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Simon Chester

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PRIVATE LAW APPROACHES

Remedies in Canadian Courts

*by Simon Chester**

While speaking at Case Western Reserve two years ago, David Sive, an environmental lawyer, formulated a general dictum for symposia such as this. He said, "No problem is worth extended discussion unless it has no solution."

Acid rain is truly worthy of discussion. Sive's law has been verified yet I'd like to focus on the usefulness of private litigation in Canada as a remedy to acid rain problems. At the root, I am ambivalent about the topic or, perhaps more honestly, indecisive. While I would like to think that private actions do play a part, I have to admit that that role is so limited as to be virtually academic. Transboundary pollution is intractable in the extreme and litigation can't touch the whole issue.

Incidentally, I should explain that I'm here simply as an interested amateur, rather than a government official.

The American aphorist, Ambrose Bierce, once defined boundary in the following terms: "In politics, the imaginary line between two nations separating the imaginary rights of one from the imaginary rights of the other."

My topic is the imaginary rights of private citizens north of that boundary to bring legal actions to deal with acid rain. Private litigation in Canada is, at best, an unexplored avenue in problems such as trans-frontier pollution. At worst, for concerned citizens it is a black hole into which vast amounts of time and energy can be sunk with no tangible results. That is a pessimistic and disheartening diagnosis, but it may well be realistic. In transfrontier pollution cases we have to confront all of the existing weaknesses of Canadian tort law and procedure, compounded by severe conflict of law's problems.

Brad Smith outlined the Mozambique rule which would prevent an American party from suing in Canadian courts for damage caused by a Canadian polluter if the controversy relates in any way to land. He explained how the Bar committee and the uniform law group are attacking that issue. I should add parenthetically that American citizens and groups

* Executive Counsel, Ministry of the Attorney General, Ontario.

able to demonstrate an interest would probably be granted standing, but only in Canadian administrative tribunals.

The basic thrust of the equal access reforms is to provide access for the victims of transfrontier pollution to the courts of the jurisdiction where the contaminant originated. As stated by Professor Steven McCaffrey:

The mere existence of a political boundary line should prevent neither the upstream state from considering the transfrontier effects of an activity, nor the downstream state from having an input into the decision-making process concerning the permissibility of that activity. Nor should the boundary line constitute an impediment to victims of transfrontier pollution seeking redress in the same country.

That's a start and a good one, but there are many other weaknesses in private actions. The reform goes neither to the harmonization nor to the utility of remedies. Fundamentally, an equal access regime provides only those rights in another jurisdiction commensurate with those of its own citizens. If he has few rights, you have no more. The Canadians have singularly few. Public interest law is underdeveloped in Canada. Our tradition indicates that environmental law is almost exclusively a government responsibility and neither the legal culture or the public has shown any desire to delegate it elsewhere.

While it is not my intention to be unduly harsh, I would like to review some of the problems posed by Canadian law.

To start with, there is no case law on point, nor even a clearly applicable cause of action which would help in an acid rain type situation. Take nuisance, for example. If a nuisance infringes on the rights of the general public, for instance, by killing fish, only the Attorney General has standing to bring an action, unless an individual can show that he has "suffered some particular, direct and substantial damage over and above that sustained by the public at large." The cases don't clearly answer the question whether special damage must differ in degree or in kind. For example, the courts refused compensation to the commercial fishermen in Newfoundland when a company destroyed the fisheries by discharging mercury into a bay. The courts held that because fishermen had no greater right to those fish than any other citizen, they were barred from suing even though their livelihood was taken away. It's a paradox that the more a polluter affects a community at large, the less any one of them can do about it. I should add that we have never had an interprovincial nuisance action.

Actions in private nuisance show greater promise, though again it would seem strange to bring a private nuisance action when acid rain causes such widespread damage to the public as a whole. Moreover, unless a landowner can show damage to property from acid rain, he may not be able to recover in private nuisance. Remember that the water and fish in Canadian lakes and rivers are publicly owned and that recovery for

pure economic loss is problematic.

While private prosecution for breaches of quasi-criminal environmental statutes is permitted, such private action may well be difficult and expensive to conduct, and because of the complexity of the acid rain phenomenon it will be very hard to meet the criminal standard of proof.

Even in civil cases, expense is a major barrier. In many Canadian Provinces contingency fees are prohibited, and even when allowed are not widely used. An acid rain action would involve complex scientific and other expert testimony and potential plaintiffs may risk having to pay very heavy costs to the defendants.

Canadian class action laws are ineffective, and archaic. Cases suggest that class actions and nuisance are improper since class members won't demonstrate the same level of interest if their damages are different, thereby necessitating separate assessment.

Even in Quebec, the civil law has not developed any more effective remedies than the common law. The Code Civil is notoriously protective of private property interests. Although the *Loi de la Qualite de l'Environnement* was amended in 1978 to give "every person a right to a healthy environment and to its protection, and the protection of the living species inhabiting it, to the extent provided by the act," together with the right to seek injunctions for breach of this section. This right has not been exercised, and Quebec environmental law, like the laws everywhere else in Canada, depends virtually exclusively upon Government enforcement.

Beyond all these difficulties are the very substantial problems of causation and proof, and the constitutional cloud which has been discussed by previous speakers.

Faced with such major problems, the likelihood of success under current Canadian law is slightly more than zero. Why then bother exploring the issue? My answer is that with some reforms the private action could usefully supplement Government efforts in the fight to combat acid rain. Frankly, I remember that the trail smelter problem took 13 years to settle through bilateral diplomatic channels; the Government moves very slowly.

The potential of the private action is that it enables the individual citizen affected by transfrontier pollution to take the initiative when Government enforcement may be non-existent or unenthusiastic. A court may well be the most objective forum in which the merits of a particular case can be aired and affected interests balanced. Finally, a court has at its disposal a broad range of immediate and flexible remedies to rectify or mitigate the situation. Fundamentally, the role of the court is to supplement Government efforts.

What sort of changes would it take for private actions to prosper? Let me suggest a few. First, Canadian Provinces need to repeal the Mozambique rule. That's fundamental. Rather than setting up special rules for transboundary cases, reforms should be made in Canada to

strengthen environmental law as a whole, stressing private remedies. The Canadian law of standing needs change. At present, it's uncertain and arbitrary. Standing barriers too often prevent the court from hearing the arguments of environmentalists or concerned citizens. Traditionally, the courts have turned to the Attorney General to speak as the guardian of the public interest. Granted that he will continue to be the primary guardian of that interest, but should he be the only guardian?

Second, we need a major overhaul of the conceptual basis of the law of nuisance, perhaps along the lines of a restatement of torts, cutting back the dead wood of archaism and overconceptualization.

We also need a modern and accessible class action law, particularly one which would permit transnational classes of pollution victims, with flexible methods of damage assessment and distribution.

Fourth, we need to reform our methods of financing public interest litigation, including cost and fee rules which would provide financial incentives for the legal profession to act in public interest cases. Perhaps we should consider whether a joint compensation fund might be established, with citizens subrogating their claims to the fund in exchange for awards.

In addition, we need to consider whether the courts are the appropriate decision makers in transfrontier pollution cases. The scientific complexity of the evidence may be daunting and trials prolonged. Moreover, balancing foreign and domestic economic interests is not easy. As Professor McCaffrey stated, "Courts have been extremely wary of shutting down foreign economic enterprises."

Perhaps we should consider dusting off and reworking the unused Article X of the IJC's founding treaty to create a joint, quasi-judicial panel to deal with private claims.

We need to look again at limitations rules in situations like those where acid rain, drop by drop, takes 20 years to accumulate, resulting in irreversible damage. When does the tort occur?

There is also a need to focus on ways to ease the evidentiary and causation burden for environmental plaintiffs. I don't know whether reverse onuses are the answer, or the admission of computer models of pollution damage, or greater use of defendant class actions.

Finally, and most fundamentally, we need to re-examine our traditional dichotomy between public and private interests in environmental law. Traditionally, we have considered transboundary problems as matters of state responsibility with governments as the sole and primary actors. We've assumed that the complex problems involved in transboundary pollution must necessarily be resolved only at the diplomatic and intergovernmental level. We are accustomed to equating public interest with government interest.

This equation may limit the range of available responses. We need to develop ways of involving affected citizens in the process of resolving acid rain problems. We need to ensure that whatever institutional model is finally adopted in the treaty, citizens will have access to present their

views, and to seek compensation. We should be exploring *parens patriae* actions, in which affected States or Provinces act with affected citizens in presenting comprehensive claims. Certainly, with acid rain, widespread harm may have been done to a great number of individuals in small amounts, and it may simply not be economically feasible for any of them to bring a separate claim. Accordingly, steps should be taken to provide economic incentives for those who take the initiative in launching an action.

Reform will require a concerned public, a committed government, a responsive legal profession and a sensitive and creative judiciary. It's a difficult and unresolved question whether Canadian Governments are prepared to strengthen the hands of private citizens affected by pollution, or public interest groups.

And if reforms like these don't materialize, what then? Well, I think we can write off private court action as anything more than a speculative footnote to government administrative agreement. Perhaps the odd, sardistic torts or conflicts professor may torment first year students with an exam question on the topic. But no responsible lawyer could advise a group of fishermen, cottage owners, or native organizations that a private action was anything more than a waste of breath.

And yet, given the right judge and the right fact situation, who knows what the dynamic rationality of the common law might produce.

Let me end by quoting a timely judgment by a sensitive judge in a transboundary pollution case:

It is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on great scale by sulphurous acid gas; yet the forests on its mountains, be they better or worse, and whatever domestic destruction they have suffered, should not be further destroyed or threatened by the act of persons beyond its control; that the crops and orchards on its hills should not be endangered from the same source.

The company had erected tall chimneys which caused the poisonous gases to be carried to greater distances than ever before. The judge ended his judgment by saying:

It is not denied that the defendants generate in their works near the border large quantities of sulphur dioxide which becomes sulphurous acid by its mixture with the air. It is hardly denied that this gas is often carried by the wind great distances and over great tracts of land. On the evidence, the pollution of the air and the magnitude of that pollution are not open to dispute. We are satisfied, by a preponderance of evidence, that the sulphuric fumes cause and threaten damage on so considerable a scale to the forests and vegetable life, if not to health, within the plaintiff's state as to justify a transboundary tort claim.

The year was 1907. The judge, Oliver Wendell Holmes, was speaking for the U.S. Supreme Court in *Georgia v. Tennessee Copper Company*. It

has been 75 years and we still face the same questions and the same difficulties. But the danger is now critical. We need to act now. We forget at our peril Thomas Hobbes' words, "Hell is truth seen too late." Thank you.