MORE THAN JUST A TRAPLINE: A TORTS LAW APPROACH TO PROTECTING INDIGENOUS TRAPPERS' ENVIRONMENTAL RIGHTS

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As I sit to write this paper in April 2019, a community of trappers[1] *from the Hollow Water Traditional Territory located on the eastern shore of Lake Winnipeg are being forced to pack up early with a significantly diminished harvest of animals.*[2] *This is a result of preliminary clearcutting and trail disruption caused by Canadian Premium Sand, a silica sand mining company that has proposed to start operation adjacent to Hollow Water Traditional Territory.*[3] *This disruption to the trappers' ability to hunt and harvest was done without consent, and it is anticipated that the future activity of the mining company will further interfere with trappers' ability to use their traplines.*[4] *This same story continues to play out in numerous communities across Canada where industrial activity directly and indirectly harms wildlife and plants. Consequently, trappers are forced to take action to protect the use of their traplines. This paper explores the potential role that tort law may play in helping Indigenous trappers protect their traplines from future harm or receive compensation for past harms.*

I INTRODUCTION

Canadian courts and policymakers attempt to strike a balance between protecting industrial activity, which is said to benefit the majority of Canadians, with the individual rights of Canadians who live near the development sites. Yet the costs of industrial development are not necessarily evenly distributed throughout society. The ability of those who live near these sites to reasonably enjoy the use of the surrounding land is often negatively impacted.[5] Studies have shown that Indigenous communities are disproportionately affected by the negative consequences of pollution and chemical contamination in Canada.[6] Specifically, Indigenous trappers who rely on access to plants and animals and who have become involuntary neighbours to development projects face some of the most negative impacts of those development projects.

For example, near Sagamok Anishnawbek First Nation, a group called the Traditional Ecological Knowledge (TEK) Elders have been attempting to stop the aerial spraying of a

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1. The term "trapper" refers to a person who has a legal right to hunt, fish, or harvest within a particular area of land, usually referred to as a "trapline," by using different forms of hunting traps.

2. Camp Morning Star, "Powerful Interview with Young Trapper Whose Trapline Has Just Been Clear Cut without Consent," (20 April 2019), online: Facebook <https://www.facebook.com/399420164196317/videos/860683360949004>.

3. Ian Froese, "Unearthed Worries: Frack Sand Mine in Manitoba Draws Ire from Neighbours," *CBC Manitoba* (26 November 2018), online: <https://www.cbc.ca/news/canada/manitoba/frac-sand-mine-lake-winnipeg-canadian-premium-sand-1.4921611>.

4. Camp Morning Star, *supra* note 2.

5. See Natasha Bakht & Lynda Collins, "The Earth Is Our Mother: Freedom of Religion and the Preservation of Aboriginal Sacred Sites in Canada" (2016) University of Ottawa Working Paper No 2016-24 at 25–26.

6. Julien Agyeman et al, *Speaking for Ourselves: Environmental Justice in Canada* (Vancouver: University of British Columbia Press, 2009); for general scholarship on environmental racism in Canada, see Kaitlyn Mitchell & Zachary D'Onofrio, "Environmental Injustice and Racism in Canada: The First Step Is Admitting We Have a Problem" (2016) 29 J Env L & Prac 305; Michael Mascarenhas, *Where the Waters Divide: Neoliberalism, White Privilege, and Environmental Racism in Canada* (Toronto: Lexington Books, 2012); Andil Gosine & Cheryl Teelucksingh, *Environmental Justice and Racism in Canada: An Introduction*, (Toronto: Emond Montgomery, 2008).

glyphosate-based herbicide, which is currently permitted as a provincially recognized forestry management practice[7] but is interfering with Indigenous trappers' rights.

A trapline refers to an area of land registered to one or more individuals to use for the trapping of fur-bearing animals.[8] The term "trapper" refers to a person who has a legal right to hunt, fish, or harvest within a particular area of land, usually referred to as a "trapline," by using different forms of hunting traps. Provinces and territories regulate the registration and use of traplines. In Ontario, the *Fish and Wildlife Conservation Act* defines a "trap" as a "body gripping trap, box trap, cage trap or net used to capture an animal or invertebrate."[9] This narrow definition, however, does not do justice to the broader meaning that a trapline has for so many people, especially Indigenous peoples in Canada. Some Indigenous trappers have stated that from an Indigenous legal perspective,[10] the word "trapline" may refer to territories that have been traditionally passed down through hereditary lines, that come with a variety of rights and responsibilities related to stewardship of land, that include rights such as primary hunting and gathering rights, that are used to share important teachings with children, or that are used to collect medicinal plants.[11]

This paper argues that Indigenous trappers have many rights and obligations related to their traplines that Canada's current environmental laws do not recognize. Indigenous trappers may look to enforce their Aboriginal rights related to traplines by bringing constitutional law claims. Yet, to bring a constitutional Aboriginal claim, claimants must receive authorization from their First Nation's or Band's authorized representatives.[12] This poses problems for individual Indigenous trappers, whose concerns and issues vary within the collective First Nation or band. As a result, in this paper I will consider alternative legal avenues for protecting Indigenous environmental rights, such as tort law, by building on the idea of developing an Aboriginal tort law[13] and applying it specifically to Indigenous trappers' legal issues. I will explore whether tort law is a workable mechanism for Indigenous trappers to ensure adequate environmental governance and stewardship. It will also be necessary to consider recent developments in Aboriginal and tort law, and consider the state of the law regarding Indigenous trappers' rights to protect property interests through tort law after the 2015 decision in *Saik'uz First Nation and Stellat'en First Nation v Rio Tinto Alcan Inc*.[14] This

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7. Christopher Read, "Trappers in Robinson Huron Treaty Area Want Aerial Herbicide Spraying to End," *APTN National News* (22 March 2019), online <https://www.aptnnews.ca/national-news/trappers-in-robinson-huron-treaty-area-want-aerial-herbicide-spraying-to-end> [Read].

8. See definition of "trapline" in British Columbia's *Wildlife Act*, RSBC 1996, c 488, s 1.

9. *Fish and Wildlife Conservation Act, 1997* SO 1997, c 41, s 1.

10. Here the term "Indigenous" refers generally to the plethora of Indigenous legal traditions that exist throughout Canada. Although some principles are similar across different Indigenous legal traditions, it should be noted that each one is unique and may change over time. For a fuller discussion of the different sources of Indigenous law and how they are not static, see John Borrows, "Indigenous Law Examples" in John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 59.

11. Bud Napoleon & Hannah Askew, "Caretakers of the Land and Its People: Why Indigenous Trapline Holders' Legal Rights and Responsibilities Matter for Everyone" (August 2018) West Coast Environmental Law at 15 [Napoleon & Askew].

12. *Behn v Moulton Contracting Ltd,* 2013 SCC 26 at para 33.

13. Lynda Collins & Sarah Morales, "Aboriginal Environmental Rights in Tort" (2014) 27:1 J Envtl L & Prac 1 at 15 [Collins & Morales].

14. 2015 BCCA 154 [*Saik'uz First Nation*].

decision affirms that *sui generis* Aboriginal property interests constitute a possessory interest in land. The fact that Aboriginal rights may constitute a proprietary interest in land is significant to Indigenous trapper claimants, because it is often required to ground a tort law cause of action. Finally, I will examine the potential role of tort law in addressing issues of Indigenous trappers by focusing specifically on the growing issue of forestry industry spraying herbicides over trapline territories to the detriment of the land, animals, and trappers. Indigenous trapline holders from all across Canada are organizing to actively resist the harms caused by the forestry industry, the mining industry, oil extraction, and so on, all of which diminish their ability to access and govern their traplines.[15] This paper focuses primarily on the TEK Elders from Sagamok Anishnawbek[16] First Nation who are fighting to end the practice of aerial herbicide spraying over forests in northern Ontario.

II "WHY IS NO ONE TALKING ABOUT THE HERBICIDE THE FORESTRY COMPANIES ARE SPRAYING ON OUR TRAPLINES?"[17]

In the case of Indigenous trappers, interference with the ability to reasonably enjoy use of land typically manifests in the form of environmental contamination or pollution. Industrial activity often involves using a wide range of chemicals, many of which are not well understood,[18] and allowing for their release into the environment, which can spread to nearby areas. Lack of research and understanding about the effects of many chemicals allows industry to use them widely without restriction from Canada's environmental regulations. These chemicals cause harm to plants, animals, and even humans who rely on the land for varying purposes. For example, herbicide spray used by the forestry industry is particularly harmful to large mammals, as the toxins accumulate at the top of the food chain: This is demonstrated in livers of animals like caribou, which have higher levels of toxicity in areas where spraying occurs.[19] Of particular concern is the use of glyphosate, a herbicide which is commonly sprayed in the air over forests to eliminate unwanted plants. In northern Ontario, the agent is deployed by air over portions of forests to eliminate unwanted plants, such as under bush, from stifling the early growth of coniferous trees, which are harvested for commercial use.[20]

Near Sagamok Anishnawbek First Nation, the TEK Elders have been attempting to stop the aerial spraying of the glyphosate-based herbicide, which is currently permitted as a provincially

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15. For example, Treaty 8 Trappers Association based in Alberta, see "MOU Transfers Management of Indigenous Traplines in Treaty 8 Territory" (1 May 2018), *Windspeaker,* online: <windspeaker.com>.

16. Please note that this paper includes a number of variations of the spelling for Anishnawbek, including Anishinaabe and Anishinabeg, to reflect the spelling used by each source.

17. Napoleon & Askew, *supra* note 11 at 59.

18. See generally Lynda Collins, *The Canadian Law of Toxic Torts* (Toronto: Canada Law Book, 2014) at 56 [Collins, *Toxic Torts*]; Carl F Cranor, *Toxic Torts: Science, Law, and the Possibility of Justice* 2nd ed (New York: Cambridge University Press, 2016) ch 1 at 1.

19. Napoleon & Askew, *supra* note 11 at 17.

20. DG Thompson & DG Pitt, "Frequently Asked Questions (FAQs) on the Use of Herbicides in Canadian Forestry: Technical Note No 112" (2011) online: *Canadian Forest Service Publications* <https://cfs.nrcan.gc.ca/publications?id=32344> [Thompson & Pitt].

recognized forestry management practice.[21] Ontario's Ministry of Natural Resource and Forestry (MNRF) maintains that the use of glyphosate is a necessary and harmless practice to ensure the success of tree-planting operations that follow major clearcutting.[22] However, TEK Elders insist that the use of the herbicide has interfered with trappers' ability to use the trapline for hunting and harvesting medicinal plants. They also explain that the practice of spraying a herbicide as potent as glyphosate interferes with the trappers' ability to steward the plants, animals, and land according to their own laws and worldview: "Herbicides destroy the interdependent balance of all life, which is the core philosophy of the Anishinabek."[23] Not only do the Anishinabek trappers suffer diminished ability to use the trapline to hunt and collect plants, but the forestry practice has also interfered with their ability to interact with the land in a way that is in line with their Anishinabek worldview.

A. Indigenous Trappers are Uniquely Vulnerable to Environmental Harm

Canadian environmental statutory law and regulation are often based on standards of allowable contaminants that do not take into account the particular cumulative effects and injury to Indigenous trappers. For example, a certain amount of toxicity and wildlife damage may be allowable under Canadian environmental standards yet may conflict with Indigenous trapline governance practices/protocols. Many experienced trappers and elders, drawing on first-hand experience out on their traplines as well as Traditional Ecological Knowledge, have warned about the need to consider the cumulative effects of contamination and pollution. For trappers, the harm arises not only from the significant reduction in their ability to hunt larger mammals, but also from a disruption to the entire system.

One of the reasons for the cognitive dissonance between what is actually needed to protect Indigenous trappers and what is permitted in the areas where traplines exist is that colonial Canadian environmental protection and conservation regimes have been superimposed onto Indigenous systems of environmental governance and stewardship.[24] Various Indigenous systems of environmental governance and stewardship continue to flourish but often do so separately or in conflict with Canadian federal and provincial laws.[25] Whereas Canadian environmental protection is maintained through a regulatory and assessment regime that industry must navigate through to obtain permits and be allowed to continue operations, many Indigenous environmental legal obligations automatically accompany land ownership or land use. Cree legal scholar Darcy Lindberg explains that the legal protocols that oblige

21. Read, *supra* note 7.

22. Julien Gignac, "In Northern Ontario, Herbicides Have Indigenous People Treading Carefully and Taking Action," *The Globe and Mail* (12 November 2017) online: <https://www.theglobeandmail.com> [Gignac].

23. A quote from a letter written by TEK Elders to provincial and federal departments, as printed in *ibid*.

24. Napoleon & Askew, *supra* note 11 at 25–26.

25. Jessica Clogg et al, "Indigenous Legal Traditions and the Future of Environmental Governance in Canada" (2016) 29 J Envtl L & Prac 227; Benjamin J Richardson, "The Ties That Bind: Indigenous Peoples and Environmental Governance" in Benjamin J Richardson, Shin Imai, & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford: Hart Publishing, 2009).

trapline holders to protect land and animals are rooted in principles of deep reciprocity.[26] In this way, trappers who have obtained a right or ability to hunt, fish, or harvest on the land simultaneously have an obligation to protect the land and the accompanying plants and animals.

Whereas Western ideas of conservation centre on the need to conserve resources for the purposes of human consumption and profit, some Indigenous trappers' obligations go beyond human-centred conservation and seek to protect the environment on behalf of the animals' best interests rather than on behalf of their own best interests.[27] To address this problem, scholars Collins and Morales have called for the development of an Aboriginal tort law through which the court will incorporate Indigenous perspectives into the tort law analysis.[28] Collins and Morales argue that tort jurisprudence in the area of Aboriginal environmental claims should reflect the insights of Aboriginal law and scholarship, and should be utilized as a crucial part of protecting property interests in Canada.[29] This approach is particularly significant for Indigenous trappers, who have their own varied systems of governance, protocol, and legal obligations that coincide with being a trapper and using their trapline. The unique perspective of trappers should be used in both civil litigation and consultation with government to raise the collective understanding of the environmental cost of industrial activity. On an individual basis, trapline holders should use this knowledge to remedy against industrial activity, such as aerial spraying of herbicides, that impedes their ability to enjoy the use of their trapline. Successful tort claims may allow Indigenous claimants to protect against environmental degradation to their trapline territory in a more direct way than environmental regulation alone could provide. It is more direct, in that protecting property interests of Indigenous trapline holders sometimes coincides with allowing Indigenous trapline holders to fulfil their own environmental protocols and legal obligations to the land under their own legal systems.

III CAN TORT LAW BE USED AS AN EFFECTIVE MECHANISM OF ENVIRONMENTAL GOVERNANCE FOR INDIGENOUS TRAPPERS?

One of the central questions of this paper is whether current tort law is a suitable avenue through which Indigenous trappers can enforce their Aboriginal rights to use their traplines. Beyond providing Indigenous trappers a legal avenue to protect their traplines, this paper also considers tort law's potential to reconcile Indigenous environmental laws upheld by Indigenous trappers with Canadian environmental law. Although there are fundamental differences between the common law's approach and various Indigenous laws' approach to remedying or preventing wrongdoings, there may be some common ground between the two. For example, tort law's historical purpose of balancing the right of autonomy with the obligations to not

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26. Darcy Lindberg, *kihcitwâw kîkway meskocipayiwin (sacred changes): Transforming Gendered Protocols in Cree Ceremonies through Cree Law* (LLM Thesis, University of Victoria Faculty of Law, 2017) [unpublished] at 95, 110.

27. Raymond Williams, "Ideas of Nature" in *Problems in Materialism and Culture: Selected Essays* (London: NLB, 1980) at 67–85.

28. Collins & Morales, *supra* note 13 at 20.

29. Collins & Morales, *supra* note 13 at 21.

do harm to one's neighbour[30] shares some similarities to the normative principles within Anishinaabe law that each person owes a duty of care to each other and the environment.[31]

A. Historical Development of Tort Law

The overarching purpose of tort law is to address the injury and losses that one person experiences because of the conduct of another person, and to compensate them for that loss.[32] Property torts specifically address injury and harms related to an interest in property. For example, private nuisance protects the right of those with a possessory interest in land to enjoy a reasonable level of environmental quality.[33]

Tort causes of action such as nuisance and trespass were developed to protect an individual's property interests.[34] Within the common law tradition, the protection of a proprietary interest in land is rooted in the idea that with ownership comes the right to do whatever you please with the land.[35] Of course, this is limited to restrict behaviour that would interfere with a neighbouring property owner's ability to reasonably enjoy their land. Within the common law concept of property, control of property is manifested through possession. Other legal traditions frame the relationship between humans and land differently. For example, within Anishinabek law the relationship to land or property is manifested in capacity, not possession. This means that a person's control of a piece of land flows from their capacity and ability to help others and maintain a reciprocal relationship with the land.[36] These fundamental differences in the way that ownership and property rights are conceived will impact the ways in which Indigenous trappers might wish to protect their property rights vis-á-vis access to a trapline that has been harmed by industrial pollution or contamination.

If tort law is "the institution that determines what our legal rights and obligations are to one another . . . and, as such, affects our expectations of ourselves and of others,"[37] then perhaps tort law is an appropriate mechanism for trappers to use to protect their ability to govern their environment in a reciprocal manner. Furthermore, in *Tsilhqot'in Nation v British Columbia*, the Supreme Court of Canada stated that the *sui generis* nature of Aboriginal title means that it creates a beneficial interest in land that gives the First Nation the right to possess it, manage it, use it, enjoy it, and profit from its economic development.[38] If tort law is open to protecting this type of *sui generis* property interest, there is potential for a deeper level of

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30. Michael Lobban, "The Development of Tort Law" in William Cornish et al, eds, *The Oxford History of the Laws of England: Volume XII: 1820–1914 Private Law* (Oxford: Oxford University Press, 2010) at 891 [Lobban].

31. Larry Chartrand, ed, *The Inter-Societal Imperative of Understanding Indigenous Concepts of "Property"* (2006) [Chartrand].

32. Allen M Linden, Lewis N Klar, & Bruce Feldthusen, *Canadian Tort Law: Cases, Notes & Materials*, 14th ed (Markham: LexisNexis, 2014).

33. Collins, *Toxic Torts*, *supra* note 18 at 56.

34. Lobban at 887.

35. *Ibid*.

36. Chartrand, *supra* note 31.

37. Leon Trakman & Sean Gatien, *Rights and Responsibilities* (Toronto: University of Toronto Press, 1999) at 3, cited in Collins & Morales, *supra* note 13 at 4.

38. 2014 SCC 44 at paras 70, 73 [*Tsilhqot'in*].

environmental rights protection open to trappers who wish to protect their own ability to steward the trapline.

Several scholars have already begun to analyze ways in which the law could adapt to better protect Aboriginal environmental rights. For example, scholar Lynda Collins' work has focused on the ways in which Aboriginal property interest may be relied on to ground tort law remedies to protect Aboriginal environmental rights outside of constitutional law.[39] As Collins explains, in the context of property tort law there are typically four categories of Aboriginal property interests: (1) interests in reserve lands, (2) interests in Aboriginal title lands, (3) interests in lands over which a claim of Aboriginal title has been asserted, and (4) interests involving lands subject to Aboriginal rights.[40] These four categories apply to Indigenous trapline holders as well. Where a trapline is within a First Nations reserve, then that trapper or trapper family will have sufficient possessory interest in the land to pursue a nuisance claim.[41] In cases where the trapline exists in territories over which treaties have been signed, this interest may stem from the constitutionally protected treaty rights.[42] In other cases, and most likely where traplines exist over untreatied territories, trappers' interest in the land may stem from constitutionally protected Aboriginal rights and/or title.[43]

B. Filling in the Gaps of Constitutional Aboriginal Law

Bringing a constitutional claim under section 35 may be a way for trappers facing interference with their trapline in the form of environmental harm to seek remedy. However, this legal avenue poses many barriers to trapper claimants. First, because Aboriginal rights are held collectively, an individual who wishes to make a claim asserting section 35 rights will require the support of the Nation's authorized representative.[44] In First Nation communities that are Aboriginal First Nations *and* "bands" within the meaning of the *Indian Act*,[45] the elected band council will act as the authorized representative. This may pose a problem to potential claimants in communities where the environmental harm comes as a result of an

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39. Lynda Collins, "Protecting Aboriginal Environments: A Tort Law Approach," in Sandra Rodgers, Rakhi Ruparelia, & Louise Bélanger-Hardy, eds, *Critical Torts* (Toronto: LexisNexis, 2008) [Collins, "Protecting Aboriginal Environments"].

40. *Ibid* at 74.

41. *Saik'uz First Nation*, *supra* note 14 at para 88.

42. The text of Treaty 8 states that "Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described," Treaty No 8 Made June 21, 1899, online: <http://www.aadnc-aandc.gc.ca/eng/1100100028805/1100100028807>; see also *Mikisew Cree First Nation v Canada*, 2005 SCC 69, where trapping rights of Indigenous people, protected in Treaty 8, were at issue.

43. In *R v Van der Peet,* [1996] 2 SCR 507 [*Van der Peet*], the Supreme Court of Canada laid out the "integral and distinctive" test for determining the existence of an Aboriginal right, and in *R v Sappier*, 2006 SCC 54, the court clarified that even practices such as food harvesting, which are essential to the survival of a group, may meet that test; the test for proving Aboriginal title was laid out in *Delgamuukw v British Columbia,* [1997] 3 SCR 2010 [*Delgamuukw*].

44. *Behn v Moulton Contracting Ltd,* 2013 SCC 26 at para 31.

45. *Indian Act,* RSC 1985, c I-5.

industrial activity that the band council has negotiated and approved of, because then they can act as the gatekeepers to any cause of action that would interfere with the industrial activity.[46]

There are also several other barriers that remain. Even if an Indigenous trapper is authorized to bring a section 35 claim, the infringement of an Aboriginal right may be justified when the interests of all Canadians are weighed against those of the Indigenous claimants. As a result, as Kent McNeil argues, Aboriginal title can provide less protection than other non-constitutional property interests.[47] In some cases, the only remedy potentially available to trappers is engaging the government's duty to consult, which does not mean their consent is required for a project or conduct to go ahead.[48]

For Indigenous trapline holders, consultation is often not enough to protect the nuanced environmental and Aboriginal right at risk: interference with a trapline holder's ability to use and steward the trapline. Consultation may succeed in bringing trappers to the table and giving them a voice. However, if statutory requirements of environmental assessment and scientific reporting do not accord with the trappers' level of knowledge and assessment of their trapline, decision making will substantially fail to give effect to trappers' roles as stewards of the trapline. Trappers should be able to protect and ensure conservation of their environment as *they* understand it and with their engagement. For example, the TEK Elders fundamentally do not believe that a chemical herbicide should be sprayed over the forests in their territory where they trap not only because it interferes with their ability to conserve wildlife and plants, but because it does not align with their Anishinaabe worldviews of how the forests should be treated.

Finally, litigating a section 35 claim requires a significant amount of time, money, and resources, especially if the plaintiff is seeking to prove the existence of Aboriginal rights and/or title. Therefore, in cases where the ultimate legal goal is to stop conduct that interferes with a trapline holder's ability to hunt, fish, or harvest plants as well as ensure that the animals and plants are protected, then tort law may be a more pragmatic avenue.

The gaps in constitutional law reiterate the need to find alternative legal avenues, such as tort law, to protect Indigenous trappers' environmental rights. Tort law is an appealing alternative legal avenue because it acts to directly address harm and is rooted in principles that synchronize with some Indigenous legal principles, such as owing a duty of care to others. Most tort law claims are grounded in the claimant's proprietary interests. Therefore, it is necessary to connect Indigenous trappers' interest in traplines to proprietary interest in the land. In Canada, the case law has started to show signs that the law could evolve to better protect Indigenous trappers' constitutional Aboriginal rights and title through the application of tort law. The following sections will discuss some of the developments in the case law, such as the *Saik'uz First Nation* and *Stellat'en First Nation v Rio Tinto Alcan Inc* decisions[49]

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46. For example, this scenario is currently playing out in Hollow Water Traditional Territory, as the elected band counsellors support the operation of a sand mine near the territory, whereas other members of the community, including trapline holders, are concerned about the negative environmental impacts of the mining operation to their trapline.

47. Kent McNeil, "Defining Aboriginal Title in the 90s: Has the Supreme Court Finally Got It Right?" (Annual Robarts Lecture; 12th) (Toronto: York University Printing Services, 1998) at 21, 26, cited in Collins & Morales, *supra* note 13 at 10.

48. Collins & Morales, *supra* note 13 at 11.

49. *Saik'uz First Nation, supra* note 14.

to demonstrate the practical ways in which tort law can be applied to protect Indigenous trappers' rights.

IV TORT ANALYSIS: THE CURRENT STATE OF TORT LAW AND POSSIBLE AVENUES FOR REMEDY AGAINST INJURY TO TRAPLINES FROM SPRAYING OF HERBICIDES

In this section I will discuss the ways in which tort law could be used by Indigenous trappers to seek remedy against injury to traplines from spraying of herbicides. I begin with a discussion of the landmark decision in the *Saik'uz First Nation* case.

A. The BCCA's Decision in *Saik'uz First Nation* and What It Means for Trappers

The first consideration for Indigenous claimants seeking to protect their traplines from the negative effects of herbicide spray through a property tort claim is whether their relationship to the trapline will qualify as sufficient "possessory interest" in the land. In the 2015 British Columbia Court of Appeal (BCCA) decision *Saik'uz First Nation*, the issue of whether Indigenous claimants could bring forward tort claims, which were grounded in not-yet-proven Aboriginal rights and/or title, was resolved in favour of Indigenous claimants.[50] In 2011, the first claims were brought by Saik'uz and Stellat'en First Nations, also referred to as the "Nechako Nations," against Rio Tinto Alcan in private and public nuisance and for breach of riparian rights as a result of operations of Rio Tinto's dam.[51] The Nechako Nations were attempting to address the issue of environmental harm to their traditional fisheries in the Nechako River area, which had occurred as a result of the construction of the dam in 1952 and continued operation by Rio Tinto Alcan. Initially, the British Columbia Supreme Court (BCSC) granted a motion to strike the claims on the basis that it was plain and obvious that the plaintiff's claims had no reasonable chance of success at trial, given that the tort's claims were grounded in unproven Aboriginal title and/or rights and interest in reserve land.[52] In 2015, the BCCA overturned this judgment, clarifying that asserted but unproven Aboriginal title and/or rights were sufficient to allow claims in nuisance and riparian rights to proceed to trial.[53] However, for the claims regarding property rights of reserve land, the BCCA found that claimants could not proceed based on riparian rights, as those water rights had not yet been conveyed when the reserve land was created.[54] Still, the court held that exclusive possessory rights to reserve lands were enough to sustain claims in nuisance or trespass.[55]

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50. *Saik'uz First Nation, supra* note 14 at para 60.

51. *Ibid* at para 4; see also *Thomas v Rio Tinto Alcan Inc*, 2013 BCSC 2303 at paras 2–3, [2013] BCJ No 2748 [*Thomas*].

52. *Ibid* at 51.

53. *Saik'uz First Nation, supra* note 14 at paras 60–79.

54. *Ibid* at paras 81–85.

55. *Ibid* at para 88.

The BCCA's decision in *Saik'uz First Nation* is significant. The decision allows Indigenous claimants to have the same access to tort law to protect their environmental rights as non-Indigenous Canadians. The BCCA clarified that *sui generis* Aboriginal property interests will constitute a possessory interest in land, which is required to ground a number of tort law causes of action. Indigenous claimants with asserted but as-yet-unproven Aboriginal title and/or rights claims can bring forward tort claims grounded in the possessory interest of those lands. In doing so, the BCCA highlighted the repeated dicta within Canadian jurisprudence that Aboriginal rights were not created by section 35 but rather existed before the arrival of the first European colonizers.[56] The words "recognized and affirmed" within section 35 indicate that the Crown has already accepted the existence of Aboriginal rights and now it is a matter of identifying what those rights are.[57]

Given the difficulty of proving a claim to Aboriginal rights and/or title—to date there has only been one successful grant of Aboriginal title[58]—the *Saik'uz First Nation* decision has opened up the possibility of remedy through tort law for a large group of Indigenous claimants facing environmental harm. Specifically, the decision now makes it possible for an Indigenous trapline holder to meet the first qualification of standing in a claim of private nuisance, as well as a number of other tort claims, which I will elaborate on below.

B. Types of Tort Claims That Could Be Advanced

There a several types of tort claims that could be used to defend Aboriginal environmental rights. This section will review profit à prendre, private and public nuisance claims, trespass claims, breach of riparian rights, and defence of statutory authority.

1. Profit À Prendre

Profit à prendre refers to a right to enter on the land of another and take something from the land, such as minerals, oil, stones, trees, turf, fish, or game.[59] In some cases, it may be possible for Indigenous trappers to initiate property tort claims by grounding their possessory right to land through a profit à prendre right to the trapline. This approach was accepted by the BCCA in *Bolton v Forest Pest Management Institute,* where a registered trapline was found to be a sufficient interest in the land to substantiate the tort claim.[60] In their original pleadings the Nechako Nations argued that they had an Aboriginal right to fish, which could be likened to a profit à prendre and thus was sufficient to ground their claim in private nuisance.[61] On appeal, this pleading was upheld on the basis that if the Aboriginal right could be proved the profit à prendre right would be sufficient to ground a private nuisance claim.[62]

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56. *Ibid* at paras 63–66, citing *Van der Peet, supra* note 43 at para 28; *Delgamuukw, supra* note 43 at para 133; and *Tsilhqot'in. supra* note 38 at para 69.

57. *Tsilhqot'in, supra* note 38 at para 62.

58. *Ibid*.

59. *R v Tener,* [1985] 3 WWWR 673 at 690–691.

60. (1985), 21 DLR (4th) 242, [1985] 6 WWR 562 (BCCA).

61. *Thomas*, *supra* note 51 at para 22.

62. *Saik'uz First Nation*, *supra* note 14 at para 55.

2. Private Nuisance Claims

Once the issue of standing is resolved, a private nuisance claimant is required to demonstrate that the interference to their property, or property over which they have shown an adequate possessory interest, is both substantial and unreasonable.[63] The first part of this two-part approach, developed in *Antrim Truck Centre Ltd v Ontario (Transportation)*, requires plaintiffs to demonstrate that the interference is substantial, or "non-trivial."[64] Non-trivial interference does not necessarily require material injury; it is possible for non-material injury that results in loss of amenity to property to constitute a non-trivial interference. The courts have previously found that the use of aerial spraying of herbicides over a plaintiff's property may constitute a private nuisance.[65] Given that government reports have found that use of glyphosate can cause short-term reduction in numbers of some wildlife species, it is likely that the contamination of glyphosate within a trapline, which is typically used for activities such as harvesting plants and hunting wildlife, will meet the non-trivial interference test.[66]

The second part of the two-part approach requires the plaintiff to demonstrate that the interference complained about is unreasonable. This analysis includes a consideration of the non-exhaustive factors enumerated in *Huron Steel*: severity of the interference, character of the locale, utility of the defendant's conduct, and sensitivity of the use interfered with.[67] The severity of the interference will include an analysis of the nature, duration, and effect of the harm. The severity of the interference is unique in Indigenous claims where the plaintiffs' rights to the trapline are often founded on the fact that hunting and harvest on that land is integral to their culture, livelihood, and well-being. As for the nature and duration of the harm, the aerial spraying of herbicides is done on a rotation, and the herbicide is said to be taken up by the targeted vegetation within around two days. However, it is unclear from the studies how long the contaminants continue to exist if ingested by wildlife or absorbed into water systems.[68]

The character of the locale, or neighbourhood, is another relevant factor to consider in the balancing test of "unreasonable" interference.[69] The court may consider the changing nature of the locale due to development, however they may also consider who was there first. In the case of an Indigenous trapline holder, the very claim of the existence of Aboriginal rights and/or title demonstrates that they were there first. Finally, in determining whether the interference is "unreasonable," the court may consider the utility of the defendant's conduct. However, in cases where the plaintiff has suffered physical or material damage to their property, the utility of the defendant's conduct, no matter how high, will not defeat the plaintiff's claim of unreasonable interference (especially where the defendant is a private party).[70] Therefore,

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63. *Antrim Truck Centre Ltd v Ontario (Transportation),* 2013 SCC 13 [*Antrim*].

64. *Ibid* at para 19.

65. See *Friesen v Forest Protection Ltd*, [1978] NBJ No 30 at para 34.

66. Thompson & Pitt, *supra* note 20 at 5.

67. *340909 Ontario Ltd v Huron Steel Products Ltd* (1992), 9 OR (3d) 305.

68. Thompson & Pitt, *supra* note 20 at 5.

69. See *St. Helens Smelting Co v Tipping* (1865), 11 HLC 642, (HL(Eng)); *Tock v St John's Metropolitan Area Board*, [1989] 2 SCR 1181.

70. This was confirmed by the Supreme Court of Canada in *Schenk v Ontario; Rokeby v Ontario*, [1987] 2 SCR 289, where salt-spraying caused physical injury to two families' farm properties; also see *Antrim, supra* note 63.

it is likely that the interference caused by aerial spraying of glyphosate-based herbicides, which kills plants and animals within traditional trapping territory, will constitute a non-trivial and unreasonable interference sufficient to ground a private nuisance claim.

3. Public Nuisance Claims

Public nuisance refers to "an unreasonable interference with the public's interest in questions of health, safety, morality, comfort or convenience."[71] A private party such as an individual trapper or trapline-holding family may only bring a claim in public nuisance with the permission of the attorney general. However, if the trapper claimant can show that they have a "special injury" as a result of the nuisance, then they may be able to bring the claim themself.[72] Case law is mixed on what constitutes a "special injury." In *Hickey et al v Electric Reduction Co of Canada, Ltd* the court held that special injury means the plaintiffs must have injury that is not only different in degree but in kind from that of the general public.[73] In contrast, in *Gagnier v Canadian Forest Products Ltd* the court rejected the *Hickey* approach and allowed crab fishers to privately pursue a public nuisance claim on the basis that a special injury, different in degree, was sufficient.[74] If the *Gagnier* approach is used, then trappers will have a better chance of being able to make a private claim in public nuisance, as typically herbicide spraying over public forests affects them to a higher degree than non-Indigenous Canadians because they are more likely to rely on that harvest as a food or medicinal source. Even if Aboriginal rights or title is claimed but not yet proved, it is arguable that preserving the environmental quality of the territory is so crucial that it would still meet the common law test for special injury.[75] Furthermore, if the trapper can prove that the harm interferes with the exercise of an Aboriginal treaty or Aboriginal right, then that will likely also meet the special injury test.[76] Notably, in *Saik'uz First Nation,* neither the BCSC nor the BCCA went into an analysis of whether the Nechako Nations had sufficient special injury to bring a claim in public nuisance.

4. Trespass Claims

In *Saik'uz First Nation,* the court confirmed that Aboriginal *sui generis* property interests are sufficient to substantiate a trespass claim. Previously, in *Tolko Industries Ltd v Okanagan Indian Band*, the Okanagan Indian Band was able to ground a trespass claim against Tolko Industries over an area of land where they had a previously proven their right to harvest

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71. *Ryan v Victoria (City),* [1999] 1 SCR 201 at para 52, *citing* LN Klar, *Tort Law,* 2nd ed (Toronto: Carswell, 1996). See also Collins, *Toxic Torts, supra* note 18 at 52.

72. Allen M Linden, Lewis N Klar, & Bruce Feldthusen, *Canadian Tort Law: Cases, Notes & Materials*, 14th ed (Toronto: LexisNexis, 2014) at 659–660.

73. *Hickey et al v Electric Reduction Co of Canada*, Ltd (1970), 2 Nfld & PEIR 246 at 372.

74. *Gagnier v Canadian Forest Products Ltd.,* 1990 CanLII 538 (BCSC) at 19.

75. Collins Morales, *supra* note 13 at 15; Lynda M Collins & Meghan Murtha, "Indigenous Environmental Rights in Canada: The Right to Conservation Implicit in Treaty and Aboriginal Rights to Hunt, Fish and Trap" (2010) 47:4 Alberta L Rev at 959–991.

76. Collins, "Protecting Aboriginal Environments," *supra* note 39 at 61. See also Meghan Murtha, "Granting Salmon Standing: Modernizing Public Nuisance to Serve the Public Interest in Environmental Protection" (2009) 17 Tort L Rev 45.

timber.[77] The BCCA's decision in *Saik'uz First Nation* expanded trespass as a cause of action to Indigenous claimants, as it is now arguable that even plaintiffs who ground the trespass claim in a not-yet-proven Aboriginal rights and/or title claim have sufficient possessory interest to bring the claim forward. The success of environmental trespass claims typically rests on the issue of directness, as the plaintiff is required to prove that the defendant directly—whether intentionally or negligently—caused the contaminant to enter the plaintiff's land.[78] In the case of Indigenous trapper claimants, if the aerial spraying is conducted directly over their territory that falls within their trapline, then the issue of directness will likely be overcome.[79] However, if the aerial spraying occurs in neighbouring territory, it will be necessary for the claimants to demonstrate that the arrival of contaminants onto the trapline was a direct result of the defendant's conduct.[80]

5. Breach of Riparian Rights

The owner of land connected to water such as a river has riparian rights, which include "the right to access the water, the right of drainage, rights related to the flow of water, rights relating to the quality of water, rights relating to the use of water and the right of accretion."[81] These common law water rights may be limited through the enactment of water legislation, as was the case in *Cook v Corporation of the City of Vancouver*.[82] In *Saik'uz Nation*, the BCCA held that because the common law riparian rights were extinguished by the enactment of the *Water Act Amendment Act*[83] before the creation of the Aboriginal land reserve, interest in the reserve lands did not suffice to ground a claim for breach of riparian rights.[84] However, the Saik'uz Nations argued that the *Water Act Amendment Act* was constitutionally inapplicable to Aboriginal title lands, and the BCCA allowed this claim to proceed.[85]

6. Defence of Statutory Authority

The leading case on the use of defence of statutory authority against a nuisance claim is *Ryan v Victoria (City),* where the Supreme Court of Canada (SCC) found that liability will not be imposed if an activity is authorized by statute and the defendant proves that the nuisance is the "inevitable result" or consequence of exercising that authority. In cases where the defendant is a statutory body operating in the public interest, rather than merely a private company regulated by statute, it is less clear if or how the court is to apply a defence of statutory authority,[86] although in *Antrim* the SCC clarified that private interests should

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77. *Tolko Industries Ltd. v Okanagan Indian Band*, 2010 BCSC 24.

78. Collins, *Toxic Torts*, *supra* note 18 at 70.

79. See Collins, *Toxic Torts*, *supra* note 18 at 72, citing Lewis N Klar, *Tort Law*, 3rd ed (Toronto: Carswell, 2003) at 103 (noting that the operation of gravity does not render an intrusion indirect).

80. Collins, *Toxic Torts*, *supra* note 18 at 71.

81. *Saik'uz First Nation, supra* note 14, citing Gérard V La Forest, *Water Law in Canada: The Atlantic Provinces* (Ottawa: Information Canada, 1973) at 200–201.

82. [1914] AC 1077, 18 DLR 305.

83. *Water Act Amendment Act, 1925*, SBC 1925, c 61.

84. *Saik'uz Nation, supra* note 14.

85. *Ibid* at paras 26, 59.

86. Collins *Toxic Torts*, *supra* note 18 at 162.

not presumptively be trumped by public purpose.[87] In the case of aerial herbicide spraying authorized by the MNRF in Ontario, the conduct that causes the nuisance—the spraying—is authorized by the governmental authority, yet the defence of statutory authority may not apply if defendants are unable to prove that harm to the traplines was inevitable. For example, it may be proven that alternative pesticides were available that were equally effective in protecting trees yet less harmful to wildlife. Similarly, courts may be reluctant to apply the defence simply because of the significant impacts of the nuisances at issue on the private interests of Anishinaabe trappers.

C. Potential Downsides of a Tort Law Approach

Although tort law is well suited to dealing with isolated incidents of harm, it is not as well suited to dealing with widespread harm, which can often accompany pollution or contamination.[88] Tort law is also reactive rather than proactive; a claim cannot be made until the tortfeasor acts in a way that infringes on the trappers' rights.[89] Still, there are upsides. For example, if the appropriate test is met, a claimant in tort law may be successful in achieving injunctive relief to stop the defendant's conduct before irreparable harm is done to a trapline.[90]

V CONCLUSION

The environmental harm that Indigenous trappers face, and the interference to their ability to use and manage the trapline as they have traditionally done, is a significant and widespread issue in Canada. In light of this environmental harm, caused by the chemical contamination and pollution that accompanies industrial operations, Indigenous trappers face many barriers to obtaining legal recourse. Relying on constitutional law alone is insufficient for individual Indigenous trappers, who face particular barriers to remedying environmental harm through constitutional claims that require the authorization of the entire First Nation's or Band's representatives. In addition, seeking remedy through Aboriginal constitutional claims is extremely cumbersome on any individual claimant. Tort law has the potential to provide useful remedies that other areas of the law may not provide, such as injunctive relief and compensatory relief. However, principles of tort law are grounded in protecting property interests, as they are understood by the common law. As a result, it is not always clear if and how Aboriginal rights and/or title can fit into tort law causes of actions.

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87. *Ibid* at 163–164, citing N Benson, "What to Do about Useful Nuisances: *Antrim Truck Centre* and Its Implications for Toxic Torts" (2012), 20 Tort L Rev 107.

88. Collins, "Protecting Aboriginal Environments," *supra* note 39 at 76.

89. Geoffry WG Leane, "Indigenous Peoples Fishing for Justice: A Paradigmatic Failure in Environmental Law" (1997) 7 J Env L & Prac 297, cited in Collins, "Protecting Aboriginal Environments," *supra* note 39 at 77.

90. The test for interlocutory injunction, as laid out by the SCC in *Metropolitan Stores (MTS) Ltd v Manitoba Food & Commercial Workers, Local 832*, [1987] 1 SCR 110, and *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, requires the court to consider whether (1) there is a serious question to be tried, (2) the applicant will suffer irreparable harm if the injunction is refused, and (3) the balance of convenience favours an injunction.

The 2015 *Saik'uz First Nation* decision was ground-breaking in that it has opened the door to Indigenous claimants wishing to exercise environmental rights through the law of torts. As Justice Tysoe explained:

> it seems to me there is no reason in principle to require [the claimants] to first obtain a court declaration in an action against the Province before they can maintain an action against another party seeking relief in reliance on their Aboriginal rights. As any other litigant, they should be permitted to prove in the action against another party the rights that are required to be proved in order to succeed in the claim against the other party.[91]

This puts Indigenous claimants on equal footing with non-Indigenous Canadians seeking to pursue a tort claim to protect their property interests. However, the reality for Indigenous trappers is that being placed on equal footing may not be enough to assist them in achieving their goals through tort law. Indigenous trappers have unique legal rights, and as such they face unique injury when those rights are interfered with.

In the case of the TEK Elders from Sagamok Anishnawbek First Nation, a successful tort claim will likely require an incorporation of Anishinaabe legal principles. These may include prioritizing a cumulative effect analysis and acknowledging the duties and obligations trapline holders owe to the plants and animals, which flow from their rights to use the trapline. Creating space for Indigenous concepts of land ownership, which often centre on the capacity to maintain reciprocal relationships with the land, within tort law is required to fully allow Indigenous claimants such as trappers to have full access to the purview of tort law.

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91. *Saik'uz First Nation*, *supra* note 14 at 66.