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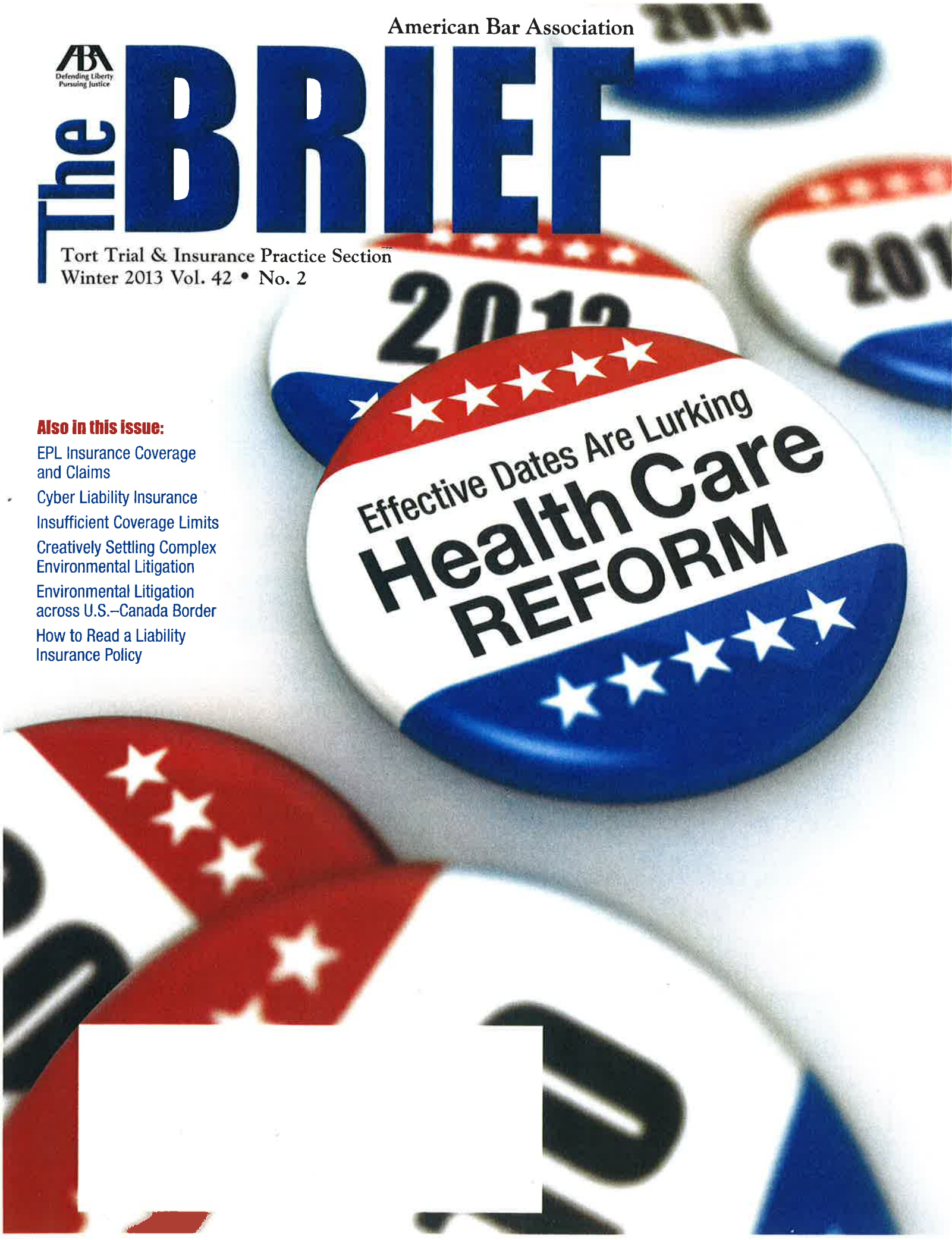

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When Complying with the Law in Your Own Backyard Is Not Enough

Cross-Border United States and Canada Environmental Litigation

By Marc McAree *and* Joanna Vince

In the rapidly evolving world of environmental law, it is not enough to understand the rules that apply in your own backyard. It is now prudent to have a solid grasp of the regulatory provisions that apply across the border as well.

In recent years, a number of Canadian companies have answered a knock at the door only to find a lawsuit or summons filed by an American citizen waiting on the doorstep. But instead of crying foul in a Canadian court, Canadian companies are being dragged into American courts to be judged against U.S. standards. Similarly, American companies have been opening their doors to find Canadian citizens beckoning American companies to Canadian courts.

Ignoring arguments about sovereignty, American courts appear to be assuming jurisdiction through creative judicial reasoning. This is most evident in a case involving the prosecution by private U.S. citizens of Teck Cominco, a Canadian company. In *Pakootas v. Teck Cominco Metals, Ltd.*, the Ninth Circuit Court of Appeals held that the U.S. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) applies to Teck Cominco, a company that operates in British Columbia.[1]

EPA Order against Teck Cominco

Teck Cominco operates a large lead-zinc smelter adjacent to the Columbia River approximately 10 miles north of the U.S.-Canada border. That plant discharges slag and metal bearing effluent into Canadian waters in compliance with Canadian laws. Within a few hours, these discharges begin to cross the border and settle in the Columbia River and Lake Roosevelt, contaminating these U.S. water bodies. In December 2003, the United States Environmental Protection Agency (U.S. EPA) issued a unilateral administrative order against Teck Cominco requiring the company to remediate the site. Teck Cominco did not comply with the order, arguing it was not subject to U.S. law. The U.S. EPA took no action to enforce the order.

Frustrated with both Teck Cominco's and the U.S. EPA's inaction, Joseph Pakootas and Donald R. Michel took action. They brought a citizen suit under CERCLA seeking a declaration that Teck Cominco was in violation of the order, an injunction compelling Teck Cominco to comply with the order, and penalties for Teck Cominco's failure to comply with the order.

In response to the citizen suit, Teck Cominco sought to have the action dismissed for lack of subject

TIP
Environmental compliance in your company's home jurisdiction is no longer enough. The strong arm of environmental law is reaching across the U.S. and Canada border to impose liability where an activity on one side of the border causes environmental harm on the other side.

matter jurisdiction. After all, Teck Cominco is a Canadian company operating on Canadian soil. The U.S. court disagreed, as did the Ninth Circuit. The appellate court reasoned that CERCLA was being applied domestically because Teck Cominco's contamination was "released" into the U.S. environment, as defined by CERCLA. The court distinguished the contaminant emission at source from the final resting point ("release"). The court held this was not an extraterritorial application of CERCLA.[2] The U.S. Supreme Court refused to review the case.[3]

In 2006, the U.S. EPA and Teck Cominco entered into an agreement requiring Teck Cominco to complete a remedial investigation and feasibility study (RI/FS) in exchange for the U.S. EPA abandoning enforcement of its unilateral order. The agreement states that Teck Cominco will consent to jurisdiction of the U.S. district court "solely for the limited purpose of an action to enforce" the contract. The agreement reserves the right to pursue potential penalties of up to $24 million if Teck Cominco does not complete the RI/FS.[4]

Despite the agreement with the U.S. EPA, the claim by Pakootas and Michel continued, seeking civil penalties for the period of time that Teck Cominco was out of compliance with the U.S. EPA order. The claim by Pakootas and Michel was ultimately dismissed by the court on June 1, 2011, because of the 2006 agreement. The $24 million potential penalty in the agreement was the same penalty Pakootas and Michel were seeking to enforce. The court held that by allowing Pakootas and Michel to continue with the claim, Pakootas and Michel would be enforcing the penalty under the agreement. If Pakootas and Michel were successful, the U.S. EPA would be left with no power to require Teck Cominco to complete the remediation. Further, if Pakootas and Michel were successful in their claim, the result could be that Teck Cominco would have insufficient funds to perform the cleanup.[5]

Liability under CERCLA

The Confederated Tribes of the Colville Reservation and the state of Washington have pressed forward with litigation seeking a judgment against Teck Cominco confirming the company's liability under CERCLA. In September 2012, Teck Cominco acknowledged that discharges from its Trail, British Columbia, smelter into the Columbia River and Lake Roosevelt were hazardous.[6] On December 14, 2012, a federal district court held that: (1) the court has jurisdiction over Teck Cominco, (2) Teck Cominco's actions constitute arrangement for disposal of hazardous substances, and Teck Cominco is jointly and severally liable for future response costs under U.S. law.[7]

Liability under the Fisheries Act

American courts are not alone in assuming jurisdiction over cross-border pollution issues. In 2008, the Ontario Superior Court of Justice issued a summons requiring an American firm, DTE Energy Co., to face charges under the federal Fisheries Act in Canada. The charges relate to mercury emissions originating in the United States that were harming fish in Canadian waters, namely the St. Clair River. As in *Pakootas*, charges were brought by a private citizen, Scott Edwards. Following the issuance of the summons, DTE agreed to address its mercury emissions. Thereafter, the charges were withdrawn.[8]

Cross-Border Disputes

Not all cross-border legal disputes have been acrimonious. The cooperative negotiation of bilateral environmental agreements between Canada and the United States dates back to the 1909 Boundary Waters Treaty.[9] More recent agreements include the Great Lakes Water Quality Agreement[10] and the North American Agreement on Environmental Cooperation,[11] a side agreement to the North American Free Trade Agreement (NAFTA). While bilateral environmental agreements require participating countries to achieve the spirit and intent of such agreements, businesses and individuals are bound only by the laws enacted in their own country.

Canada and the United States have found themselves before the International Joint Commission to resolve environmental disputes. The most notable dispute involved cross-border air pollution from a smelter in Trail, British Columbia. The issue was argued by the Canadian and American governments beginning in 1927. It was finally resolved in 1938 by arbitration. The decision turned on the sovereignty of each state and the application of international law principles. Due to the environmental damage resulting from smelting, at the time owned by Consolidated Metal (later Teck

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Cominco), Canada was ordered to pay $350,000 for damages prior to 1932, and $78,000 for damages between 1932 and 1937.[12]

Challenges under NAFTA

Cross-border contamination is not the only source of environmental friction between the United States and Canada. Our cross-border neighbors also have considerable interest in the federal and provincial statutes that govern what is discharged from the smokestacks and wastewater pipes of facilities situated firmly on their neighbor's soil. Both Canadian and American interests are challenging the validity of a number of their neighbor's environmental statutes and policies under the dispute resolution apparatus of NAFTA.[13]

These companies are using the fair trade provision under Chapter 11 of NAFTA to circumvent Canadian environmental laws and policies and sue for purported damages. U.S. company Dow AgroSciences brought a claim for $2 million in response to the province of Quebec's ban on the cosmetic use of certain pesticides manufactured by Dow AgroSciences.[14] A ban on Lindane-based seed treatments by Canada's federal Pest Regulatory Management Agency resulted in a similar $100 million suit by the U.S.-based Chemtura Corp.[15] The failure of a proposed quarry in the province of Nova Scotia to gain approval following a full environmental assessment caused the U.S. proponent Bilcon to bring a claim under NAFTA for $188 million in damages against the Canadian government.[16] Lastly, the legislative actions of the Ontario government to prevent the use of the Adams Mine in Northern Ontario, a former iron ore mine, as a landfill led to a NAFTA claim for $355 million which has since been dismissed.[17]

While *Bilcon* is still ongoing with no clear resolution in sight, the claims by Dow and Chemtura have been resolved. In May 2011, Dow and Canada reached a settlement. Interestingly, Dow did not receive any financial compensation, and the Quebec regulations were upheld. However, the agreement did require Quebec to agree that the products produced by Dow do not pose an unacceptable risk to human health or the environment if the instructions on their labels are followed.[18]

In August 2010, the arbitration tribunal in the Chemtura case released a final decision. The arbitration tribunal held that Canada had not violated NAFTA. Chemtura was ordered to pay the costs of the arbitration and 50 percent of Canada's fees and costs—a total of over $3 million.[19]

A number of environmental statutes and policies are being challenged under the dispute resolution apparatus of NAFTA.

Claims under the Clean Water Act

This kind of cross-border litigation cuts both ways. The province of Manitoba, along with nine U.S. states, has brought a claim against the U.S. EPA under the U.S. Clean Water Act. The claim alleges that the U.S. EPA is allowing water transfers that could injure waters in Manitoba and elsewhere. Concerns center on the construction of an outlet on Devils Lake in North Dakota. Manitoba and the other parties claim that wetlands protected under the Clean Water Act will be impacted by the project. The parties claim that a permit for water transfers under the Clean Water Act is required. Manitoba is concerned that the outlet will transfer flooding and environmental contaminants (solids, sulfates, biota, and excessive phosphorus) downstream, and eventually into Lake Winnipeg in Manitoba.

The case was stayed pending the outcome of *Friends of the Everglades v. South Florida Water Management District*.[20] In November 2010, *Friends of the Everglades* was decided and the Court required a permit for the water transfers.[21] Prior to the Court issuing an injunction, the U.S. EPA issued a notice of proposed rulemaking to exempt water transfers from permitting requirements under the Clean Water Act. The notice stated that judicial review could only occur at the U.S. court of appeals. All parties sought review, both in district courts and at the court of appeals. At the same time, there was an appeal of the decision in *Friends of the Everglades*. The court of appeals held that in light of the new water transfer rule, a permit was not required. Following this decision, in October 2012, the Eleventh Circuit ruled that it does not have jurisdiction to decide the judicial review.[22] Presumably, this leaves open for the province of Manitoba and the nine U.S. states to apply in the district courts to lift the stay of their claims against the U.S. EPA under the Clean Water Act.

Conclusion

While final judgment is pending in several of these cases, they all serve as a warning to both American and Canadian companies. Obviously, there is need to comply with the laws of one's own jurisdiction. But, there is also growing need

to understand what environmental liability a company's operations may attract beyond its borders. ■

Notes

1. Pakootas v. Teck Cominco Metals, Ltd., 452 F.3d 1066 (9th Cir. 2006).
2. *Id.* at 1077–79.
3. Teck Cominco Metals, Ltd. v. Pakootas, 552 U.S. 1095 (2008).
4. Pakootas v. Teck Cominco Metals, Ltd., 646 F.3d 1214 (9th Cir. 2011).
5. *Id.*
6. Press Release, Confederated Tribes of the Colville Reservation, Colville Tribes Pleased with Teck Acknowledgment of Release of Hazardous Substances into the Columbia River/Lake Roosevelt (Sept. 11, 2012), *available at* http://www.colvilletribes.com/from_the_chairman___teck_metals_vs_colvilletribes_press_release.php.
7. Pakootas v. Teck Cominco Metals, Ltd., Findings of Fact and Conclusions of Law, No. CV-04-256-LRS, 2012 WL 6546088 (E.D. Wash. Dec. 14, 2012).
8. Krystyn Tully, *Case Closed:* Edwards vs DTE Energy, Lake Ont. Waterkeeper (Apr. 13, 2010), http://www.waterkeeper.ca/2010/04/13/case-closed-edwards-vs-dte-energy/.
9. Treaty Relating to Boundary Waters, and Questions Arising between the United States and Canada, U.S.-Gr. Brit., Jan. 11, 1909, 36 Stat. 2448, U.K.T.S. 1910 No. 23.
10. U.S.-Can., Nov. 22, 1978, 30 U.S.T. 1383 (as amended Oct. 16, 1983, and Nov. 18, 1987, and reaffirmed in Great Lakes Water Quality Protocol of 2012, U.S.-Can., Sept. 7, 2012).
11. U.S.-Can.-Mex., Sept. 14, 1993, 32 I.L.M. 1480.
12. Trail Smelter Case (U.S. v. Can.), 3 R.I.A.A. 1905 (1941).
13. U.S.-Can.-Mex., Dec. 17, 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (1993).
14. Notice of Intent to Submit a Claim to Arbitration under Chapter Eleven of the North American Free Trade Agreement, Dow AgroSciences LLC v. Canada (Aug. 25, 2008).
15. Notice of Intent to Submit a Claim to Arbitration under Section B of Chapter Eleven of the North American Free Trade Agreement, Crompton (Chemtura) Corp. v. Canada (Nov. 6, 2001).
16. Notice of Intent to Submit a Claim to Arbitration under Section B of Chapter 11 of the North American Free Trade Agreement, Clayton & Bilcon of Del. v. Canada (Feb. 5, 2008).
17. Notice of Intent to Submit a Claim to Arbitration under Section B of Chapter 11 of the North American Free Trade Agreement, Gallo v. Canada (Oct. 12, 2006). This case was dismissed on September 15, 2011, due to a lack of sufficient evidence that Gallo owned the company at the time of the alleged expropriation. Canada received costs in the amount of $450,000 USD.
18. Settlement Agreement, Dow AgroSciences LLC v. Canada (May 25, 2011).
19. Award of the Arbitral Tribunal, Crompton (Chemtura) Corp. v. Canada (Aug. 2, 2010).
20. Catskill Mountains Chapter of Trout Unlimited, Inc. v. U.S. EPA, 630 F. Supp. 2d 295 (S.D.N.Y. 2009).
21. Friends of the Everglades v. S. Fla. Water Mgmt. Dist., 131 S. Ct. 643 (2010).
22. Friends of the Everglades v. S. Fla. Water Mgmt. Dist., Nos. 08-13652, 08-13653, 08-13657, 08-14921, 08-16283 (11th Cir. Oct. 26, 2012).