When the Canadian government proposed entrenching property rights in the Constitution in 1991, the mainstream environmental community expressed virtually unanimous opposition. Career environmentalists objected that stronger rights would weaken government’s authority to legislate and shift undue power to the judiciary. Further, they asserted that property rights would confer a right to pollute. Such concerns betrayed an ignorance of government’s role in environmental degradation and a profound misunderstanding of legal history. For centuries, property rights have empowered people to protect the environment. More often than not, it has been the legislated erosion of property rights that has allowed industries to pollute.

This chapter reviews the ancient roots of contemporary property rights and traces their evolution, influenced by English and American legal decisions, in Canada. It describes the ways in which concerned citizens have used their property rights to clean up and to prevent pollution. It then chronicles successive governments’ efforts to replace the common law with statutes and regulations governing the environment. Lastly, it recommends restoring strong property rights in order to return control over environmental degradation to those most directly affected by it.

Common Law Property Rights

In all Canadian provinces except Quebec, property rights come from the English common law—the unwritten or customary law that from medieval times has governed the rights and responsibilities of property owners. England passed the common law down to her colonies, including Canada. Both federal and provincial governments have often overridden it with their own statutes and regulations. Where they have not done so, however, the common law continues to apply.

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

Until 1949, Canadian courts hearing property disputes were legally obligated to follow the laws as revealed by English courts. Although Canadian courts have since gained independence from their British counterparts, they often continue to look to English precedents when deciding cases. American judicial decisions have also, although to a lesser degree, influenced Canadian courts. Loyalists settling in Upper Canada, bringing with them an understanding of American law, may have influenced the early Canadian legal system (Flaherty 1981, 22, 26). Of greater influence was the similarity of the legal challenges facing the two countries. Canadian judges could look to American cases without violating their obligation to follow English precedent if no English cases
applied to the situation at hand (Risk 1981, 108).

Because both English and American cases helped form Canadian property law, and continue to influence its development, this chapter will discuss cases from all three countries. While different in certain respects, American common law is very similar to Canadian common law; the legal history of the countries, and their moves favoring regulation, are much the same. (See Yandle, 1997).

Under the common law, people have very strong property rights: They have the right to both use and enjoy their property. Balancing this right, however, is a responsibility not to interfere with others’ rights to use and enjoy their property. This responsibility dates back to the English law of the mid-thirteenth century. Henry of Bracton, a judge and prominent legal scholar of that era, wrote that “no one may do in his own estate any thing whereby damage or nuisance may happen to his neighbour.” Bracton, whose writings provided a foundation for later nuisance law, noted that a landowner could not, in raising a pond, flood his neighbour’s land; nor could he divert a watercourse and deprive his neighbour of water (Lauer 1963, 65-68).

This principle became embodied in a maxim that has governed common law decisions since being coined by an English court in 1611: “Use your own property so as not to harm another’s.” Clearly, the maxim has profound environmental implications. It was one of the important legal concepts applied in seventeenth-century air pollution cases (Harvey 1990, 518). By the eighteenth century, the famous jurist Sir William Blackstone cited the maxim as “the rule” in English law (Blackstone 1765-1769, 3:191). Nineteenth-century courts continued to accept the maxim as a given. One British law lord summarized the law as it stood in 1885:

> Prima facie no man has a right to use his own land in such a way as to be a nuisance to his neighbour, and whether the nuisance is effected by sending filth on to his neighbour’s land, or by putting poisonous matter on his own land and allowing it to escape on his neighbour’s land, or whether the nuisance is effected by poisoning the air which his neighbour breathes, or the water which he drinks, appears to me wholly immaterial. If a man chooses to put filth on his own land he must take care not to let it escape on to his neighbour’s land (Ballard v. Tomlinson 1885, 126).

The maxim also applied in Britain’s North American colonies, where courts invoked it frequently.¹ Deeply ingrained in our legal history, it influences Canadian courts to this day.

If a victim of pollution convinces a court that, on the balance of probabilities, his property is being harmed by another’s actions, the court will likely issue an injunction. It will order the defendant to refrain from acting in a particular way or, in some cases, require it to take specific action. At one time, certain courts had no choice but to issue injunctions. Not until 1858 did the British Parliament empower Chancery courts to award damages in lieu of injunctions. Ontario’s 1877 Judicature Act gave Ontario courts the same power. The courts, however, remain hesitant to exercise their authority in this realm.

¹ See Horwitz (1992, 32, 102) for a discussion of the frequency with which eighteenth-century American courts invoked the maxim and its decline in the nineteenth century.
A number of factors have contributed to the courts’ reluctance to substitute damages for injunctions. Judges have long understood that many injuries cannot be monetized. How, one law lord wondered, can someone prove the exact quantity of pecuniary loss he has sustained? What, for example, is the value of a business’s lost customers (Imperial Gas Light and Coke v. Samuel Broadbent 1859, 243)? Only victims themselves can know what value they place on a good night’s sleep or how much money they would be willing to accept for breathing foul air. When a judge or jury awards damages, however, the victims do not determine the amount. Substituting damages for an injunction therefore amounts to forcing the victim to sell his property rights at a price set by the court. It amounts, in short, to giving a defendant the power of expropriation.

In contrast, injunctions allow the victim to negotiate his own price. If his environment is priceless, he may insist that the polluter stop harming it. Alternatively, he may bargain away his rights or reach a compromise that benefits both him and the polluter. Whatever the result, the decision will be arrived at freely and fairly and will reflect the values and circumstances of both parties.

Furthermore, only injunctions can prevent the recurrence of property rights violations. In allowing damages to replace injunctions, courts in effect license continuing wrongs—a role which they generally reject. A British judge warned in 1894 that the Court must not become “a tribunal for legalizing wrongful acts… [T]he Court has always protested against the notion that it ought to allow a wrong to continue simply because the wrongdoer is able and willing to pay for the injury he may inflict.” His colleague added that a court should substitute damages for an injunction only if the injunction would be oppressive and the injury was small and could be easily estimated and compensated by money (Shelfer v. City of London Electric Lighting 1894, 311, 315-16, 322-3). With some important exceptions, the judges’ successors have paid them heed. Injunctions remain the favoured remedy in Canadian property rights cases, especially where trespass or a violation of riparian rights has occurred, and generally, but somewhat less categorically, in nuisance cases (Sharpe 1983, 6, 180-201; Nedelsky 1981, 301-3; Estrin and Swaigen 1993, 108-10). A discussion of each of these categories of property rights violations follows.

Trespass

Under the common law, it is a trespass to place anything upon someone else’s property or to cause anything to be placed there by wind, water, or other means. A trespass occurs against the person in possession of the invaded land. If a tenant is in possession of the land at the time of the trespass, it is normally he rather than the owner who should sue (Hailsham 1985, 45:637, 639).

Any intrusion onto another’s land—whether by people, flood-waters, structures, or pollutants—constitutes a trespass. The common law forbids even harmless trespasses. A 1765 decision, for example, noted that a person could be subject to an action for trespass, “though the damage be nothing,” for merely “bruising the grass and even treading upon the soil” (Entick v. Carrington 1765, 1066). More than a century and a half later, a judge in Manitoba echoed that decision, explaining, “every invasion of private property, be it ever so minute, is a trespass” (Boyle v. Rogers 1921, 706). The common law remains unchanged on this point. In 1978, organic farmers won a trespass case against a company that sprayed their land with pesticides as part of the New
Brunswick government’s program to control spruce budworm in the province’s forests. In finding that the spraying constituted a trespass, the judge explained the law as follows:

To throw a foreign substance on the property of another, and particularly in doing so to disturb his enjoyment of his property, is an unlawful act.... This of course does not involve any question of whether or not the spray may have been toxic or non-toxic, because even to have thrown water, or garbage, or snow, or earth tippings, or any substance on the property would equally have amounted to an act of trespass (Friesen v. Forest Protection 1978, 162).

In its early days, trespass law helped people combat the divers environmental problems of an agrarian society, from straying livestock to seeping privies. An eighteenth-century judge explained the law’s virtually physical character: “The law bounds every man’s property, and is his fence” (Star v. Rookesby 1711, 295). More recently, people have adapted the law of trespass, using it to protect themselves or their land against more elusive encroachment by industry. The Alberta Supreme Court held in 1976 that fly ash and sawdust from a lumber company constituted a trespass against a nearby motel. In a decision that indicates that the common law could play a major role in controlling air pollution, the court explained that it is a trespass to cause any noxious substance to cross the boundary of another’s land (Kerr v. Revelstoke Building Materials 1976, 137).

Trespass law has had to evolve to accommodate modern technologies. Courts have wrestled with the question of how far property rights extend above and below the land. The thirteenth-century maxim, “a landowner owns everything from the sky to the depths,” guided early common law cases. More recent cases have narrowed the scope of ownership and determined that airspace is public domain; air traffic far above the ground which is transient and does not directly interfere with the use of peoples’ property does not constitute a trespass. As one judge noted, however, a low-flying aircraft might indeed commit a trespass (Didow v. Alberta Power 1988, 612). As a general rule, rights to airspace extend only as far as is necessary to protect the use and enjoyment of one’s land and structures (Hailsham 1985, 45:632).

Another question facing the courts, as ancient trespass laws evolve to suit contemporary circumstances, is whether an invasion need be tangible to constitute a trespass, and if so, how to define tangibility. Traditionally, courts restrained only sensible, visible invasions—invasions by a tangible mass that could be seen by them in evidence. However, modern science, enabling courts to verify the presence of invisible pollutants, has vastly expanded potential applications of trespass laws. Some courts, relaxing traditional requirements, have found invisible gases and microscopic particulates to be trespasses. In the most frequently cited cases, the invisible trespasses have damaged property (Fairview Farms v. Reynolds Metals 1959; Martin v. Reynolds Metals 1959, 1960; McDonald v. Associated Fuels 1954). As noted above, however, traditional trespass law allows a landowner or tenant to sue whether or not he has suffered any harm. Conceivably, then, courts could define trespass to include any measurable invasion, any scientifically-detectable emission, regardless of its effect.  

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2 For further discussion of this problem and a possible solution, see Rothbard (1990, 250-54). Rothbard suggests that if trespass is defined as an interference with one’s exclusive use
It is impossible to know what balance the courts will strike in their efforts to preserve common law principles while preventing scientific advances from pushing trespass law to unworkable extremes. At a minimum, trespass law remains a powerful tool for protecting oneself against visible encroachments. And where it fails as a remedy for environmental wrongs, nuisance law, which has traditionally dealt with less material infractions, may succeed.

**Nuisance**

Blackstone broadly defined nuisance as “anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another” (Blackstone 1765-1769, 3:190). Two centuries later, where the common law still applies, an interference with the use or enjoyment of property remains a nuisance for which an owner or tenant can sue. Blackstone’s definition, however, was overly-inclusive: Stopping a nuisance, unlike a trespass, requires proof of harm. Furthermore, unlike trespass law, nuisance law does not deal with trivial matters. Courts are reluctant to address minor infractions necessarily resulting from everyday practices; they are guided by the notion that everyone benefits from relaxing standards to allow people to carry on common activities. An English judge explained in 1862:

> It is as much for the advantage of one owner as of another; for the very nuisance the one complains of, as the result of the ordinary use of his neighbour’s land, he himself will create in the ordinary use of his own, and the reciprocal nuisances are of a comparatively trifling character. The convenience of such a rule may be indicated by calling it a rule of give and take, live and let live (Bamford v. Turnley 1862, 33).

Nuisance law nonetheless prohibits an infinite variety of environmental harms. People have used it to protect themselves from pesticide sprays, smoke, soot, steam, dust, fumes, and other air pollutants. Road salt has been successfully challenged under nuisance law, as have leaking oil tanks and seeping privies. Foul smells are often found to be nuisances, as are noise and vibrations from commercial and industrial operations. In the 1920s, one judge went so far as to say, “Pollution is always unlawful and, in itself, constitutes a nuisance” (Groat v. Edmonton 1928, 532).

Courts have also found less tangible interferences, as varied as aesthetic blight and the casting or obstruction of light, to be nuisances. People have invoked nuisance law to keep countless undesirable commercial operations, from gas stations to houses of prostitution, out of their neighbourhoods (Ellickson 1973, 719, 721, 734). In 1910, the Supreme Court of Washington issued an injunction against a tuberculosis sanitarium that caused nearby residential properties to depreciate in value. According to the court, “The question is, not whether the fear [of tuberculosis] is founded in science, but whether it exists; nor whether it is imaginary, but whether it is real, in that it affects the movements and conduct of men. Such fears are actual, and must be recognized by the courts as other emotions of the human mind (Everett v. Paschall

of one’s property, many intangible invasions—which would not so interfere—would not constitute trespasses. Magnet (1977, 291) suggests that contemporary courts may be less willing than their traditional counterparts to treat trifling interferences as trespasses.
Industry has long tried to defend its nuisances on the grounds that they are in the public interest. Manufacturers reiterate the number of people employed, and utilities cite the essential services provided. Although no longer always the case, courts have traditionally refused to consider such social factors. They have instead stressed the sanctity of minority rights and refused to condone activities, whatever their presumed value, that would override them. As Blackstone explained, “So great ... is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community” (Blackstone 1765-1769, 1:109-10).

A famous nuisance case of the nineteenth century illustrates the law’s refusal to accommodate public needs at the expense of individuals. The case concerned Birmingham, England, which in 1851 had built a large sewer that disgorged into the Tame River. The owner of a downstream estate sued, complaining that the resulting pollution aggravated disease, killed fish, and prevented cattle from drinking from the river and sheep from being washed in it. Birmingham did not deny that dumping sewage was highly offensive. It argued, however, that the Court should allow continued pollution in the name of the public good:

[T]he evil that must ensue if the Court should interfere would be incalculable ... Birmingham will be converted into one vast cesspool ... The deluge of filth will cause a plague, which will not be confined to the 250,000 inhabitants of Birmingham, but will spread over the entire valley and become a national calamity. The increase of population, inseparable from the progress of a nation in industry and wealth, is attended of necessity by inconvenience to individuals against which it is in vain to struggle. In such cases private interests must bend to those of the country at large (Attorney-General v. Birmingham 1858, 224).

The judge who heard the case dismissed the argument as an “extreme proposition ... of remarkable novelty.” He was not, he explained, a public safety committee; his function was simply to interpret the law and to define who has what rights. Once the plaintiff’s right to enjoy a clean river was established, the Court should grant an injunction, regardless of its consequences: “it is a matter of almost absolute indifference whether the decision will affect a population of 25,000, or a single individual carrying on a manufactory for his own benefit” (Attorney-General v. Birmingham 1858, 224, 225). The judge added that if an injunction would produce considerable injury, the Court would, “by way of indulgence,” give Birmingham an opportunity to stop its nuisance before restraining its activity. But if the city failed to stop the nuisance, it would be up to Parliament—rather than the Court—to allow it to continue: “If, after all possible experiments, they cannot drain Birmingham without invading the Plaintiff’s private rights, they must apply to Parliament for power to invade his rights” (The Attorney-General v. Birmingham 1858, 225-6).

In the following century, the courts returned time and again to the themes that informed the Birmingham case: the sanctity of individuals’ property rights and the inappropriateness of overriding them. The courts, it was said, should not weigh a nuisance’s cost to an individual
against the social costs of shutting down a polluting industry. They should simply determine where property rights lie and enforce them. Any balancing of interests should be done—if at all—by the legislature.

When an electric company protested in 1894 that restraining its steamy, noisy, vibrating generating station would leave London’s streets and buildings in darkness, the court refused to sacrifice an individual’s rights for the public’s convenience: “Neither has the circumstance that the wrongdoer is in some sense a public benefactor (e.g., a gas or water company or a sewer authority) ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed.” Consideration of the public good, the court explained, would be better left to Parliament: “Courts of Justice are not like Parliament, which considers whether proposed works will be so beneficial to the public as to justify exceptional legislation, and the deprivation of people of their rights with or without compensation” (Shelfer v. London Electric Lighting and Meux’s Brewery v. London Electric Lighting 1894, 316).

In an 1899 case regarding the effects of asphalt excavation on neighbouring property, the British Privy Council granted a restraining injunction despite its possible impact on the community. It rejected the defence of the public good with the following comments: “It was said that digging for pitch was the common industry of La Brea, and that if an injunction were granted the industry would be stopped altogether.... Whatever the result may be, rights of property must be respected, even when they conflict, or seem to conflict, with the interests of the community.” Any overriding of property rights, the court explained, would be up to the government rather than the court: “If private property is to be sacrificed for the benefit of the public, it must be done under the sanction of the Legislature” (Trinidad Asphalt v. Ambard 1899, 602-3).

Over the years, Canadian courts have occasionally strayed from this reasoning, ruling that the public good—in the guise of industrial development, economic growth, job creation, or other community benefits—required them to override the property rights of individuals. Fortunately, such decisions have been exceptions to the rules. The Ontario High Court noted in 1984 that “the defence of ‘general benefit of the community’ ... is not available in answer to a claim for nuisance. There has been consistent rejection of that notion by the highest Canadian courts” (Buysse v. Town of Shelburne 1984, 740). Five years later a Canadian Supreme Court judge confirmed the courts’ reluctance to override common law property rights. “The courts,” he said, “strain against a conclusion that private rights are intended to be sacrificed for the common good” (Tock v. St. John’s Metropolitan Area Board 1989, 651).

Polluting industries also frequently try to defend themselves by claiming that their actions are reasonable. The “defence of reasonable use” seems to mean something different to every polluter. It can mean that the disputed activity is ordinary and lawful, or, given the location, appropriate. It can mean that a business has taken great care and caution, having installed the most modern machinery available and having operated it responsibly. Or it can be industry’s way of urging the courts to balance competing interests and find reasonable compromises among them. Although contemporary courts occasionally heed the defence, they have traditionally refused to consider whether a disputed activity is reasonable.
A 1915 case in which a Toronto resident claimed that a blacksmith’s operation in his neighbourhood constituted a nuisance exemplifies the courts’ reluctance to consider the reasonableness of an activity. The fact that the smith did his work “in a usual and reasonable fashion” did not influence the trial judge: “If the defendant has caused a nuisance to the plaintiff, it is of course no defence to say that he is making a reasonable use of his premises in the carrying on of a lawful occupation.” On appeal, a higher court judge agreed. “It is,” he said, “of no importance” (Beamish v. Glenn 1916, 13, 18).

The defence of reasonable use again failed in a 1952 nuisance case against a foundry in Ontario whose emissions damaged the finish on cars in a nearby lot. Citing an authoritative legal text, the judge explained, “He who causes a nuisance cannot avail himself of the defence that he is merely making a reasonable use of his own property. No use of property is reasonable which causes substantial discomfort to others or is a source of damage to their property” (Russell Transport v. Ontario Malleable Iron 1952, 728).

The issue also arose in a 1990 nuisance suit against an Ontario steel products company. The steel company had argued that its operations were reasonable in its particular neighbourhood. The judge responded that other industrial activity in the mixed use neighbourhood could not justify the nuisance, which would offend the typical resident: “‘Unreasonableness’ in nuisance law is when the interference in question would not be tolerated by the ordinary occupier.” To support his opinion, the judge relied on, among other sources, a respected law text: “It is not enough to ask: Is the defendant using his property in what would be a reasonable manner if he had no neighbour? The question is, Is he using it reasonably, having regard to the fact that he has a neighbour” (340909 Ontario Ltd. v. Huron Steel Products 1990, 645, 644)?

Courts have also rejected two other defences that industries have put forward time and again: that either their responsibility for small fractions of greater environmental problems or their operations’ long histories justify continued pollution. The existence of numerous sources of pollution has not prevented courts from ruling against one particular source. An early example can be found in an 1851 English case regarding a brickmaker’s pollution. The defendant tried without success to excuse his brick burning on the grounds that others also polluted the local air. But, the judge responded, the plaintiffs had not objected to these more remote operations. And even if they were nuisances, they would “not form a reason why the defendant should set up an additional nuisance. There is no ground, I think, for inferring a licence to him” (Walter v. Selfe 1851, 435).

Almost one hundred years later, when a foundry in Ontario tried to defend itself against a florist’s nuisance suit on the grounds that other industries contributed to the offending pollution, the court would not be moved. Other pollution, the chief judge explained, is no defence:

“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” (Walker v. McKinnon Industries 1949, 767).
In Canada, nuisances can be stopped even when they predate the people complaining of them. For example, in an 1896 case concerning a stable in a residential neighbourhood of Montreal, the defendant objected that since the plaintiff had acquired the neighbouring property after the stable’s construction, he had no right to complain. The court dismissed this argument: “This circumstance as to the date of the respondent’s acquisition of title can make no difference in his rights to object to the nuisance” (*Drysdale v. C.A. Dugas* 1896, 25).³

Even a long-established operation may lose its right to pollute if a new neighbour complains about it. Although the Ontario Malleable Iron Company had been doing business since 1907, and its predecessors had operated a foundry on the property since 1876, a court restrained its harmful emissions in 1952. The Chief Justice refused to consider that the plaintiff company had chosen to locate beside the foundry. He noted that only after two years in business had it become aware of the damage. And regardless, he added, citing a well-known legal commentary, “It is no defence that the plaintiffs themselves came to the nuisance.” On this subject the Chief Justice also cited a much earlier decision: “whether the man went to the nuisance or the nuisance came to the man, the rights are the same” (*Russell Transport v. Ontario Malleable Iron* 1952, 728, 729).

Riparian Rights

From nuisance law has evolved a separate branch of the common law that riparians—people who own or occupy land beside lakes and rivers—can enlist to protect water. Under the common law, riparians have the right to the natural flow of water beside or through their property, unchanged in quantity or quality.⁴ This simple provision has enabled farmers, mill-owners, manufacturers, absentee landlords, fishermen, and titled aristocrats alike to protect themselves and the environment from water diversions or abstractions and from a host of pollutants including coal mine discharges, pulp and paper mill wastes, sanitary sewage, storm-water runoff, salt, and oil.

During the second half of the nineteenth century and the first half of the twentieth century, riparian rights played a crucial role in preserving and restoring lakes and rivers throughout much of Britain and North America. Riparian law remains a powerful force in Great Britain. There, the

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³ Although this case originated in Quebec, the Chief Justice of the Supreme Court of Canada cited another justice’s observation that “the English and French law on the subject of nuisance are exactly alike” (*Drysdale v. C.A. Dugas* 1896, 23).

⁴ Legal scholars disagree about who has riparian rights. According to Rueggeberg and Thompson (1984, 4), riparian rights “belong only to those who own the banks of rivers, lakes or other bodies of water.” Similarly, Percy (1988, 73) explains that “the riparian doctrine restricts water rights to those who own property that adjoins a body of water.” Others define riparians more broadly. According to McNeil and Macklem (1992, 1), “Every person who is in lawful possession of land adjacent to water, whether as a freeholder, leaseholder or in some other capacity, has riparian rights.” Campbell *et al.* (1974, 479, 480) straddle the issue, suggesting first that the riparian “doctrine provides occupiers of land bordering a natural stream (riparian land) with certain rights to the use and flow of water” but later mentioning “rights which are incidental to the ownership of land.”
Anglers’ Conservation (formerly Cooperative) Association fights water pollution by defending the property rights of riparians and fishermen in County courts. The Association has brought some 2,000 actions since its founding in 1948; it has lost only two (Bate 1993, 52-54; Bate 1994, 14).

In Canada’s Western provinces, where riparian law would have impeded mining and irrigation, statutes have governed water allocation since the late nineteenth century, although riparians may retain rights to clean water (Harvey 1990, 523). Even in Atlantic Canada and Ontario, where riparian rights theoretically remain in place, provincial governments have in recent decades overridden essential elements of riparian rights with statutes and regulations governing water (Percy 1988, 72; Lucas 1990, 20). Furthermore, for various reasons including the financial risks entailed in court cases and the courts’ possible reluctance to frustrate industry, Canadians now rarely enforce even those riparian rights that haven’t been overridden by statutes (Percy 1988, 75; Sharpe 1983, 197-98; Canadian Environmental Law Research Foundation 1986, 112). Where they continue to exist and are enforced, however, riparian rights remain powerful tools for environmental protection.

Under the common law, riparians may use an unlimited amount of water for “ordinary” purposes, which traditionally included only domestic and subsistence agricultural activities. More recently, courts have stretched the meaning of ordinary to encompass waterpower, provided that the power is used on the riparian land, or even, in some industrial areas, manufacturing (McNeil and Macklem 1992, 2; Campbell et al. 1974, 481). In most jurisdictions, riparians may use additional water for certain reasonable “extraordinary” purposes, such as irrigation or manufacturing, connected with their property. Courts have debated the reasonableness of various activities, with one of the strictest definitions of unreasonable being “any user which inflicts positive, repeated, and sensible injury upon a proprietor above or below” (Ellis v. Clemens 1891, 230). Reasonable or not, riparians do not have a right to divert water for use off their property.

A riparian’s right to use water confers no right to abuse it. Extraordinary water users may not interfere with other riparians’ property rights: They must return the water to the watercourse substantially undiminished in quantity and quality. As early as 1858 the courts determined that a tanner in Lower Canada must not block the River Yamaska’s flow to a downstream mill; they found that the tanner had the right to hold back water to propel his tannery’s wheels and machinery—an extraordinary use—only if “he does not thereby interfere with the rights of other proprietors” (Miner v. Gilmour 1858, 870). Similarly, in deciding an 1893 case against a Scottish mining company, one British law lord noted, “I am not satisfied that a riparian owner is entitled to use water for secondary [i.e., extraordinary] purposes, except upon the condition that he shall return it to the stream practically undiminished in volume and with its natural qualities unimpaired” (John Young v. Bankier Distillery 1893, 696).

Riparian law is extraordinarily potent, prohibiting any sensible change in the water’s quality. In the Scottish case noted above, a distiller obtained an injunction preventing an upstream coal mine from discharging hard water into a stream; while still pure and drinkable, the stream was no longer fit for the manufacture of whiskey. Twenty years later, a New Brunswick court ruled against an iron company whose operations discoloured the Nepisiquit River (Nepisiquit Real
Estate and Fishing v. Canadian Iron (1913). More recently, at the behest of a fishing club and a local landowner, a British court restrained upstream industries whose thermal pollution killed fish (Pride of Derby v. British Celanese (1952)).

Riparians can sue polluters to protect their rights even if they have suffered no evident harm; once interference with a riparian right is established, damage is presumed. In fact, riparians who can demonstrate that a proposed activity will likely violate their rights may act before water has been polluted or diverted. In 1970, a riparian living in northern Ontario demonstrated the law’s prophylactic effect by going to court to prevent a speed boat regatta planned by the Rotary Club. She feared that 60 racing boats would contaminate the lake upon which she lived. The judge issued an order forbidding the races, explaining that the plaintiff’s riparian rights entitled her “to the flow of water through or by her land in its natural state” (Gauthier v. Naneff (1970), 101). By polluting the lake—regardless of whether the pollution caused any harm—the planned races would violate her property rights. In such a case, said the judge, the court should grant an injunction as a matter of course.

Riparians’ rights to water substantially undiminished in quality and quantity by other riparians exist whether or not they use the water, and whether or not its alteration interferes with any of their activities. That a Trinidadian land owner in one 1918 case put to no use whatsoever either the river flowing through his property or the property itself didn’t prevent the court from recognizing his right to the natural flow of the river (Stollmeyer v. Trinidad Lake Petroleum (1918)). The law thus enables riparians to prevent polluters from establishing the right to carry on longstanding activities (a “prescriptive” right) that might interfere with future water uses.

As with nuisance law, under riparian law existing water pollution does not justify further pollution. Courts have not cared that, because a dozen other industries polluted a river, restraining one would not restore the water’s purity. If every polluter could defend himself on the ground of existing pollution, the reasoning goes, riparians could never repair the environment. The issue arose in an early twentieth century case against a New York salt manufacturer accused of depleting a creek’s flow and contaminating it with salt. The company tried to defend itself on the grounds that a dozen other salt works also diminished and polluted the creek. The judge, however, found that others’ contribution to the problem in no way lessened the defendant’s obligation; if anything, it increased it:

The fact that other salt manufacturers are doing the same thing as the defendant, instead of preventing relief, may require it. “Where there is a large number of persons mining on a small stream, if each should deteriorate the water a little, although the injury from the act of one might be small, the combined result of the acts of all might render the water utterly unfit for further use; and, if each could successfully defend an action on the ground that his act alone did not materially affect the water, the prior appropriator might be deprived of its use, and at the same time be without a remedy” (Strobel v. Kerr Salt (1900), 148).

Nor, under traditional riparian law, may polluters violate an individual’s rights in order to promote a greater good, be it private or public. As with nuisances, courts long refused to
consider the economic or social costs of prohibiting water abstraction, diversion, or pollution; they ruled against companies that had invested considerable capital in their works, those that employed hundreds of people and those representing a region’s leading—sometimes only—industries. Likewise, municipalities frequently failed to convince the courts to allow polluting sewage disposal systems in the name of the greater good. The courts, however, generally made one concession to the public interest: They delayed injunctions in order to give industrial and municipal polluters time to clean up.

American cases have provided some of the most interesting decisions about conflicts between individuals and the so-called public good. A case in 1900 against a paper mill in Indiana whose wastes polluted a creek illustrates the courts’ traditional refusal to balance private economic factors when choosing a remedy. In issuing an injunction against further pollution, the Indiana court refused to weigh the paper mill’s $90,000 construction costs against the plaintiffs’ material damages, which amounted to just $250. The court noted that the creek’s condition constituted a nuisance which caused damages “immeasurable by a pecuniary standard.” In this context, the size of the company’s investment was irrelevant:

The fact that [the] appellant has expended a large sum of money in the construction of its plant, and that it conducts its business in a careful manner and without malice, can make no difference in its rights to the stream. Before locating the plant the owners were bound to know that every riparian proprietor is entitled to have the waters of the stream that washes his land come to it without obstruction, diversion, or corruption, subject only to the reasonable use of the water, by those similarly entitled, for such domestic purposes as are inseparable from and necessary for the free use of their land; and they were bound, also, to know the character of their proposed business, and to take notice of the size, course, and capacity of the stream, and to determine for themselves, and at their own peril, whether they should be able to conduct their business upon a stream of the size and character of Brandywine creek without injury to their neighbors; and the magnitude of their investment and their freedom from malice furnish no reason why they should escape the consequences of their own folly (Weston Paper v. Pope 1900, 721).

A dozen years later, in a similar New York case, a judge who refused to consider the financial burdens an injunction would place upon a pulp mill explained, “It has always been the boast of equity that any substantial injustice might be corrected by it to even the humblest suitor, and that the financial size of such a suitor’s antagonist was not important” (Whalen v. Union Bag & Paper 1911, 393). The New York high court later confirmed that balancing an injunction’s great cost to the pulp mill against the plaintiff’s relatively small injury would be unjustified: “Although the damage to the plaintiff may be slight as compared with the defendant’s expense of abating the condition, that is not a good reason for refusing an injunction. Neither courts of equity nor law can be guided by such a rule, for if followed to its logical conclusion it would deprive the poor litigant of his little property by giving it to those already rich” (Whalen v. Union Bag & Paper 1913, 806).

Canadian courts have reached the same conclusions. In fact, the courts’ refusal to consider an injunction’s economic impact on a defendant remained so common that, according to the judge
in the above-mentioned case against a proposed Rotary Club regatta, “It is trite law that economic necessities of the defendants are irrelevant in a case of this character” (\textit{Gauthier v. Naneff} 1970, 103).

So, too, have courts refused to consider the \textit{public} costs of their injunctions. In rejecting the public good as a justification for water pollution, judges have frequently soared to inspiring rhetorical heights. Behind the rhetoric have been some of the most powerful environmental protection decisions in common law history. In the New York salt case previously discussed, the manufacturer tried to defend its polluting ways in the name of the public good. Salt manufacturing, it averred, was the region’s leading industry. The defendant alone employed more than 100 men and women. To shut it down—to say nothing of the dozen other salt mines that might be subject to similar actions—would harm the public interest. But the Court of Appeal judge objected. Requiring the interest and convenience of the individual to give way to the general good, he warned, “would amount to a virtual confiscation of the property of small owners in the interest of a strong combination of capital” (\textit{Strobel v. Kerr Salt} 1900, 145).

In defending individual rights against the interests of industry the judge cited an early coal mining decision:

\begin{quote}
It was urged that the law should be adjusted to the exigencies of the great industrial interests of the commonwealth, and that the production of an indispensable mineral ... should not be crippled and endangered by adopting a rule that would make colliers answerable in damages for corrupting a stream into which mine water would naturally run.... The consequences that would flow from the adoption of the doctrine contended for could be readily foretold. Relaxation of legal liabilities and remission of legal duties to meet the current needs of great business organizations, in one direction, would logically be followed by the same relaxation and remission, on the same grounds, in all other directions. One invasion of individual right would follow another, and it might be only a question of time when, under the operations of even a single colliery, a whole countryside would be depopulated (\textit{Strobel v. Kerr Salt} 1900, 146).
\end{quote}

The judge acknowledged that a higher court had, in the name of the community interest in natural resource development, overturned this decision, but noted that “[c]ourts of the highest standing have refused to follow the Sanderson Case” and that “its doctrine was finally limited by the court which announced it” (\textit{Strobel v. Kerr Salt} 1900, 147).

The judge then launched into his own passionate defence of individual rights:

\begin{quote}
The lower riparian owners are entitled to a fair participation in the use of the water, and their rights cannot be cut down by the convenience or necessity of the defendant’s business.... While the courts will not overlook the needs of important manufacturing interests, nor hamper them for trifling causes, they will not permit substantial injury to neighboring property, with a small but long-established business, for the purpose of enabling a new and great industry to flourish. They will not change the law relating to the ownership and use of property in order to accommodate a great business enterprise. According to the old and familiar rule, every man must so use his own property as not to
\end{quote}
injure that of his neighbor; and the fact that he has invested much money and employs many men in carrying on a lawful and useful business upon his own land does not change the rule (Strobel v. Kerr Salt 1900, 147-48).

Most Canadian courts continue to uphold the tradition of placing individual rights before the public good. When considering the above-mentioned bid to cancel the Rotary Club’s speed boat regatta, the judge hearing the case refused to allow his respect for the Rotary Club’s mission—to raise money for its work with crippled children—to influence his decision. “It is unfortunate,” he said, “that in the circumstances of this case the rights of a riparian land proprietor come into conflict with the laudable objects of a charitable pursuit formulated and prosecuted with sincerity and dedication ... None the less, the most honourable of intentions alone at no time can justify the expropriation of common law rights of riparian owners” (Gauthier v. Nanef 1970, 103).

In the absence of a specific law to the contrary, even government itself cannot justify violating people’s property rights to clean water in the name of the public good. As one judge explained at the end of the nineteenth century:

I know of no duty of the Court which it is more important to observe and no power of the Court which it is more important to enforce than its power of keeping public bodies within their rights. The moment public bodies exceed their rights, they do so to the injury and oppression of private individuals, and those persons are entitled to be protected from injury arising from the operations of public bodies (Roberts v. Gwyrfai District Council 1899, 614-15).

Similarly, in his decision on a 1928 challenge to the storm sewage disposal practices of Edmonton, Alberta, a Supreme Court judge acknowledged that the city represented the collective rights of its ratepayers, who required sewers. “But these rights,” he explained, “are necessarily restricted by correlative obligations. Although held by the municipalities for the benefit of all the inhabitants, they must not—except upon the basis of due compensation—be exercised by them to the prejudice of an individual ratepayer” (Groat v. Edmonton 1928, 533). The judge echoed the decision from an early sewage disposal case: “whatever the consequences, and much as the result may cause inconvenience, the principle must be upheld that, unless Parliament otherwise decrees, ‘public works must be so executed as not to interfere with private rights of individuals’” (Groat v. Edmonton 1928, 534).

Riparian rights, protecting lakes and rivers from obstruction, diversion, and corruption, complete the trio of property rights most commonly used in the defence of nature. Together, trespass, nuisance, and riparian rights have effectively empowered people to preserve or restore clean land, air, and water—too effectively, apparently, for governments, which have worked assiduously to undermine property rights and the environmental protection they have fostered.
The Erosion of Common Law Property Rights

Governments and, to a lesser degree, courts have weakened common law property rights. Through statutes, regulations, and judgments, they have modified liability rules, eroding victims’ rights to obtain injunctions against harmful activities and allowing pollution that the common law traditionally forbad.

The Defence of Statutory Authority

For centuries, governments have overridden or modified the common law with statutes and regulations. All too often, legislatures have made laws legalizing trespasses, nuisances, and violations of riparian rights, thereby indemnifying polluters from liability under the common law. As one judge explained, “The Legislature is supreme, and if it has enacted that a thing is lawful, such a thing cannot be a fault or an actionable wrong” (Canadian Pacific Ry. v. Roy 1901, 389). Governments have thus given polluters who are challenged in court a prized defence: the defence of statutory authority.

Courts, in determining whether governments have indeed indemnified particular activities, generally distinguish between permissive and mandatory statutes. Under the former, which maintain industries’ discretion over operating methods and locations, industries are expected to act in conformity with private property rights and cannot claim the defence of statutory authority. For example, a company’s obligation to maintain a highway cannot justify its use of damaging road salt when instead it could have used a harmless de-icing agent. Similarly, the right to generate electricity does not authorize a company to create a nuisance; it must choose a generating method and location that will not interfere with others’ property rights.

It is when the harm is an inevitable consequence of a legislatively authorized activity that a polluter can claim the defence of statutory authority. In mandating an activity or authorizing something to be done in a specific manner or location, the reasoning goes, the legislature sanctions all of its unavoidable consequences, including those that would have previously been forbidden. This is based on the principle of law that “he who grants something is deemed to also grant that without which the grant would be worthless.”

Madame Justice Wilson noted disapprovingly that some recent cases have not followed these principles. “[The] inevitable consequences doctrine is now being applied without regard to the type of statutory authority conferred on the public body,” she warned. “In my view,” she concluded, “to the extent that some of the more recent cases are inconsistent with the early principles, they should not be followed” (Tock v. St. John’s Metropolitan Area Board 1989, 634, 635). The Tock decision has been followed in at least seven cases since, and has been considered in several others. For commentary on the extent to which the decision has narrowed the defence.

For an extensive discussion of this issue, see the Supreme Court decision in Tock v. St. John’s Metropolitan Area Board (1989). In her decision for the majority, Madame Justice Bertha Wilson reviewed the case history of the defence of statutory authority and stated the principles to be derived from it. She distinguished between the inevitable results of legislation that imposes a duty or confers a specific authority and the results of legislation that confers a discretionary authority. Only the former, she concluded, have been statutorily authorized.
liability, people would retain their right to challenge in court the inevitable results of statutorily-authorized activities; legal actions could lead to injunctions against offending activities, thus thwarting the will of the legislature. Not surprisingly, legislators have written the laws—have set the rules governing the courts, in other words—so as to avoid that outcome.

Two judges of the Supreme Court of Canada have recently questioned the wisdom of the inevitability test, and with it the value of the defence of statutory authority. Chief Justice Dickson concurred with Mr. Justice La Forest that inevitability itself should not excuse exemption from tort liability. The fact that an operation will inevitably damage some individuals does not explain why those individuals should be responsible for paying for that damage. “Arguments about inevitability,” the judges agreed, “are essentially arguments about money.... ‘[I]nevitable’ damage is often nothing but a hidden cost of running a given system.” Their conclusion? “The costs of damage that is an inevitable consequence of the provision of services that benefit the public at large should be borne equally by all those who profit from the service.” The judges added that requiring the body that provides a service to bear the costs of its operations could serve as a valuable deterrent: “if the authority is to bear the costs of accidents … it may realize that it is more cost-effective to forestal[1] their occurrence” (Tock v. St. John’s Metropolitan Area Board 1989, 645, 646, 647, 648). Unfortunately, the judges do not seem to have succeeded in weakening the almost universal respect that the defence of statutory authority has enjoyed for over 200 years.

Although government-authorized nuisances are as old as the rights they violate, they long remained exceptions to the rule. Government-sanctioned property rights violations became more common in the late eighteenth century when American state legislatures passed a series of Mill Acts in order to promote their favoured form of economic development. Designed to encourage the construction of mills and to protect mill owners from expensive lawsuits, they permitted the owners to flood neighbouring lands. Although they provided for monetary compensation, they deprived victims of the rights to injunctions, punitive damages or self-help actions that they would have otherwise enjoyed under the common law (Horwitz 1992, 47-51).

British acts of that era likewise protected certain ventures from common law liability. As early as 1792, the courts determined that the public interest warranted indemnifying some public works authorized by Parliament. As the Chief Justice explained in that year, without liability exemptions “every Turnpike Act, Paving Act, and Navigation Act would give rise to an infinity of actions.... Some individuals suffer an inconvenience under all these Acts of Parliament; but the interests of individuals must give way to the accommodation of the public” (British Cast Plate Manufacturers v. Meredith 1792, 1307).

Some of the most dramatic early illustrations of statutory authority can be found in the British, American, and Canadian laws protecting railway companies from common law liability. Railways, the first of which were chartered in Britain in the late 1820s, mushroomed in the following decades; the British Parliament authorized the construction of over 400 between 1844 and 1846. As steam locomotives became commonplace, their noise, vibration, and smoke, along with the danger of fires set by escaping sparks, became frequent problems. Lawsuits involving of statutory authority, see Harvey (1990, 522) and Rankin (1991, 30-31).
 nuisances caused by trains were common. It rapidly became apparent, however, that the legislation authorizing the railways had overridden people’s common law rights to stop such nuisances. Those harmed could not expect the courts to issue injunctions against the railway companies; in fact, unless the legislation so provided, they couldn’t even count on being financially compensated for their losses.

*Rex v. Pease*, an 1832 English case in which users of a highway complained that the noisy, smoky locomotives on an adjacent railway line alarmed their horses and caused accidents, established the extent to which governments had immunized railway companies from liability for the damages they caused. The railway company defended itself on the grounds that Parliament, in authorizing its operations, undoubtedly took into consideration—and therefore tacitly authorized—the nuisances caused by steam locomotives. It likely did so, the company added, because locomotives served a public interest by facilitating the cheap transport of coal; the benefits of highway use, in short, should “be sacrificed to the greater public benefit derived from the undertaking” (*The King v. Edward Pease* 1832, 370). The court agreed that Parliament had, without qualification, authorized both the construction of the railroad parallel to the highway and the use of locomotives upon it. Although Parliament must have known that the railroad would inconvenience highway travelers, it had failed to impose any duty to screen the railway or to otherwise lessen its impacts. One could reasonably presume, therefore, that “the Legislature intended that the part of the public which should use the highway should sustain some inconvenience for the sake of the greater good to be obtained by other parts of the public in the more speedy travelling and conveyance of merchandise along the new railroad” (*The King v. Edward Pease* 1832, 371).

The courts confirmed the validity of the railroads’ defence of statutory authority in *Vaughan v. The Taff Vale Railway*, an 1860 case against a company whose sparking locomotive had set fire to a woods. The judges who heard that case agreed that they could not hold the company responsible for the fire. As one explained, “although the use of a locomotive engine must have been accounted a nuisance unless authorized by the legislature, yet, being so authorized, the use of it is lawful, and the defendants are not liable for an accident caused by such use without any negligence on their part” (*Vaughan v. Taff Vale Railway* 1860, 1355).

Four years later Horatio and Mary Brand filed a now-famous claim against the Hammersmith and City Railway Company, whose trains traveled the rails beside their property. The railroad’s vibrations reduced the value of their house and gardens and ensured that they would command a reduced rent in the future. When the Brands requested compensation for their losses, the lower court ruled against them, explaining that Parliament, in expressly authorizing the use of locomotives, had overridden the common law and its protection of individuals’ property rights. The statutes that replaced the common law did not stipulate that the companies must compensate for the effects of their operations. Requiring the railway company to compensate the Brands would therefore interfere with the power conferred upon it by the legislature.

The House of Lords upheld this decision after a spirited hearing at which some law lords argued that the Brands deserved compensation and others insisted that compensation was inappropriate since the legislature had not provided for it. Most agreed that in the absence of statutory authorization, the railway’s vibrations would have constituted a nuisance which neighbours
could have enjoined. No longer could the Brands sue for nuisance, however. As one justice explained, “if the Legislature authorizes the doing of an act (which if unauthorized would be a wrong and a cause of action) no action can be maintained for that act, on the plain ground that no Court can treat that as a wrong which the Legislature has authorized, and consequently the person who has sustained a loss by the doing of that act is without remedy, unless in so far as the Legislature has thought it proper to provide for compensation to him” (*Hammersmith and City Railway v. G. H. Brand* 1869, 196). *Rex v. Pease*, he said, had decided the matter back in 1832; *Vaughan v. Taff Vale* had followed. Huge sums had been invested in railways on the strength of those decisions. And so, regardless of those original decisions’ soundness, they ought to now be considered the law.

One law lord did point out the inequity of this reasoning. Mr. Baron Bramwell could not imagine that a company would be allowed to increase its profits by refusing to compensate the victims of its nuisances. Arguments about the necessity of creating nuisances, he protested, were really arguments about costs. For example, a railway company intent on preventing fires might station employees along its tracks to prevent sparks from igniting nearby grass. Since doing so would cost a considerable sum, the company would find it cheaper to simply risk starting fires. But there was no reason that the company—and ultimately the fare-paying passengers who benefited from the system—should not bear those risks and costs:

> Admitting that the damage must be done for the public benefit, that is no reason why it should be uncompensated. It is to be remembered that that compensation comes from the public which gets the benefit. It comes directly from those who do the damage, but ultimately from the public in the fares they pay. If the fares will not pay for this damage, and a fair profit on the company’s capital, the speculation is a losing one, as all the gain does not pay all the loss and leave a fair profit. Either, therefore, the railway ought not to be made, or the damage may well be paid for (*Hammersmith and City Railway v. G. H. Brand* 1869, 191).

The law lord failed to persuade his colleagues or to modify the well-established thinking on the issue of statutory authority.

*Brand v. Hammersmith* was to be extensively cited over the years, including in a 1901 case brought against the Canadian Pacific Railway Company for a fire set by sparks from one of its locomotives. In that case, CPR acknowledged that under common law it would have been liable for damages caused by fires that its trains started. It argued, however, that in authorizing the use of locomotives, Parliament had also authorized the use of fire and the occasional accidental escape of sparks. It claimed that Parliament had, in other words, indemnified railroad companies against the anticipated and inevitable results of using locomotives. The Privy Council agreed. “[I]t would be a repugnant and absurd piece of legislation,” the Lord Chancellor suggested, echoing *Brand v. Hammersmith*, “to authorize by statute a thing to be done, and at the same time leave it to be restrained by injunction from doing the very thing which the Legislature has expressly permitted to be done” (*Canadian Pacific Ry. v. Roy* 1901, 388).

Statutes authorizing property rights violations now abound. Their forms are legion. Often the statutes shield a single polluter or an entire industry by ordering courts to substitute damage
awards for injunctions. Ontario’s government started protecting favoured polluters from injunctions in 1885 in response to a riparian’s legal challenge to saw mills that deposited their wastes in the Ottawa River. Concerned that the lawsuit could shut down the polluting mills, the legislature passed a law ordering judges to weigh the lumber trade’s economic importance against the plaintiff’s injury before granting an injunction (McLaren 1984). In 1921, the Ontario government extended protection from injunctions to the copper and nickel mining and smelting industry, passing a law forbidding courts to hear cases about sulphur fumes. Instead, an arbitrator appointed by the government would award damages; in no circumstances would the arbitrator issue injunctions (Dewees and Halewood 1992). Three decades later, in response to a Supreme Court decision against a polluting pulp mill, the Ontario government decreed that the mill’s downstream victims would have to be content with damage awards rather than an injunction. Five years later, again in response to a successful court case, the government likewise protected the operators of sewage treatment plants across the province.

By now, in Canada and in the U.S., virtually no major polluter operates without some kind of statutory protection. Farmers benefit from laws that exempt them from liability for odours, noises, and dust that would, under the common law, constitute nuisances. The designers and manufacturers of nuclear power plants enjoy the protection of federal laws releasing them from any financial liability resulting from a nuclear accident—even if the accident is caused by their negligence or wilful wrongdoing.

In case after case, regulations and standards governing emissions, odours, and noise levels have made it easier—and cheaper—for industries to pollute. Polluters have long understood that they benefit from regulation. As one industry advisor noted, “No industry offered the opportunity to be regulated should decline it. Few industries have done so” (Owen and Braeutigam 1978, 2). The legislative erosion of traditional common law property rights has provided enormous subsidies to polluting industries. Manufacturers have been allowed to use others’ property for free, or at greatly reduced costs. The costs, of course, have not disappeared simply because polluters have not had to bear them. Instead, they have been externalized: The victims of pollution have been forced to underwrite the activities that harm them. This redistribution of costs is in effect a redistribution of wealth, typically from individuals to industry (Horwitz 1992, 70, 100-1; Ellickson 1973, 694-99).

While the erosion of property rights may have helped some industries to thrive, those industries have often been unviable, harming the economy as a whole as well as the environment. And they have often survived at the expense of more promising industries which have failed to secure special regulatory treatment. Furthermore, in relieving polluters from responsibility for the consequences of their actions, governments have removed a strong incentive for environmentally responsible behaviour. Under a common law liability regime, it is in an industry’s financial interest to avoid harming others. Otherwise, it may face injunctions or large damage awards. Experience in diverse fields confirms that strict liability increases incentives for responsible behaviour. Stricter product liability laws in the United States have led to the improved safety of many products. Similarly, increased medical malpractice premiums have changed doctors’ practices (Trebilcock and Winter 1993, 11).6

6 For more on the deterrent value of liability, see Wright and Linden (1980, Chapter 1) and Bardach and Kagan (1982, 271-83).
Conversely, immunizing people or industries from risk and responsibility decreases their level of care. After Quebec adopted a no-fault automobile insurance system in 1978, automobile fatalities rose; Australia’s no-fault scheme similarly increased fatalities. Likewise, industries that, thanks to government regulation, do not bear the costs of environmental destruction are unlikely to invest adequately in systems that preserve clean air, land, and water (Trebilcock and Winter 1993, 10, 22).

The public seems blissfully unaware of the perverse results of much environmental regulation. Environmentalists habitually call for further government intervention to stop pollution. Nobel economist Ronald Coase explained that most economists share that approach:

> When they are prevented from sleeping at night by the roar of jet planes overhead (publicly authorized and perhaps publicly operated), are unable to think (or rest) in the day because of the noise and vibration from passing trains (publicly authorized and perhaps publicly operated), find it difficult to breathe because of the odour from a local sewage farm (publicly authorized and perhaps publicly operated) and are unable to escape because their driveways are blocked by a road obstruction (without any doubt, publicly devised), their nerves frayed and mental balance disturbed, they proceed to declaim about the disadvantages of private enterprise and the need for Government regulation (Coase 1960, 26).

More than three decades later, those concerned about the environment continue to cling to the illusion that our land, air, and water can only be saved by further government action. Far too few yet realize the extent to which government-made laws and regulations, designed to protect particular industries and promulgated in the name of the public good, are environmental culprits (Yandle 1997).

**Compromise in the Courts**

Governments aren’t the only ones who have eroded common law property rights. The courts themselves have modified both the rules governing liability and the remedies available to those whose rights have been violated, diminishing people’s power to oppose environmental degradation. Various courts in the United States have been willing to modify the common law to accommodate industrial concerns (Horwitz 1992). While British and Canadian courts have maintained more conservative views, even they have sporadically made concessions to industrialization (Risk 1981, 122; Nedelsky 1981, 281-310).

The most important concession has concerned whether the character of a neighbourhood in which an activity occurred should influence its legality. In 1865, a British law lord suggested a compromise. He distinguished between nuisances resulting in personal discomfort and those resulting in material injury or financial harm. Courts, he said, should consider the character of the neighbourhood only in the former cases:

> If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are
actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighbourhood of another, and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration.... [T]he submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbours, would not apply to circumstances the immediate result of which is sensible injury to the value of the property (St. Helen’s Smelting v. William Tipping 1865, 1486).

The compromise as laid down in that case was accepted in both England and Canada; it still applies today. Courts continue to distinguish between nuisances resulting in “mere” personal inconvenience, discomfort, or annoyance and those causing actual damage to health or property. The former, unless substantial, may be justified by the character of the neighbourhood in which they occur. The latter, in contrast, readily entitle a complainant to his remedy. In 1989, two Canadian Supreme Court judges summarized the law as follows:

> The courts attempt to circumscribe the ambit of nuisance by looking to the nature of the locality in question and asking whether the ordinary and reasonable resident of that locality would view the disturbance as a substantial interference with the enjoyment of land.... [T]hese criteria find their greatest application in cases where the interference complained of does not consist of material damage to property but rather interference with tranquility and amenity.... In the presence of actual physical damage to property, the courts have been quick to conclude that the interference does indeed constitute a substantial and unreasonable interference with the enjoyment of property (Tock v. St. John’s Metropolitan Area Board 1989, 639-40).

**Reversing the Trend**

The simple rule that one may not interfere with his neighbour’s use or enjoyment of his property has protected the environment from an endless variety of insults for over seven hundred years. Only in the last two hundred years have governments extinguished, in any systematic way, people’s common law rights to be free of harm. In Canada, this trend has escalated over the course of the last fifty years, as governments have assumed greater control over polluting activities. The environmental consequences have been devastating.

Our challenge is to reverse the trend. We must restore strong property rights, thereby returning authority over resource uses and other environmental changes to those most directly affected by them. We must make it possible for the victims of pollution to once again use trespass, nuisance, and riparian law to prevent or to clean up the pollution of their land, the air above it, and the water running by or through it.
Property rights are not the best tool to solve every contemporary environmental problem. As a general rule, high transaction costs resulting from unavailable information, costly negotiations, or other factors reduce the common law’s effectiveness in fighting pollution. When many people suffer minor, cumulative damages from many small polluters, no individual has an incentive to sue; each costly suit would bring inconsequential relief. No one, for example, could sue every smog-producing driver that passes his home, and suing one or two would not measurably clear the air. Such cases call for government regulations that, in reducing emissions from numerous minor sources, make a major difference in air quality. However, the need for finely tuned regulations in specific cases does not diminish the need for stronger property rights that will empower individuals to address many of the most serious environmental threats facing them.

It is far more difficult to restore property rights than it is to erode them. Both those with pre-existing rights and those with newer rights now have legitimate—but nonetheless conflicting—interests in the ways property is used and affected by others’ uses. Whose rights should take precedence, who deserves compensation, and the source and form of that compensation are questions that both governments and courts will have to grapple with for years.

It will, in contrast, be far easier for governments to decide that new laws and regulations will not further override people’s property rights. When authorizing industries’ activities in the future, governments should specify that they are maintaining their citizens’ common law rights and not legalizing trespasses, nuisances, or violations of riparian rights. Conditions protecting the rights of potential victims to sue were common in nineteenth-century England, where early sanitation statutes specified that they did not legalize nuisances or other unlawful acts and where the Gas Act stated that in carrying on their works, gas manufacturers could not injure surrounding land. Inserting such conditions into contemporary laws would benefit the environment immensely.

Furthermore, although Canadians missed the opportunity in 1991 to enshrine property rights in the Constitution, constitutional reform is by no means off the political agenda. Including property rights in the Constitution’s Charter of Rights and Freedoms would more formally secure

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7 See Brenner (1974, 423). One law establishing sewage works is described in *Pride of Derby v. British Celanese* (1952, 164). The 1901 Derby Corporation Act, while establishing sewage disposal works, had specifically prohibited nuisances: “The sewage disposal works constructed ... shall at all times hereafter be conducted so that the same shall not be a nuisance and in particular the corporation shall not allow any noxious or offensive effluvia to escape therefrom or do or permit or suffer any other act which shall be a nuisance or injurious to the health or reasonable comfort of the inhabitants of Spondon.”

The Gas Clauses Act is described in *Hammersmith and City Railway v. G. H. Brand* (1869, 222).

Similarly, an Order in connection with England’s Electric Lighting Act, specifying that “Nothing in this order shall exonerate the undertakers from any indictment, action, or other proceedings for nuisance in the event of any nuisance being caused by them,” is discussed in *Shelfer v. City of London Electric Lighting* and *Meux’s Brewery Company v. City of London Electric Lighting* (1894, 290).
them. As centuries of case law so clearly demonstrate, secure property rights provide both citizens and the environment with immeasurable protection.

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