PRIVATE REMEDIES FOR TRANSBOUNDARY INJURY IN CANADA AND THE UNITED STATES: CONSTRAINTS UPON HAVING TO SUE WHERE YOU CAN COLLECT*

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I. INTRODUCTION

Canada and the United States share one of the longest and longest-lived undefended borders in the world.[1] Apart from the fifteen hundred miles reaching from the Alaskan panhandle to the Beaufort Sea, approximately thirty-five hundred miles separate the oceans in a continuous boundary from east to west. Given the ever-increasing concentrations of both population and economic activity along this zone, and especially in the Great Lakes Basin,[2] conflicts of interest manifested in various forms of transboundary injury are bound to arise, notwithstanding the cordial relations between both the public and private sectors on either side.

The field of international dispute settlement can be as wide as the breadth of relationships entered into between nations and their peoples. Thus, for Canada and the United States, the spectrum of relationships is, as a result of common origins, geopolitical proximity and long association, both intricate and wide-ranging. It follows, therefore, that potential areas for disagreement are equally comprehensive. However, when one speaks of private remedies in municipal courts the spectrum narrows. Individuals seek redress from judicial bodies when they have

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[1] The two countries have been officially at peace since 1814 and the border was demilitarized by the Rush-Bagot Agreement (Naval Forces on American Lakes), Apr. 28 and 29, 1817, U.K.-U.S., 8 Stat. 231, T.S. No. 110 1/2.

[2] *See* Bilder, *Controlling Great Lakes Pollution: A Study in United States-Canadian Environmental Co-operation*, in LAW, INSTITUTIONS AND THE GLOBAL ENVIRONMENT 294 (J. Hargrove ed. 1972), also in 70 MICH. L. REV. 469 (1972); Landis, *Legal Controls of Pollution in the Great Lakes Basin*, 48 CAN. B. REV. 66 (1970).

been wronged. Moreover, they must have suffered considerable damage before the trouble and expense of litigation appears worthwhile. This factor is accentuated where the additional hurdle of an international boundary complicates the issue. It appears that, to date, the bulk of claims that have been worth pursuing are in the field of environmental litigation, a subject which dominates both the case law and the surrounding literature in respect of cross-border actions.[3]

II. MERITS OF THE APPROACH

Preliminary to an analysis of the relevant Canadian and American authorities, it might be worthwhile to consider the efficacy of private litigation as compared with the more traditional international vehicle of government representation in some form. The question may be asked whether plaintiffs are better to go "public" or pursue a remedy on their own behalf.

A case in point is the celebrated *Trail Smelter Arbitration*[4] in which citizens of the State of Washington sought injunctive relief and damages for injuries sustained as a result of pollutants discharged into the air by a smelter in Trail, British Columbia.[5] In 1928, the dispute, although essentially a private matter, was referred by the American and Canadian governments to the International Joint Commission under Article 9 of the Boundary Waters Treaty, 1909.[6] The recommendations made by the Commission were rejected by the United States in 1933. Negotiations which followed led to the signing of a Convention in 1935[7] that set up an Arbitral Tribunal, which was given the authority to adjudicate the issues from the base point of January 1, 1932. After exhaustive research by specially appointed scientists from either side which was carried out during both investigations, the Tribunal adjudicated the matter through hearing argument based upon the pleadings of both sides and the tabling of evidence. Thus, from the commencement of the original investigation thirteen years passed before the final decision of the Tribunal was rendered in 1941.

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[3] *See* McCaffrey, *Trans-Boundary Pollution Injuries: Jurisdictional Considerations in Private Litigation Between Canada and the United States*, 3 CAL. W. INT'L L.J. 191 (1973). This is the most comprehensive treatment of the subject this writer has discovered. *See also* Ianni, *International and Private Actions in Transboundary Pollution*, 11 CAN. YEARBOOK INT. L. 258 (1973).

[4] 3 U.N.R.I.A.A. 1905 (1941); 33 AM. J. INT'L L. 182 (1938) and 35 AM. J. INT'L L. 684 (1941).

[5] *See generally* Read, *The Trail Smelter Dispute*, 1 CAN. YEARBOOK INT. L. 213 (1963).

[6] Boundary Waters Treaty, Jan. 11, 1909, U.K.-U.S., 36 Stat. 2448, T.S. No. 548.

[7] 3 U.N.R.I.A.A. 1905, at 1907; Convention for Settlement of Difficulties Arising from Operation of Smelter at Trail, B.C., Apr. 15, 1935, Canada-U.S., 49 Stat. 3245, T.S. No. 893.

Trail Smelter quickly became a symbol for international comity and co-operation as well as providing a significant learning experience, from the scientific point of view, with respect to a problem little understood prior to the investigations of the Commission. However, it cannot be said that the Tribunal did much to expedite the claims of private individuals, notwithstanding that compensation and protection were eventually forthcoming.[8]

The chief disadvantages attendant to public espousal of essentially private grievances appear to be inertia and the lack of specificity. International arbitrations and settlement procedures resolve nothing quickly if they resolve anything at all. "[T]he principle of good neighborliness", according to one critical observer, "remains, without the development of specific and mediating concepts for its application, little more than a policy slogan."[9] Indeed, it has even been suggested that the *Trail Smelter* dispute was arbitrated only because legal constraints appeared to preclude a local action being brought before the British Columbia courts.[10]

Furthermore, it remains a settled principle of public international law that the available local remedies should be exhausted before litigation is commenced at the international level.[11] This important rule of admissibility circumscribes any diplomatic overture, the fulfillment of which constitutes a prerequisite to the assertion of international responsibility for a transboundary claim.[12] Thus, it becomes necessary as well as expedient for the injured party to pursue the available remedies in the municipal courts of accessible jurisdiction.

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[8] "Thus", according to Ianni, "those familiar with the encumbrances that traditionally plague diplomatic channels might well wish to explore more immediate and efficient forms of private redress that might be available to them." *Supra* note 3, at 264.

[9] Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 INT. & COMP. L.Q. 1189, at 1227 (1965).

[10] *Supra* note 5, at 222; *cf.* British South Africa Co. v. Companhia de Mocambique, [1893] A.C. 602, 63 L.J.Q.B. 70 (H.L.), *rev'g* [1892] Q.B. 358 (C.A.). This case established the rule pertaining to tort actions involving injuries to foreign lands, which declares that such an action is "local" and may only be entertained in the jurisdiction in which the land is situated.

[11] *See* HARVARD LAW SCHOOL PRELIMINARY DRAFT CODIFICATION OF THE RESPONSIBILITY OF STATES FOR INJURIES TO ALIENS (1956); Head, *A Fresh Look at the Local Remedies Rule*, 5 CAN. YEARBOOK INT. L. 142 (1967); *see generally* J. G. CASTEL, INTERNATIONAL LAW 1198 (3d ed. 1976).

[12] According to Brownlie:

> This is a rule which is justified by practical and political considerations and not by any logical necessity deriving from international law as a whole. The more persuasive practical considerations advanced are the greater suitability and convenience of national courts as forums for the claims of individuals and corporations, the need to avoid the multiplication of small claims on the level of diplomatic protection, the manner in which aliens by residence and business activity have associated themselves with the local jurisdiction, and the utility of a procedure which may lead to classification of the facts and liquidation of the damages.

I. BROWNLIE, PRINCIPALS OF PUBLIC INTERNATIONAL LAW 483 (2d ed. 1973).

International legal concepts of state responsibility are continually expanding.[13] Nevertheless, it cannot seriously be contended that international legal institutions approach the sophistication of municipal law in furnishing effective principles of liability.[14]

The *Trail Smelter* arbitration represents the apogee of what might be considered the golden age of "Good Offices".[15] The fact that the arbitration took place may not be so significant as the fact that the precedent has not been repeated in the intervening years, notwithstanding the profusion of modern environmental issues. The complexity and remoteness of the modern state militates against the meaningful consideration of individual claims for compensation and protection at an inter-state level. Accordingly, it stands to reason that the aggrieved party would be wise to pursue his claim quickly and with vigour in his private capacity.

If one accepts the proposition that individual plaintiffs are better off as private party litigants, it remains to be seen how well they are served north and south of the barrier of national jurisdiction and, within these larger units, across the sometimes equally formidable ramparts of inter-state and provincial jurisdiction.

The utility of bringing an action in a domestic or a foreign court for injury sustained from activities taking place outside the jurisdiction where the damage occurred depends upon a number of factors. The most basic requirement must be the jurisdictional authority of the particular court to entertain the claim brought before it. But not less important — especially from the plaintiff's point of view — remains the ability of that same tribunal, once it has found jurisdiction to try the action, to also command an effective remedy from the defendants, assuming they are found responsible.

Considerable problems have been posed concerning the type of situation where a person suffers damage in his jurisdiction — the damage often adhering in the most substantial portion to realty — but must pursue the defendant in another jurisdiction to obtain his remedy. This species of case is treated in depth. Cases *in personam*, on the other hand, where the plaintiff seeks redress in his own jurisdiction, but which nevertheless require the court to "reach out" for the defendant, appear on the whole less difficult to tackle. While complexities there are many, it is submitted that the majority of the problems encountered in this area can be resolved through the judicious

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[13] *See, e.g.*, Goldie, *International Principles of Responsibility for Pollution*, 9 COLUM. J. TRANSNAT'L L. 283 (1970).

[14] Ianni, *supra* note 3, at 262.

[15] For an account up to the period of the *Trail Smelter* dispute, *see generally* P. CORBETT, THE SETTLEMENT OF CANADIAN-AMERICAN DISPUTES (1937).

manipulation of choice of law rules and basic conflicts principles, or through recourse to statutory protections.[16]

Suing locally, however, will remain an empty remedy if the defendant has no assets in that jurisdiction; the plaintiff is compelled to bring suit in the foreign jurisdiction. Problems arise in such situations, for where the action is *in rem* (where all or part of the injury suffered was to the plaintiff's land), then the plaintiff's remedy may be barred by the rules on local actions as developed by Canadian authorities. Thus, the primary concern becomes one of ascertaining, with respect to cases of transboundary injury, where jurisdictional constraints combined with the geographical location of the suable assets of the defendant act to permit or exclude redress to the aggrieved plaintiff.

Canada and the United States both adhere to federal institutions and structures. While not to discount the many differences between the forms of government of the two countries, the separation of powers on either side resulting in the autonomous spheres (in certain constitutionally defined areas of authority) of provincial and individual state entities, has created jurisdictional and remedial barriers akin to those of national boundaries. Therefore, the present inquiry is equally if not better served by examining the inter-state precedents of both countries, even though devoid of a truly international aspect. The analogy becomes fortuitous as well as convenient, given the paucity of authority directly involving both Canadian and U.S. nationals.[17]

III. The Local Action Rule: Anglo-Canadian Authority

Transboundary injuries most often involve damage to foreign real property necessitating, therefore, that any action be brought *in rem*. It is this characteristic of claims arising from such damage that unfortunately precludes substantial redress for Americans suing in Canadian

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[16] A leading precedent is the Michigan Environmental Protection Act of 1970, Mich. Comp. Laws Ann., s. 691.12 (Supp. 1972). The Statute permits private litigants to bring civil actions directly against polluters. *Cf.* s. 2:

> (1) The Attorney-General, any political subdivision of the state or of a political subdivision thereof, any person, partnership, corporation, association, organization or other legal entity may maintain an action in the circuit court having jurisdiction where the alleged violation occurred or is likely to occur for declaratory and equitable relief against the state, any political subdivision thereof, any instrumentality or agency of the state or of a political subdivision thereof, any person. . .for the protection of the air, water and other natural resources and the public trust therein from pollution, impairment or destruction.

The Statute has spawned a whole new branch of environmental litigation chronicled in Sax and Conner, *Michigan's Environmental Protection Act of 1970: A Progress Report*, 70 Mich. L. Rev. 1003 (1972). *See also* the Minnesota Environmental Rights Act, Minn. Stat. s. 116B (1971); and Note, *The Minnesota Environmental Rights Act*, 56 Minn. L. Rev. 575 (1972).

[17] Michie v. Great Lakes Steel Div., Nat'l Steel Corp., 495 F. 2d 213, 4 E.L.R. 20324 (6th Cir. 1974), *cert. denied* 419 U.S. 997, 95 S. Ct. 310 (1974).

courts and, indeed, even for Canadian citizens suing across provincial boundaries. The general rule remains that where tort actions involve injuries to foreign lands, the action is "local" and may only be entertained in the jurisdiction where the land is situate.[18]

The source of this rule, not to mention an appropriate rationale to justify the wide variety of circumstances over which it is applied, remains somewhat obscure. According to J.H.C. Morris:

> The origins of this rule have been traced to the ancient common law practice whereby juries were chosen from persons acquainted with the facts of a case, who therefore decided questions of fact from their own knowledge and not from the evidence of witnesses. In order that the right jury might be empanelled it was necessary to lay the venue exactly. The consequence was that English courts had no jurisdiction to entertain actions where the facts occurred abroad. This led to such inconvenience that the rule was evaded by the fiction of *videlicet*, *i.e.* by the untraversable allegation that a foreign place was situated in *e.g.*, the parish of St. Marylebone. Unfortunately this relaxation only applied to transitory actions, that is, actions where the facts might have occurred anywhere (*e.g.* actions for breach of contract). It did not apply to local actions, that is, actions where the facts could only have occurred in a particular place (*e.g.* actions relating to foreign land).[19]

English law records early exceptions to the rule. In *Bulwer's Case*[20] Lord Coke set forth the proposition that, in cases where conduct in one jurisdiction resulted in damage to the property of a person in another jurisdiction, the aggrieved party could choose to sue either where the act was committed or where the damage was suffered.

Similarly, Lord Mansfield "entertained actions for trespass to land in Nova Scotia and Labrador, on the ground that there were no local courts in those then uncivilized places and that therefore the plaintiff would otherwise have been without a remedy."[21] Lord Mansfield apparently recognized, as did Lord Coke, the absurdity of defeating the remedial function of the courts through an artificial construction applied to situations where an injury requires redress and where the question of title to the damaged property does not arise. Notwithstanding the fact that the aforementioned exception to the general rule did not have the

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[18] British South Africa Co. v. Companhia de Mocambique, *supra* note 10; *followed in* Albert v. Fraser Companies Ltd., 11 M.P.R. 209, [1937] 1 D.L.R. 39 (N.B.C.A.).

[19] J. MORRIS, THE CONFLICT OF LAWS 293 (1971), *citing* W. HOLDSWORTH, Vol. V, A HISTORY OF ENGLISH LAW 140-42 (1945).

[20] 7 Co. Rep. 1a, 77 E.R. 411 (C.P. 1587).

[21] MORRIS, *supra* note 19. The two judgments of Lord Mansfield were cited in Mostyn v. Fabrigas, 1 Cowp. 161, 98 E.R. 1021 (C.P. 1774), and overruled in Doulson v. Matthews, 4 T.R. 503, 100 E.R. 1143 (K.B. 1792) *per* Buller J. stating: "It is now too late for us to inquire whether it were wise or politic to make a distinction between transitory and local actions: it is sufficient for the Courts that the law has settled the distinction, and that an action quare clausum fregit is local."

The term *quare clausum fregit* relates to "[t]hat species of the action of trespass which has for its object the recovery of damages for an unlawful entry upon another's land. . . .The language of the declaration in this form of action is 'that the defendant, with force and arms, broke and entered the close' of the plaintiff." BLACK'S LAW DICTIONARY 1408 (4th ed. rev. 1968).

effect of entrenching upon the jurisdiction of a foreign court in any meaningful sense, the wisdom of early authority unfortunately failed to prevail over subsequent precedent.

The leading authority for all Canadian jurisdictions is an extended interpretation of the decision of the House of Lords in *British South Africa Co. v. Companhia de Mocambique*.[22] The case involved a dispute between a Portuguese chartered company (plaintiff) and an English chartered company (defendant) concerning the possession of and damages to lands situate in South Africa. The plaintiff claimed three things: first, a declaration giving the plaintiff lawful possession of the lands in dispute; second, an injunction restraining the defendant from occupying or claiming any title to the said lands; and third, £250,000 in damages for trespass. The Divisional Court of the Queen's Bench dismissed the action for want of jurisdiction, accepting the submission of the defendant that, as a matter of law, the plaintiff had no cause of action by virtue of the lands being outside the jurisdiction. However, the Court of Appeal found there was jurisdiction once the claims to title and for an injunction had been abandoned, the action having been reduced to one of damages. The House of Lords declined to agree and restored the judgment of the Divisional Court.

In delivering the opinion of the court,[23] Lord Herschell cited *Doulson v. Matthews*[24] as the governing law in the matter, noting that this decision had overruled the earlier *dicta* of Lord Mansfield.[25] The Lord Chancellor reasoned that even though the effect of his decision might be to deny a remedy to an injured plaintiff, the dangers of allowing an exception to the general rule outweighed considerations of such potential injustice.[26] Accordingly, Lord Herschell concluded that

[22] *Supra* note 18, *per* Lord Herschell L.C.

[23] Macnaghten and Morris L.JJ. concurring; Lord Halsbury delivered a separate opinion also allowing the appeal.

[24] *Supra* note 21.

[25] *Cited in* Mostyn v. Fabrigas, *supra* note 21.

[26] Thus:

> The inconveniences which might arise from such a course are obvious, and it is by no means clear to my mind that if the courts were to exercise jurisdiction in such cases the ends of justice would in the long run, and looking at the matter broadly, be promoted. Supposing a foreigner to sue in this country for trespass to his lands situate abroad, and for taking possession of and expelling him from them, what is to be the measure of damages? There being no legal process here by which he could obtain possession of the lands, the plaintiff might, I suppose, in certain circumstances, obtain damages equal in amount to their value. But what would there be to prevent his leaving this country after obtaining these damages and re-possessing himself of the lands? What remedy would the defendant have in such a case where the lands are in an unsettled country, with no laws or regular system of government, but where, to use a familiar expression, the only right is might?

Supra note 18, at 625-26, 63 L.J.Q.B. at 78. The limited persuasiveness of the argument appears to be substantiated by the fact that examples such as the above do not address the issue of appropriate compensation for injury where questions of title are not disputed.

"the grounds upon which the courts have hitherto refused to exercise jurisdiction in actions of trespass to lands situate abroad were substantial and not technical",[27] more than sufficient reason, or so it was thought, for leaving the rule as it was.

The *Mocambique* case suffers from considerable ambiguity since the precise scope of the rule was left somewhat open-ended. Lord Justice Scott suggested in *The Tolten*[28] that the House of Lords could still permit an award for damages to foreign land where the question of title was not material, thereby distinguishing the *Mocambique* case on that basis. However, he did not believe it would be right for the Court of Appeal to attempt this distinction here, since he was certain there was no such distinction in the mind of the House of Lords with regard to common law actions in *Mocambique*. Regrettably, his brethren failed to express even this limited view.[29] It has been observed that the "substantial grounds" for the *Mocambique* rule were never clarified in the judgment,[30] although one Canadian analyst has been less circumspect. "The substantial reason", according to John Willis, "was, to put it at its widest, that the form of action, trespass *quare clausum fregit*, inevitably brought questions of title to the foreign land in issue: it was an application of Dicey's principle of effectiveness."[31] Nevertheless, the scope of the decision continues to elude precise definition.

While the *Mocambique* rule does not lend itself to a singular explanation, possible alternative interpretations have been clearly identified. Basically, there are three:[32]

(1) English courts have no jurisdiction to adjudicate upon the title or right to possession of foreign land;[33]

(2) English courts have no jurisdiction to adjudicate upon the title to foreign land or to grant damages for trespass thereto;[34]

(3) English courts have no jurisdiction to entertain any actions involving damage to foreign land, whether or not title to the land is in issue.

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[27] *Id.* at 629, 63 L.J.Q.B. at 80.

[28] [1946] P. 135, [1946] 2 All E.R. 372 (C.A.).

[29] *Id.* at 141-42, [1946] 2 All E.R. at 374-75 *per* Scott L.J., *contra* at 163-64, [1946] 2 All E.R. at 386 *per* Somervell L.J. and at 168-69, [1946] 2 All E.R. at 389 *per* Cohen L.J.

[30] MORRIS, *supra* note 19, at 294.

[31] Willis, Comment, 15 CAN. B. REV. 112, at 113 (1937); *Cf.* A. DICEY, CONFLICT OF LAWS 516-19 (9th ed. J. Morris 1973).

[32] According to MORRIS, *supra* note 19, at 295 and Willis, *supra* note 31.

[33] *See also* CHESHIRE, PRIVATE INTERNATIONAL LAW 494 (9th ed. P. North 1974).

[34] Here, Willis distinguishes between trespass *quare clausum fregit* which applied strictly in the *Mocambique* case, where the plaintiffs had been forcibly ejected from their lands by the defendants, and other forms of trespass not covered by the decision. Willis, *supra* note 31, at 113. The question then arises whether other forms of trespass such as trespass on the case, permanent trespass and continuing trespass are also precluded. Morris does not advert to this distinction but does state that the second view "is supported by the *Mocambique* case itself" whereas there is no English authority for the third and more extensive interpretation which follows. MORRIS, *supra* note 19, at 295.

The third and widest interpretation of the rule thereby excludes all types of trespass to foreign land from the jurisdiction of the court, as well as actions in nuisance, negligence or the form of strict liability imposed by the rule in *Rylands v. Fletcher*.[35]

Unfortunately, Canadian authority adheres to the most comprehensive and therefore most detrimental — at least for the victim of cross-border injury — interpretation of the rule, effectively stifling the remedial function of the courts where real property is damaged from a source beyond provincial or national boundaries.[36]

The leading case on point is *Albert v. Fraser Companies*,[37] a decision of the Appellate Division of the Supreme Court of New Brunswick. A New Brunswick company had amassed a considerable quantity of pulpwood in the lower reaches of the Madawaska River (New Brunswick side) thereby causing the stream flow to be impeded. Consequently, the upper reaches of the river (Quebec side) overflowed and the floodwaters undermined the foundations of a building owned by the plaintiff, whereupon the structure collapsed and then burned with all its contents. The plaintiff sued the defendant in a New Brunswick court since the latter had no assets which could be reached by a Quebec action. After an initial appearance, the defendant moved for dismissal alleging want of jurisdiction; the trial judge agreed and dismissed the action. Following the *Mocambique* case, the Court of Appeal upheld the decision at trial.

Chief Justice Baxter delivered the judgment of the court. He concentrated upon the distinction between venue and jurisdiction, asserting that the House of Lords had characterized matters of land in the *Mocambique* case as going to jurisdiction solely: "Whether title to land comes into question or not appears to be immaterial. The moment it appears that the controversy relates to land in a foreign country our jurisdiction is excluded."[38] The Chief Justice also referred to the decision in *Manville Co. v. Worcester*,[39] in which Mr. Justice Holmes saw "no reason why an act in one state followed by injurious consequences in another state should not be the subject of an action in the state where the original act was done." But the Chief Justice then dismissed this authority through the insertion of an arbitrary distinction, to wit, the conclusion that "he [Holmes J.] practically treats the

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[35] L.R. 3 H.L. 330, 37 L.J. Ex. 161 (1868).

[36] Albert v. Fraser Companies Ltd., *supra* note 18; Brereton v. C.P.R., 29 O.R. 57 (H.C. 1898); Boslund v. Abbotsford Lumber, Mining and Development Co., 34 B.C.R. 485, [1925] 1 W.W.R. 475, [1925] 1 D.L.R. 978 (S.C.). For a convenient synopsis, *see* McCaffrey, *supra* note 3, at 224-29.

[37] *Id.*, *per* Baxter C.J., Grimmer J. concurring.

[38] *Id.* at 216, [1937] 1 D.L.R. at 45.

[39] 138 Mass. 89, 52 Am. Rep. 261 (Sup. Jud. Ct. 1884). *See also* Armendiaz v. Stillman, 54 Tex. 623 (Sup. Ct. 1881), and the "water diversion" line of cases, *infra* note 59.

question as one of venue and does not distinguish between that and jurisdiction."[40]

Contrasting vividly with the majority judgment was the (rather) more sensible dissent of Mr. Justice Harrison, who recognized that "the *Mocambique* case does not directly cover the case at bar." Put simply:

> It deals with an action of trespass *quare clausum fregit* to foreign land. No doubt it would apply to an action of trespass on the case to foreign land where both the tortious acts and the damage caused thereby arose in the foreign country. But it does not in my opinion directly apply to an action for damages to land in one British Province caused by tortious acts in an adjacent British Province.[41]

He reasoned further that "[t]he controversy here involves matters affecting land in two jurisdictions, and, therefore, the courts in both jurisdictions should have jurisdiction over the action."[42] American authority was cited with approval, although avoiding a head-on confrontation with the House of Lords.[43] Unfortunately, Mr. Justice Harrison was — and appears to remain — a lone voice.

The result in *Fraser Companies* was predictable in view of the two single-judge decisions which preceded it. In *Brereton v. C.P.R.*,[44] a fire started on the defendant's railroad line on the Ontario side of the border with Manitoba. The fire spread and destroyed the plaintiff's house and furniture situate on the Manitoba side of the boundary. The Ontario Supreme Court cited the *Mocambique* case and, while upholding the "unquestionable right to have this complaint determined in the Manitoba courts", declared it did not have the jurisdiction to do so since the latter "must turn on the locality of the land". However, the court was willing to entertain an action for damage to personal property (the furniture in the house) provided the rest of the action was abandoned.[45]

The *Brereton* decision was distinguished by Chief Justice Baxter in *Fraser Companies* so as to preclude even an award for damages to personal property destroyed with the building, reasoning that, because the harm to chattels arose "indirectly through the medium of the real estate", the lack of jurisdiction under the one head extended by implication to the other.[46] The distinction between the two cases was

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[40] *Supra* note 18, at 216, [1937] 1 D.L.R. at 45. Baxter C.J. continued:

> [E]ven though the expressions used in the Mocambique case may seem to be somewhat wider than were called for in a decision upon the particular facts of the case, yet I cannot help thinking that the decision was intended as an emphatic declaration that in no case, where the controversy related to foreign land, would the courts of our country assume jurisdiction.

[41] *Id.* at 225, [1937] 1 D.L.R. at 51-52; *cited with approval by* Willis, *supra* note 31, at 113.

[42] *Id.* at 227, [1937] 1 D.L.R. at 53.

[43] *Id.* at 228-29, [1937] 1 D.L.R. at 54-55.

[44] *Supra* note 36, *per* Boyd C.

[45] *Id.* at 58-63.

[46] *Supra* note 18, at 218, [1937] 1 D.L.R. at 47.

based upon the opinion that, in *Brereton*, the injuries to personalty could be directly attributed to the negligence of the defendant, thus differentiating it from the situation in *Fraser*.[47]

The second precursor to *Fraser*, *Boslund v. Abbotsford Lumber, Mining and Development Co.*,[48] also involved a fire, which started in British Columbia and caused damage in the State of Washington. While there were other complicating factors,[49] the British Columbia court in which the action was brought found jurisdiction to award damages to the Washington plaintiffs for injuries to the person and to chattels, which included growing crops. But no damages could be recovered for damages to realty such as buildings, fences and trees. As with the *Brereton* court before it, the court in *Boslund* cited the *Mocambique* case in support of this restriction.[50]

There have been cases where Canadian courts have exercised jurisdiction even though the question of title to foreign lands was incidental to the dispute.[51] However, *Albert v. Fraser Companies* does

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[47] In *Brereton* the plaintiff's furniture was destroyed directly by the fire while in *Fraser* the flood-water undermined the plaintiff's building whereupon it subsequently caught fire, destroying the contents. It was therefore satisfactory that "there is nowhere an allegation that the destruction of any part of the personal property is a direct consequence of the defendant's acts". *Id.* at 220, [1937] 1 D.L.R. at 48.

[48] *Supra* note 36.

[49] It was necessary for the court to bring the case of the alleged foreign tort within the rule in Phillips v. Eyre, L.R. 6 Q.B. 1, at 28-29, 40 L.J.Q.B. 28, at 40 (Ex. Ch. 1870) *per* Willes J., where "two conditions must be fulfilled. First the wrong must be of such a character that it would have been actionable if committed in England. . . .Secondly, the act must not have been justifiable by the law of the place where it was done." The rule has since been refined by the decision of the House of Lords in Chaplin v. Boys, [1971] A.C. 356, [1969] 2 All E.R. 1085, [1969] 3 W.L.R. 322 (H.L.), such that the foreign tort must be actionable in both the *lex fori* and the *lex loci delicti* and not be merely "not justifiable" or "not approved of" in the foreign jurisdiction. *But see* the discussion in Carr, *Torts in the Conflict of Laws in British Columbia: LaVan v. Danyluk*, 6 U.B.C.L. REV. 353 (1971) as to whether there are exceptions to this "double actionability" rule. In England, Chaplin v. Boys overruled the case of Machado v. Fontes, [1897] 2 Q.B. 231, 66 L.J.Q.B. 542 (C.A.), which was utilized by the *Boslund* court. In Canada, however, Machado v. Fontes appears to have been followed in Canadian Nat'l SS. Co. v. Watson, [1939] S.C.R. 11, [1939] 1 D.L.R. 273, in McLean v. Pettigrew, [1945] S.C.R. 62, [1945] 2 D.L.R. 65 and recently in LaVan v. Danyluk, 75 W.W.R. 500 (B.C.S.C. 1970); it is thus still the applicable rule. Accordingly, the *Boslund* decision would still be valid in Canada and, furthermore, would even comply with the modified rule proposed by the majority of the Law Lords in *Boys* if the negligent acts were actionable in the State of Washington. *See infra* note 75.

[50] *Supra* note 36, at 488, [1925] 1 W.W.R. at 477, [1925] 1 D.L.R. at 981.

[51] In McLaren v. Ryan, 36 U.C.Q.B. (N.S.) 307 (C.A. 1875), the court was not willing to adjudicate upon title to bind land but would do so to decide the issue of plaintiff's entitlement to be paid for timber he claimed; *semble* Stuart v. Baldwin, 41 U.C.Q.B. (N.S.) 446 (C.A. 1877). These cases predate the decisions in *Mocambique* and *Fraser* but in Malo v. Clement, [1943] O.W.N. 555, [1943] 4 D.L.R. 773 (H.C.) the court allowed recovery by a tenant of a building in Quebec which had allegedly collapsed due to the negligence of the defendant owner who resided in Ontario. Given that the defendant had been personally served within the court's jurisdiction the court felt qualified to render judgment "[r]esisting a mechanical application of the local action rule" where the question of title was peripheral to the issue of compensation of the victim. *See* McCaffrey, *supra* note 3, at 225, n. 165.

not appear to be less than settled law on the subject,[52] notwithstanding the wide-ranging criticism the decision continues to endure. Professor Willis states that the rule, so phrased, is "unnecessary and unjust".[53] He contends, however, that in fairness, "Canadian courts have been quite guiltless: they have only pressed the technical reasons of the House of Lords to their logical conclusion."[54] One might, however, easily entertain a different view of the blameworthiness of Canadian courts for having enlarged upon ambiguous authority divorced from the realities of the North American geopolitical situation, thereby thwarting their remedial function in cases of transboundary injury.

Despite traditional justifications to the contrary, the local action rule declared by the House of Lords, not to mention the extreme Canadian formulation of the rule, exhibits no practical value where issues of title are secondary.[55] And, more important in the present context, such a rule has the potential of severely eroding international comity in the recognition of otherwise legitimate claims of foreign litigants.

IV. Departure From the Local Action Rule: American Authority

American jurisprudence necessarily adverts to the same common law antecedents as its English and Commonwealth counterparts. Nevertheless, the blessing (or misfortune) of precedent can often lead to several divergent outcomes. The path chosen by American judges [56] with respect to actions for damages to foreign land reflects, in a positive fashion, the power of imaginative judicial precedent.

Whereas Anglo-Canadian authority chose to reject the exception to the local action rule declared by Lord Coke and recognized for practical purposes by Lord Mansfield,[57] American courts adopted it with enthusiasm. The first transnational case on point was *Armendiaz v.*

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[52] Morris, *supra* note 19, at 295; J. Castel, Conflict of Laws: Cases, Notes and Materials 480 (3d ed. 1974); Landis, *Legal Controls of Pollution in the Great Lakes Basin*, 48 Can. B. Rev. 66, at 130, n. 294 (1970); McCaffrey, *supra* note 3, at 229.

[53] Willis, *supra* note 31, at 114.

[54] *Id.* at 115. The "technical" reason Professor Willis ascribed to the judgment in the *Mocambique* case was simply that "whereas a court has jurisdiction over foreign transitory actions, it has no jurisdiction over foreign local actions". *Id.* at 114.

[55] In response to the observations that "it would be contrary to international comity if the courts were to adjudicate over the land of a foreign sovereign. The only convenient forum is that of the situs", Castel replies that "if the court applies the *lex situs*, why should it not be able to exercise jurisdiction over foreign immovables provided there are sufficient practical reasons to do so in the circumstances of the case". J. Castel, The Canadian Conflict of Laws 345 (1976).

[56] *See generally* the discussion by McCaffrey, *supra* note 3, at 210-13 and 219-24.

[57] *Cf.* Bulwer's Case, *supra* note 20; Mostyn v. Fabrigas, *supra* note 21. This line of authority declaring an exception to the general common law rule was overruled in Doulson v. Matthews, *supra* note 21, the latter being cited with approval in British South Africa Co. v. Companhia de Mocambique, *supra* note 18. *See* note 21, *supra*.

Stillman,[58] although, prior to this decision in 1884, a considerable number of inter-state cases (mostly concerning the diversion or depletion of watercourses) had expressly followed the rule of Lord Coke in *Bulwer's Case*.[59]

The *Armendiaz* case involved a claim for damage to property situate in Mexico as a result of flooding caused by the defendant in placing obstructions on the Texas side of the stream bed.[60] Both plaintiff and defendant were American citizens; however, this fact did not alter the judicial policy of awarding damages for proven injury to real property outside the jurisdiction of the forum. Moreover, it is clear law that aliens enjoy free access to American courts.[61] Therefore, citizenship would not in any way impede a Canadian from bringing a claim before a United States court.

A long line of authority succeeds and reinforces the *Armendiaz* precedent. In *Ducktown Sulphur, Copper and Iron Co. v. Barnes*,[62] Georgia landowners successfully brought an action to enjoin suits at law in nuisance against a smelter located in Tennessee. The Tennessee court entertained the action notwithstanding the claim by the defendant that issues of title to land were involved, and that, therefore, the action was local and must be brought only where the land is situate — Georgia. To this the court replied that "[t]he actions are purely actions for damages sustained by virtue of a nuisance operated by the complainant. The action was personal and not local; and the appellees ... although the injury done was to property in the state of Georgia, had the right to maintain their suits in the courts of Tennessee."[63]

Similar authority can be found in *Smith v. Southern Railway*,[64] where a plaintiff sued a defendant in Kentucky for the negligent explosion of a railroad car destroying his building in Tennessee. And in *Southwestern Portland Cement Co. v. Kezer*,[65] a Texas court awarded

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[58] *Supra* note 39.

[59] Rundle v. Delaware & R. Canal, 55 U.S. (14 How.) 80 (1852); Foot v. Edwards, 3 Blatchf. 310, Fed. Cas. No. 4, 908 (1851); Slack v. Walcott, 3 Mason 508, Fed. Cas. No. 12, 932 (1825); Stillman v. White Rock Mfg. Co., 3 Woodb. & M. 538, Fed. Cas. No. 13, 466 (1847); Thayer v. Brooks, 17 Ohio 849, 49 Am. Dec. 474 (1848); Great Falls Mfg. Co. v. Worster, 23 N.H. 462 (1851). This last case, according to McCaffrey, "is noteworthy because a New Hampshire court was held to have jurisdiction to enjoin acts of trespass upon a dam in Maine which caused injury to plaintiff's land in New Hampshire". McCaffrey, *supra* note 3, at 211, n. 84.

[60] The case is factually analogous to Albert v. Fraser Companies Ltd., *supra* note 18, further emphasizing the opposite judicial approach of the American court.

[61] 42 U.S.C., s. 1981 (1970); *see generally* McCaffrey, *supra* note 3, at 219, n. 79.

[62] 60 S.W. 593 (Tenn. Sup. Ct. 1900).

[63] *Id.* at 607.

[64] 136 Ky. 162, 123 S.W. 678 (Ct. App. 1909). The court reversed a Kentucky venue statute, CIV. CODE PRAC., s. 62(4) stating that the latter should not be "arbitrarily enforced" in cases of cross-jurisdictional damage to real estate. *See generally* McCaffrey, *supra* note 3, at 222-23, n. 147-50.

[65] 174 S.W. 661 (Tex. Ct. App. 1915); *see also* Otey v. Midland Valley Ry., 108 Kan. 755, 197 P. 203 (Sup. Ct. 1921).

damages for flooded land in New Mexico caused by the defendant's dam on the Texas side of the border.

From these and other cases it has been safe to conclude that they

> demonstrate clearly the willingness of American courts to take cognizance of actions at law involving damage to foreign land when the injury was caused in an act within the court's jurisdiction. Since the court needs only power over the person of the defendant to grant effective relief, it would make no difference that the land involved was located in Canada.[66]

However, one need no longer confirm this point by analogy since a Canadian suit has now been successfully brought before and adjudicated by an American court.

In *Michie v. Great Lakes Steel*,[67] thirty-seven Canadian residents on the Windsor side of the Detroit River brought a diversity suit seeking to hold three Michigan corporations — the Great Lakes Steel Division of the National Steel Corp., Allied Chemical Co. Ltd. and Detroit Edison Co. Ltd. — jointly and severally liable for nuisance attributed to the combined consequences of the discharge of air pollutants by their respective plants. The defendants appealed from a decision of the Federal District Court refusing to dismiss the action of the plaintiffs, whereupon the U.S. Court of Appeals, Sixth Circuit, concurred with the court below and confirmed the plaintiffs' claim.

Interestingly enough, the transnational aspect of the suit caused the Court of Appeal no difficulty. Rather, the major hurdle was distinguishing the old tort notion of divisible harm which, under Michigan law, appeared to preclude "joint and several liability on the part of persons charged with maintaining a nuisance". *Quaere* whether

> [u]nder the law of the State of Michigan may multiple defendants, whose independent actions of allegedly discharging pollutants into the ambient air...be jointly and severally liable to multiple plaintiffs for numerous individual injuries which plaintiffs claim to have sustained as a result of said actions, where said pollutants mix in the air so that their separate effects in creating the individual injuries are impossible to analyze.[68]

The court agreed with the District Judge who, despite contrary authority in respect of multiple causes of action for single or indivisible injuries,[69] had analogized the instant case to a recent automobile negligence case,[70] which in turn had applied a case of pollution decided in Texas,[71] so as to conclude in the result that

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[66] McCaffrey, *supra* note 3, at 224.

[67] *Supra* note 17.

[68] *Id.* at 215, 4 E.L.R. at 20325.

[69] *Cf.* Meir v. Holt, 347 Mich. 430, 80 N.W. 2d 207 (1957); DeWitt v. Gerard, 281 Mich. 676, 275 N.W. 729 (Sup. Ct. 1937); DeWitt v. Gerard, 274 Mich. 299, 264 N.W. 379 (Sup. Ct. 1936); Frye v. Detroit, 256 Mich. 466, 239 N.W. 886 (Sup. Ct. 1932).

[70] Maddux v. Donaldson, 362 Mich. 425, 108 N.W. 2d 33 (Sup. Ct. 1961).

[71] Landers v. East Texas Salt Water Disposal Co., 151 Tex. 251, 248 S.W. 2d 731 (Sup. Ct. 1952).

> [i]t is clear that there is a manifest unfairness in "putting on the injured party the impossible burden of proving the specific shares of harm done by each....Such results are simply the law's callous dullness to innocent sufferers. One would think that the obvious meanness of letting wrongdoers go scot free in such cases would cause the courts to think twice and to suspect some fallacy in their rule of law."[72]

Hence, the U.S. Court of Appeals cited this and one other companion authority[73] as representative of "the more recent rule adopted by the Michigan Supreme Court and relied upon by the District Judge" in support of sustaining the validity of the plaintiffs' action.[74]

The *Michie* decision clearly reaffirms the willingness of American courts to preside over the claims of transboundary plaintiffs who have suffered damage to realty. Such a willingness is of considerable importance in view of the reasonable assumption that most cases of cross-border damage will fall within this category. Perhaps more important, however, was the sensitivity displayed by the judicial reasoning of the *Michie* court to the actual and deeply-felt needs of the individuals who were sufficiently motivated to come before it. Given the already burdensome vagaries and expense of litigation ancillary to the determination of one's rights and another's duties, the purpose of the courts is in no way served by needless strictures to access. What has been recognized by American judges appears to have slipped the minds of their Anglo-Canadian counterparts.

V. Personal Jurisdiction and Statutory Reaching Out

The assertion of personal jurisdiction over an extra-territorial defendant does not present special difficulties for either Canadian or American courts. The rule in Canada remains the old common law rule in *Phillips v. Eyre*,[75] although it has been recently refined by the decision of the House of Lords in *Boys v. Chaplin*,[76] to the effect that, for an alleged foreign tort to be entertained, the wrong must be actionable in the *lex fori* and be conduct to which liability—and not merely disapproval—attaches in the *lex loci delicti*. In the United States the general rule is simply "that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends".[77]

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[72] *Supra* note 70, at 430, 108 N.W. 2d at 36.

[73] Watts v. Smith, 375 Mich. 120, 134 N.W. 2d 194 (Sup. Ct. 1965).

[74] *Supra* note 17, at 216, 4 E.L.R. at 20326.

[75] *Supra* note 49, *followed in* O'Connor v. Wray, [1930] S.C.R. 231, [1930] 2 D.L.R. 899 and Canadian Nat'l SS. Co. v. Watson, *supra* note 49.

[76] *Supra* note 49.

[77] U.S. v. Aluminum Co. of America, 148 F. 2d 416, at 443 (2d Cir. 1945) *per* Hand J. *See generally* H. Steiner and D. Vagts, Transnational Legal Problems 731-47 (2d ed. 1976). *See also* McCaffrey, *supra* note 3, at 240, n. 247.

Getting hold of the defendant is probably a greater challenge in cases of this kind than is the assertion of jurisdiction, at least of the common law variety. Personal service of a Writ of Summons *ex juris* is provided by provincial statutory authority throughout Canada[78] and similarly by state law, as a general rule, throughout the United States.[79]

Special "long-arm" statutes have also appeared, notably in the United States, to carve out a wider degree of jurisdiction than was otherwise possible at common law. For example, the Michigan Environmental Protection Act[80] permits civil suits by private litigants in cases of public nuisance[81] which would normally be precluded at common law, since the plaintiff must ordinarily prove special damages to differentiate himself from the general populace.[82]

It would be misleading, however, to say that courts are indifferent to or necessarily supportive of legislative assistance with respect to the pursuit of transboundary mischief matters. In fact, judicial minds remain very sensitive to any modality which may be considered as constituting inappropriate interference with another jurisdiction. The decision of the Supreme Court of Canada in *Interprovincial Co-operatives*[83] illustrates this proposition with contemporary authority.

The case concerned the familiar problem of cross-border pollution of watercourses draining into the Province of Manitoba by the effluents from chlor-alkali plants operated by the defendants in the provinces of Ontario and Saskatchewan. At issue was the constitutional validity of a Manitoba statute[84] under which the fishermen—whose livelihood had

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[78] *E.g.*, O.R.P. 25.1:

> Subject to rule 795, a party to an action or proceeding may be served out of Ontario as provided by rule 26 where the action or proceeding as against the party consists of a claim or claims. . .
>
> (g) in respect of a tort committed within Ontario;
>
> (h) in respect of damage sustained in Ontario arising from a tort or breach of contract committed elsewhere.

Cf. Jenner v. Sun Oil Co., [1952] O.R. 240, [1952] 2 D.L.R. 526 (H.C.), where an order for service *ex juris* was maintained in a defamation case arising from a radio broadcast outside Ontario but causing injury within the province.

[79] *E.g.*, N.Y. CIV. PRAC., s. 302(3) (McKinney 1963), exercising *in personam* jurisdiction over a tortfeasor outside New York causing damage within the state.

[80] MICH. COMP. LAWS ANN., s. 691.12 (Supp. 1972).

[81] *Supra* note 16.

[82] In Ontario, the rights of private individuals to proceed judicially in cases of "public nuisance" have been narrowly construed: St. Lawrence Rendering Co. v. Cornwall, [1951] O.R. 669, [1951] 4 D.L.R. 790 (H.C.); Preston v. Hilton, 48 O.L.R. 172, 55 D.L.R. 647 (H.C. 1920); and Turtle v. Toronto, 56 O.L.R. 252 (C.A. 1924). Similarly strict American authority can be found in Bouquet v. Hackensack Water Co., 90 N.J.L. 704, 101 A. 379 (Ct. Err. & App. 1917). Later cases are less rigid. *See* Note, *Private Remedies for Water Pollution*, 70 COLUM. L. REV. 734 (1970). *See generally* Juergensmeyer, *Common Law Remedies and Protection of the Environment*, 6 U.B.C.L. REV. 215 (1971).

[83] Interprovincial Co-operatives Ltd. v. The Queen in Right of Manitoba, [1976] 1 S.C.R. 477, [1975] 5 W.W.R. 382, 53 D.L.R. (3d) 321, *rev'g* [1973] 3 W.W.R. 673, 38 D.L.R. (3d) 367 (Man. C.A.), *rev'g* [1972] 5 W.W.R. 581, 30 D.L.R. (3d) 166 (Man. Q.B.).

[84] The Fishermen's Assistance and Polluters' Liability Act, R.S.M. 1970, c. F-100.

been adversely affected by the effluent from the defendants' plants—were compensated, and through which the province was bringing an action against the polluter as statutory assignee of the right to sue. A motion by the defendants to strike out the portions of the statement of claim dependent on the Manitoba Act was granted by the trial judge, but reversed by the Manitoba Court of Appeal. A majority of the Supreme Court[85] agreed with the decision in the first instance (that the statute was *ultra vires* the province because of its extra-territorial effect) and allowed the appeal by the defendants. One of Manitoba's more useful "long arms" had been summarily chopped off.

For three of the justices who comprised the nominal majority, the case turned upon the constitutionality of the Manitoba legislation. Mr. Justice Pigeon viewed the statute as an attempt to legislate with regard to acts done outside the province and thus beyond the reach of a province's jurisdiction. He felt that only a federal law or the common law would be applicable to circumstances such as these. Mr. Justice Ritchie differed from Mr. Justice Pigeon on this issue. He held that, although the control of pollution of interprovincial rivers is a federal matter, the legislation in question is inapplicable only because of its extra-territoriality in this particular case, *i.e.*, its attempt to permit a cause of action in Manitoba against an activity which was licensed and entirely legal in Ontario and Saskatchewan. He contended that the applicable law in such a situation is that of the place where the acts complained of were done.

The minority, on the other hand, rejected the constitutional argument and approached the case as one dealing with the legal characterization of the place of the tort. Chief Justice Laskin stated that Manitoba statute law is applicable, since the damage occurred within the province, even though its cause was external. He therefore differed with Ritchie J. in determining the *locus* of the tort and, moreover, felt that the licenses granted in the other two provinces had no impact in Manitoba.

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[85] Pigeon, Martland and Beetz JJ. concurring. According to Pigeon J., the statute trenched upon the administration of justice in another province and property and civil rights in another province (ss. 92(14) and 92(13) of the B.N.A. Act), and since jurisdiction does not rest with the provinces to enact laws which have an interprovincial effect, only Parliament has legislative jurisdiction in the matter, either under s. 91(12) of the B.N.A. Act or under its residual legislative power.

Ritchie J. wrote a separate opinion stating that while the control of pollution of interprovincial rivers is a federal matter, the legislation here in dispute dealt with damage to property in Manitoba and it only became inapplicable due to extra-territoriality. Thus, Ritchie J. refused to view the case, as did Pigeon J., as involving a matter of constitutionality but rather saw it as one involving conflicts principles. He stated that the applicable law was that of the jurisdiction in which the acts complained of were done, applying the second half of the Phillips v. Eyre rule (*see* note 49).

In contrast, Laskin C.J.C. stated that the appropriate jurisdiction was the one in which the tort was committed, *i.e.*, where the damage was done.

For a further discussion, *see* Hertz, *"Interprovincial", The Constitution and the Conflict of Laws*, 26 U. TORONTO L.J. 84 (1976).

Thus, the nominal majority decided that the statutory remedy provided through the Manitoba legislation pertained to acts outside the province. Chief Justice Laskin, in his dissent,[86] disagreed with this proposition and it is submitted that his is the correct (and preferable) view:

> Section 4(1) may be regarded, so far as the appellants are concerned, as making Manitoba law, as expressed therein, applicable to their activities originating in Saskatchewan and Ontario respectively, but only by reason of their having caused damage to a fishery in Manitoba by discharging a contaminant into waters flowing into Manitoba....I do not see how it can be said that the Manitoba Act denies to the appellants any legal rights they acquired in Saskatchewan or in Ontario in respect of the operation there of their respective chlor-alkali plants. If, as is assumed for the purposes of this case, they are respectively licensed to discharge contaminants to the extent that they did, that license, local to each of the Provinces, does not have an extraterritorial reach to entitle each of them with impunity to send their pollutants into the waters of another Province....To put the matter in tort terms, Ipco and Dryden in discharging a pollutant into waters that flow into an adjoining Province created a risk of harm there that could not be justified by reliance on permission that was necessarily limited to the waters and the fisheries in the licensing Provinces.[87]

Furthermore, the ruling decision in *Interprovincial Co-operatives* is disturbing since it implies that a person may not sue in his own jurisdiction for damage caused there, if the instigating act (*i.e.* the discharge of the contaminant) was done outside his jurisdiction. This is despite the fact that it has been judicially recognized that the actual infliction of damage may be determinative in placing the *locus* of the tort.[88]

The situation in the United States with respect to similar extensions of jurisdiction has taken a more positive view.[89] Nevertheless, the generally sensitive attitude of courts to the circumvention of jurisdictional barriers persists there as well.[90]

Legislative enactments have great potential for facilitating the fair dispatch of transboundary injuries litigation. Within the bounds of constitutional propriety, mutual respect for the authority inherent in comparison jurisdictions, and the comity of nations, such enactments accelerate the development of common law remedies in a positive

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[86] Judson and Spence JJ. concurred in the dissent.

[87] *Supra* note 82, at 498-99, [1975] 5 W.W.R. at 416-17, 53 D.L.R. (3d) at 337-38.

[88] There appears to be no logical distinction (although there are legal ones) between the case of a person who puts a deleterious substance into a watercourse which inflicts damage in another jurisdiction and one who utters defamatory statements that are transmitted so as to cause harm to a person in another jurisdiction. *See* Jenner v. Sun Oil Co., *supra* note 78.

[89] *See* Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 91 St. Ct. 1005, 1 E.L.R. 20124 (1971); and Woods Jr. and Reed, *The Supreme Court and Interstate Environmental Quality: Some notes on the Wyandotte Case*, 12 ARIZ. L. REV. 691 (1970).

[90] *See* Graham v. General U.S. Grant Post No. 2665, 43 Ill. 2d 1, 248 N.E. 2d 657 (Sup. Ct. 1969); *cf.* Tarble's Case, 80 U.S. (13 Wall.) 397, 20 L. Ed. 597 (1872).

fashion. They also possess the attribute of being able to challenge and remove the obstacles posed by particularly bothersome judicial decrees.

VI. Conclusions

The foregoing discussions have concentrated on the thornier points of law thwarting private litigants in pursuit of claims for transboundary injury. It would appear that Canadian legal precedents tend to be unnecessarily restrictive in respect of certain categories of claims—especially regarding actions *in rem*—while American authorities are less so. Generally speaking, however, the conflicts rules are well-developed between the two national common law jurisdictions.

The appropriateness of advocating the pursuit of private remedies wherever possible stems from the realization that international claims may often be better served by the internal sophistication of municipal legal systems. However, it is equally important to realize that such systems have what might be considered "design limitations" with respect to transnational grievances which are entirely unrelated to potential areas of improvement of these systems as they presently exist.

Cross-jurisdictional lawsuits are best adapted to the payment of damages for a proven injury. While the possibility of injunctive relief remains open, the difficulties of obtaining and enforcing "preventive" remedies across international boundaries would discourage courts from utilizing them, even assuming the existence of the jurisdiction requisite to their operation. Thus, private remedies are ill-suited to the avoidance of transboundary injury prior to problems becoming full-blown and, similarly, municipal courts cannot be expected to furnish continuous relief such that it constitutes permanent interference in another jurisdiction. Such interference may be justifiable to the extent that, if one accepts the proposition of no rights being absolute in a crowded world, the exercise of personal rights and freedoms in one jurisdiction must not encroach unduly upon similar rights and freedoms declared within neighbouring jurisdictions. Nevertheless, theoretical persuasiveness seldom dictates practical realities of human co-existence.

The point is simply that, with respect to the settlement of international disputes, as with most complex problems, several avenues will have to be followed in pursuit of the same goal. One route has been examined here. It may also be possible for different roads to intersect at various points thereby shortening the distance to specific objectives. For instance, one could envisage an international committee for the classification, correlation and assessment of transboundary claims with a view to recommending areas for reform, as well as evaluating the efficiency of the system(s) of redress presently available in municipal

courts. The rich field for potentially fruitful research and experimentation in the settlement of transnational grievances certainly merits further cultivation.

The volume of transboundary litigation will no doubt continue to spiral upward within the foreseeable future as inter-jurisdictional relationships multiply in the face of diminishing resources and the escalating number of competing needs forced upon a shrinking world. If these needs are to be met for now and in the future, the task remains to carve out broader paths through the legal barriers separating one jurisdiction from another. Canada and the United States are leaders in this respect. It is hoped that the quest for closer co-operation will continue with the perseverance of past precedent.