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John N. Hanson

Paul E. Hagen

Kathleen Rogers

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The Application of the United States Hazardous Waste Cleanup Laws in the Canada-U.S. Context

*John N. Hanson**
*Paul E. Hagen***
*Kathleen Rogers****

INTRODUCTION

Environmental and economic issues have become increasingly linked in Canada-United States relations.¹ Environmental regulation in the United States and Canada has increased dramatically over the past two decades, imposing significant compliance and cleanup liability costs on industries in both countries. The North American market for environmental goods and services is now estimated at over \$100 billion annually.

Traditionally, the United States and Canadian governments have settled transboundary environmental problems diplomatically.² Although the courts of both countries are available to resolve environmental disputes in certain circumstances, there is surprisingly little case law dealing with environmental disputes between Canadian and United States parties. However, the increasing integration of the Canadian and United States economies, a process accelerated by the Canada/United States Free Trade Agreement, and the tightening of environmental stan-

* John N. Hanson, Director, Beveridge & Diamond, P.C. (Washington, D.C.).

** Paul E. Hagen, Associate, Beveridge & Diamond, P.C. (Washington, D.C.); Adjunct Professor of Law, The American University (Washington, D.C.).

*** Kathleen Rogers, Associate, Beveridge & Diamond, P.C. (Washington, D.C.).

¹ For example, environmental issues have figured prominently in the negotiations between the United States, Canada and Mexico for a North American Free Trade Agreement. Environmental groups in the United States brought an action against the office of U.S. Trade Representative alleging that the National Environmental Policy Act required the preparation of an environmental impact statement. See *U.S. Trade Representative's Office Sued Over Compliance with Environmental Statute*, 14 INT'L ENV'T. Rep. (BNA) 446 (Aug. 14, 1991).

Similarly, the increasing cost of landfilling household garbage in Canada, estimated at \$150 per ton, recently led to a sharp increase in Canadian solid waste shipments to the United States where landfilling costs were roughly \$35 per ton. See Lindsey Gruson, *Canadian Trash Flows South, Landing in Dumps in the U.S.*, N.Y. TIMES, Nov. 27, 1991, at 1. Concern over the impact of the increased waste imports on the cost and availability of landfilling in the United States led to the introduction of legislation which, if adopted, would have required the Animal and Plant Health Inspection Service of the Department of Agriculture to inspect Canadian waste imports and assess a fee of \$150 per ton of garbage inspected. S. 1884, 102d Cong., 1st Sess. (1991).

² See Catherine Cooper, *The Management of International Environmental Disputes in the Context of Canada-United States Relations: A Survey and Evaluation of Techniques and Mechanisms*, 24 CAN. Y.B. INT'L L. 247 (1986) (discussing the resolution of environmental disputes between Canada and the United States).

dards on both sides of the border, is likely to result in increased environmental litigation between Canadian and United States parties.

This article examines one discreet aspect of liability for environmental harm in the Canada-U.S. context — liability for hazardous waste cleanup under United States law. In the United States, the Environmental Protection Agency (“EPA” or the “Agency”) is investigating or remediating more than 1,000 hazardous waste sites,³ some of which could expose Canadian companies to liability for cleanup costs. Roughly 137,000 tons of hazardous waste were reportedly imported into the United States from Canada in 1990.⁴ The United States exported an estimated 143,000 tons of such waste to Canada.⁵ This transboundary trade in hazardous waste could lead to transboundary litigation in United States or Canadian courts if the wastes are mishandled or disposed of improperly.

Part I of this article provides an overview of federal statutes, state laws and common law principles governing civil liability for hazardous waste cleanup in the United States. Criminal liability under federal environmental statutes is also discussed. Part II examines the potential liability of Canadian companies for the cleanup of hazardous waste sites in the United States. Jurisdictional and procedural issues regarding actions involving Canadian defendants are also examined. Part III examines the extraterritorial reach of United States laws to hazardous waste sites in Canada. The application of United States hazardous waste laws to contaminated sites affecting both countries is also discussed in both Parts II and III.

I. LIABILITY FOR THE CLEANUP OF HAZARDOUS WASTE

United States federal courts may impose liability for the costs of cleaning up hazardous wastes and hazardous substances in the United States under a number of federal statutes as well as under certain common law principles. The primary federal statutes governing the cleanup of contaminated sites are the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA” or “Superfund”)⁶ and the Resource Conservation and Recovery Act (“RCRA”).⁷ Many states

³ UNITED STATES GENERAL ACCOUNTING OFFICE, SUPERFUND — EPA HAS NOT CORRECTED LONG-STANDING MANAGEMENT PROBLEMS 13 (Oct. 1991).

⁴ Testimony of Robert J. Redhead, Laidlaw Inc., before the United States Senate Subcommittee on Environmental Protection, Committee on Environment and Public Works (June 25, 1991) (citing 1990 statistics obtained from Environment Canada) (on file with authors). The precise amount of hazardous waste imports and exports between the United States and Canada is difficult to quantify due to differing regulatory definitions of what constitutes a hazardous waste.

⁵ *Id.*

⁶ Comprehensive Environmental Response, Compensation, and Liability Act of 1980 §§ 101-405, 42 U.S.C. §§ 9601-9675, amended by Superfund Amendments and Reauthorization Act of 1986 “SARA”, Pub. L. No. 99-499, 100 Stat. 1613 (1986) [hereinafter CERCLA].

⁷ Resource Conservation and Recovery Act §§ 1002-11012, 42 U.S.C. §§ 6901-6992(k) [hereinafter RCRA].

have enacted similar cleanup statutes. Such common law theories as nuisance, trespass, negligence and strict liability may also be invoked by plaintiffs in federal and state courts seeking a remedy for harm caused by hazardous wastes and substances. The following is a brief survey of federal laws, representative state statutes, and common law principles that may impose liability on parties for the costs of cleaning up hazardous wastes and substances.

A. *Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA")*

Congress passed CERCLA in 1980, which, along with the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), provides EPA with certain authorities intended to facilitate the cleanup of sites contaminated by the past disposal of hazardous substances. Congress established a fund of \$8.5 billion to finance the cleanup of contaminated sites.⁸ CERCLA requires EPA to maintain a "National Contingency Plan" ("NCP"), under which contaminated sites are investigated and cleanup activities are prioritized.⁹

CERCLA establishes two primary mechanisms for cleaning up contaminated sites. First, the government, upon a determination that the release or threatened release of a hazardous substance presents an "imminent and substantial endangerment to the public health or welfare or the environment," may issue an administrative order or bring a civil suit to compel responsible parties to clean up the site.¹⁰

Second, EPA is authorized to take action to cleanup a site, provided the Agency's action is not inconsistent with the NCP.¹¹ The government's action may include removal of the hazardous substance, pollutant or contaminant, arranging for such removal or taking other actions necessary to protect public health or the environment.¹² The government can recover costs incurred in responding to releases or threatened releases of hazardous substances through a cost recovery action against the responsible parties.¹³

1. Responsible Parties

CERCLA imposes liability for the government's response costs on

⁸ See FREDERICK ANDERSON, DANIEL MANDELKER & A. DANIEL TARLOCK, ENVIRONMENTAL PROTECTION: LAW AND POLICY 568-603 (1983 & Supp. 1988) (providing an overview of the Superfund program).

⁹ CERCLA § 105, 42 U.S.C. § 9605. See National Oil and Hazardous Substances Pollution Contingency Plan, 53 Fed. Reg. 51,394 (1988).

¹⁰ CERCLA § 106, 42 U.S.C. § 9606(a). Persons who fail to comply with an administrative order without sufficient cause may be liable for a fine of up to \$25,000 for each day of non-compliance. *Id.*, 42 U.S.C. § 9606(b).

¹¹ *Id.* at § 104, 42 U.S.C. § 9604(a)(1).

¹² *Id.*

¹³ *Id.* at § 107, 42 U.S.C. § 9607.

four categories of “persons” or responsible parties:¹⁴

- 1) present owners or operators of the facility;
- 2) persons who owned or operated the facility at the time hazardous substances were disposed of;
- 3) generators of hazardous substances who arranged by contract, agreement or otherwise for the treatment, disposal or transportation for disposal or treatment of hazardous substances; and
- 4) transporters of hazardous substances who selected the disposal or treatment facilities for the hazardous substance.¹⁵

Responsible parties are liable for all removal and remediation costs, other necessary costs incurred that are not inconsistent with the NCP, and the cost of any health assessment or effects studies.¹⁶ Such liability extends to injuries to or loss of natural resources, including costs resulting from such injuries or loss.¹⁷

CERCLA Section 107 allows the government to recover costs from responsible parties upon a showing that there has been a release or threatened release¹⁸ of a hazardous substance¹⁹ from a vessel²⁰ or facility²¹ for which the government has incurred response costs.²² The government often begins the process of identifying responsible parties by issuing Section 104(e) information request letters which require the submission of information relevant to whether the respondent is liable for

¹⁴ CERCLA defines “person” as “an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.” *Id.* at § 101, 42 U.S.C. § 9601(21).

¹⁵ *See id.* at § 107, 42 U.S.C. § 9607(a).

¹⁶ *Id.*, 42 U.S.C. § 9607(a)(4).

¹⁷ *Id.* Interest is recoverable on all such costs from the date the government demands payment of a specific amount in writing from a responsible party or from the date of the expenditure. *Id.*

¹⁸ CERCLA states: “The term ‘release’ means any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant).” *Id.* at § 101, 42 U.S.C. § 9601(22).

¹⁹ CERCLA defines “hazardous substance” as substances designated as a hazardous substance pursuant to CERCLA, listed toxic pollutants under the Clean Water Act, listed hazardous wastes under RCRA, hazardous air pollutants listed pursuant to the Clean Air Act, and imminently hazardous chemicals or mixtures identified under the Toxic Substances Control Act. The term does not include petroleum or fractions of petroleum such as crude oil. *Id.* at § 101, 42 U.S.C. § 9601(14).

²⁰ CERCLA defines “vessel” as “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” *Id.* at § 101, 42 U.S.C. § 9601(28).

²¹ CERCLA defines “facility” as:

(A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

Id. at § 101, 42 U.S.C. § 9601(9).

²² *Id.* at § 107, 42 U.S.C. § 9607(a).

costs incurred under CERCLA.²³

Liability under CERCLA is strict, thereby allowing courts to hold parties liable regardless of whether they were negligent or intended to undertake conduct that contributed to the contamination of a site.²⁴ Parties can also be held liable regardless of whether their activities were legal at the time hazardous substances were disposed.²⁵ Liability under CERCLA is also joint and several, thus allowing a court to hold each responsible party liable for the entire cost of remedial action in cases where the harm is not divisible.²⁶

Courts have ruled that a parent company may in some instances be held liable under CERCLA for the activities of its subsidiaries. For example, in *Idaho v. Bunker Hill Co.*,²⁷ the court held a parent company liable as an owner and operator under CERCLA because the parent was familiar with the disposal practices and releases at the subsidiary's facility, had the capacity to control the disposal and releases, and had the capacity to prevent and abate the resulting harm. Corporate officers who make, direct, or control corporate decisions regarding the handling of hazardous substances may be held personally liable as owners and operators under CERCLA.²⁸

Lenders that foreclose on contaminated property may also be liable as owners and operators under CERCLA. In *United States v. Fleet Factors Corp.*,²⁹ the Eleventh Circuit ruled that a secured creditor will be liable under CERCLA if its involvement with the management of the foreclosed on facility is sufficient to show that the creditor could effect hazardous waste disposal decisions. In response, EPA has published regulations that attempt to specify a range of activities that a secured creditor can take to protect its interest in a particular facility without incurring liability under CERCLA.³⁰

2. Contribution Claims and Allocation Issues

Under CERCLA, any person who is liable may seek contribution from any other liable person under Section 9607(a) during or after a gov-

²³ *Id.* at § 104, 42 U.S.C. § 9604(e).

²⁴ *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1042 (2d Cir. 1985); *United States v. NEPACCO*, 579 F. Supp. 823, 843-44 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987).

²⁵ *United States v. Hooker Chems. & Plastics Corp.*, 680 F. Supp. 546, 566 (W.D.N.Y. 1988).

²⁶ *See NEPACCO*, 579 F. Supp. at 844-45. Responsible parties bear the burden of demonstrating that the harm resulting from their activities is divisible. *United States v. Bliss*, 667 F. Supp. 1298, 1313 (E.D. Mo. 1987) (holding defendants jointly and severally liable because defendants offered no rational basis for apportionment).

²⁷ 635 F. Supp. 665, 672 (D. Idaho 1986).

²⁸ *See, e.g., Shore Realty Corp.*, 759 F.2d at 1052 (holding a stockholder and officer liable as "owner or operator" under CERCLA).

²⁹ 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 752 (1991).

³⁰ National Oil and Hazardous Substances Pollution Contingency Plan; Lender Liability Under CERCLA, 57 Fed. Reg. 18,344 (1992).

ernment civil action under Section 9606 or 9607(a).³¹ Often, defendants named by the government in a cost recovery action will bring third-party claims against other potentially responsible parties. CERCLA provides courts with broad equitable authority to allocate response costs among responsible parties. For example, in cases involving the allocation of costs among generators, courts have allocated costs based on the volume and characteristics of the wastes generated.³² In allocating costs between owners and operators and generators, courts have looked to conduct-based factors such as the level of involvement at the site, the degree of care exercised by the parties, and the degree to which parties cooperated with government officials.³³

B. Resource Conservation and Recovery Act

The cleanup of hazardous wastes may also be required under the Solid Waste Disposal Act, more commonly referred to as RCRA.³⁴ RCRA is the federal statute intended to secure the "cradle to grave" management of hazardous wastes.³⁵ Unlike CERCLA, RCRA is largely a prospective statute that addresses current hazardous waste management practices.

RCRA regulates listed hazardous wastes³⁶ and wastes exhibiting hazardous characteristics,³⁷ some of which may also be covered by CERCLA. Categories of persons regulated under RCRA are generators of hazardous wastes,³⁸ transporters of hazardous waste,³⁹ and owners and operators of hazardous waste treatment, storage and disposal facilities.⁴⁰

³¹ CERCLA § 113, 42 U.S.C. § 9613(f).

³² See, e.g., *United States v. Monsanto*, 858 F.2d 160, 172 n.27 (4th Cir. 1988) (stating "volumetric contributions provide a reasonable basis for apportioning liability only if it can be reasonably assessed, or it has been demonstrated, that independent factors had no substantial effect on the harm to the environment."), cert. denied, 490 U.S. 1106 (1989); *United States v. Ottati & Goss*, 24 Env't Rep. Cas. (BNA) 1152 (D.N.H. 1986) (allocating costs between generators based on the number of drums sent to the site); *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 401 (W.D. Mo. 1985) ("... factors such as volume, toxicity, migratory potential etc. come into play in assessing the culpability of each party").

³³ See *Amoco Oil Co. v. Dingwell*, 690 F. Supp. 78 (D. Me. 1988), *aff'd sub nom. Travelers Indem. Co. v. Dingwell*, 884 F.2d 629 (1st Cir. 1989).

³⁴ RCRA § 1002-11012, 42 U.S.C. §§ 6901-6992(k).

³⁵ RCRA § 1004, 42 U.S.C. § 6903(5) defines "hazardous waste" as:

... a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may-

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

³⁶ 40 C.F.R. § 261.30.

³⁷ The characteristics upon which RCRA regulates certain wastes as hazardous are ignitability, corrosivity, reactivity and toxicity. *Id.* at §§ 261.21-261.24.

³⁸ *Id.* at pt. 262.

³⁹ *Id.* at pt. 263.

⁴⁰ *Id.* at pts. 264, 265.

Generally, RCRA imposes certain manifest, testing, and permitting requirements on persons involved with the management of hazardous wastes. As discussed below, the statute also requires the cleanup of hazardous wastes in certain circumstances.

1. Section 3013 Orders

Under RCRA Section 3013, EPA is authorized to issue an order requiring an owner or operator of a facility or site to conduct monitoring, testing, analysis, and reporting with respect to a site if EPA determines that the presence of hazardous waste presents a substantial hazard to human health or the environment.⁴¹ The Agency conducts routine compliance evaluation inspections of RCRA regulated facilities and often requests owners or operators to investigate suspected environmental problems further. If EPA is unable to determine that there is an owner or operator able to conduct such testing or if such testing is unsatisfactory, EPA is authorized to conduct the testing and seek reimbursement from the owner or operator at a later time for costs incurred by the Agency.⁴²

2. Section 7003 Orders

RCRA Section 7003 authorizes EPA to bring a civil suit to compel persons involved in the handling, storage, treatment, transportation or disposal of hazardous waste that presents an imminent and substantial endangerment to health or the environment to take necessary actions to abate the hazard.⁴³ Under Section 7003, EPA may recover costs incurred in responding to an imminent and substantial endangerment⁴⁴ or may obtain necessary injunctive relief.⁴⁵ Courts have interpreted Section 7003 as conferring broad powers on courts to remedy hazards.⁴⁶

3. Corrective Action Requirements

EPA is also in the early stages of implementing "corrective action" requirements under RCRA that may require certain hazardous waste facilities in the United States that have or are required to obtain a RCRA operating permit to take corrective action to cleanup releases of hazardous wastes. EPA estimates that the costs of this program to the regu-

⁴¹ RCRA § 3013, 42 U.S.C. § 6934(a).

⁴² *Id.*, 42 U.S.C. § 6934(d). EPA is authorized to seek reimbursement through an administrative order. *Id.*

⁴³ *Id.* at § 7003, 42 U.S.C. § 6973.

⁴⁴ *United States v. Vertac Chem. Corp.* 671 F. Supp. 595, 612 (E.D. Ark. 1987), *vacated in part*, 855 F.2d 856 (8th Cir. 1988); *United States v. Conservation Chem. Co.*, 619 F. Supp. 162, 201 (W.D. Mo. 1985).

⁴⁵ *United States v. Waste Indus., Inc.*, 734 F.2d 159, 168 (4th Cir. 1984).

⁴⁶ *See United States v. Price*, 688 F.2d 204, 214 (3d Cir. 1982) (stating that Congress by enacting Section 7003 conferred broad powers on the courts, including the power to order the cleanup of documented hazardous waste sites).

lated community could range between \$7 and \$48 billion.⁴⁷

Facilities seeking a RCRA permit⁴⁸ after November 8, 1984 are required to take corrective action for all releases of hazardous wastes or releases of hazardous constituents from non-hazardous solid wastes from "solid waste management unit[s]" at the facility.⁴⁹ Remedial action is to be taken regardless of when the waste was actually placed in the unit.⁵⁰ Facilities may also be required to take corrective action beyond the borders of the facility if such action is necessary to protect human health and the environment and permission to access adjoining property can be obtained.⁵¹ Certain "interim status" facilities receiving wastes after July 26, 1982 are also subject to corrective action requirements.⁵² EPA may either issue an administrative order or bring a civil judicial action for corrective action or other appropriate relief in cases when such action is necessary in response to a release of hazardous waste into the environment from an interim status facility.⁵³

EPA has issued regulations implementing portions of the corrective action program, and additional regulations have been proposed by the Agency.⁵⁴ In a challenge to EPA's first rulemaking regarding the Agency's corrective action authority, the United States Court of Appeals for the District of Columbia Circuit upheld the Agency's broad interpretation of its corrective action authority.⁵⁵

C. Criminal Liability Under Federal Statutes

In the last decade, the federal government has increasingly focused its attention on the prosecutions of environmental crimes. In the last three years alone, for example, there were 360 federal indictments, resulting in 288 pleas or convictions, more than \$61 million in fines and 149

⁴⁷ Proposed Rule for Corrective Action for Solid Waste Management Units at Hazardous Waste Management Facilities, 55 Fed. Reg. 30,798, 30,861 (1990). EPA has estimated that roughly 5,700 RCRA regulated facilities may be subject to the corrective action rules. *Id.*

⁴⁸ RCRA requires a permit for the treatment, storage or disposal of hazardous wastes. RCRA § 3005, 42 U.S.C. § 6925.

⁴⁹ *See id.* at § 3004, 42 U.S.C. § 6924(u).

⁵⁰ *Id.*

⁵¹ *Id.*, 42 U.S.C. § 6924(v).

⁵² *Id.* at § 3005, 42 U.S.C. § 6925(i). "Interim status" refers to facilities that have not received a final RCRA permit, but which are authorized to treat, store or dispose of hazardous waste pending Agency action on the facility's application for a permit. *See id.*, 42 U.S.C. § 6925(e); 40 C.F.R. pt. 270, subpt. G (1991).

⁵³ RCRA § 3008, 42 U.S.C. § 6928(h).

⁵⁴ *See* Hazardous Waste; Codification Rule for the 1984 RCRA Amendments, 52 Fed. Reg. 45,788 (1987); Corrective Action for Solid Waste Management Units (SWMUs) at Hazardous Waste Management Facilities, 55 Fed. Reg. 30,798 (1990).

⁵⁵ United Technologies Corp., Pratt & Whitney Group v. EPA, 821 F.2d 714 (D.C. Cir. 1987) (holding in part that all solid waste management units anywhere within the property boundary of a plant are subject to Section 3004(u), rather than merely those units within that portion of the property currently used for hazardous waste).

years in prison terms.⁵⁶ Corporations are increasingly the target of federal enforcement efforts. In fiscal year 1991, the average corporate fine was \$502,000.⁵⁷ More than fifty percent of the total federal criminal environmental indictments in the last five years were brought for CERCLA/RCRA violations.⁵⁸

1. Criminal Liability Under CERCLA

CERCLA contains criminal penalties for knowing violations of the Act, including submitting false claims for reimbursements from Superfund,⁵⁹ failing to notify the appropriate agency of the release of hazardous substances⁶⁰ or of the existence of an unpermitted hazardous waste disposal site,⁶¹ false reporting, and failure to comply with notification requirements.⁶² CERCLA's criminal provisions reach not only owners and operators,⁶³ but those who are "in charge" of a facility as well.⁶⁴

Prior to the enactment of SARA, which reauthorized CERCLA, the criminal penalties under CERCLA were light; CERCLA now imposes felony penalties of up to three years imprisonment for first offenses, five years for subsequent offenses, and/or a fine of up to \$250,000 for individ-

⁵⁶ UNITED STATES DEP'T OF JUSTICE, MEMORANDUM RE: ENVIRONMENTAL CRIMINAL STATISTICS FY 83 THROUGH FY 91 (May 27, 1992) (on file with authors).

⁵⁷ United States Dep't of Justice, Press Release (May 8, 1992) (on file with authors).

⁵⁸ *Id.*

⁵⁹ CERCLA § 112, 42 U.S.C. § 9612(b)(1).

⁶⁰ *Id.* at § 103, 42 U.S.C. § 9603(b)(3). Knowing destruction or falsification of records carries the same penalties as failure to notify. It is important to note that SARA was intended to greatly increase EPA's information gathering authority.

⁶¹ CERCLA § 103, 42 U.S.C. § 9603(c).

⁶² Many cases prosecuted under CERCLA include at least one count in the indictment premised on a violation of Title 18. Title 18 punishes, *inter alia*, the knowing and willful making of false statements, the knowing and willful concealment of material facts, conspiracies, and mail and wire frauds. This appears to be so for two reasons. First, Section 1001 of Title 18 is not limited to false statements made pursuant to an environmental statute, but includes any false statements to the government or its agents. *See, e.g.,* United States v. Olin Corp., 465 F. Supp. 1120, 1130-31 (W.D.N.Y. 1979). Second, a first time felony conviction for false statements under Section 1001 carries a longer imprisonment period (five years) than does the same conviction under CERCLA. The submission of nearly any false material information that has the propensity or capacity to influence or affect the authorized functions of a government agency falls within the scope of Section 1001. The element of materiality is satisfied if the statements have the capacity to influence; actual use of the false representations in the decision-making is not necessary. United States v. Greber, 760 F.2d 68, 72-73 (3d Cir.), *cert. denied*, 474 U.S. 988 (1985). The statement need have only the propensity or capacity to influence or affect an agency's decision. Materiality, therefore, is not measured by effect or magnitude. United States v. Fern, 696 F.2d 1269 (11th Cir. 1983) (affirmative unsolicited false statement capable of affecting or influencing the exercise of a government function is a violation of Section 1001 and the fact that the government is not actually influenced by the statement is immaterial).

⁶³ United States v. Greer, 850 F.2d 1447 (11th Cir. 1988).

⁶⁴ United States v. Carr, 880 F.2d 1550, 1554 (2d Cir. 1989) (persons responsible for the operation of a facility, including those who are in a position to detect, prevent or abate the release of a hazardous substance, may be charged under CERCLA's criminal provisions).

uals and \$500,000 for organizations.⁶⁵

2. Criminal Liability Under RCRA

Although most environmental statutes contain criminal provisions, RCRA is the environmental statute of choice for prosecution by the federal government.⁶⁶ RCRA imposes criminal penalties for a myriad of “knowing” violations,⁶⁷ including the transporting, treating, storing or disposing of hazardous wastes without a permit.⁶⁸ Criminal penalties under RCRA are also directed against “any person”⁶⁹ who “knowingly” violates any of RCRA’s numerous reporting requirements, including knowingly omitting material information or making false statements in any document used in compliance with RCRA regulations.⁷⁰

Like most environmental statutes, RCRA and CERCLA require the government to prove *scienter* to obtain a conviction. However, the parameters of “knowledge” in the RCRA and CERCLA contexts particularly are the subject of much debate and inconsistent judicial application. Courts addressing the parameters of “any person” and “knowledge” have done so primarily in the context of the “responsible corporate officer doctrine”. The “responsible corporate officer doctrine” permits the prosecution of corporate *officers* for actions of their employees if the officer had the authority to prevent the violations.⁷¹

⁶⁵ For some violations, CERCLA also permits federal prosecutors to use Title 18’s criminal fine provisions which are considerably more onerous.

⁶⁶ UNITED STATES DEP’T OF JUSTICE, *supra* note 56.

⁶⁷ *United States v. Conservation Chem. Co.*, 733 F. Supp. 1215 (N.D. Ind. 1989). *See also United States v. Hayes Int’l Corp.*, 786 F.2d 1499 (11th Cir. 1986) (hazardous waste transporters were found to have criminally violated RCRA by knowingly transporting hazardous waste to a recycling facility that did not have a permit and that did not intend to recycle the waste. RCRA’s “knowingly” requirement applied to the transporters’ knowledge that the recycling facility was not permitted and that the facility did not intend to recycle waste).

⁶⁸ RCRA § 3008, 42 U.S.C. § 6928(d).

⁶⁹ RCRA’s definition of “person” includes both individuals and corporations. *Id.* at § 1004, 42 U.S.C. § 6903(15).

⁷⁰ *Id.* at § 3008, 42 U.S.C. § 6928(d). All convictions under RCRA are felonies and carry penalties ranging from \$50,000 for each day of violation and five years in prison for the first offense. *Id.* Knowing violations that place another in “imminent danger” carry penalties of up to fifteen years in prison. 42 U.S.C. § 6928(e).

⁷¹ Liability based on the “responsible corporate officer doctrine” originated as a strict liability concept in public health statutes that do not contain express knowledge components, such as the Federal Food, Drug and Cosmetic Act. This doctrine was first developed in *United States v. Dotterweich*, 320 U.S. 277, *reh’g denied*, 320 U.S. 815 (1943), a case in which the Supreme Court upheld a company president’s misdemeanor conviction in spite of his lack of knowledge.

In the second leading case, *United States v. Park*, 421 U.S. 658, 672 (1975), the Supreme Court held that a conviction could be based on an individual corporate officer’s “failure to exercise the authority and supervisory responsibility reposed in them by the business organization . . .” The Supreme Court explained that doctrine as follows:

The requirements of foresight and vigilance imposed on responsible corporate agents are beyond question demanding, and perhaps onerous, but they are no more stringent than the public has a right to expect of those who voluntarily assume positions of authority in busi-

In a few celebrated cases, courts have held that under the “responsible corporate officer doctrine,” knowledge can be imputed to those who exercise control of company operations or hold supervisory positions at the facility.⁷² In *United States v. Johnson & Towers, Inc.*,⁷³ for example, in considering whether mid-level corporate managers could be held liable for the company’s violation of RCRA requirements, the Third Circuit held that the individuals could be held criminally liable only if they knew both that the corporation was required to obtain a permit and also that the corporation did not have one. However, the court then added that “such knowledge . . . may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant.”⁷⁴

While most federal circuits do not expressly visit liability on corporate officials for the acts of their employees, they do permit a jury to infer knowledge of wrongdoing in appropriate situations when the corporate official, by reason of his or her position, either knew or should have known of the violation of law. A conviction may also be based on circumstantial evidence, including the willful failure to investigate or to ensure compliance with regulatory requirements.⁷⁵

More recently, federal courts have held that being in an *oversight* position alone, without *actual knowledge* of the acts involved, could not support a conviction for a “knowing” RCRA violation.⁷⁶ The First Circuit, for example, overturned a double felony conviction of a disposal

ness enterprises whose services and products affect the health and well being of the public that supports them.

Id.

To succeed in such cases, however, the government, at least theoretically, must prove beyond a reasonable doubt that the corporate official had, by reason of his or her position in the corporation, the responsibility and the authority either to prevent in the first instance or to promptly correct the violation complained of, and that the official failed to do so.

⁷² See, e.g., *United States v. Buckley*, 934 F.2d 84 (6th Cir. 1991) (CERCLA’s criminal reporting penalties apply to any person, even if of relatively low rank, if that person can be considered to have been in charge of a facility).

⁷³ 741 F.2d 662 (3d Cir. 1984), *cert. denied sub nom. Angel v. United States*, 469 U.S. 1208 (1985).

⁷⁴ *Id.* at 670.

⁷⁵ *Hayes Int’l Corp.*, 786 F.2d at 1504-1505.

⁷⁶ In *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35 (1st Cir. 1991), the conviction of the president and owner of a company under RCRA § 3008(d)(1) was vacated because the trial court incorrectly charged the jury that knowledge of a particular violation could be inferred as long as it proved that the defendant was an officer of the corporation and had responsibility for the activities alleged to be illegal. The court held:

Simply because a responsible corporate officer believed that on a prior occasion illegal transportation occurred, he did not necessarily possess knowledge of the violation charged.

In a crime having knowledge as an express element, a mere showing of official responsibility . . . is not an adequate substitute for direct or circumstantial proof of knowledge.

Id. at 55. See also *United States v. White*, 766 F. Supp. 873 (E.D. Wa. 1991) (the responsible corporate officer doctrine cannot support a conviction for a knowing violation without the showing of specific intent).

facility's president under RCRA and CERCLA for knowing transportation of hazardous waste to an unpermitted facility, after the district court judge permitted the use of a "responsible corporate officer" jury instruction.⁷⁷ In reversing the lower court, the court held that the "responsible corporate officer doctrine" could not be applied when the relevant statute contained an express knowledge requirement.⁷⁸ The issue, however, is far from resolved as United States courts continue to hold opposing views on the issue of imputed knowledge.⁷⁹

⁷⁷ *MacDonald & Watson Waste Oil Co.*, 933 F.2d at 50. The jury instruction stated that the government could prove a corporate officer's knowledge provided the person is an officer of the corporation, the officer had the direct responsibility for the activities that were alleged to be illegal, and that the officer must have known or believed that the illegal activity of the type alleged occurred.

⁷⁸ *Id.* at 51-52 (citation omitted).

⁷⁹ In *White*, 766 F. Supp. at 894-895, the court held that a corporate officer may not be held criminally liable under RCRA (and FIFRA) solely because his employees acted illegally. The court reasoned that his "oversight" position could not support a conviction for a "knowing" RCRA violation without actual knowledge of the acts involved. Federal prosecutors were required to strike allegations that a corporate officer could be criminally liable under RCRA for illegal acts of his subordinates, because (1) RCRA requires proof beyond reasonable doubt that a defendant knowingly violated the act, and (2) allowing a conviction to be based on the responsible corporate officer doctrine could improperly allow a defendant to be convicted without proof that he had the requisite criminal intent to violate the law.

In *United States v. Dee*, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991), civilian employees of the Department of the Army were found to have criminally violated RCRA for unpermitted storage, disposal and treatment of various hazardous wastes. The court found the employees not immune from prosecution under RCRA, as they were tried and convicted as individuals rather than as government agents. In addition, the court found that the government need not prove that defendants knew that violations of RCRA were crimes. The government was required to prove, however, that defendants knew the general hazardous character of the waste. (Government did not have to prove that the defendants knew the chemicals were listed or identified by law as hazardous waste.)

In *Conservation Chems.*, 733 F. Supp. at 1221-1222, a defendant, who was president, chairman, treasurer, principal shareholder and person in authority at a corporation was held personally liable for various RCRA violations that occurred at the facility. Not only was the defendant a "person" under RCRA, but he was also an "operator." He was personally liable under RCRA because: (1) he took part in the day-to-day decisions affecting operation of the facility; (2) though the company also operated the facility, hazardous waste facilities can have more than one operator under RCRA; and (3) liability can also be based on the fact that an individual was an actively involved official in the company.

In *United States v. Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), shareholders and officers of a chemical manufacturer, who were personally involved in or directly responsible for corporate acts which violated RCRA, were held individually liable for contributing to imminent and substantial endangerment to human health and the environment.

In *United States v. Baytank (Houston), Inc.*, 934 F.2d 599, 613 (5th Cir. 1991), the court rejected Baytank's argument that the jury must find that substances were in fact hazardous and that the defendants knew that the waste was identified by the regulations as hazardous waste.

In *United States v. Sellers*, 926 F.2d 410, 416-17 (5th Cir. 1991), the court rejected Sellers' argument that the jury charge should have required the government to prove that he knew that the paint waste could be hazardous or harmful to persons or to the environment. The court also affirmed rejection of Sellers' proposed jury instruction that "Defendant knew or reasonably should have known . . . that the waste could be harmful to persons or the environment if . . . improperly

Notwithstanding the domestic effort to increase criminal environmental enforcement actions, international prosecutions for environmental crimes have been virtually unknown. In May 1992, however, a Utah grand jury handed the Department of Justice its first criminal indictment against a foreign national for alleged illegal storage and disposal of hazardous wastes in violation of RCRA.⁸⁰ The defendant, a citizen of Greece, is president of two Utah manufacturing and distributing corporations. The Department of Justice is currently considering his extradition.

More common, however, are prosecutions of United States citizens for criminal violations of "federal environmental laws governing the export and import of hazardous waste and chemicals."⁸¹ At the recent international symposium on Fraud and Environmental Crime, hosted by Interpol, thirty countries passed two resolutions which, if adopted by Interpol, will mark a serious international effort to criminalize the illegal transboundary shipment of hazardous substances.⁸² On the civil side, at least seven of the twenty-three civil enforcement actions filed in 1991 involved shipments of hazardous substances to or from Canada.⁸³

As a policy matter, extraditions for violations of United States environmental statutes are currently handled on an ad hoc basis, coordinated chiefly through the EPA's International Activities Division, the Department of Justice and the Office of the Legal Counsel at the Department of State. In the Canada/United States context, the Treaty on Extradition,⁸⁴ which has been in force between the two bordering nations since 1976, would be the obvious vehicle for pursuing transborder violators. At the

disposed of." The court held that Sellers' construction was "legally deficient" because he would not be liable if he disposed of waste in what he considered to be proper containers.

In *United States v. Laughlin*, 768 F. Supp. 957 (N.D.N.Y. 1991), the Court held that the government is neither required to prove that defendants knew that a permit was required by law nor that it knew that the company did not have a permit in order to prove that defendants violated § 3008(d)(2)(A). Decision includes an in-depth discussion of the language of § 3008(d)(2)(A), the legislative history of RCRA and recent case law.

In *United States v. Hoflin*, 880 F.2d 1033 (9th Cir. 1989), cert. denied, 493 U.S. 1083 (1990), the director of city public works department was convicted in district court of aiding and abetting disposal of hazardous waste and burial of sludge. The court of appeals affirmed conviction, holding that knowledge that the disposal permit had not been obtained was not a requirement for criminal conviction of improper disposal under RCRA. The defendant's participation in the unauthorized burial was enough, despite the defendant's lack of knowledge that the permit had not been obtained.

The court also held that the prosecution must prove that the defendant knew that the material in question was "hazardous". However, to prove this, the court concluded that it would be enough to show that the defendant knew that the material was potentially harmful to others, not that the material met the statutory definition of "hazardous waste". *Id.* at 1039.

⁸⁰ United States Dep't of Justice, Press Release (May 22, 1992) (on file with authors).

⁸¹ See Herbert H. Tate, Jr., *International Enforcement Efforts and the Environment: EPA, Interpol, and the Export of Hazardous Waste*, NAT'L ENV'T ENFORCEMENT J., Aug. 1992, at 13, 15.

⁸² *Id.*

⁸³ *Id.* at 15.

⁸⁴ Treaty on Extradition Between the United States of America and Canada, Dec. 3, 1971, 27 U.S.T. 983.

heart of this Treaty, like the majority of the ninety extradition treaties to which the United States is a signatory, is the "Schedule," a laundry list of thirty transgressions for which extradition is available to the parties. Although environmental crimes are not specifically listed, several of the categories probably could be construed to encompass violations of environmental statutes. Those categories include: "willful injury to property," "making a false affidavit or statutory declaration for any extrajudicial purpose," "obstruction of justice" and "use of the mails or other means of communication in connection with schemes devised or intended to deceive or defraud the public."⁸⁵ Although the prosecution of environmental crimes is unlikely to reach the level of civil enforcement actions, Canadian corporations doing business in the United States should be aware of the criminal penalties available to federal and state enforcement authorities, particularly under CERCLA and RCRA.

D. State Hazardous Waste Laws

Companies and individuals may also be required to undertake hazardous waste cleanup or reimburse state governments for costs incurred in responding to releases of hazardous wastes under state statutes. Most states have enacted hazardous waste cleanup and management statutes, some of which have cleanup standards that may exceed the requirements of federal programs.

Many state hazardous waste cleanup statutes resemble CERCLA in that they may impose liability for hazardous waste cleanup on generators, transporters, and owners of contaminated property.⁸⁶ State agencies often have the authority to issue administrative orders to abate hazards or bring a civil action in state court for necessary relief. State agencies may also undertake remedial action using state funds and later recover the cleanup costs from responsible parties. Some states have enacted "superlien" statutes that allow the state to place a lien on contaminated property to secure reimbursement for cleanup costs.⁸⁷

Some state statutes also require owners of commercial or industrial property to certify to the government that the property is not contaminated with toxic substances or that plans exist for remediating known contamination before the property is sold.⁸⁸ Most states have hazardous waste management statutes, drinking water protection statutes and other public health and safety laws that may also require the cleanup of hazardous wastes.

⁸⁵ *Id.* at 997-999 (Sched.).

⁸⁶ See generally DANIEL P. SELMI, STATE ENVIRONMENTAL LAW § 9.02 (1991).

⁸⁷ See, e.g., N.J. STAT. ANN. § 58:10-23.11(f).

⁸⁸ See, e.g., The New Jersey Environmental Cleanup Responsibility Act ("ECRA"), N.J. STAT. ANN. §§ 13:1K-6-13:1K-13.

E. Common Law Theories

Private plaintiffs or the government may also pursue remedies for harm caused by toxic substances under various common law theories. Common law tort theories of nuisance, trespass, negligence, and strict liability have been invoked in many environmental cases in both federal and state courts. Remedies can include damages and injunctive relief. These theories, however, often place significant burdens of proof of causation on plaintiffs that limit the ability of injured parties to recover.⁸⁹ Federal and state governments adopted environmental legislation, in part, as a response to the uncertainty of environmental actions based on common law standards.⁹⁰

Generally, courts have recognized two types of nuisance actions. First, courts have allowed plaintiffs to recover damages based on a private nuisance theory, which is often defined as an unreasonable interference with the use or enjoyment of one's property.⁹¹ Second, courts have allowed public representatives, such as local governments, to bring an action for the abatement or recovery of costs incurred in responding to conditions found to constitute a public nuisance.⁹² A public nuisance is generally defined as an unreasonable interference with a right belonging to the general public.⁹³ Private parties suffering a particular injury different in kind from injuries incurred by the general public may also be entitled to relief under a public nuisance theory.⁹⁴ Although different courts have articulated different tests for asserting a nuisance claim, plaintiffs are generally required to prove that they have suffered a substantial injury as a result of the defendant's unreasonable, negligent, or reckless conduct.⁹⁵

Some courts have also ruled that the migration of hazardous substances onto another's property amounts to a trespass for which damages can be recovered.⁹⁶ An action based on trespass generally requires an intent to physically invade another's land.⁹⁷ Intention to do the act that leads to the invasion often fulfills this intent requirement.

⁸⁹ See ANDERSON, MANDELKER & TARLOCK, *supra* note 8, at 56-57 (discussing the adequacy of common law remedies in environmental disputes).

⁹⁰ See Werner Pfennigstorf, *Environment, Damages, and Compensation*, 1979 AM. B. FOUND. RES. J. 347, 404.

⁹¹ *Id.* at 379; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 619 (5th ed. 1984).

⁹² See *State v. Schenectady Chems. Inc.*, 479 N.Y.S.2d 1010 (1984) (ruling that the seepage of toxic materials from a site constituted a public nuisance for which New York State could seek abatement).

⁹³ RESTATEMENT (SECOND) OF TORTS § 821B (1991).

⁹⁴ See *Wood v. Picillo*, 443 A.2d 1244, 1248 (R.I. 1982) (upholding a lower court's ruling that defendant's hazardous waste dump amounted to both a public and private nuisance).

⁹⁵ See SUSAN COOKE, *THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY AND LITIGATION* §§ 17.01[2] *et seq.* (MB ed., 1992 Supp.).

⁹⁶ See, e.g., *City of Philadelphia v. Stepan Chem. Co.*, 544 F. Supp. 1135 (E.D. Pa. 1982).

⁹⁷ See SUSAN COOKE, *supra* note 95, at §§ 17.01[3] *et seq.*

Courts have also held that plaintiffs can recover damages for injuries that arise from the negligent disposal of hazardous wastes.⁹⁸ Plaintiffs bringing a negligence claim must show that the defendant acted or failed to act in a manner that breached a legal obligation owed to plaintiff and resulted in injury to the plaintiff or his property. Courts have also ruled that persons handling toxic substances may be strictly liable for injuries that result from their activities.⁹⁹

II. HAZARDOUS WASTE CLEANUP IN THE CANADA/U.S. CONTEXT

Many environmental problems that affect the United States and Canada have been addressed diplomatically between the two governments. For example, in response to the alleged discharges of raw sewage and untreated industrial waste by the Province of British Columbia into waters bordering the United States and Canada, the Washington State Legislature and the United States Congress have used diplomatic channels to address the problem.¹⁰⁰ The International Joint Commission ("IJC"), established under the Boundary Waters Treaty of 1909 between Canada and the United States, provides a formal mechanism for resolving environmental disputes, particularly with regard to problems affecting the boundary waters between the two countries.¹⁰¹ Transboundary air pollution issues have also been addressed diplomatically.¹⁰²

Principles of international law have long recognized the responsibility of states to ensure that the activities within their jurisdiction do not cause damage to the environment of other states.¹⁰³ Although these

⁹⁸ See, e.g., *Knabe v. Nat'l Supply Div. of Armco Steel Corp.*, 592 F.2d 841 (5th Cir. 1979).

⁹⁹ See, e.g., *Mowrer v. Ashland Oil & Ref. Co.*, 518 F.2d 659, 662 (7th Cir. 1975).

¹⁰⁰ *U.S. Legislators Claim Canadian Province Discharges Raw Sewage into Shared Waters*, 14 INT'L ENV'T REP. (BNA) 177 (Mar. 27 1991) (discussing letters sent by U.S. Congressmen to the United States State Department and the adoption of a Washington State Senate resolution aimed at pressuring Canadian officials).

¹⁰¹ See Catherine Cooper, *supra* note 2, at 254-255 (discussing the role of the IJC in resolving environmental disputes between the United States and Canada).

¹⁰² See *Air Quality Accord Between the U.S., Canada Sets Framework to Resolve Future Issues*, 14 INT'L ENV'T REP. (BNA) 127 (Mar. 13, 1991) (discussing a bilateral agreement between Canada and the United States that addresses acid rain issues, sulfur dioxide emission, and urban smog, and which includes a dispute resolution system).

¹⁰³ For example, in the *Trail Smelter Case* (U.S. v. Can.), 3 R. Int'l Arb. Awards 1907 (1941), the International Court of Justice ruled on a dispute between the United States and Canada concerning property damage in the State of Washington caused by sulfuric and other noxious fumes originating from a smelter in British Columbia, stating:

[U]nder principles of international law . . . no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another, of the properties of persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Similarly, Principle 21 of the Stockholm Declaration states:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their

principles have arguably become customary international law,¹⁰⁴ United States courts have not viewed these principles as providing private plaintiffs with a cause of action.¹⁰⁵

The enforcement of United States environmental laws in the Canada-U.S. context requires consideration of jurisdictional and procedural issues as well as issues of substantive environmental law. Following an overview of jurisdictional and evidentiary issues, the exposure of Canadian companies to liability for the cleanup of hazardous waste sites in the United States under United States law is examined.

A. Overview of Jurisdictional and Procedural Issues

The enforcement of United States hazardous waste cleanup laws against Canadian defendants may give rise to a number of jurisdictional and procedural questions, especially in cases where the Canadian defendant has only limited contacts within the United States. Generally, a country has the authority to apply its laws with respect to: (1) conduct that takes place within its territory; (2) the status of persons or things within its territory; (3) conduct outside its territory that has a substantial effect within its territory; and (4) activities of nationals outside its territory.¹⁰⁶ The exercise of jurisdiction must be reasonable.¹⁰⁷ In addition,

jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Stockholm Declaration on the Human Environment, U.N. Doc. A/CONF. 48/14 and Corr. 1 (1972), U.N. Sales No. E. 73. II. A.14 and Corr., reprinted in 11 I.L.M. 1416, 1420 (1972).

¹⁰⁴ See, e.g., Durwood Zaelke & James Cameron, *Global Warming and Climate Change — An Overview of the International Legal Process*, 5 AM. U. J. INT'L L. & POL'Y 249, 265 (1990).

¹⁰⁵ See *Amlon Metals v. FMC Corp.*, 775 F. Supp. 668, 671 (S.D.N.Y. 1991) (ruling that the Stockholm Principles are not specific international proscriptions that can form a basis for a claim under the Alien Tort Statute, 28 U.S.C. § 1350).

¹⁰⁶ Section 402 of the Restatement (Third) of Foreign Relations Law of the United States (1987) states as follows:

§ 402. Bases of Jurisdiction to Prescribe

Subject to § 403, a state has jurisdiction to prescribe law with respect to

- (1) (a) conduct that, wholly or in substantial part, takes place within its territory;
- (b) the status of persons, or interests in things, present within its territory;
- (c) conduct outside its territory that has or is intended to have substantial effect within its territory;
- (2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and
- (3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.

¹⁰⁷ Section 403 of the Restatement (Third) of Foreign Relations Law of the United States (1987) states as follows:

§ 403. Limitations on Jurisdiction to Prescribe

- (1) Even when one of the bases for jurisdiction under § 402 is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.
- (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

the exercise of jurisdiction in an adjudicatory proceeding must also be reasonable.¹⁰⁸

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- (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
 - (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
 - (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
 - (d) the existence of justified expectations that might be protected or hurt by the regulation;
 - (e) the importance of the regulation to the international political, legal, or economic system;
 - (f) the extent to which the regulation is consistent with the traditions of the international system;
 - (g) the extent to which another state may have an interest in regulating the activity; and
 - (h) the likelihood of conflict with regulation by another state.
- (3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

¹⁰⁸ Section 421 of the Restatement (Third) of Foreign Relations Law of the United States (1987) states as follows:

§ 421. Jurisdiction to Adjudicate

- (1) A state may exercise jurisdiction through its courts to adjudicate with respect to a person or thing if the relationship of the state to the person or thing is such as to make the exercise of jurisdiction reasonable.
- (2) In general, a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted:
 - (a) the person or thing is present in the territory of the state, other than transitorily;
 - (b) the person, if a natural person, is domiciled in the state;
 - (c) the person, if a natural person, is resident in the state;
 - (d) the person, if a natural person, is a national of the state;
 - (e) the person, if a corporation or comparable juridical person, is organized pursuant to the law of the state;
 - (f) a ship, aircraft or other vehicle to which the adjudication relates is registered under the laws of the state;
 - (g) the person, whether natural or juridical, has consented to the exercise of jurisdiction;
 - (h) the person, whether natural or juridical, regularly carries on business in the state;
 - (i) the person, whether natural or juridical, had carried on activity in the state, but only in respect of such activity;
 - (j) the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect of such activity; or
 - (k) the thing that is the subject of adjudication is owned, possessed, or used in the state, but only in respect of a claim reasonably connected with that thing.

1. Jurisdiction

The Supreme Court has observed that the “foundation of jurisdiction is physical power.”¹⁰⁹ Personal jurisdiction in United States courts concerns the power of a court to adjudicate a claim against an individual and to render an enforceable judgment against the individual or his or her property. United States courts have exercised in personam, or personal, jurisdiction over foreign corporations and individuals doing business in the United States. Before a court can exercise personal jurisdiction over a defendant, there must be a statutory grant of jurisdiction to the court, notice to the defendant, authorization for service of summons, and a constitutionally sufficient relationship between the defendant and the forum.¹¹⁰

A defendant with continuous and systematic activities in a forum may be subject to a court’s general jurisdiction, thereby allowing a court to adjudicate any claim against the defendant.¹¹¹ A defendant with more limited contacts with a forum may nonetheless be subject to the personal jurisdiction of the court on the basis of specific or limited jurisdiction.¹¹² Specific jurisdiction allows a court to adjudicate a claim that arises out of a defendant’s activities within the forum state.¹¹³

Most states have adopted long-arm statutes that define the personal jurisdiction of their courts over foreign defendants. Because Congress has not enacted a federal long-arm statute, federal courts can either look to grants of jurisdiction in specific federal statutes or borrow from the state long-arm statute in which the court sits.¹¹⁴

(3) A defense of lack jurisdiction is generally waived by any appearance by or on behalf of a person or thing (whether as plaintiff, defendant, or third party), if the appearance is for a purpose that does not include a challenge to the exercise of jurisdiction.

¹⁰⁹ *Ex Parte Indiana Transport Co.*, 244 U.S. 456, 457 (1917).

¹¹⁰ *See Omni Capital Int’l v. Rudolph Wolff & Co.*, 484 U.S. 97 (1987). *See also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (ruling that constitutional principles of due process are not satisfied unless a defendant is given adequate notice of a suit and is subject to the personal jurisdiction of the court).

¹¹¹ GARY BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN THE UNITED STATES COURTS: COMMENTARY AND MATERIALS* 25-29 (1990). *See Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

¹¹² BORN & WESTIN, *supra* note 111, at 25.

¹¹³ *Id.*

¹¹⁴ The Federal Rules of Civil Procedure state that service of process may be made upon a defendant outside the forum state in accordance with a statute that provides for service of a summons. FED. R. CIV. P. 4(e).

The Supreme Court has explained:

The first sentence of the rule [Fed. R. Civ. P. 4(e)] speaks to the ability to serve summons on an out-of-state defendant when a federal statute authorizes such service. The second sentence, as an additional method, authorizes service of summons “under the circumstances” prescribed in a state statute or rule. Thus, under Rule 4(e), a federal court normally looks either to a federal statute or to the long-arm statute of the State in which it sits to determine whether a defendant is amenable to service, as a prerequisite to its exercise of personal jurisdiction.

Long-arm statutes typically establish circumstances under which non-resident individuals and corporations may be subject to the jurisdiction of a state's courts. State courts often interpret state long-arm statutes to extend to the limits of constitutional due process discussed below.

In addition to needing a statutory grant of jurisdiction over a defendant, courts must also determine whether the exercise of personal jurisdiction is reasonable and constitutionally sufficient. The Due Process Clause protects an individual or corporation from being subject to the binding judgments of a forum with which the individual or corporation has not established meaningful contacts, ties or relations.¹¹⁵ The Supreme Court has ruled that courts can exercise personal jurisdiction over foreign corporations that have "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."¹¹⁶ Courts may only exercise jurisdiction over defendants with "contacts, ties, or relations" with the forum state sufficient to provide fair warning to individuals that their activities may subject them to the jurisdiction of the court.¹¹⁷ The Supreme Court has held that this "fair warning" requirement is met if the defendant "purposefully directed" his activities to the forum and the "litigation results from alleged injuries" that arise from or relate to those activities.¹¹⁸

2. Procedural and Evidentiary Issues

A court exercising personal jurisdiction must also have authorization for service of summons. The Federal Rules of Civil Procedure authorize service of process upon parties located in the forum state by personally delivering a copy of the summons and complaint to the individual or by leaving the documents at the individual's home.¹¹⁹ Similarly, where the defendant is a domestic or foreign corporation, service can be made on an officer of the corporation or other agent authorized by appointment or law to receive service.¹²⁰ Environmental statutes may also have an authorization for service of process. For example, CERCLA provides for nation-wide service of process in any action brought by the United States.¹²¹ Thus, for claims brought under CERCLA, process may be served on Canadian individuals or companies that are outside the

Omni Capital Int'l, 484 U.S. at 105.

Nearly all of the states in the United States have enacted long arm statutes or court rules that indirectly define the proper exercise of personal jurisdiction by enumerating factors or circumstances concerning the defendant's relationship with the forum which are sufficient to allow a court to exercise personal jurisdiction. BORN & WESTIN, *supra* note 111, at 20.

¹¹⁵ *Omni Capital Int'l*, 484 U.S. at 103-104.

¹¹⁶ *Id.* (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

¹¹⁷ *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (citation omitted).

¹¹⁸ *Id.*

¹¹⁹ FED. R. CIV. P. 4(d)(1).

¹²⁰ FED. R. CIV. P. 4(d)(3).

¹²¹ CERCLA § 113(e), 42 U.S.C. § 9613(e), states: "In any action by the United States under

forum state but within the territorial United States. CERCLA, however, does not authorize service of process in Canada.¹²²

In cases where the defendant is outside the state, and is outside the United States, issues related to service of process may be significant.¹²³ In instances where a Canadian defendant cannot be properly served in the forum state or in the United States under the federal rules or applicable state service of process rules, plaintiffs must comply with the procedures of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention").¹²⁴ Both the United States and Canada are parties to the Hague Service Convention, and, as required under that Convention, each has designated a "Central Authority" which is charged with receiving and executing requests for service of process.¹²⁵

The Hague Service Convention requires the use of model forms for requesting service of process abroad.¹²⁶ The Central Authority in the receiving state must complete a standard certificate, contained in the Annex to the Hague Service Convention indicating whether service has been made. Defendants may bring a motion to quash service if the Hague Service Convention's procedures apply and are not followed.¹²⁷ In addition, compliance with the Hague Service Convention's procedures may facilitate the enforcement of a court's judgment in Canada.¹²⁸

Discovery procedures may also be affected if the defendant is a foreign corporation or individual outside the United States. Discovery is a

this chapter, process may be served in any district where the defendant is found, resides, transacts business, or has appointed an agent for service of process."

¹²² See *United States v. Ivey*, 747 F. Supp. 1235, 1238 (E.D. Mich. 1990).

¹²³ See *id.* (challenging the Court's exercise of jurisdiction on the basis that service of process under CERCLA was ineffective).

¹²⁴ Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 (hereinafter "Hague Service Convention"). The Supreme Court in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, (1988), ruled that the Hague Convention does not apply when process can be served on a foreign corporation by serving the defendant's domestic subsidiary which under state law is an involuntary agent of its parent.

¹²⁵ Hague Service Convention, *supra* note 124, at Art. 2. The Foreign Litigation Section of the Civil Division of the United States Department of Justice is the Central Authority for the United States. In Canada, the Department of External Affairs is the Central Authority for the federal government. Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, Canada Treaty Services 1989 No. 2. Central Authorities have also been designated in Canada's province's and territories. *Id.* See also, Bruno Ristau, *Cross Border Litigation Involving Canadian and U.S. Litigants*, 17 CAN.-U.S. L.J. 247 (1991) (providing a detailed description of the requirements of the Convention); BORN & WESTIN, *supra* note 111, at at 136.

¹²⁶ Hague Service Convention, *supra* note 124, at Art. 3.

¹²⁷ See *id.* (stating that if service of process is governed by the Convention and a party admits to not complying with the Convention, the trial court should grant a motion to quash).

¹²⁸ See *Volkswagenwerk Aktiengesellschaft*, 484 U.S. at 706 (stating that adherence to the Convention may result in easier enforcement of judgments abroad). See also Kenneth B. Reisenfeld, *Service of United States Process Abroad: A Practical Guide to Service Under the Hague Service Convention and the Federal Rules of Civil Procedure*, 24 INT'L LAW. 55, 59 (1990).

particularly important aspect to hazardous waste cleanup litigation, because the acts giving rise to liability may have occurred decades earlier. In cases where a United States federal court has personal jurisdiction over the party, the production of documents and taking of depositions can usually take place pursuant to the Federal Rules of Civil Procedure.¹²⁹ However, if documents are requested from a non-party who is outside the court's jurisdiction, a court will not have the power to order the production of documents.¹³⁰ Similarly, absent personal jurisdiction over a proposed deponent in Canada, a court is without power to compel a deposition of that person.

In such cases, a United States court may make a formal request for the assistance of a Canadian court in obtaining necessary evidence by using a letter rogatory.¹³¹ Generally, Canadian courts are receptive to requests for assistance made by letters rogatory from courts abroad.¹³² Canadian courts may, however, be reluctant to compel the production of documents or the examination of a witness in pre-trial proceedings.¹³³ Compliance with internationally recognized procedures for the service of process and discovery may make a judgment less vulnerable to attack upon enforcement of the judgment by a Canadian court.¹³⁴

EPA is currently reviewing its legal authorities and procedures under Section 104(e) of CERCLA for information request letters to foreign companies in anticipation of bringing more CERCLA claims against foreign Potentially Responsible Parties.¹³⁵

B. *Liability of Canadian Companies for Hazardous Waste Sites in the United States*

United States courts have imposed liability for environmental harm on Canadian defendants doing business in the United States. United States courts have also provided relief to United States plaintiffs injured by contaminants attributable to Canadian defendants located in Canada. The application of United States hazardous waste cleanup laws and com-

¹²⁹ See BORN & WESTIN, *supra* note 111, at 266-273.

¹³⁰ See *Re Grand Jury Proceedings*, 691 F.2d 1384 (11th Cir. 1982), *cert. denied sub nom. Bank of Nova Scotia v. United States*, 462 U.S. 1119 (1983).

¹³¹ A letter rogatory is a formal request by a court in one nation to the courts of another for assistance. See BORN & WESTIN, *supra* note 111, at 305-306.

¹³² See T. Bradbrooke Smith, *Cross-Border Litigation Involving Canadian and U.S. Litigants*, 17 CAN.-U.S. L.J. 261 (1991) (providing an overview of Canadian laws governing the taking of evidence).

¹³³ *Id.* at 268.

¹³⁴ See generally *Discussion after the Speeches of Bruno Ristau and T. Bradbrooke Smith*, 17 CAN.-U.S. L.J. 277 (1991) (stating that although Canadian courts begin with the presumption that foreign judgments should be honored, issues regarding service and the conduct of the proceedings may lead to a reopening of the judgment).

¹³⁵ Telephone Interview with Peter Christich, EPA Office of International Activities (Mar. 30, 1992).

mon law principles to hazardous waste sites involving Canadian defendants is discussed below.

1. CERCLA and RCRA Claims

Canadian companies owning property in the United States or doing business involving hazardous wastes or substances in the United States may be required to undertake remedial action under either CERCLA or RCRA. These statutes may also impose liability on Canadian companies for response costs incurred by the United States government. In addition, Canadian transporters and even Canadian generators of hazardous wastes located in Canada are arguably within the scope of these federal statutes in certain circumstances. Canada and the United States have formally agreed to enforce their domestic laws with regard to contamination arising from transboundary shipments of hazardous wastes.¹³⁶

a. Owners and Operators

Canadian owners and operators of hazardous waste sites in the United States can be liable for cleanup costs incurred by the government. In *Ivey*, a federal court in Michigan ruled that it had jurisdiction over both an alien defendant in Canada and a Canadian corporation in an action brought by the United States under CERCLA to recover costs the government incurred in cleaning up a Superfund site in Michigan.¹³⁷ The government alleged that Canadian plaintiffs Robert Ivey and Ineco, Ltd. were each liable as owners or operators of the site.¹³⁸

The Canadian defendants admitted to being personally served in Canada, but argued that Section 113(e) of CERCLA limited the court's

¹³⁶ Agreement between the Government of the United States of America and the Government of Canada Concerning the Transboundary Movement of Hazardous Waste, Oct. 28, 1986, TIAS No. 11099, Art. 7 (stating "[t]he Parties shall ensure, to the extent possible, that within their respective jurisdictions, their domestic laws and regulations are enforced with respect to the transportation, storage, treatment and disposal of transboundary shipments of hazardous waste").

¹³⁷ CERCLA grants exclusive jurisdiction over controversies arising under the statute to United States district courts. Section 113 states:

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy.

Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office.

CERCLA § 113, 42 U.S.C. § 9613(b).

¹³⁸ *Ivey*, 747 F. Supp. at 1237. Ivey served as president of Liquid Disposal, Inc., a Michigan corporation that owned the site and conducted its principal business operations at the location from 1967 to 1984. Ivey also served as president and director of Ineco, a Canadian company whose Canadian predecessor held a controlling interest of LDI's stock. Hazardous substances were disposed of at the site during this time. *Id.*

Ivey also served as president of Ineco's predecessor company Maziv Industries, Ltd., which held an eighty percent sharehold of Liquid Disposal, Inc. Maziv also held the mortgage to the contaminated property. In 1986, Ineco began operations at the business address of Maziv, and later Maziv assigned its rights and interests in Liquid Disposal to Ineco. *Id.*

jurisdiction to defendants who are found within the territorial boundaries of the United States.¹³⁹ The court held that although CERCLA did not provide for service of process in a foreign country, Rule (4)(e) of the Federal Rules of Civil Procedure allows courts to look to applicable state long-arm statutes, and under the Michigan long-arm-statute, the court had jurisdiction over both Ivey and Ineco.¹⁴⁰

The Michigan long-arm statute authorized limited personal jurisdiction over an individual outside the state based on the existence of certain relationships between the individual or his agent and the state.¹⁴¹ The statute provided that a court could exercise personal jurisdiction over persons acting as a director, manager or officer of a corporation incorporated under the laws of Michigan or having its principal place of business within the state. On this basis, the court ruled that it had jurisdiction over Ivey because he served as both a president and director of Liquid Disposal, Inc., a company incorporated under the laws of Michigan with its principal place of business in Michigan. The court also found that Ivey purposefully directed his activities to the state and that the exercise of jurisdiction was therefore reasonable.¹⁴²

The court held that jurisdiction over Ineco, the Canadian corporation, was proper based on Michigan's long-arm statute governing corporations, which provided that the transaction of business within the state or the ownership of certain property in the state provided a sufficient basis for exercising personal jurisdiction. Ineco owned a majority share of Liquid Disposal, Inc. and also held a mortgage to the site.

Canadian owners and operators of facilities in the United States that are the subject of RCRA Sections 3013, 7003, and corrective action orders are also within the jurisdiction of United States federal courts. Companies or individuals owning or operating a treatment or disposal facility in the United States would likely have contacts sufficient to satisfy state long-arm statute requirements. For example, the ownership of tangible property in Michigan is also a basis for asserting jurisdiction over a foreign corporation.¹⁴³ Constitutional due process requirements would also be satisfied in such cases.

b. Transporters

CERCLA also imposes liability on transporters who have accepted hazardous substances and have selected the disposal or treatment facility at which the release occurred.¹⁴⁴ Although no court has ruled on the question, the rationale applied in *Ivey* and various Supreme Court

¹³⁹ *Id.*

¹⁴⁰ *Ivey* was decided before Canada became a party to the Hague Service Convention.

¹⁴¹ *Id.* at 1238-1239.

¹⁴² *Id.* at 1239.

¹⁴³ MICH. COMP. LAWS ANN. § 600.715.

¹⁴⁴ CERCLA § 107, 42 U.S.C. § 9607(a)(4).

cases¹⁴⁵ suggests that a court would have jurisdiction in a cost recovery claim over a Canadian transporter located in Canada that brought hazardous substances into the United States for disposal. Courts have exercised jurisdiction over Canadian carriers operating in the United States.¹⁴⁶ Many state long-arm statutes permit the exercise of jurisdiction over persons doing business in the state. For example, the Michigan long-arm statute authorizes courts in Michigan to exercise limited personal jurisdiction over any defendant transacting business within the state or entering into a contract for services or materials to be furnished in the state.¹⁴⁷ For example, by selecting the treatment or disposal site in the United States and delivering waste to that site under a contract with the operations of the site, a Canadian transporter would likely trigger CERCLA liability and satisfy state long-arm statute requirements. By purposefully directing activities to the forum state, a Canadian transporter company or individual would also likely establish constitutionally sufficient contacts with the forum state and provide a basis for a federal court to exercise personal jurisdiction over the defendant.

c. Generators

Less clear is whether a generator of waste located in Canada is liable for remediation costs under CERCLA based on simply arranging for the disposal of hazardous substances in the United States. With regard to United States defendants, courts have held that a generator may be liable for cleanup costs regardless of whether he chose the site where the hazardous substances were disposed.¹⁴⁸ However, the issue of whether a Canadian generator of hazardous substances selects a disposal site in the United States, rather than allowing the transporter to select the site, becomes significant in determining whether a United States court could properly exercise jurisdiction over the Canadian generator. Assuming the Canadian generator does not have property, offices or agents in the forum state, the Canadian generator has arguably not purposefully availed itself to the forum state, even if some of its waste ends up in a Superfund site in the United States.¹⁴⁹ On this basis, the exercise of jurisdiction may exceed the limits of the Due Process Clause.¹⁵⁰ However, where a Canadian generator selects a treatment or disposal site for its hazardous wastes which is located in the United States pursuant to a contract with the operators of the site, the Canadian defendant has ar-

¹⁴⁵ See, e.g., *World-Wide Volkswagen Corp.*, 444 U.S. at 286.

¹⁴⁶ See *Kingsley and Keith (Canada) v. Mercer Int'l*, 456 A.2d 1333 (Pa. 1983).

¹⁴⁷ MICH. COMP. LAWS ANN. § 600.715.

¹⁴⁸ See *Conservation Chems. Co.*, 619 F. Supp. at 162.

¹⁴⁹ See *Asahi Metal Ind. v. Superior Ct. of Cal., Solano Cty.*, 480 U.S. 102 (1987) (holding that the exercise of jurisdiction over a Taiwanese company that did not avail itself to the laws of California by directing the sales of its products in California would be unreasonable).

¹⁵⁰ *Id.* The absence of meaningful contacts may also fail to satisfy applicable state long arm requirements.

guably purposefully availed itself to the laws of the state in a way that would allow a court to exercise personal jurisdiction over the defendant.¹⁵¹

Finally, it is unclear whether a court would consider a cost recovery action by EPA against a Canadian generator to be an extraterritorial application of United States law. Because the situation described above involves the cleanup of hazardous waste located in the United States, an action against a Canadian generator of the waste under CERCLA is arguably not an extraterritorial application of United States law. In considering the extraterritorial reach of RCRA, the court in *Amlon Metals*, discussed below, focused on the location of the hazardous waste rather than the place where the conduct giving rise to the hazard took place. Moreover, a court may be reluctant to apply CERCLA in a way that in effect shields Canadian generators from the costs of cleaning up environmental contamination in the United States caused by waste generated in Canada, and which were purposefully sent to the United States for treatment or disposal.

2. State and Common Law Claims

Canadian companies owning or operating facilities or otherwise doing business in the United States may also be subject to state hazardous waste cleanup laws that mandate the remediation of a waste site. State court jurisdiction over companies doing business in the state would likely be proper under applicable long-arm statutes for the reasons explained above. State courts would likely have jurisdiction over Canadian companies transporting hazardous wastes into the United States that present an environmental hazard. The jurisdictional and liability issues would, of course, turn on the specific statutes granting jurisdiction, the nature of the defendant's contacts with the forum state, and the law governing liability for hazardous waste cleanup.

Canadian defendants owning property or doing business in the United States may also be held liable for environmental harm in the United States under various common law tort theories. Such actions could be brought in either state or federal court. Typically, state long-arm statutes allow courts to exercise jurisdiction over foreign companies where the defendant's activities result in a tort within the forum state.¹⁵²

¹⁵¹ See *World-Wide Volkswagen Corp.*, 444 U.S. at 297-98 (stating that courts considering the exercise of personal jurisdiction must consider whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there"). The Court also noted that the exercise of personal jurisdiction does not exceed the limits of due process if "a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *Id.* This rationale could be used to assert the reasonableness of exercising personal jurisdiction over a Canadian company that arranges for the transportation of its hazardous substances to sites in the United States.

¹⁵² See, e.g., *Helzer v. F. Joseph Lamb Co.*, 429 N.W.2d 835 (Mich. 1988).

3. Liability of Canadian Companies for Pollution Originating in Canada

Plaintiffs in the United States may also be able to bring a nuisance claim in a United States court to remedy hazards posed by waste sites in Canada that cause harm to persons or property in the United States. Diversity jurisdiction will exist in many instances between Canadian and United States private plaintiffs.¹⁵³ As discussed above, before a court could extend personal jurisdiction over the Canadian defendant, there would have to be a grant of jurisdiction, such as through a state long arm statute, and the Canadian defendant would have to have constitutionally sufficient contacts.¹⁵⁴

In *Ohio v. Wyandotte Chemicals Corp.*,¹⁵⁵ the Supreme Court ruled that it had original jurisdiction under the Constitution over a dispute between the State of Ohio and a Canadian corporation located in Canada that was allegedly responsible for the release of toxic metals into Lake Erie. The Court, however, declined to exercise its jurisdiction because the claim concerned issues of local law and involved complex factual issues that the Court felt ill equipped to address. The Court noted, however, that an assertion of jurisdiction over a Canadian corporation was possible and would require a determination that the Canadian defendant had sufficient contacts of the sort to make an assertion of jurisdiction proper.¹⁵⁶ A determination that service of process could lawfully be made upon the company would also be required.¹⁵⁷ In leaving the claim to the Ohio courts, the Court observed that the Ohio court could also exercise personal jurisdiction to adjudicate the nuisance action.¹⁵⁸ The Court concluded that “while we cannot speak for Canadian courts, we have been given no reason to believe they would be less receptive to enforcing a decree rendered by Ohio courts than one issued by this Court.”¹⁵⁹

The court’s reasoning suggests that courts in the United States would be willing to hear a common law claim against a defendant located

¹⁵³ 28 U.S.C. § 1332(a).

¹⁵⁴ An argument can be made that a state or federal court would also have jurisdiction under the effects doctrine (i.e., on the basis that the conduct outside the United States is having a substantial effect within the United States). See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987).

¹⁵⁵ 401 U.S. 493 (1971).

¹⁵⁶ *Id.* at 496 n.2. Arguably, a United States court would have jurisdiction over Canadian individuals or companies responsible for a hazardous waste site effecting the United States under the effects doctrine. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

¹⁵⁷ *Wyandotte Chems. Corp.*, 401 U.S. at 496 n.2.

¹⁵⁸ *Id.* at 500 (stating that “[t]he courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim . . . to exercise jurisdiction to adjudicate the instant controversy”).

¹⁵⁹ *Id.* at 501.

in Canada that was responsible for hazardous substances that were migrating and causing injury to persons or property in the United States.

III. LIABILITY OF UNITED STATES COMPANIES FOR HAZARDOUS WASTE SITES IN CANADA UNDER UNITED STATES LAW

United States courts have generally not applied United States environmental statutes extraterritorially. The courts have, however, allowed Canadian plaintiffs to bring common law actions to abate pollution originating in the United States and affecting individuals or property in Canada. Recovery based on common law tort theories may be difficult given the common law standards of liability. Available remedies are also limited in comparison to those available under various environmental statutes.¹⁶⁰

A. *The Extraterritorial Reach of CERCLA and RCRA*

Recent case law has begun to clarify the extent to which United States hazardous waste cleanup laws can be applied extraterritorially to hazardous waste problems outside the United States. These developments limit the remedies available to plaintiffs under United States law for the cleanup of environmental hazards in Canada that are attributable to persons or companies in the United States.

Under what has come to be known as the "Foley Doctrine," the Supreme Court has ruled that United States laws do not apply extraterritorially absent clear Congressional intent to apply such laws outside the territorial United States.¹⁶¹ In 1991, the court in *EEOC v. Arabian Am. Oil Co.*,¹⁶² ruled that Title VII of the Civil Rights Act of 1964 did not apply extraterritorially to prohibit discriminatory conduct against American citizens employed abroad by a Delaware corporation doing business in Saudi Arabia. The Court noted the "long-standing principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States'."¹⁶³ Because the petitioner failed to demonstrate a Congressional intent to apply United States civil rights laws to actions occurring outside the territorial United States in either the language of the statute or its legislative history, the Court affirmed a lower court's ruling dismissing the claim. In reaching this decision, the Court noted that the absence of any mechanisms for overseas enforcement and the absence of provisions

¹⁶⁰ Courts in the United States would also have to consider choice of law issues. In tort claims, United States courts have, based on the facts, applied either the law of the location of the act giving rise to the injury or the law of the place where the harm occurred. See Joel Gallob, *Birth of the North American Transboundary Environmental Plaintiff Transboundary Pollution and the 1979 Draft Treaty for Equal Access and Remedy*, 15 HARV. ENVTL. L. REV. 85 (1991).

¹⁶¹ *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949).

¹⁶² 111 S. Ct. 1227 (1991).

¹⁶³ *Id.* at 1230 (quoting *Foley Bros., Inc.*, 336 U.S. at 285).

addressing possible conflicts with foreign laws or procedures supported limiting the statute to domestic concerns.¹⁶⁴

Lower courts have recently applied the Foley Doctrine with regard to environmental statutes.¹⁶⁵ In *Amlon Metals, Inc. v. FMC Corp.*, the United States District Court for the Southern District of New York applied the principles discussed in *EEOC v. Arabian Am. Oil Co.* and ruled that RCRA does not apply extraterritorially. Plaintiff Amlon Metals, a New York Corporation, contracted with FMC, a Delaware corporation, to reclaim copper residue produced by a FMC plant in Baltimore Maryland. Under the contract, FMC agreed that the material would not be hazardous waste and would typically contain thirty-three percent copper. Amlon, as an agent for plaintiff Wath Recycling, a United Kingdom corporation doing business in the United Kingdom, would acquire metal residues and ship them to Wath for processing.

In 1989, Amlon arranged for twenty containers of residue from FMC's plant to be sent to England. After discovering that the material contained xylene and other hazardous substances, Amlon and Wath sued FMC in New York seeking injunctive relief and damages under RCRA's citizen suit provisions.¹⁶⁶ Plaintiffs alleged that the toxic chemicals taken from FMC's plant to England presented an "imminent and substantial danger" to workers and others in England.

The court in *Amlon Metals* found no evidence of Congressional intent in RCRA's legislative history to apply RCRA's citizen suit provisions extraterritorially. The court also failed to find evidence to support a congressional intent to apply RCRA to wastes outside the United States in the structure of the statute. Indeed, the court noted that Congress failed to provide a venue for citizen suits based on wastes located in another country, thereby suggesting a Congressional intent to limit RCRA to hazards in the United States.¹⁶⁷ Similarly, the court noted that whereas the statute requires notice to the state in which the violation occurs prior to initiating a suit, the statute did not contain provisions for citizen suit notification in instances where wastes subject to the suit were

¹⁶⁴ *Id.* at 1234. The Court noted that the statute's venue provisions call for venue only in a judicial district in the state where matters related to the employer occurred or were located. *Id.* The Court also observed that the investigative powers of the Commission had a domestic focus. *Id.*

¹⁶⁵ See, e.g., *Amlon Metals*, 775 F. Supp. at 688 (ruling that RCRA does not apply extraterritorially); *Env'tl. Defense Fund v. Massey*, 772 F. Supp. 1296 (D.D.C. 1992) (ruling that the National Environmental Policy Act ("NEPA") does not apply extraterritorially).

¹⁶⁶ Plaintiffs brought suit in the United States after Wath had unsuccessfully attempted to sue FMC in England. *Amlon Metals*, 775 F. Supp. at 670. The Commercial Court of the Queen's Bench Division of the British High Court of Justice dismissed the suit on the grounds that all the actions attributed to FMC had taken place in the United States and that United States law should apply. *Id.*

¹⁶⁷ The court noted that Section 6972(a)(1) states that a citizen suit "shall be brought in the district court for the district in which the alleged endangerment may occur." *Id.* at 675. The statute does not speak to venue provisions for wastes located in a foreign country. *Id.*

located outside the United States.¹⁶⁸

It is important to note that *Amlon Metals* concerned the extraterritorial application of RCRA's citizen suit provisions to a hazardous waste site entirely outside the territorial United States. The court was not called upon to consider the reach of EPA's RCRA enforcement powers or whether an individual in Canada could use the citizen enforcement provisions to remedy a waste site located in the United States that presented an imminent and substantial endangerment to persons or property in Canada.¹⁶⁹

The courts have not yet ruled on the extraterritorial reach of CERCLA. There is, however, little evidence in the legislative history or statutory language to suggest that Congress intended CERCLA to apply to hazardous waste sites outside the United States. In fact, the focus of the National Contingency Plan on identifying and prioritizing releases or threatened releases "throughout the United States" for the purpose of

¹⁶⁸ The court observed that citizens are required to give notice to the "State in which the alleged endangerment may occur" 90 days prior to initiating a suit under RCRA Section 6972(b)(2). The court viewed the absence of provisions governing notice in instances where wastes were not located in a particular "state" as evidence of Congressional intent to limit RCRA's application to the territorial United States. *Id.* RCRA defines "State" as "any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands." RCRA § 1004, 42 U.S.C. § 6903(31).

¹⁶⁹ Based on the *EEOC v. Arabian Am. Oil Co.* and the *Amlon Metals* decision, it seems unlikely that a court would uphold an attempt by EPA to extend RCRA to hazardous wastes located outside the United States. For example, under Section 7003, EPA is required to provide notice to "the affected State" upon the initiation of a suit based on an imminent and substantial endangerment. RCRA § 7003, 42 U.S.C. § 6973(a). Notwithstanding the requirement that the Administrator "provide notice to the affected State of any such suit," Section 7003 does not contain language that would otherwise limit RCRA's extraterritorial reach. First, unlike the citizen suit provisions of Section 7002, which states that an action may be brought in the "district court for the district in which the alleged violation occurred," Section 7003 directs the Administrator to bring suit on behalf of the United States "in the appropriate district court against any person" who is contributing to the imminent and substantial endangerment. Compare RCRA § 7002, 42 U.S.C. § 6972(a), with RCRA § 7003, 42 U.S.C. § 6973(a). Similarly, the Administrator is required to provide notice to the "affected State" under Section 7003. This language is broader than that used under Section 7002 which requires citizen plaintiffs to give notice to "the State in which the alleged violation occurs." Compare RCRA § 7002, 42 U.S.C. § 6972(b), with RCRA § 7003, 42 U.S.C. § 6973(a). Similar notification requirements were viewed by the *Amlon Metals* court as evidence of Congress' intent to limit RCRA to dangers within the United States. Section 3013 allows EPA to enforce an administrative order in the United States District court in which the defendant is located, resides or is doing business. Although a plain reading of Section 3013 would not preclude EPA from enforcing an order related to a facility or site outside the United States, the provisions fail to provide any indication that Congress expressly intended to extend EPA's authority to sites outside the United States, and thus fails to overcome the presumption that the legislation covers only domestic sites or facilities. Section 3013 does not limit the enforcement of an EPA administrative order to a court in the jurisdiction where the facility or site is located, and thus can be read as allowing EPA to enforce orders against persons in the United States even though the site or facility is outside the United States. See RCRA § 3013, 42 U.S.C. § 6934(e). The fact that Congress did not foreclose such an interpretation of Section 3013 does not, however, represent the "affirmative intention of the Congress clearly expressed" that RCRA applies abroad. See *EEOC v. Arabian Am. Oil, Co.*, 111 S. Ct. at 1230 (citation omitted).

undertaking remedial action can be read as evidence of Congressional intent to preclude the application of CERCLA to hazardous waste sites outside the United States.¹⁷⁰ However, unlike the venue provisions in RCRA's citizen suit provisions that link the proper judicial venue to the site or facility where the hazardous waste is located, CERCLA states that proper venue shall include any district where the defendant resides, may be located, or has his principal office.¹⁷¹ The fact that the statute's venue provisions do not preclude actions against a defendant for the cleanup of sites outside the United States, however, falls short of overcoming the presumption that Congress intended CERCLA to apply only to waste sites in the United States.

Despite these limitations, in at least one case, EPA has taken the position that under CERCLA the government can recover the costs of sampling, testing and inspecting waste located outside the United States where the hazardous substance was exported illegally and the Agency has arranged for the waste to be returned to the United States for proper disposal.¹⁷²

B. Citizen Suit Provisions

Plaintiffs in Canada may also seek to invoke the citizen suit provisions of CERCLA or RCRA to abate a hazardous waste site located in the United States that also presents a hazard for plaintiffs located in Canada. The likely success of such claims is uncertain.

In order for a Canadian plaintiff to have standing in an United States Court, the plaintiff must first demonstrate that he has suffered an "injury in fact" (*i.e.*, an invasion of a legally protected interest).¹⁷³ Second, the plaintiff must demonstrate that the injury is "fairly traceable" to the conduct of the defendant.¹⁷⁴ Finally, the injury must be redressable by a favorable court decision.¹⁷⁵ A Canadian plaintiff invoking the citizen suit provisions of RCRA or CERCLA would bear the burden of satisfying these requirements.

In *Michie*, the court stated *in dicta* that Canadian plaintiffs had standing to bring a claim for injunctive relief under the Clean Air Act in

¹⁷⁰ See CERCLA § 105, 42 U.S.C. §§ 9605(a)(8)(A)-9605(a)(8)(B) (directing the President to revise the national contingency plan so as to provide criteria for determining "priorities among releases or threatened releases throughout the United States" and to list such releases or threatened releases).

¹⁷¹ *Id.* at § 113, 42 U.S.C. § 9613(b).

¹⁷² Telephone Interview with Dan Reich, Assistant Regional Counsel, EPA Region 9 (Mar. 30, 1992) (discussing EPA's current cost recovery action concerning a California company that illegally shipped hazardous waste to Mexico).

¹⁷³ *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992); *Conservation Law Found. v. Reilly*, 43 F. Supp. 933 (D. Mass. 1990).

¹⁷⁴ *Simon v. Eastern, KY Welfare Rights Org.*, 426 U.S. 26 (1976).

¹⁷⁵ *Id.*

response to noxious air emissions originating in the United States.¹⁷⁶ Courts have also given Canadian plaintiffs standing to petition EPA for rulemakings under environmental statutes.¹⁷⁷ Canadian plaintiffs have also participated in court challenges concerning the preparation of environmental impact statements under the National Environmental Policy Act.¹⁷⁸ These cases suggest that Canadian plaintiffs have legally protected interests under United States federal environmental statutes.

The citizen suit provisions of both RCRA and CERCLA contain broad language. For example, RCRA's citizen suit provision states that "any person" may commence a civil action against "any person" in violation of RCRA standards or any person who is contributing to the management of hazardous waste that presents an imminent and substantial endangerment.¹⁷⁹ Nevertheless, the recent holding in *Amlon Metals* suggests that courts may read RCRA as providing a remedy for only injuries suffered in the United States and not injuries to persons or property in Canada.¹⁸⁰ Thus, even though the wastes would be primarily within the

¹⁷⁶ *Michie v. Great Lakes Steel Div.*, 495 F.2d 213, 216 n.2 (6th Cir.), cert. denied, 419 U.S. 997 (1974).

¹⁷⁷ See *Her Majesty the Queen ex rel. Ontario v. EPA*, 912 F.2d 1525 (D.C. Cir. 1990) (regarding a petition by the Province of Ontario and various states and environmental groups to have EPA initiate provisions under the Clean Air Act regarding international pollution abatement).

In *United States v. Hooker Chems. and Plastics Corp.*, 20 Env't Rep. Cas. (BNA) 1857 (W.D.N.Y. 1984), the Province of Ontario sought to intervene in an action against a United States defendant in New York on the basis that it had a cause of action under RCRA's citizen suit provision. *Id.* at 1862. The court discussed the issue of whether the Province was a "person" under RCRA Section 7002 but did not decide the question because neither the Province nor the United States had fully briefed the issue. Nevertheless, the court recognized that there were serious questions regarding whether the Province could bring a citizen suit against the defendant based on the plain language of Section 7002. Section 7002 states that "any person" may bring a citizen suit, with "person" defined as: "an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body." RCRA § 1003, 42 U.S.C. § 6903(15).

Although a Canadian company or individual seeking to bring a citizen suit against EPA or other defendant in the United States would have stronger arguments than a Canadian province that it is a "person" for purposes of RCRA, a Canadian plaintiff would still have to demonstrate that RCRA provides the plaintiff with a legally protected interest.

¹⁷⁸ See *Swinomish Tribal Community v. Federal Energy Regulatory Comm'n*, 627 F.2d 499, 512 (D.C. Cir. 1980); *Wilderness Society v. Morton*, 463 F.2d 1261 (D.C. Cir. 1972).

¹⁷⁹ RCRA § 7002, 42 U.S.C. § 6972(a). CERCLA also permits "any person" to bring an action against "any person" in violation of CERCLA. CERCLA § 310, 42 U.S.C. § 9659(a). Plaintiffs can also bring an action against the federal government for failure to perform non-discretionary duties. *Id.* Similar to RCRA, "person" is described broadly enough to arguably include Canadian plaintiffs, although such plaintiffs would have to demonstrate that they have standing and are entitled to relief under CERCLA. *Id.* at § 101, 42 U.S.C. § 9601(21).

¹⁸⁰ See *Amlon Metals*, 775 F. Supp. at 675 (ruling that RCRA does not apply to hazards caused by wastes outside the United States); *Detroit Audubon Soc'y v. City of Detroit*, 696 F. Supp. 249, 253 (E.D. Mich. 1988) (ruling that the Province of Ontario lacked standing to challenge the construction of an incinerator in Detroit, because Michigan's Environmental Protection Act only addresses threats to resources in Michigan), *vacated sub nom.* *Her Majesty the Queen ex rel. of Ontario v. City of Detroit*, 874 F.2d 332 (6th Cir. 1989). An argument could be made that where the wastes are primarily located in the United States, *Amlon Metals* should be distinguished, and a court

United States, a court might conclude that plaintiffs in Canada have no legally protected interests under RCRA or CERCLA and cannot, therefore, invoke the citizen suit provisions of these statutes.

C. Common Law Claims

A number of federal and state courts have recognized that Canadian plaintiffs injured by pollution originating in the United States may seek redress in United States courts. Federal district courts can exercise diversity jurisdiction over such actions involving private parties.¹⁸¹

At least one court has ruled that Canadian private plaintiffs may bring an action against defendants in the United States for injunctive relief and damages resulting from activities that are in violation of applicable environmental laws or amount to a nuisance. In *Michie*, thirty-seven residents of Canada brought an action under the diversity jurisdiction of the federal courts against three corporations in the United States that operate plants in the United States. The plaintiffs sought damages for harm caused by air emissions from the plants. The plaintiffs alleged that the plants were in violation of applicable city and state ordinances and amounted to a nuisance. Each plaintiff sought damages ranging from \$11,000 to \$35,000 from the three corporate defendants, asserting that the defendants were jointly and severally liable for the damages.¹⁸² The court applied Michigan State law, holding that the defendants could be held liable for jointly and severally maintaining a nuisance. The claim was ultimately settled out of court.¹⁸³

In *Hooker Chems.*, a federal district court in New York held that it had diversity jurisdiction over a common law nuisance claim brought by the Province of Ontario against a United States chemical company in New York. Ontario sought to intervene in a law suit brought against Hooker Chemicals by the United States and State of New York for the cleanup of hazardous waste at Love Canal. The court found that the Province had an ancillary common law nuisance claim and could therefore intervene in the action as a matter of right.¹⁸⁴

These cases provide precedent for allowing a Canadian plaintiff to

should rule that plaintiffs in Canada are entitled to relief under RCRA's citizen suit provisions. Canadian plaintiffs could also argue that because Congress chose to allow "any person" to bring a citizen suit under RCRA rather than "any citizen" as in the case of citizen suits under the Clean Water Act, Congress intended to allow non-nationals access to United States courts under RCRA. Compare Clean Water Act § 505, 33 U.S.C. § 1365(a)(1) with RCRA § 7002, 42 U.S.C. § 6972(a).

¹⁸¹ 28 U.S.C. § 1332 (stating that district courts shall have original jurisdiction over civil actions between citizens of a state and subjects of a foreign state where the amount in controversy exceeds \$50,000). State courts would have jurisdiction over lesser claims.

¹⁸² *Michie*, 495 F.2d at 215.

¹⁸³ See Stephen McCaffrey, *Private Remedies for Transfrontier Pollution Damage in Canada and the United States: A Comparative Survey*, 19 U. W. ONT. L. REV. 61 (1981) (stating that two of the companies agreed to pay \$105,000 in damages and were required to install \$4 million in pollution-control equipment).

¹⁸⁴ 20 Env't Rep. Cas. (BNA) at 1863.

bring a common law nuisance action in a United States court for damages or the abatement of hazards arising from a site or facility in the United States contaminated with hazardous substances or wastes. Plaintiffs in such an action would have to satisfy standing requirements and show substantial interference with the use or enjoyment of their property as a result of the contamination, and that the contamination is attributable to the United States defendant.¹⁸⁵

D. *Equal Access and Remedy Legislation*

The issues of jurisdiction, standing, choice of law, and enforcement of judgments that confront transboundary litigants have been addressed by various government and non-governmental organizations. Although efforts to have the Canadian and United States federal governments adopt a treaty that would provide plaintiffs in either country with equal access to courts and remedies have been unsuccessful to date, a number of state and Canadian provincial governments have adopted legislation that seeks to provide equal access to victims of transfrontier pollution to the courts of the jurisdiction where the contamination originated.¹⁸⁶

In 1974, the organization for Economic Cooperation and Development ("OECD") adopted a Recommendation on Principles Concerning Transfrontier Pollution, which provided that persons injured by transportation pollution should be given no less favorable treatment than victims in the country from which the pollution originates.¹⁸⁷ In 1979, the Canadian and American Bar Associations prepared a draft treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollutions and recommended its adoption by the Canadian and United States governments.¹⁸⁸ Although neither the Canadian nor the United States federal government has acted on these recommendations, concern for "levelling the playing field" with regard to environmental standards among the United States, Canada and Mexico under the pending North American Free Trade Agreement ("NAFTA") may prompt the govern-

¹⁸⁵ See *Wood v. Picillo*, 443 A.2d at 1246. Although there is little relevant case law, it is at least possible that a federal court would also have jurisdiction under the Alien Tort Statute for injunctive relief or damages related to hazardous substances in Canada that were imported from the United States in violation of the bilateral agreement between Canada and the United States on the transboundary movement of hazardous wastes. 28 U.S.C. § 1350. This obscure section of the Judiciary Act of 1789 grants original jurisdiction to federal district courts over any civil action by an alien for a tort committed in violation of the law of nations or a treaty to which the United States is a party. Although the alien tort statute may provide a federal court with jurisdiction, it is not clear whether a federal court would apply Canadian or United States law. See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d. Cir. 1980) (stating that the determination of whether a court has jurisdiction under 28 U.S.C. § 1350 and the choice of law to be applied are distinct issues).

¹⁸⁶ See *Gallo*, *supra* note 160, at 131.

¹⁸⁷ See *McCaffrey*, *supra* note 183, at 35 (providing a detailed discussion of OECD efforts to provide equal access and remedies for transboundary pollution).

¹⁸⁸ Joint working group on the Settlement of International Disputes, Draft Treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution (1979) (on file with authors).

ments of the United States and Canada to revisit the issue of reciprocal access legislation.

Some state and provincial governments have enacted reciprocal access legislation based in part on the CBA/ABA draft treaty.¹⁸⁹ These state statutes may provide Canadian plaintiffs, in provinces that provide United States plaintiffs with comparable access to their courts, with access to the particular state's courts and remedies available under state environmental statutes. Thus, on the state and provincial level, some progress has been made toward simplifying standing, jurisdictional and choice of law questions.

CONCLUSION

Transboundary environmental problems between the United States and Canada will continue to be resolved primarily through diplomatic negotiation between the two governments. However, the growing number of Canadian companies doing business in the United States will inevitably lead to increased environmental enforcement actions against such companies in United States federal and state courts. Canadian companies should therefore familiarize themselves with the stringent requirements of applicable United States federal and state hazardous waste management and cleanup laws. Canadian generators should also weigh the risks and benefits of treating disposing hazardous substances in the United States due to the possibility of being liable for future cleanup costs under CERCLA or RCRA. United States companies doing business in Canada should familiarize themselves with the reach of United States environmental laws as well as the requirements of Canadian federal and provincial environmental laws.

In addition, both Canadian and United States businesses should recognize that the growing integration of the Canadian and United States economies is likely to result in additional institutional developments and bilateral agreements between the two countries that will facilitate access for plaintiffs on either side of the border to the courts of both nations. In the near and long term, however, both Canadian and United States companies should take steps to reduce liabilities for hazardous waste cleanup altogether by undertaking waste minimization efforts, ensuring compliance with applicable laws and by avoiding transactions that could result in future liability for the cleanup of hazardous waste.

¹⁸⁹ States that have adopted reciprocal access legislation include: Colorado, COLO. REV. STAT. §§ 13-1.5-101-13-1.5-109 (1991); Montana, MONT. CODE ANN. §§ 75-16-101 to 109 (1992); New Jersey, N.J. STAT. § 2A:58A-1 (1991); New Jersey, N.J. STAT. 2A:58A-1 (1991); Wisconsin, WIS. STAT. § 144.995 (1989-1990); and Oregon, 1991 OR. ALS § 26; 1991 OR. LAWS 826; 1991 OR. HB 2382.

Provinces in Canada that have adopted reciprocal access legislation include Manitoba, Prince Edward Island, and Ontario. See Gallob, *supra* note 160, at 131.

