

CROSS-BORDER ENVIRONMENTAL LITIGATION

Courts on both sides of the border have signaled that in some circumstances local environmental laws can be used against foreign companies

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It is often taken for granted that cross-border pollution requires a multijurisdictional solution. In 1907, in the *State of Georgia v. Tennessee Copper Company*, Georgia successfully enjoined two foreign corporations from discharging sulphurous fumes from their Tennessee facilities that polluted the air over Georgia. In that case, the United States Supreme Court observed:

It is a fair and reasonable demand on the part of a sovereign [American state] that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that 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.

As sensible as those words sound today, the legal analysis of cross-border international environmental pollution has never been so straightforward. Traditionally, countries have protected their sovereignty in part by respecting that of their neighbors. Facing an international environmental dispute, states have turned to diplomatic resolution processes rather than to local courts and laws that were not designed to deal with the complexities of international disputes.

Likewise, and for largely the same reasons, courts have historically resisted extraterritorial applications of local laws, often noting the adverse effect

such rulings would have on international relations. Yet courts from time to time have had to wrestle with exceptions to territoriality in environmental proceedings where parties, causes and effects might all reside in different jurisdictions. In two important and recently publicized proceedings – *Pakootas v. Teck Cominco Metals, Ltd.* in the United States and *Edwards v. DTE Energy* in Canada – courts on both sides of the border signaled that, under the right circumstances, local environmental laws can be used against a foreign company for actions occurring within a foreign jurisdiction. If these decisions become a trend, the result may have a significant impact on international comity, business and environmental enforcement.

The Presumption Against Extraterritoriality

Most jurists agree that local laws have exclusive power within the territory that enacts them, and that all persons within that territory are subject to the local law. The corollary of this theory is that no state can use its laws to directly affect property outside or persons not resident in its territory, for doing so would clash with the equality and exclusiveness of the sovereignty of any nation.

Canadian courts have traditionally adopted this territorial approach, generally refusing to give extraterritorial effect to a variety of foreign laws and judgments, particularly those concerning revenue or penal matters. Indeed, a consequence of the territorial theory is that the force of one country's laws in

another depends entirely upon the will of the other country.

That said, courts periodically choose to recognize foreign laws, invoking the principle of comity when doing so. In *Tolofson v. Jensen*; *Lucas v. Gagnon*, the Supreme Court of Canada defined comity as “the deference and respect due by other states to the actions of the state legitimately taken within its territory.” It elucidated this definition in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, endorsing the US Supreme Court’s description of comity as:

The recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Although comity has been criticized as an inadequate unifying exception to the presumption against extraterritoriality, it is very clear that, in certain circumstances, Canadian courts are willing to entertain the extraterritorial application of foreign laws.

Extraterritoriality in the Environmental Context

Canada and the United States have historically resolved cross-border environmental conflicts through diplomacy, resulting in international treaties and, occasionally, international arbitration on consent by both governments. These countries are parties to several bilateral agreements covering a range of environmental issues, from migratory birds to waste management.

One example is the Boundary Waters Treaty (BWT), signed in 1909 and which now gives the two countries principles and mechanisms for resolving and preventing disputes regarding the use of waters along their shared border.

This framework was most famously used to resolve a dispute between Canada and the United States in the 1920s concerning a mining facility in Trail, British Columbia. Sulphur dioxide from this facility had been drifting downwind and had damaged apple crops in the United States. The apple growers were prevented by the jurisdictional limits of the regime from bringing a claim in either Canadian or American courts. They appealed to the American federal government, which, along with the Canadian federal government, sent the issue to an arbitral panel. Constituted under the BWT, this panel concluded that the smelter

was responsible for monetary damages to the apple growers’ crops. A later panel ordered the Canadian government to require the smelter to make capital improvements to mitigate sulphur emissions.

The *Trail Smelter* arbitration is often cited in international environmental law for the principle that “no State has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.” The arbitral decision entrenched this no-harm principle in customary international law.

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Yet diplomacy is often slow – the *Trail Smelter* arbitration, for example, took 14 years to reach a resolution – and is burdened not only by environmental but also economic, social, political and other considerations. In part as a consequence, private litigants have recently moved to redress cross-border environmental harm with domestic judicial remedies with increasing frequency. What is more interesting is that courts appear to be growing more comfortable with the extraterritorial application of laws to resolve these issues.

Expanding Exceptions to Territoriality

Although bilateral negotiations have allowed Canadian and American governments to agree upon the forum and legal principles with which to resolve international environmental disputes, when private litigants drive this resolution through the courts, a conflict often arises between local laws. In the case of an environmental impact, if the court characterizes

the issue as one of pollution prevention, the laws of the place where the pollution originates might logically prevail. If the issue is characterized as remediation, the laws of the place where the contamination exists normally determine cleanup obligations.

In the three distinct types of international environmental disputes discussed below, private parties, availing themselves of citizen suit provisions in statute, regulation or common law, have forced courts into conflict of law analyses they have traditionally resisted, and as a result courts are slowly broadening the exceptions to territoriality.

Statutory Duty of No Harm

Private parties have increasingly attempted to enforce provisions in Canadian and American statutes that place non-discretionary obligations on governments to prevent cross-border pollution. For example, in the first Canadian court case to focus on climate change, which has since been stayed, the Friends of the Earth filed a judicial review application in the Federal Court of Canada against the ministers of Environment and Health under section 166 of the *Canadian Environmental Protection Act, 1999*. Section 166 requires the Minister of the Environment to take certain actions if the release of a substance into the air from Canada may reasonably be anticipated to contribute to air pollution in another country or to air pollution in violation of Canada's international treaty obligations.

Similarly, in November 2006, a number of Canadian environmental groups and municipalities petitioned the US Environmental Protection Agency (EPA) to reduce emissions from 150 Midwestern coal-fired generators, arguing that paragraphs 202(a), 302(g) and 302(h) of the American *Clean Air Act* together require EPA to mandate emission reductions when American emissions are shown to have harmed Canadians.

As these provisions are used more often, courts are increasingly being asked to consider the sovereign obligations of states to abide by the no-harm principle articulated in the *Trail Smelter* arbitration, suggesting that the traditional obligations associated with territoriality are too often being neglected.

Local Enforcement of Foreign Judgments

Further challenging the traditional framework of territoriality, a significant line of cases has considered when Canadian courts will recognize foreign judgments against Canadian persons for their contribution to environmental harm in the United States.

The precedent for these cases is *Morguard Investments Ltd. v. De Savoye*, a 1990 decision in which the Supreme Court of Canada articulated a test for determining when one province or territory would have jurisdiction to enforce a judgment of another — namely, when there is a real and substantial connection between the original province or territory and the subject matter of the proceeding or the defendant. The Supreme Court later commented that this test “must ultimately be guided by the requirements of order and fairness, not a mechanical counting of contacts or connections.”

Although the Supreme Court affirmed this decision in the international context only in 2003 (*Beals v. Saldanha*), the Ontario Court of Appeal had already adopted the real and substantial connection test in the international environmental context in *United States of America v. Ivey*. In that 1996 case, the EPA had conducted remedial work at a waste disposal site in Michigan operated by an American company, Liquid Disposal, Inc. (LDI), following which it sought reimbursement under the *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA) from LDI, two Ontario corporations that at various times had held controlling interests in LDI, and Mr. Ivey, an Ontario resident who oversaw the management of the site.

The Ontario Court (General Division), as it was then called, enforced the judgment against the Canadian defendants in September 1996, ruling that each had a real and substantial connection to the American contamination and rejecting the argument that the enforcement of this foreign public law in Canadian courts would constitute an affront to Canadian sovereignty. The court stated that “[g]iven the prevalence of regulatory schemes aimed at environmental protection and control in North America, considerations of comity strongly favour enforcement.”

In upholding this decision on appeal, the Ontario Court of Appeal stated, “it is no extension of US sovereign jurisdiction to enforce domestic judgments against those legally accountable for an environmental mess in the United States by reason of their ownership or operation of American waste disposal sites.” Canadian courts have since affirmed the decision in *Ivey*, confirming that Canadian companies should remain conscious of their potential liability for waste being shipped to or disposed of in the United States.

Other Canadian statutes expressly allow for the recognition of foreign judgments. For example, Canada's *Shipping Act* specifically allows for judgment

creditors to apply to the Federal Court of Canada to register a judgment regarding civil liability for oil pollution that was rendered in the court of a foreign state that is a signatory of the International Convention on Civil Liability for Oil Pollution Damage.

Still, Canadian courts have generally refused to enforce local Canadian laws against a foreign person or entity whose impugned conduct occurred outside Canada. The *Teck Cominco* and *Edwards* cases, however, have opened the door for exactly that kind of proceeding where cross-border environmental impacts are at issue.

Extraterritorial Environmental Enforcement

On January 7, 2008, the US Supreme Court declined to hear the appeal in *Teck Cominco*, thus allowing the earlier decision of the US Court of Appeals for the Ninth Circuit to stand. The Ninth Circuit had affirmed the validity of an EPA order issued to Teck Cominco Ltd. (Teck), a Canadian company, with respect to pollution that originated entirely within Canada.

EPA originally issued this unilateral administrative order (UAO) under CERCLA in December 2003, directing Teck to conduct a feasibility study and remedial investigation regarding the release of heavy-metal laden slag and mercury, among other pollutants, from its Trail, BC, smelter into the Columbia River, which ultimately flows into Lake Roosevelt, Washington. This is the same facility that was at issue in the *Trail Smelter* arbitration.

Teck initially refused to accept EPA's jurisdiction to issue the UAO and petitioned the Canadian government for diplomatic help. In turn, the federal government asked the US Department of State to rescind the UAO. Although EPA did not do so, it took no action to enforce it, seemingly in the interests of international comity. Seeing a failure of diplomatic efforts to resolve the issue, members of the Confederated Tribes of the Colville Reservation filed a citizen suit under CERCLA, demanding that EPA enforce the UAO. Teck moved to dismiss the action, again arguing that EPA lacked jurisdiction over Canadian companies conducting lawful activities entirely within Canada.

The District Court disagreed and dismissed Teck's motion in late 2004. It ruled that it had jurisdiction over Teck since the company knew or should have known that its activities would cause a significant impact in the United States. Moreover, the court refused to characterize the issue as a purely domestic one governed entirely by domestic laws; it acknowl-

edged that doing so would rely on a "legal fiction" that the release of a hazardous substance, in this case to the Upper Columbia River, is separable from its discharge, which in this case occurred upriver at the Trail smelter. The court held that CERCLA's clear purpose was to address domestic contamination and could therefore validly apply to a foreign company whose conduct had such foreseeable effects within the United States.

Teck appealed this decision to the Ninth Circuit, but before that court issued its decision, EPA, Teck Cominco Metals Ltd. and an American affiliate, Teck Cominco American Incorporated (TCAI), entered into an agreement whereby TCAI is required to conduct a remedial investigation and feasibility study on the Upper Columbia River Basin. In return, EPA agreed to rescind the UAO.

Despite the settlement, Teck agreed that the settlement did not render moot the Colville tribe's claims for civil penalties and attorney fees. As a result, the Ninth Circuit heard the appeal, affirming the decision of the District Court but using a different rationale. The Ninth Circuit characterized the issue as the actual or threatened release of hazardous substances, not the arrangement for their disposal in Canada, the former issue being, in the view of the Ninth Circuit, the operative trigger for CERCLA liability. Accordingly, the court saw the release in question as the movement of the pollutants within the United States, and therefore saw no issues of extraterritoriality, consequently adopting the legal fiction the District Court had described. Although EPA had already agreed in the settlement agreement not to take action over Teck's non-compliance with the rescinded UAO, the Ninth Circuit, by upholding a citizen suit by private American plaintiffs against a Canadian company for pollution that originated in Canada, opened the door for further extraterritorial applications of American environmental law.

Shortly after the US Supreme Court's refusal to hear the appeal in *Pakootas*, a Canadian court issued an order in an unrelated decision that would allow similar applications of Canadian law in the United States. On January 16, 2008, the Ontario Superior Court of Justice for the Southwest Region issued a *mandamus* order directing the Ontario Court of Justice to issue a summons to DTE Energy Company (DTE) to face charges in Canada for atmospheric mercury emissions in Michigan that had allegedly harmed fish and fish habitat in Canada.

The charges were laid on February 6, 2007, when

Scott Edwards, a private citizen and legal director for the Waterkeeper Alliance, swore an information alleging that DTE had violated provisions of Canada's *Fisheries Act* that prohibit both the harmful alteration, disruption or destruction of fish habitat and the deposit of a deleterious substance in waters frequented by fish. According to Edwards, mercury emissions from DTE's two coal-fired power plants in Belle River and St. Clair, Michigan, have significantly contaminated the Canadian portion of the St. Clair River watershed. The river, which marks the border between the United States and Canada, has been designated as an "Area of Concern" under the Great Lakes Water Quality Agreement between the US and Canada.

On the basis of this evidence, the Ontario Court of Justice recognized on August 9, 2007 that Edwards had a *prima facie* case against DTE, but refused to summon the company to an Ontario court because of comity considerations. Edwards subsequently filed the *mandamus* application with the Ontario Superior Court. By granting the *mandamus* order, the Superior Court has allowed for future prosecutions of a foreign company under Canadian laws for actions that had a cross-border effect on the Canadian environment. It remains to be seen how DTE will respond to the charges.

Consequences of Extraterritoriality

Canadian and American courts are clearly wrestling with cross-border environmental issues that involve the extraterritorial application of environmental laws, and on the basis of *Teck Cominco* and *Edwards*, the trend appears to be toward expanding the exceptions to the presumption against extraterritoriality when the facts demand it. It is, therefore, important to consider the consequences of these decisions.

Comity

For better or worse, these decisions affect Canada-US relations. Whereas comity has historically been used to justify the extraterritorial application of environmental laws, comity considerations are now being used to reinforce the territorial principle. For example, the Canadian government noted in its brief to the US Supreme Court in *Teck Cominco*, "Canada has a vital sovereign interest in having cross-border environmental disputes resolved through diplomatic measures rather than by unilateral adjudication in the domestic courts of the United States." Indeed, when private parties bring enforcement actions, they have little incentive to evaluate the effects of such actions on international relations.

Whether a reason for or against the territoriality

principle, comity has always been used to balance respect for one's neighbor with the rights of citizens under the local law. The recent *Teck Cominco* and *Edwards* cases, if nothing else, show that this balance has been upset in the environmental context. If these decisions have stressed the framework of Canada-US environmental protection, both jurisdictions would be wise to restore the balance, perhaps by establishing a mechanism outside the court system that might deal more effectively with those issues or by coordinating the regulatory regimes of the two countries to standardize parties' expectations on how the cross-border effects of their operations will be regulated.

Business

Industry is particularly concerned with the *Teck Cominco* and *Edwards* decisions. The Canadian Chamber of Commerce and the Mining Association of Canada have commented that the Ninth Circuit's decision could disrupt the joint management of environmental issues and create uncertainty and instability in the economic and business climate.

For businesses, the extraterritorial application of environmental laws on their operations is not inherently negative; it has negative repercussions, however, when private parties choose when and where to pursue this application. The resulting uncertainty over applicable regulatory standards can confound the environmental management of businesses with obvious cross-border impacts. Businesses would clearly benefit from further regulatory integration or, at least, common rules on the applicability of foreign environmental laws.

Environmental Protection

Despite criticisms that the *Teck Cominco* and *Edwards* decisions will upset both international comity and businesses with cross-border impacts, both these decisions arguably result in some satisfaction of the polluter-pays principle. Environmental protection and restoration are primary goals of most modern environmental statutes, and when traditional principles of territoriality frustrate these aims, decisions like *Teck Cominco* and *Edwards* offer alternative paths.

Moreover, these cases may not be as much an affront to comity or the reasonable expectations of industry when the impugned parties could be thought to expect such liability. Despite their many differences, the environmental regulatory regimes in Canada and the United States, at a basic level, are largely similar. The Ontario Court of Appeal recognized this in *Ivey*, noting that CERCLA and Ontario's *Environ-*

mental Protection Act are sufficiently similar to defeat any argument that enforcing a judgment under the former is contrary to Canadian public policy.

Certainly post *Teck Cominco* and *Edwards*, whether operating in Canada or the United States, businesses should have a reasonable expectation that they will be responsible for the environmental effects of their operations, regardless of the affected jurisdiction. Not only has customary international law endorsed this polluter-pays principle, but so too has the Supreme Court of Canada in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*. The challenge is to standardize how this principle is applied in part in the context of international environmental disputes.

Conclusion

Although it has been entrenched in modern international law for decades, the principle of territoriality has faced significant challenges from cross-border environmental issues. With the line of cases following *Ivey*, and now the *Teck Cominco* and *Edwards* decisions, it is no longer wise to presume against the extraterritorial application of foreign environmental laws. In fact,

with more private parties availing themselves of citizen suits provisions to address cross-border environmental issues that governments have failed to resolve, an increase in extraterritorial claims may be imminent. Yet if left to the discretion of private parties, these claims, however laudable their ultimate goals, may significantly disrupt diplomatic and business relations between Canada and the United States, contributing to a confused application of environmental laws.

That said, as long as instances remain where governments fail to prevent “sulphurous acid gas” and other pollutants from causing serious injury to other states, private proceedings will remain an alternative. If that is the case, perhaps the best result of the *Teck Cominco* and *Edwards* decisions would be for states to coordinate the mutual expectations of their citizens, both with respect to their permissible environmental impact and the protection from cross-border pollution available to them.

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