

TRANSBORDER POLLUTION LEADS TO JURISDICTIONAL TUSSLE

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Legislation that came into force on May 4 last year was swiftly applied in *Lloyd's Underwriters v. Cominco Ltd. et al.*, a case that came before the British Columbia Supreme Court in 2006 and before the Court of Appeal in April 2007.

Although the case concerns a B.C. company potentially liable for cleanup and remediation costs in Washington State under United States federal environmental legislation, the Court applied the *Court Jurisdiction and Proceedings Transfer Act* (CJPTA) to determine if it had jurisdiction in the matter. Almost concurrently, the same parties were in a Washington District court in Eastern Washington seeking to have the same issues tried there.

Behind this potential “tug-of-war” is an allegation of extensive pollution crossing the Canada/U.S. border. Over a period of several decades, slag from a smelter now owned by Teck Cominco Metals Ltd. in Trail, B.C. entered the Columbia River and accumulated in Lake Roosevelt in Washington State. In July 2004, Teck Cominco became a defendant in an action under the U.S. *Comprehensive Environmental Response, Compensation, and Liability Act*, (CERCLA). Taking into account all potential claims, the ultimate exposure of Teck’s insurers for those claims is over \$760 million.

Complicating matters further is the fact that Teck Cominco had a number of insurance policies with different underwriters from 1958 to 1985. In these policies, under Washington State law, all the insurers would be liable for the entire sum of the legal obligations insured under the policy, meaning that an insurer who only insured Teck Cominco for a year would be responsible to the same extent as an insurer who insured the company for the entire time of the policy. On the other hand, under British Columbia law, an insurer would be proportionally liable according to the length of time and extent of their exposure to the risk.

Lloyd’s and other insurers denied that they were required to defend or indemnify Teck in the environmental actions being brought in the U.S. To obtain the advantage in resolving this insurance coverage issue, Teck Cominco raced to file in the courthouse in Washington State while Lloyds hurried to the B.C. Supreme Court. Although Teck Cominco was the first to commence an action (just after midnight in Washington on November 23, 2005, the same day that Lloyds commenced its

action in B.C.), the B.C. Supreme Court nonetheless decided to hear arguments as to whether this province was a more appropriate forum.

Mr. Justice Davies recognized that the newly-proclaimed CJPTA would affect an analysis of whether his Court should decline jurisdiction over the matter in favour of the District Court in Washington. B.C. courts, prior to the new legislation, when faced with a decision to either hear an action in B.C. or allow it to be heard in a foreign court, undertook an analysis using the doctrine of *forum non conveniens* (“inconvenient forum”). This was an analysis dictated by the common law, dependent on the precedent judgments of courts and subject to the interpretation of those judgments. CJPTA, on the other hand, clearly enumerates the factors that a court must consider and the process of either accepting or declining jurisdiction over a particular matter. Nonetheless, Justice Davies recognized he still had to consider previous court decisions because, while CJPTA should be given a “fair, large and liberal construction”, it was nonetheless “informed” by the common law.

He concluded that B.C. was the more appropriate forum for the insurance coverage dispute. The only apparent connection with Washington State was that it was the residence of those persons alleging environmental damage. B.C., on the other hand, had several connections with the dispute relating to the insurance policies. The law to be applied to the insurance contracts was likely B.C. law, the balance of convenience and expense favoured B.C., and other potentially polluted sites were in B.C.

The Court also took into consideration “judicial comity” which is the showing of respect and deference by local judges for the decisions of foreign judges. In this case, the Court had to assess the decision of the District Court of Washington State which had already decided that it was the proper forum for the insurance dispute. However, Justice Davies decided that Teck Cominco was simply “forum shopping,” meaning it was looking for a favourable (from its point of view) jurisdiction to launch its action. Justice Davies allocated little weight to the fact that the Washington District Court had pre-empted its B.C. counterpart, noting that the judge across the border had emphasized that Washington State had a financial interest in the outcome of the litigation.

Teck Cominco appealed Mr. Justice Davies’ decision to the B.C. Court of Appeal, which released its judgment on April 30, 2007 in *Lombard General Insurance Co. of Canada v. Cominco Ltd.* Madam Justice Newbury, for the Court of Appeal, agreed that the Court should consider both the CJPTA and case law when deciding whether to decline jurisdiction over the matter. She also agreed that Cominco had attempted to invoke the jurisdiction of Washington State in order to avoid an unfavourable interpretation of its insurance policies. In the result, the Court of Appeal upheld Mr. Justice Davies’ decision.

This decision is important in terms of both environmental and jurisdictional law. A benchmark has now been created for further jurisdictional cases, requiring that the new CJPTA as well as case law be taken into consideration. From an environmental law perspective, it has confirmed that, even if there is an ongoing legal action for remediation and cleanup in a foreign jurisdiction, when there are sufficient factors connecting the parties and dispute to B.C., the question of whether or not an insurance policy covers the extraprovincial environmental risks will continue to be decided in this province's courts.