts III and IV—is resolved, there are three main differences that a First Nations client should consider when choosing between a claim in public nuisance and more traditional Aboriginal law claims.

Issues of Proof and Complexity

Aboriginal title cases are some of the most complex litigation of any type, involving countless days of oral testimony, historical documents and other complex and contentious evidence. Aboriginal rights claims may be more modest, but can nonetheless be complicated. In both cases a large volume of evidence is required to prove the existence of the rights being asserted. Cases that have gone ahead have often been highly intricate and extremely expensive.

necessarily deprive that group of the right to bring claims in private nuisance. However, other barriers continue and Professor McLaren's statement remains accurate today.

5 Both causes of action may easily be pleaded in the alternative. There should be little additional risk in doing so in cases where a clear public nuisance exists and where the evidence of the existence of a right is relatively straightforward. In some cases it may be more practical to plead both; as discussed in Part IV, obtaining standing for public nuisance may require a First Nation to demonstrate at least a strong *prima facie* case that the nuisance has affected rights and title. Since one would be pleading the existence of such rights in either private or public nuisance cases, a claim in the alternative makes some sense. Note, however, that title requires proof of occupation and use of a very specific area, whereas the test for standing may be satisfied if there is a strong *prima facie* case that title exists at some place within the area affected by the nuisance.

Consider the hurdles facing in the most recent land title case, *Tsilhqot'in Nation v. British Columbia*.⁶ This case involved a 339-day trial and proceeded in large part due to an advance cost award, and reportedly costing almost \$30 million at the trial stage alone. After presenting mountains of paper and oral evidence, the plaintiffs failed to obtain a declaration of their title rights due to a defect in their pleadings.⁷

By contrast, in most public nuisance cases the primary question is whether or not the actions complained of amount to a public nuisance. Fortunately, there is a wide body of case law establishing that air and water pollution, destruction of forests, and other environmentally destructive behaviour can constitute a public nuisance.⁸ While the facts can be complex, and other legal issues can be raised, the core of the issue is often far simpler than in rights or title litigation.

The question of standing represents the most formidable barrier to the use of public nuisance claims to address environmental problems, and that is the barrier that Part IV seeks to address. If standing is established, on the basis of any of the three arguments advanced in Part IV, without the necessity of proving the existence of rights and title, then a nuisance claim may be a far simpler matter than a title or rights claim.⁹

Even if I am wrong, and a First Nations plaintiff must prove the *actual* existence of a right or title in order to obtain public nuisance standing, there is no need for a broad claim of rights or title; the First Nation only need be able to demonstrate its rights in respect of some part of its territory that is impacted by the nuisance.¹⁰

6 *Tsilhqot'in Nation v. British Columbia*, 2007 B.C.S.C. 1700.

7 Specifically, the pleadings only sought a declaration of title over the whole of the lands described in the pleadings and did not set out or request declarations in respect of smaller areas of the plaintiff's territory: *ibid.* at paras 120-129.

8 See *Faieta et al.*, *supra* note 2 for discussion of the limits of an action in public nuisance.

9 In some cases it may even be possible to resolve the issue of standing at an early stage of the proceedings, thus greatly simplifying the rest of the case. This could most obviously occur if the defendant were to apply to strike the claim in public nuisance, allowing the court to make a preliminary ruling on the law: see B.C. Supreme Court Civil Court Rules, s. 19(24). However, the issue might be put before the court in other ways: Court Rules, ss. 18A (application for summary trial on the issue of standing), 33 (statement of a special case, either by consent of the parties or by order of the court), and 34 (proceedings on a point of law, by consent of the parties or by order of the court).

10 One colleague suggested that the real question is not whether to bring a claim based on Aboriginal rights or public nuisance, but whether or not to bring a claim based on private or public nuisance. I assert, in Part V, that a First Nation's standing for a claim in public nuisance can be obtained without proof of the specific existence of the right or title that has been affected by the nuisance; whereas such rights-specific evidence is required for a claim based on private nuisance. See also *infra* note 18 for a discussion of whether proof of specific rights is a prerequisite for a claim in damages. If, however, these arguments are incorrect, and a Nation bringing a claim in public nuisance must also lead the onerous evidence necessary to prove Aboriginal rights, then it may be that in some cases there is little difference between the

There is probably less difference between the two approaches for a First Nation seeking an interim injunction; at the interim injunction stage a plaintiff need not prove their case and a title and rights case is generally far less complicated. Even at this point, however, there may be some differences between the causes of action. For example, the courts may be more willing to consider the negative impact of the nuisance on other members of the public in the context of a public nuisance claim, and not only on the plaintiff, when assessing the balance of convenience.¹¹

Aboriginal law has developed another partial solution to the complexity of rights and title litigation: petitions to challenge particular government actions based on the failure to consult a First Nation on decisions that affect their alleged rights and title.¹² Consultation-based petitions can avoid the need for a full trial (relying instead on affidavit evidence) and are far simpler as it is necessary only to demonstrate a strong *prima facie* claim to title or rights. However, these petitions are only available to challenge government actions: the courts have indicated that it is only the Crown that owes a duty to consult to Aboriginal peoples.¹³ These petitions have no role where the action complained of is primarily a private action with no real government involvement.¹⁴ Moreover, it will not be possible to win such a petition if the Crown has, in fact, adequately consulted the affected First Nation. While such petitions are important tools in the toolkit of lawyers advising Aboriginal clients, they will not always remove the need for public nuisance claims.

Political Implications

Conceptually, a public nuisance action is an action on behalf of the public. While a First Nation may nominally be the plaintiff, in law the First Nation can speak, not only on its own behalf, but on behalf of British Columbia's "public" as well. This may be troubling for some Aboriginal litigants. It

elements of the two claims. The First Nation would be in the position that the land owners were in *Sutherland v. Vancouver International Airport Authority*, *supra* note 4, in which it was held that private land owners that suffered a nuisance from noise from the airport were "specially affected" and therefore also had the ability to bring a claim in public nuisance.

11 It is true that if standing is granted on the basis of special harm (see *infra* notes 41 to 51) the main role of the plaintiff is to demonstrate that the nuisance has harmed them in particular, and in a different manner from the rest of the public. However, even then the nature of the tort is that the harm has been suffered by all of the public, and it would be inconsistent of the court not to take note of harm suffered by other members of the public when assessing the balance of convenience. Moreover, if standing is granted to bring an action as a relator action or on the basis of public interest standing (see *infra* notes 54 to 67) then the suit is actually brought on behalf of the public at large, and the court must consider all harm suffered by the public.

12 *Haida Nation v. British Columbia et al.*, [2004] 3 S.C.R. 511, 2004 SCC 73.

13 *Ibid.*

14 While such challenges can only be brought against the Crown, private parties may, of course, be included as interested third parties. However, the primary focus is on the actions of the Crown in consulting the First Nation.

might be seen as implying that the First Nation is merely a subset of “the public,” which overshadows the unique status and rights of that Nation. There may also be concerns that a public nuisance claim advances public rights that the non-Native litigants might later use against the First Nation.¹⁵

Nonetheless, there are circumstances in which a Nation may wish to build common cause with the non-native community. This may be politically powerful where there are clear common interests between the First Nation and segments of the settler population, or where it may be politically controversial to directly assert the Nation’s rights.

For example, a First Nation might wish to oppose logging on private land that harms key wildlife habitat or drinking water. While First Nations can, and have, asserted Aboriginal rights and title in respect of private lands,¹⁶ many First Nations may be reluctant to do so because of the potential of such claims to cause a political backlash. A public nuisance claim, however, does not directly assert Aboriginal title over the land, but rather asserts a general public interest in certain resources. It may be easier politically to bring such a claim—especially if a broad coalition of interests opposes the logging—on the basis of public nuisance. A coalition might also be able to help raise funds to pay for the litigation, share the risk of adverse costs and bring political pressure to bear.¹⁷

Remedies

A lawyer considering what type of action to bring will also want to consider the remedies available. The final remedy in an Aboriginal rights or title claim is typically a declaration of the First Nation’s rights. A petition based on a failure to consult will often result in an order that the government consult further and make efforts to accommodate a First Nation’s concerns.

In a public nuisance case, however, injunctive relief against a specific nuisance-causing activity will be the primary relief. There is also a possibility of damages, although this will be available only where First Nations plaintiff has fully demonstrated the extent of its loss.¹⁸

15 For example, a claim in public nuisance related to damage to a fisheries resource might be based, in part, on the public’s right to fish and to the protection of fish habitat; however such rights have been raised in opposition to First Nations commercial fisheries: for example, *R. v. Kapp*, 2003 B.C.P.C. 279, reversed 2004 B.C.S.C. 958, affirmed on appeal 2006 B.C.C.A. 277 and 2008 SCC 41.

16 For example, *Hunt v. Halcan Log Services Ltd.*, (1986), 15 B.C.L.R. (2d) 165 (S.C.).

17 Other members of the coalition may also appear as co-plaintiffs, particularly if they have also suffered financial loss or prospective loss from the public nuisance. Given the restrictive rules around standing, discussed in Part III, it may be that such plaintiffs would ultimately not be allowed to proceed.

18 It is unclear exactly when damages can be claimed in a public nuisance claim of this type, and whether a First Nation will need to fully prove its rights or title claims before obtaining an order for damages; further judicial direction will be required. In *British Columbia v. Canadian*

Summary of Part I

There are many differences between claims grounded in Aboriginal rights and those based on public nuisance. In many cases a First Nations client will be interested in establishing its rights to land and resources, and a claim based on those rights will be most appropriate. However, where the purpose of bringing a claim is to stop a nuisance activity, and not specifically to assert rights, the evidence required for a public nuisance claim may be considerably less complex than for many Aboriginal rights or title claims. Moreover, there may be some cases where there are political reasons to advance a claim that emphasizes the First Nation's common cause with the public at large. Finally, the opportunity to obtain injunctive relief through a public nuisance claim may be attractive. A lawyer should understand the strengths and weaknesses of a public nuisance claim so as to best advise his or her clients.

III PUBLIC NUISANCE STANDING

As noted in Part II, public interest litigants have not generally been able to use public nuisance claims to right public wrongs. This is primarily due to the limitations of the “public nuisance rule of standing”—the rules about who can bring a claim on behalf of the public. The basic rule of standing for public nuisance cases is that it “can be asserted in a civil action only by the Attorney General as the Crown officer representing the public,” by his or her designate, or by a private person “for an alleged or anticipated breach of the law only where that breach would constitute a breach of his private rights or would inflict ‘special’ or ‘peculiar’ damage upon him.”¹⁹

This rule arises from the common law understanding of the role of the Attorney General in protecting the public interest and as guardian of criminal law.²⁰ Commentators on the tort of public nuisance frequently point

Forest Products Ltd., [2004] 2 S.C.R. 74 (“*Canfor*”) (*supra* note 40) the Supreme Court of Canada found that a public nuisance could result in a damages claim for loss of environmental values, and independent of the impact of that loss on private rights. However, in that case the Crown was the plaintiff and the Court suggested that the Crown’s ability to sue for these damages was based on its *parens patriae* role in relation to public environmental rights. Nonetheless, a First Nation with a well-developed environmental restoration plan might argue that damages should be awarded to allow it to implement such a plan. In terms of damages to compensate loss that is distinct to the First Nation, I initially thought that proof of the particular rights that had been harmed by the nuisance (the Aboriginal rights) would clearly be necessary before a First Nation could be awarded compensation through a claim in either public or private nuisance. On reflection, however, the better view is that it should be enough for the First Nation or its members to demonstrate financial loss; this is all that was required for the non-Indigenous plaintiffs in the cases cited *infra* at notes 25 to 27.

19 *Stein v. Gonzales et al.*, (1984) 58 B.C.L.R. 110 (S.C.) per McLachlin J. at 112.

20 Interestingly, it is possible for a private prosecutor to initiate and carry on a criminal prosecution without the Attorney General’s permission, although the Attorney General does

to its historical origins as a common law criminal offence, where the offences were “a variegated assortment of petty offences whose common element was obstruction, inconvenience, or damage to the public in the exercise of rights common to all.”²¹

Public nuisance did not remain purely a criminal offence. Over time the courts came, first, to allow the Attorney General to bring a civil action to obtain an injunction against an ongoing or anticipated public nuisance, and then to allow an individual who suffered special harm from the public nuisance to claim damages and injunctive relief.²² However, the courts continue to view the standing of an individual who suffers “special harm” as a deviation—to be interpreted narrowly—from the otherwise exclusive role of the Attorney General as guardian of the public interest:

The policy behind this rule is that the public and criminal jurisdiction of the court is not to be usurped in a civil proceeding. As long as the suffering or inconvenience is general, there is no place for independent intervention by private citizens. This rule, which prevents individuals from taking upon themselves the role of champions of the public interest, has been said to be established “for the purpose of preventing oppression by means of a multiplicity of civil actions for the same cause”²³

What is meant by “special harm” is less than clear at common law. There are two main competing theories, and case law to support both.

The first theory holds that special harm must be different in type from the harm suffered by the public at large: it is not sufficient to be different in degree. Thus, in *Hickey v. Electric Reduction Co. of Canada Ltd.*,²⁴ fishermen who sued for a toxic spill that had destroyed a public fishery were held not to have suffered special damage. Since the public right to a fishery is, at common law, a right possessed by all members of the public, the fishermen, according to the court, merely suffered a greater economic loss as a result of

have the power to intervene and take over or stay the proceedings. The public nuisance rule is more restrictive, however. This discrepancy is discussed in S. Elgie and A. Lintner, “The Supreme Court’s *Canfor* Decision: Losing the Battle but Winning the War for Environmental Damages” (2005) 38 U.B.C. L. Rev. 223 at 237-38. It should be noted that in Canada the existence of a common law criminal offence of public nuisance has been entirely displaced by the Criminal Code: Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 9. There is a codified version of the offence of common nuisance: s. 180. Nonetheless, despite severing the civil tort of public nuisance from its common law criminal aspect, to date the civil tort retains the standing restrictions arising from its criminal law origin.

21 J. Fleming, *The Law of Torts*, 7th ed. (Melbourne: Law Book Company Limited, 1987) at 380, quoted in Ontario Law Reform Commission, Report on the Law of Standing (Ministry of Attorney General, Ontario, 1989) at 12.

22 Fleming, *ibid.*

23 Stein, *supra* note 19.

24 (1972) 21 D.L.R. (3d) 368 (N.S.S.C.). *Hickey* seems to have had a disproportionate impact on the discussion of the appropriate test for standing given the number of cases that have adopted a broader approach and the fact that it is a lower court decision.

the damage to the fishery, and not a different type of loss. This was held not to be special harm.

The second theory holds that special harm can include a greater amount of harm of the same type. In a series of Ontario court cases, individuals who suffered a disproportionate degree of harm as a result of the obstruction of a public highway²⁵ or a navigable river,²⁶ or the contamination of a river,²⁷ were able to recover damages, notwithstanding that all members of the public had the rights at issue. The apparent contradiction between these two approaches has been noted by the courts and remains a live issue.²⁸

Although the courts have been willing to expand public nuisance standing to include cases where there is a “special harm”, they have generally resisted further expanding the common law’s interpretation of who can represent the public interest. Even local governments, who might seem to be well placed to represent the interests of that segment of the public, cannot generally claim standing to bring a claim in public nuisance.²⁹ While there is some debate about how the public nuisance rule is to be applied, there is no question that it has represented a significant barrier to members of the public suffering from serious environmental harm.

Developments in Public Nuisance Standing

The public nuisance standing rule has come in for some judicial and academic comment over the past few decades. Most notably, while Canadian courts have continued to apply the rule in public nuisance cases, they have stopped applying it to a wide range of public interest cases.

The public nuisance rule once applied not only to public nuisance claims, but also to constitutional and administrative law challenges to government decisions where the petitioner lacked a legally recognized interest distinct from the rest of the public. Members of the public seeking to challenge a government decision faced the same barriers as a member of the public

25 *O’Neil v. Harper*, (1913) 13 D.L.R. 649 (Ont. S.C. App. Div.); *Muirhead et al. v. Timber Bros. Sand and Gravel Ltd. Et al*, (1977) 3 C.C.L.T. 1 (Ont. H.C.).

26 *Drake v. Sault St. Marie Pulp & Paper Co.*, (1898) 25 O.A.R. 251; *Ireson v. Holt Timber Co.*, (1914) 18 D.L.R. 604 (Ont. S.C. App. Div.); *Crandell v. Mooney*, (1878) 23 U.C.C.P. 212 (C.A.); *Rainey River Navigation Co. v. Ontario and Minnesota Power Co.*, (1914), 17 D.L.R. 885 (C.A.); and *Rainey River Navigation Co. v. Wastrous Island Boom Co.*, (1914), 26 O.W.R. 456 (C.A.).

27 *Watson v. City of Toronto Gas and Water Co.*, 10 Vic. 158 (Upper Canada Q.B., Hilary Term) at 163.

28 *Gagnier v. Canadian Forest Products*, (1990) 51 B.C.L.R. (2d) 218 (S.C.), in which the court refused to strike a claim for public nuisance in a preliminary motion, explicitly noting, at 230, the tension between *Hickey*, *supra* note 24, and some of the Ontario cases listed at note 26.

29 *St. Lawrence Rendering Co. v. Cornwall (City)*, (1951), [1951] O.R. 669, [1951] 4 D.L.R. 790, 1951 Carswell Ont 74 (H.C.); *Oak Bay (District) v. Gardner* (1914), 19 B.C.R. 391, 6 W.W.R. 1023, 17 D.L.R. 802, 1914 Carswell BC 238 (C.A.), but see *Guelph v. The Canada Company*, (1854) 4 Grant 632.

bringing a public nuisance claim. Unless he or she had suffered some type of special harm, the decision could only be challenged with the permission of the Attorney General. Since the Attorney General is a representative of the government that made the decision (unless it was made by a local government or arms-length government body), this was frequently not forthcoming.

Starting with the 1973 Supreme Court of Canada decision in *Thorson v. Attorney General*,³⁰ however, the Canadian courts have moved away from applying the public nuisance rule of standing in the context of challenges to government decisions. Instead, the courts have adopted a public interest rule of standing in which a member of the public can bring a court challenge provided that certain tests of interest and public significance are met. These more relaxed standing requirements were adopted first in constitutional cases,³¹ and subsequently in challenges to administrative decisions made by government.³² In the context of these cases the courts addressed and dispensed with many of the traditional objections to a broader public interest standing rule, such as the fear of a multiplicity of actions or of abuse of process. For example, in *Thorson*, Laskin J. rejected this argument and stated that courts are “quite able to control declaratory actions, both through discretion, by directing a stay, and by imposing costs”³³

It is now well established that in constitutional or administrative law proceedings a court may choose to grant a public interest litigant standing on the basis of a “public interest standing” test.³⁴ As a result, public nuisance cases are now almost the only area of the law where the restrictive public nuisance standing rule is still required by the courts. There has been limited judicial consideration of whether the modern public interest standing rule should be extended to public nuisance cases, although Laskin J., in *Thorson*, did distinguish the issue of standing in public nuisance cases from standing in constitutional cases because a public nuisance claim “involves no question of the constitutionality of legislation, there is a clear way in which the public interest can be guarded through the intervention of the Attorney General who would be sensitive to public complaint about an interference with public rights.”³⁵

30 *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138.

31 *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575.

32 *Minister of Finance of Canada v. Finlay*, [1986] 2 S.C.R. 607.

33 *Supra* note 30 at 145.

34 The public interest standing test was articulated by the Supreme Court of Canada in *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 at 253:

First, is there a serious issue to be raised as to the invalidity of the legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

35 *Supra* note 30, para. 14 at p. 150.

This explanation did not quell calls for the expansion of the new public interest standing rule to cover public nuisance cases. For example, in the 1980s the Law Reform Commissions of both B.C. and Ontario called for a relaxing of the requirements of standing in public nuisance cases.³⁶ The Ontario Commission criticized the absolute control of the Attorney General, describing it as “offensive and not compatible with our notions of who ought to have access to the judicial process in the face of widespread harm caused to all, or a significant segment, of the community.”³⁷

Academic comment on the public nuisance standing rule has also been highly critical, using terms such as “illogical”, “absurdly technical” and “unfortunate.”³⁸ Stuart Elgie and Anastasia Lintner, in particular, criticize the view that the Attorney General can necessarily be expected to be “sensitive to public complaint about an interference with public rights” as “fictitious”. They point out that Attorneys General “are influenced by a variety of political and fiscal limitations—and their decision not to pursue a particular public nuisance claim certainly cannot be taken as an indication that the claim lacks merit or is not in the public interest.”³⁹

With over 30 years of experience in public interest standing cases, it is still possible that the courts could decide to further extend that rule to apply to public nuisance cases. The reasons for loosening the standing requirements for public nuisance cases are most compelling in the context of First Nations litigants. These reasons are considered in Part IV.

36 Law Reform Commission of British Columbia, Report on Civil Litigation in the Public Interest (Ministry of Attorney General: Victoria, B.C., 1980); Law Reform Commission of Ontario, *supra* note 21.

37 *Supra* note 21 at 2-3. The L.R.C. of Ontario went on to say:

The contemporary world is one in which adherence to a strict separation of the ‘public interest’ and the ‘private interest’ of individual members of society can no longer be justified. As one commentator has argued, “new values have developed which people feel are worthy of protection but which cannot be accommodated by the traditional restrictive standing criteria. Broader social, economic, religious and non-economic values outside established property criteria are justly prized and protection sought against their infringement.” Accordingly, we can now say that, as a matter of principle, it is precisely because the wider community itself is prejudicially affected by some large-scale wrong-doing that individual persons—those who, are all, are the community—should be entitled to seek relief in our courts of law.

38 Elgie and Lintner, *supra* note 20 at 223-34, summarizing other academic comment including: J. McLaren, *supra* note 3 at 511; P. Mercer, “The Citizen’s Right to Sue in the Public Interest” (1983) 21 U.W.O.L. Rev. 89 at 93; T. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto: Carswell, 1986) at 27; A. Roman, “Locus Standi: A Cure in Search of a Disease?” in J. Swaigen, ed., *Environmental Rights in Canada* (Butterworth, Toronto: 1981) 1 at 46; W. Wade, *Administrative Law*, 7th ed. (Oxford: Clarendon Press; New York: Oxford University Press, 1994) at 607; B. Bilson, *The Canadian Law of Nuisance* (Toronto: Butterworths, 1991) at 51 to 64.

39 Elgie and Lintner, *ibid.* at 243.

IV FIRST NATIONS AND STANDING

Aboriginal peoples stand in a special relation to the Crown and to the laws of Canada. They have lived in Canada from time immemorial, and they have had the benefit of the clean air, water, waterways, fish, animals and other resources that the land has had to offer. Under Canadian law, actions that interfere with these environmental resources may amount to a public nuisance,⁴⁰ but the First Nations used these resources long before the settler population had an interest in them. The First Nations have a cultural attachment and relationship to these resources, and that is now given legal effect by the Canadian courts.

The interface between the rights of the public in respect to natural resources and the rights of Aboriginal peoples who have used those same resources since before Canada (and its public) existed is a complex one. The idea that First Nations can and should bring actions to protect the public's rights could be criticized as suggesting that First Nations are just another part of the public—an idea that ignores First Nations' prior claims to Canada's land and resources. My intention is not to diminish the historic and ongoing relationship of First Nations with their territory, but to point out that the common law can recognize this relationship even in the context of public nuisance actions.

As the title of this article suggests, there are at least three reasons that Aboriginal law, as it has developed in Canada, requires a major rethinking of how standing is defined in public nuisance actions. The following questions must be considered:

1. Do the Crown's duties to a First Nation allow the Attorney General to decline a First Nation's request for permission to bring a suit in public nuisance?
2. Does a First Nation's rights and special relationship to their territory mean that they will inevitably suffer "special harm" when some types of public nuisance take place?
3. Can the customary law of a First Nation give appropriate members of that Nation standing to bring a claim in public nuisance?

Relator Actions and the Crown's Fiduciary Duty to the First Nation

At common law, the Crown, as represented by the Attorney General, has the ability to bring public nuisance claims on behalf of the public, or to grant permission to others to bring a claim in the Attorney General's name (known as a "relator action"). Moreover, the courts have held that the discretion of the Attorney General in deciding whether or not to bring a public nuisance

40 *Canfor*, *supra* note 18.

claim, or to give his or her consent to a relator action, is not open to review by the courts.⁴¹

When the Canadian courts developed new rules on public interest standing in constitutional and administrative law cases, allowing public interest litigants to challenge government decisions without the consent of the Attorney General, they did so not by reviewing the Attorney General's decision, but by asserting an authority to allow the action to proceed notwithstanding that there was no consent. Laskin J., writing in *Thorson*, affirmed the traditional rule that the Attorney General's discretion is beyond the authority of the courts, but went on to say:

.... where all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the court must be able to say that as between allowing a taxpayer's action and denying any standing at all when the Attorney General refuses to act, it may choose to hear the case on its merits.⁴²

As one commentator explained, Laskin's position is not for the court to "control" the Attorney General's discretion" but to "look at the exercise of such discretion and ... decide to accord standing in spite of the Attorney General's refusal."⁴³ This distinction allows the courts to grant standing without the constitutional issues arising from a direct challenge to the Crown's royal prerogative powers.⁴⁴

Although the traditional reluctance of the courts to interfere with the exercise of royal prerogatives in general, and with the discretion of the Attorney General in granting his or her consent to a relator action in particular, is well established, it seems possible that in Canada this otherwise firm rule might be challenged through the unique obligations that the Crown owes to First Nations.

The Crown, when making decisions that may affect the interests of a First Nation, must act in a manner consistent with the honour of the Crown.

41 *Gouriet v. U.P.W.*, [1978] A.C. 435 (H.L.), rev'g [1977] Q.B. 729 (C.A.); *Grant v. St. Lawrence Seaway Authority*, [1960] O.R. 298 (Ont. C.A.), citing *London Council v. The Attorney General* [1902] A.C. 165.

42 *Thorson*, *supra* note 30 at 161. Laskin J. also cites Lord Denning's *obiter* statements on this distinction from *Attorney General ex rel. McWhirter v. Independent Broadcasting Authority*, [1973] Q.B. 629 (C.A.) at 649:

I am of the opinion that, in the last resort, if the Attorney General refuses leave in a proper case, or improperly or unreasonably delays in giving leave, or his machinery works too slowly, then a member of the public, who has a sufficient interest, can himself apply to the court itself.

43 J.M. Johnson, "Locus Standi in Constitutional Cases after *Thorson*" (1975) Public Law 137, cited in Law Reform Commission of British Columbia, *supra* note 36, at 15.

44 *Ibid.* Johnson writes: "The distinction is subtle but important, for a direct assault on the Attorney General's discretion might have constitutional ramifications in that the latter's powers in this regard derive from the royal prerogative, not statute, and are therefore thought not to be reviewable by the courts without the aid of specific statutory authority."

In some cases the Crown may actually acquire a fiduciary duty to act in the best interests of a First Nation. These obligations have taken on a quasi-constitutional status with the enactment of section 35 of the *Constitution Act, 1982*.

Before considering the precise nature of these obligations, it is worth noting that the courts have suggested that the government's obligations to First Nations may allow the review of government decisions which were not traditionally reviewable. For example, the Supreme Court of Canada, in *R. v. Adams*,⁴⁵ suggested that the fiduciary duty might require Parliament to pass legislation that anticipates the possibility of, and prevents, the infringement of Aboriginal rights.

If a statute confers an administrative discretion which may carry significant consequences for the exercise of an [A]boriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of [A]boriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfill their fiduciary duties, and the statute will be found to represent an infringement of [A]boriginal rights under the *Sparrow* test.⁴⁶

Even Charter rights do not generally receive such a level of protection; the courts will merely require provisions of a statute that could result in a Charter violation to be exercised in a way that does not violate an individual's rights.⁴⁷ Nor does the fact that the Attorney General's authority in respect of public nuisance is derived from the prerogative powers insulate it from review.⁴⁸

While the Crown should generally act in accordance with the "honour of the Crown" in its dealings with First Nations, the Supreme Court of Canada has clarified that the Crown does not owe a general "fiduciary duty" in respect of all of its dealings with Canada's First Nations. A fiduciary duty will arise in respect of decisions that are tied to "specific Indian interests" over which the Crown has "assumed discretionary control."⁴⁹ The court has explained that:

The fiduciary duty, where it exists, is called into existence to facilitate supervision of the high degree of discretionary control assumed by the Crown over the lives of [A]boriginal peoples. As Professor Slattery commented:

45 *R. v. Adams*, [1996] 3 S.C.R. 101.

46 *Ibid.* at 132.

47 *Ibid.* at 131-32.

48 *Operation Dismantle v. the Queen*, [1985] 1 S.C.R. 441, at 463 per Wilson J., with Dickson J. agreeing with her analysis in the major decision at 455. The reasoning in *Operation Dismantle* focused on the reach of the Canadian *Charter of Rights and Freedoms*. However, it seems unlikely that the courts would not require the government to act in a manner consistent with section 35 in the exercise of its prerogatives.

49 *Wewaykum Band v. Canada*, [2002] 4 S.C.R. 245 at para. 83.

The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a “weaker” or “primitive” people, as has sometimes been suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help.⁵⁰

Is the power of the Attorney General to decide whether or not to authorize a relator action a situation that gives rise to a fiduciary duty? There is no doubt that a public nuisance within a Nation’s traditional territory will in many cases directly affect very “specific Indian interests,” and that the Attorney General, through his or her discretion as to whether or not to initiate or authorize a public nuisance action, has a high level of control over whether and how those interests will be protected. Certainly a First Nation, in being persuaded to rely upon the Crown for protection, would have expected its rights to fish, hunt and use its village sites—and other similar rights—to be protected. There seems to be an argument that a fiduciary obligation could arise in relation to the Crown’s discretion in such cases.

It might be argued that the Crown is not subject to a fiduciary duty until the Aboriginal rights or title affected by the public nuisance have been established in the courts. Even if the courts ultimately hold that the Attorney General does not have a fiduciary relationship in a particular case, the Crown should certainly exercise its discretion in a manner consistent with the broader concept of the honour of the Crown.

Where a First Nation has a strong *prima facie* argument for the existence of Aboriginal rights or title, the “honour of the Crown” will give rise to a duty to consult and accommodate a First Nation’s concerns about the impact of government decisions on its rights and title, even prior to a conclusive finding that those alleged rights and title exist.⁵¹ Although arising in a different context, the honour of the Crown might well require the Attorney General to accommodate a First Nation’s concerns by consenting to it taking legal action against a demonstrable public nuisance that is likely to affect the Nation’s claimed rights or title, or at least to fairly consider granting such consent.⁵² Where the Crown is aware of the likelihood that some title or

50 *Ibid.* at para. 79, quoting B. Slattery, “Understanding Aboriginal Rights” (1987) 66 Can. Bar Rev. 727 at 753.

51 *Haida*, *supra* note 12.

52 Further judicial direction may be required as to the precise nature of the Attorney General’s obligations on receiving a request to allow a Nation to bring a relator action. Does the Attorney General need to evaluate the likelihood that the nuisance will actually impact upon Aboriginal rights (a variant of the “special harm” test discussed below) or does the honour of the Crown require the Attorney General to accommodate the First Nation’s interest in its territory generally, even if a specific right may not be at stake? How does the nature and severity of the alleged public nuisance factor into the decision? Other issues will presumably arise in the context of specific cases.

rights will be established, there is arguably an obligation on the Attorney General to allow a First Nation to use existing common law tools that might protect the Nation's interests, and to do so until such time as those interests are fully assessed by the courts.

It is not necessary for the courts to actually review the discretion of the Attorney General. Given the approach taken by the courts in the public interest standing cases, it would be far simpler for a judge to simply take note of the Attorney General's refusal to consent to a First Nation bringing a relator action, and then decide whether or not the First Nation should be granted standing to bring the case on the basis of a proper exercise of the Crown's duties. Alternatively the court could apply a more expansive public interest standing test, and then consider the fiduciary duty owed by the Crown as part of that test. The latter approach seems simpler; it would create a single standing rule for all public interest cases, whereas the former would introduce yet another rule for standing into the common law.

First Nations as “Specially Affected”

It has long been the case that a private litigant who suffers “special harm” from a public nuisance may bring a public nuisance claim in his or her own name. As noted in Part III, the correct meaning of “special harm” continues to be a matter of some dispute.⁵³

Nonetheless, even applying the more restrictive of the possible meanings of special harm—that the harm must be different in nature, and not merely in degree, from the harm suffered by other members of the public—it seems likely that First Nations whose rights and territory are affected by a public nuisance will suffer a harm different from the harm experienced by non-Aboriginal Canadians.

Aboriginal rights arise from the traditional use of a territory by a First Nation since time immemorial. As the Supreme Court of Canada has explained in *R. v. Van der Peet*: “In order to be an [A]boriginal right an activity must be *an element of a practice, custom or tradition integral to the distinctive culture of the [A]boriginal group claiming the right.*”⁵⁴

Thus any public nuisance that impacts, or risks impacting, on such a traditional “practice, custom or tradition” threatens the very integrity of First Nations culture. This cannot be viewed as equivalent to the harm suffered by a member of the public at large, and therefore should amount to special harm. The reasoning of Justice Groberman, while dealing with the concept of “irreparable”, rather than “special”, harm in a recent injunction decision involving environmental harm to a fishery, seems relevant:

⁵³ *Supra* notes 24 to 28.

⁵⁴ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at 549. Emphasis added

From the plaintiff's standpoint, the ability to fish is more than an economic right. I am satisfied that the fishery involved in this case is a central feature of the culture of the Snuneymuxw people. I am also satisfied that the situation with the estuary is of sufficient long-standing that there remain only a few elders that can remember it in a more pristine condition. Sadly, the lives of those elders are inevitably drawing to an end and they have limited time to train the younger generation in traditional ways.⁵⁵

The argument that a public nuisance may strike at the heart of a First Nation's culture receives further support from the cases concerning Aboriginal title, which emphasize the unique relationship between a First Nation and its land. In *Delgamuukw v. British Columbia*, the Court acknowledged "a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture."⁵⁶ Further, the Court described this relationship as involving "an important non-economic component," with the land having "an inherent and unique value in itself, which is enjoyed by the community with [A]boriginal title to it."⁵⁷

The Hawaii Supreme Court applied similar reasoning in respect of standing in the 1995 case of *Public Access Shoreline Hawaii v. Nansey*. That case concerned the ability of a group of native Hawaiians, represented by Public Access Shoreline Hawaii (PASH), to challenge planning decisions of the Hawaii County Planning Commission (HCP). Since Hawaii has not adopted a public interest standing rule, the traditional standing rule—which is similar to the public nuisance standing rule—applied. The HCP held that PASH had not demonstrated an interest that was different from that of the general public, and therefore denied standing. On appeal, the Hawaii Supreme Court disagreed, holding that:

Through unrefuted testimony, PASH sufficiently demonstrated that its members, as "native Hawaiian[s] who [have] exercised such rights as were customarily and traditionally exercised for subsistence, cultural, and religious purposes on undeveloped lands[,] [have] an interest in a proceeding for the approval ... for the development of lands within the ahupua'a which are ... clearly distinguishable from that of the general public."⁵⁸

While this decision occurred in the context of standing to bring a judicial review, the reasoning applies in relation to the public nuisance standing rule.

Against this approach stand a small number of older English cases that appear to suggest that an action may be either a violation of a local community right or a public nuisance, but not both. Arising in the context of

55 *Snuneymuxw First Nation et al. v. HMTQ et al.* (2004), 26 B.C.L.R. (4th) 360 at 368.

56 *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at 1089-90.

57 *Ibid.*

58 *Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 903 P.2d 1246 (1995) at 1255-56.

interference with footpaths, these decisions attempt to distinguish between civil suits brought on the basis of the customary right to use a footpath (in which only members of the community have standing) and criminal public nuisance suits brought in respect of a footpath that is a public right of way (in which only the Attorney General has standing).⁵⁹ These cases appear to assume, without discussion, that the same road (or presumably the same resource) cannot be the subject of both a public and customary (local) right.

These cases do not explicitly consider the suggestion that members of the community might suffer a “special harm” arising from a public nuisance. Moreover, in Canada there is no doubt that there can be a customary right over resources that are also covered by a public right; the overlapping public and Aboriginal rights over fish resources are good example.⁶⁰ Consequently, the better view, at least in Canada, is that the same harm may at once give rise to a public nuisance and a claim based on Aboriginal rights.⁶¹

The details of the special harm that might be suffered by a First Nation will vary considerably depending on the public nuisance and the culture of the particular First Nation affected.⁶² However, because of the unique nature

59 In the 1903 case of *Brocklebank v. Thompson* [1903] 2 Ch. 344 at 355, the owner of a manor in England sued a farmer who used a footpath that ran across the manor’s parkland. The farmer counter-sued, claiming that the footpath was public and asking for an injunction to allow him to use it. Joyce J. of the Chancery Division of the Queen’s Bench heard the case and expressed concern that the Attorney General was not present in what at first glance appeared to be a claim in public nuisance. However, he noted that “an indictment [for public nuisance] does not lie ... for an obstruction of a local right,” and, after reviewing the evidence, concluded that the case concerned the violation of a local right, and not a public nuisance. Accordingly, the farmer was successful. The reverse result occurred in *Throwers Case* (1672), 1 Ventris 208, 86 E.R. 140, in which a man was indicted for having obstructed a church path. The defendant sought to argue that he had violated a common law right held by the parishioners of the church and that, therefore, those parishioners could sue him, but that the Attorney General could not indict him for public nuisance. Hale J. agreed that if access to the footpath were a right of the parishioners, then “the nuisance [sic] would extend no further than the parishioners, for which they have their particular suits; but for ought appears this is a common foot-way, and the church is only the *terminus ad quem*” (at 140-41). These two English cases do not really answer the question of the relationship between customary law and public nuisance. By introducing a fine distinction between the rights held by members of a community and the public rights held by the public at large, the cases uphold the requirement that the Attorney General must be a party to public nuisance claims. There is an appearance that the courts interpreted the facts in a way that allowed them to reach the common sense result.

60 *R. v. Gladstone*, [1996] 2 S.C.R. 723 at 770-71.

61 As noted above, it has also been established that under Canada’s common law a nuisance may be both a public and private nuisance at the same time: *Sutherland*, *supra* note 4, which the English common law has historically disputed.

62 Although the issue did not arise in the context of a public nuisance suit, the British Columbia Environmental Appeal Board recently considered the impact of pesticide use on the spiritual sites of the Cowichan Tribes. The Board heard evidence that according to the cultural beliefs of the Cowichan Tribes, any pesticide use in a sacred bathing area would “permanently destroy the spirituality of the site”; the Board concluded:

of a First Nation's attachment to both the land and the resources of the land, members of a First Nation should generally be able to claim a special harm when faced with public nuisances that directly or indirectly affect those interests.

A crucial question is whether a court can find that "special harm", and therefore standing to bring a public nuisance claim, exists on the basis of something less than full proof of the existence or precise extent of the affected Aboriginal rights and title. If the courts require a high level of proof of the existence of such rights before granting standing, then this would undermine many, although not all,⁶³ of the advantages of a public nuisance claim that were discussed in Part II. In effect it would mean that demonstrating standing would be just as onerous as obtaining a declaration of rights and title.

However, in my view the courts should not set such a high bar as a precondition to standing to bring a claim to enforce general public rights. The requirement of special harm is not an element of the tort of public nuisance itself, but only of standing.⁶⁴ If an action amounts to a public nuisance, then a tort has been committed and the only question is whether the First Nation should be allowed to bring a claim based on that tort. It may be that a strong *prima facie* case that an affected Aboriginal right or title exists should be sufficient to demonstrate special harm and convey standing.

The courts have suggested that the law concerning Aboriginal rights is a way of reconciling the long-standing tension between the prior occupation of Canada by First Nations with the current colonial legal system.⁶⁵ However, this process of reconciliation is a slow one, particularly in British Columbia and other areas of Canada where there were no treaties signed, and First Nations common law Aboriginal rights are often ignored in the interim. Nor is the treaty process—which promised to clarify the rights of First Nations through negotiations—any less expensive, frustrating and confusing than the

The evidence also indicates that purity of the water at a bathing site, and the plants and minerals in proximity to a bathing site, is important for ritual bathing to be effective in a physical and spiritual sense. The Panel accepts that the presence of pollution such as pesticides in the water, plants and minerals at a sacred site can negatively impact the spiritual value and usefulness of the site for members of the Cowichan Tribes. Consequently, the Panel accepts that there would be an adverse effect on the Cowichan Tribes' spiritual values and ability to use spiritual sites if pesticide use under the PMP [Pest Management Plans] caused pesticides to enter the water, plants or minerals at sacred sites.

Timberwest v. Deputy Administrator of Pesticides, EAB, Appeal no. 2002pes008a.

63 *Supra* note 10.

64 If a First Nation claims compensation for interference with a particular right then it may become necessary to prove the existence and extent of the right in order to quantify damages. See *supra* note 18 for thoughts on whether and when proof of such a right is a necessary precondition for a damages claim. In any case, in a claim for injunctive relief, or for compensation based on an exercise of the public right, it should not be necessary.

65 For example, *Van der Peet*, *supra* note 54.

judicial process.⁶⁶ At least in part because of the lack of certainty about how and when Aboriginal rights and Canadian law may be reconciled, the courts have begun to require the Crown to consult any First Nation that has demonstrated a strong *prima facie* case that they have rights or title likely to be affected by government decisions.⁶⁷

This uncertainty affects everyone with a stake in the eventual resolution of First Nations claims. If a public nuisance negatively affects the rights that a First Nation is claiming, but has not yet negotiated or proved in court, then the negotiations of the Nation, and its hopes and aspirations, are negatively impacted. Even if the First Nation is ultimately unsuccessful in proving its claims, or in negotiating title to those lands, in the meantime the First Nation is worse off as a result of the public nuisance. It makes no sense to say that, for example, an oil spill affecting large areas of a First Nation's territory affects the Nation, with its unresolved claims, and its cultural dependence on the territory, in the same manner as it affects other members of the public.⁶⁸

Moreover, unless the public nuisance is particularly local in scope, or affects only a small portion of the First Nation's claimed territory, in most cases the actual or potential impact of a public nuisance will be widespread and likely to affect in some way the rights of the First Nation, once those rights are confirmed in law. Does it matter whether the Aboriginal right to fish is established in this area or that area, or to this or that fish population, if the fishery in both locations is destroyed? A court should be more willing to accept, on a balance of probabilities, that a First Nation has some rights that are affected by a public nuisance within its territory than that a particular right exists in respect of a particular location or resource.

It would be unreasonable to require, in relation to a technical question of standing, a level of evidence that has, in title cases, amounted to months' worth of testimony. In most cases a First Nation, with interrelated claims to rights and title over their traditional territory, will be affected—either directly or in terms of its claims to the area—by a public nuisance affecting land or resources in the territory.

Conversely, a person who causes a public nuisance should not be able to escape the consequences by requiring a First Nation to prove the specific

66 See *Williams v. Riverside Forest Products*, (2001), 95 B.C.L.R. (3d) 371 at 378 for judicial comment on the difficulties posed by the treaty process:

Both governments publicly assert a commitment to the treaty process. The most recent information indicates there are 49 First Nations participating in 40 sets of negotiations in the British Columbia treaty process. These negotiations are at various stages but it must be noted that the treaty process has yet to conclude a single signed treaty.

Just recently (2007), the treaty process has finally resulted in its first treaties.

67 *Supra* note 12.

68 It may be that a judge would consider the nature and extent of the alleged public nuisance as a factor when deciding whether to grant full standing prior to full proof of the claimed Aboriginal rights.

existence of a title claim in a particular location; such proof is irrelevant to the liability of the defendant, and relates, if at all, only to the question of who may appropriately bring the claim.

Thus, in my view if the First Nation can demonstrate strong proof of the existence of Aboriginal rights or title based in the area impacted by the public nuisance, then a court should find that this satisfies the standing-test requirement of demonstrating that they are likely to suffer, or have suffered, “special harm”. In such a case the First Nation will have demonstrated, on a balance of probabilities, that some aspect of their rights, unique and integral to their culture, are at least at risk, and may have been negatively impacted by the public nuisance.

In summary, a First Nation with recognized Aboriginal rights or title that are directly or indirectly affected by a public nuisance, or with a strong claim to such rights, likely has the standing to bring a claim in public nuisance, in addition to any cause of action it may have on the basis of its Aboriginal rights.

First Nations Customary Law

The Attorney General’s consent is required in an action for public nuisance because of his or her traditional role as guardian of the public interest. However, long before an Attorney General had any authority in Canada, First Nations governed themselves and had customary rules about who was responsible for protecting the First Nation and its territory against threats. While these customs varied from Nation to Nation, many, if not most, First Nations had individuals who were responsible for identifying threats to the rights of the Nation as a whole (public rights) and enforcing rules which prevented interference with those rights.

Legal Status of Customary Law

While the exact scope of First Nations self-government at common law is far from clear, the laws of a First Nation may have legal effect. Williamson J. describes the legal status of Aboriginal laws in *Campbell v. British Columbia (Attorney General)* as follows:

History, and a review of the authorities, persuades me that the [A]boriginal peoples of Canada, including the Nisga’a, had legal systems prior to the arrival of Europeans on this continent and that these legal systems, although diminished, continued after contact

[T]he most salient fact, for the purposes of the question of whether a power to make and rely upon [A]boriginal law survived Canadian Confederation, is that since 1867 courts in Canada have enforced laws made by [A]boriginal societies. This demonstrates not only that at least a limited right to self-government, or a limited degree of legislative power, remained with [A]boriginal peoples after the assertion of sovereignty and after Confederation,

but also that such rules, whether they result from custom, tradition, agreement, or some other decision making process, are “laws”⁶⁹

Williamson J. then goes on to discuss the wide range of cases in which Canadian courts have enforced the customs of various First Nations. These include customary laws concerning marriage,⁷⁰ adoption,⁷¹ and the ability of a Band to sue on behalf of its members.⁷²

Williamson J. could have equally drawn on examples of customary laws from England or other Commonwealth countries to demonstrate the possible scope and authority of customary laws under the common law.⁷³ Some of the customary laws that have been recognized in England extend well into the realm of what we ordinarily think of as a legislative role, including dispute resolution and urban planning,⁷⁴ the creation of customary courts,⁷⁵ and taxation.⁷⁶

Custom and Access to the Courts

The customary laws of a First Nation may help determine when that Nation has standing to bring a claim—presumably including a claim in public nuisance. Counsel in *Delgamuukw v. Canada* deliberately framed their pleadings to reflect the right of the hereditary heads of households to bring a claim on behalf of their families, and the courts accepted that approach.⁷⁷ In many ways *Delgamuukw* and other cases like it implicitly recognize the ability of hereditary chiefs to speak on behalf of their nation in a court of law. Similarly, in the lower court decision in *Wewayakum Indian Band v. Canada*, Addy J. wrote that the ability of a Band to sue on behalf of its members “need not be subject to any special rules, laws or procedures other than those prescribed by the traditions, customs and government of the particular Band.”⁷⁸

69 *Campbell v. B.C. (Attorney General)* (2000), 79 B.C.L.R. (3d) 122 (S.C.) at 141.

70 *Connolly v. Woolrich* (1867), 17 R.J.R.Q. 75, 1 C.N.L.C. 70 (Que. S.C.);

71 *Casimel v. Insurance Corp. of British Columbia*, (1993), 82 B.C.L.R. (2d) 387 (C.A.).

72 *Wewayakum Indian Band v. Canada*, [1991] 3 F.C. 420 at 430 (T.D.).

73 For discussion of customary law under the common law, see R.D. Pesklevits, *Customary Law, the Crown and the Common Law: Ancient Legal Islands in the Post-Colonial Stream* (University of British Columbia: Vancouver, 2002) at 741 and Lord Mackay of Clashfern, *Halsbury's Laws of England*, 4th ed., Vol. 12(1) (London: Butterworths, 1998) at 160 para. 606.

74 P. Orebech *et al.*, *The Role of Customary Law in Sustainable Development* (Cambridge: Cambridge University Press, 2005) at 162 for examples of customs related to the resolution of disputes related to the construction of buildings in a city.

75 *Ibid.* at 163, citing Lord Mackay of Clashfern, *Halsbury's Laws of England*, 4th ed., Vol. 12(1), at 249 para. 699.

76 *Hill v. Hanks* (1614), 2 Blust 201, 80 E.R. 1066, per Coke J., cited *ibid.* at 178. The case concerned the right of a town crier to take a toll on grain.

77 *Supra* note 57.

78 *Supra* note 72, cited with approval in *Campbell*, *supra* note 69 at 144.

However, these cases involved rights asserted by the First Nations community. A public nuisance claim generally needs to be brought on behalf of the public at large. Can the traditional laws and responsibilities of a nation provide the basis for a claim to represent the public at large, or at least a large enough segment of the public to support a claim in public nuisance?

One possible objection to this argument is the fact that the custom could not have involved a right of redress before the Canadian courts—themselves an instrument of the colonial government. Rather, the custom would have to involve bringing the complaint to the attention of the First Nation as a whole, or of some part of the First Nation, which was able to respond to the nuisance. As U.S. Chief Justice Marshall noted in 1831: “At the time the [U.S.] Constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong had perhaps never entered the mind of an Indian or of his tribe.”⁷⁹

This observation probably makes more sense in the context of U.S. history, with its series of Indian wars. In a Canadian context, it has been suggested that First Nations accepted the Crown’s sovereignty on the understanding that their rights as peoples would be protected both by the Crown and by Her Majesty’s courts.⁸⁰

In Canada it is well established that the manner in which a custom is exercised is not frozen in time.⁸¹ Indeed, none of the various rights and customs of a First Nation would traditionally have been asserted in a Canadian court, yet the courts have claimed the jurisdiction to hear such claims.⁸² To the extent that a custom gives a power or responsibility to an individual to raise nuisance issues affecting part or all of the territory of a First Nation, there is good reason to believe that the courts should give effect to the custom by allowing that individual to bring a public nuisance claim.

A second objection affirms the unique role of the Attorney General in representing the public. The Attorney General, in a public nuisance action, appears as a representative of the Crown and his or her subjects, representing not merely members of the public, but the state itself. The mere fact that a government represents a group of people does not mean that it may bring a claim in public nuisance; for example, local governments may not generally initiate a public nuisance claim (without the consent of the Attorney General).⁸³

79 *Cherokee Nation v. State of Georgia* (1831), 5 Pet. 1, 8 L. Ed. 25 at 31, cited with approval in *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911.

80 See, for example, the quote from Professor Slattery, *supra* note 50.

81 *Vanderpeet*, *supra* note 54 at p. 557.

82 Marshall’s comments in *Cherokee*, *supra* note 79, were made in the context of finding that his court did not have jurisdiction to hear an Aboriginal title claim, which is not an approach that the Canadian courts have adopted.

83 *Supra* note 29.

However, a First Nation can be viewed not only as a collection of subjects of the Crown, but as something akin to a nation, capable of petitioning the Queen, and her courts, in its own right. At times the courts appear to have acknowledged this distinction, thus recognizing the ability of First Nations to speak for themselves as nations, which includes the ability to make treaties. Although the U.S. term “domestic dependent nation” has not generally been adopted by the Canadian courts, Chief Justice Marshall used that term to describe Native Americans. In *Cherokee Nation v. Georgia* the court accepted:

.... the character of the Cherokees as a state, as a distinct political society separated from others, capable of managing its own affairs and governing itself. They have been uniformly treated as a state from the settlement of our country.⁸⁴

Williamson J., in *Campbell*, summarized the relevant case law as follows:

[A]ny consideration of the continued existence, after the assertion of sovereignty by the Crown, of some right to [A]boriginal self-government must take into account that: (1) the [I]ndigenous nations of North America were recognized as political communities; (2) the assertion of sovereignty diminished but did not extinguish [A]boriginal powers and rights; (3) among the powers retained by [A]boriginal nations was the authority to make treaties binding upon their people; and (4) any interference with the diminished rights which remained with [A]boriginal peoples was to be “minimal.”⁸⁵

Given that the courts have accepted that particular members of a First Nation have standing, apparently by virtue of their customary role within the Nation, to bring a claim on behalf of that Nation, it is not unreasonable to assign standing to such an individual to bring a claim in public nuisance.

A third possible objection might be that the Attorney General’s ability to bring a public nuisance claim is a royal prerogative power which ought not to be displaced by customary law. In fact, local customary law usually remains valid even when there is a conflict with the prerogative powers as they existed under the English common law.⁸⁶ Unless the courts feel that the

84 *Supra* note 79 at 30; see also *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) at 559, cited by the Supreme Court of Canada in *Vanderpeet*, *supra* note 54 at 543.

85 *Supra* note 69 at 143.

86 Joseph Chitty, writing on Crown prerogatives in a time of colonial expansion (1820), explained that only those prerogatives that were inseparable from the Crown’s sovereignty over a colony would necessarily supersede local laws and customs. J. Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Duties and Rights of the Subject* (London: Joseph Butterworth and Son, 1820) at 25-26: “The various prerogatives and rights of the sovereign which are merely local to England, and do not fundamentally sustain the existence of the Crown, or form the pillars on which it is supported, are not it seems *prima facie* extensible to the colonies.” It is difficult to find modern authority directly on point, but Chitty appears to still be a good statement of the law. It seems unlikely that recognizing a custom that allows access to the courts represents a fundamental challenge to the “existence of the Crown.”

prerogative power to control access to the courts in public nuisance cases is fundamental to the Crown's sovereignty, a valid customary law granting standing to the courts should be upheld.

The overlap between the customary law of First Nations and the common law of Canada has barely begun to be considered by the Canadian courts. However, customary law may displace some of the ordinary rules of the common law. In Canada, the courts have acknowledged the unique political and legal status of First Nations, and have allowed members of First Nations to bring actions on behalf of their community on the basis of customary law. Should a First Nation demonstrate the existence of a customary law allowing members of that First Nation to speak for the public of that Nation in regard to matters that affect the entire community, it seems likely that such a custom might assist those members to obtain standing to bring a claim in public nuisance.

V CONCLUSION

The common law's treatment of Aboriginal customs, rights and title has developed entirely independently of the common law doctrine of public nuisance standing, thus leading to a situation in which the former represents a real challenge to the latter. It is difficult to see how the public nuisance standing rule can be upheld against Canada's First Nations.

This being the case, the courts have a choice. They can allow First Nations to bring claims in public nuisance, on the basis of one or more of the three arguments discussed above, but continue to exclude all other members of the public from bringing public nuisance claims. This approach would expand on principles laid down by Aboriginal law cases, but would avoid the broader equity questions raised by the limitations of the public nuisance standing rule. In short, it would fail the many non-Aboriginal people who directly or indirectly suffer from public nuisances.

The other option would be for the courts to re-examine the public nuisance standing rule itself, and recognize that it is no longer defensible in a democratic society. This would complete the revisions to public interest standing that the Supreme Court of Canada began in a constitutional context in the 1970s, and expanded to the administrative law context shortly thereafter. It would be consistent with the recommendations of two Law Reform Commissions and a considerable volume of academic comment on the subject. After over 30 years, it would finally expand the public interest standing rules to include public nuisance tort claims.

If the latter approach is taken, the unique status of Aboriginal litigants could be considered as part of the expanded public interest standing test, while at the same time affirming the rights of all members of the public not to be exposed to public nuisances. In effect, this would be a fourth argument in favour of First Nations public nuisance standing: public nuisance standing

before the courts is a right of all people who are negatively impacted by a breach of public rights.