

Race to the Courthouses



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The Supreme Court of Canada's decision in *Tech Cominco* may send parties racing to Canadian and U.S. courts to obtain a ruling in their preferred legal forum.

Early this year, in *Tech Cominco Metals Limited v. Lloyd's Underwriters et al.*, the Supreme Court of Canada declined to end coverage proceedings brought in British Columbia by an insurer, notwithstanding the existence of prior and parallel proceedings having been brought in Washington State by the insured.

With the Supreme Court's decision, the race to courthouses in British Columbia and Washington State by the insurer and the insured may be replaced by a race to the finish line, with both parties attempting to obtain a final ruling in their chosen legal forum. If so, any substantive merits of this decision may be rendered meaningless, as technical or tactical procedures, such as filing first, may prevail in the end.

At some point, the Supreme Court may have to render a more far-reaching opinion. That is, if the court wants to better ensure procedural technicality does not trump the court's desire to see a matter heard in the most appropriate legal forum.

THE TECH COMINCO CASE

The battle between the insured, Tech Cominco, and its insurers, including Lloyd's Underwriters, followed the discharge of waste material into the Columbia River in British Columbia. The waste material accumulated in the Upper Columbia River and Lake Roosevelt in Washington State.

Private citizens and Washington State in 2004 sued Tech Cominco in U.S. District Court, seeking to hold it liable under an American statute for environmental property damage purportedly caused by the contamination. As a result, Tech Cominco commenced action in Washington State against its insurers, seeking a declaration of coverage.

On the same date, Tech Cominco's insurers commenced actions in British Columbia, seeking a declaration that the insurers had no obligation to defend or indemnify Tech Cominco for any of the claims.

Following this race to courthouses, Tech Cominco's insurers brought applications before a judge of a U.S. District Court seeking dismissal of Tech Cominco's action on the basis that the more appropriate legal forum for hearing the claims would be British Columbia. However, these applications were unsuccessful.

In response, Tech Cominco brought an application before the B.C. Supreme Court seeking an order to stay the B.C. actions, arguing that the appropriate legal forum was Washington State —

especially in light of the U.S. District Court's decision that it had jurisdiction to preside over the coverage matters. Notwithstanding this decision in the United States, both the British Columbia chambers judge who heard Tech Cominco's application and the B.C. Court of Appeal dismissed Tech Cominco's pleas, deciding that a multiplicity of proceedings is only one factor to be taken into account when deciding the appropriate legal forum for the determination of a matter.

At the heart of this jurisdictional dispute is the B.C. *Court Jurisdiction and Proceedings Transfer Act* (CJPTA), legislation intended to codify principles to determine jurisdictional issues. Section 11 of the act requires a court to consider a number of circumstances when determining whether a court inside or outside British Columbia is the more appropriate forum in which to hear a proceeding.

- The comparative convenience and expense for the parties to the proceeding and for their witnesses in litigating in British Columbia or an alternate forum.
- The law to be applied to the issues in the proceeding.
- The desirability of avoiding multiplicity of legal proceedings.
- The desirability of avoiding conflicting decisions in different courts.
- The enforcement of an eventual judgment.
- The fair and efficient working of the Canadian legal system as a whole.

Before the Supreme Court of Canada, Tech Cominco argued s. 11 did not apply to situations in which a foreign court had asserted jurisdiction. Writing on behalf of the court, Supreme Court of Canada Chief Justice McLaughlin rejected this argument, stating s. 11 is intended to constitute a complete codification of the common law test for determining the appropriate forum.

In its fallback position, Tech Cominco argued the assertion of jurisdiction by a foreign court "is a factor of overwhelming significance in the determination of whether the local forum is appropriate." Therefore, as a result of the U.S. District Court's decision to assert jurisdiction, B.C. courts are bound to stay the parallel B.C. actions.

The Supreme Court rejected this argu-

ment, too. Even if it were to be found that the actual assertion of jurisdiction by a foreign court is a factor overriding all others, the legislation should allow for this, the Supreme Court ruled. Furthermore, McLaughlin wrote, policy considerations do not support "a foreign court's prior assertion of jurisdiction" as an overriding and determinative factor. To do such, she wrote, would precipitate a rush to the courthouse by the parties to secure a prior assertion of jurisdiction in

a preferred jurisdiction, irrespective of whether it was the appropriate jurisdiction.

The chief justice acknowledged that allowing the B.C. actions to proceed "places the parties in the difficult position of having legal proceedings on the issue of insurance coverage in two separate jurisdictions." But as she noted, the court's principal focus is to ensure, to the extent it can, that an action is tried in the jurisdiction with the closest connection to the action and the parties. ≡