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FORUM SHOPPING ON COVERAGE ISSUES SOUTH OF THE 49TH PARALLEL



FACTS & BACKGROUND

In a complex legal battle over the bounds of insurance coverage, the century-old Canadian mining company Teck Cominco Metals Ltd. ("TCML") is fighting to have the interpretation of its General and Excess Liability Insurance Policies adjudicated in the United State of Washington.

The original lawsuit, triggering the coverage petition, is a claim brought by private citizens of the State of Washington against TCML for the environmental contamination of the Upper Columbia River and Lake Roosevelt in Washington State. The source of the environmental contamination is the alleged water migration of "barren slag," a by-product of TCML's mining operations, from TCML's smelter in Trail BC.

As a result of the original lawsuit TCML's various insurers face claims for coverage in excess of \$760 million.

The affected insurance companies, are denying their obligation to defend and indemnify the environmental claims made in the original lawsuit for a variety of reasons including:

1. pollution is not an occurrence or insurable risk;
2. the applicable policies contain pollution exclusions;
3. the applicable policies contain "own work" exclusions; and
4. TCML failed to provide notice of the claim as required in the various policies of insurance.

Unfortunately, the policies of insurance involved do not contain choice of law clauses, which would have explicitly stated the applicable jurisdiction.

In a “race to the courthouse” TCML delivered proceedings to enforce coverage at the home of a Washington Superior Court Judge one second after midnight. The insurers commenced their own action in the Supreme Court of British Columbia the next morning when the BC courthouse registry opened.

TCML applied to the British Columbia Supreme Court to have the insurers’ action stayed. TCML advanced that as a matter of comity, the BC Supreme Court should decline jurisdiction over the insurance coverage issues in favour of the proceedings commenced in the State of Washington.

Even though TCML won the race to the courthouse by nine hours, and jurisdiction was first accepted in the State of Washington, the British Columbia Supreme Court did not decline jurisdiction.

THE RULING

Mr. Justice Davies dismissed TCML’s application to stay the proceedings commenced by Lloyd’s on the strength of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, (the “Act”) permitting the BC court to exercise its territorial competence in the proceeding.

Further, Mr. Justice Davies rejected TCML’s argument that Washington State’s insurance law was “more developed” as a thin disguise over an attempt to forum shop.

IMPACT ON INSURERS

While it is costly to wage an international dispute over a jurisdictional issue, it was important that the affected insurance companies proceeded with the dispute to prevent TCML from securing a litigation advantage by choosing a jurisdiction more favorable to its legal position on coverage. On balance, it was not ill considered that the Washington Superior Court might be inclined to find cover under the policies of insurance to keep the burden of foreign contamination on the shoulders of a foreign polluter, and their insurance companies rather than the shoulders of US federal reserves.

AUTHOR Robyn L. Wishart

Direct Line: 604-891-0378 E-mail: rwhishart@dolden.com

EDITOR Alex L. Eged

Direct Line: 604-891-0357 E-mail: aeged@dolden.com