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Insurance Law Newsletter

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Home Court Advantage?

by C. Nicole Mangan

From the bankruptcy proceedings for soft wood manufacturer Pope & Talbot Ltd. (“P&T”) has come a detailed review of jurisdiction law for British Columbia insurance matters. The issues for the court related to the appropriate forum in which to have insurance coverage determined and which jurisdiction’s law should be applied in that determination. These issues were determined in two separate judgments. Although the law in this area is complicated, the two judgments provide clear direction for insurers about when foreign litigation is “foreseeable” and what jurisdiction’s law will be applied to resolve coverage issues.

Background

P&T was incorporated in Delaware. Its head office was in Portland, Oregon. Its parent, subsidiary and related companies had approximately 2,500 employees with approximately 1,800 of those employees in British Columbia. A major asset of the company was located in Oregon but assets were also located in British Columbia. P&T’s Canadian subsidiary was registered in Ontario and federally incorporated. Some corporate directors lived in Canada while others resided in the United States; however, Canada had the greatest number of resident directors by a 2 to 1 ratio. Companies’ Creditors Arrangement Act proceedings were commenced in Ontario and bankruptcy proceedings were commenced in Delaware, however, the Delaware proceedings were deferred to the Canadian proceeding and the Ontario action was transferred to British Columbia.

When the restructuring of P&T failed, a question arose as to whether, under Canadian law, P&T’s directors were liable for employee claims relating to unpaid wages. The Director’s and Officer’s insurance for all of P&T’s directors was provided by American insurance companies on a worldwide coverage basis. Five policies existed written by four different insurers. The primary insurer was incorporated in Indiana but its head office was in New Jersey. None of the policies contained clauses stating the law that was to govern the policy’s interpretation or the forum where policy disputes were to be resolved.

The Ruling

The Court provided a detailed outline of the governing statutory and case law factors to be considered when assessing jurisdictional issues. Basically put, British Columbia Courts have the authority to have an action conducted in this province if there is a “real and substantial connection” to the facts and parties to the proceedings. The relevant statute expressly notes that the location where contractual obligations are to be performed and where a company carries on business are factors to be considered. The case law notes that a Court is to consider “principles of order and fairness” rather than “count” connections to a jurisdiction. In doing so a Court must look at, among other things, the parties’ connections to a jurisdiction and any unfairness a particular jurisdiction might present. The determination of the law applicable to interpreting and enforcing the policy required an examination of the entire contract to assess the intention of the parties at the time the contract was formed. If the answer was not stated in the contract or apparent from the circumstances, then the law of the jurisdiction with the





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most real and substantial connection to the matter would be employed.

British Columbia was chosen as the most convenient forum and as the appropriate law to determine coverage. Some key factors influencing the decision to have the coverage dispute resolved in British Columbia were:

- The unpaid wages claims for which coverage was sought arose from a Canadian statute. Oregon, which the insurers argued was the appropriate forum and the appropriate governing law, had no similar law.
- The insolvency proceedings, which were being conducted in British Columbia, could not be resolved without a determination of this coverage issue.
- Many of the witnesses and claimants for the unpaid wage claims were in British Columbia.
- The primary insurer was well aware of the potential bankruptcy when it “renewed” the policy. On this basis it negotiated the renewal terms and cut the policy limits in half while doubling the cost of the policy.
- Because the four insurers did not all have the same head office location and issued the various policies from different states, even if British Columbia did not assume jurisdiction the potential still existed for multiple laws to be applied.

Practical Impact for Underwriters and Claims Staff

Ultimately, these decisions make it clear that, in British Columbia, jurisdictional issues will be determined primarily from an assessment of the insured’s connection with the Province as opposed to the insurer’s. The insurers’ arguments in these matters often related to where the insurer was incorporated, where its head office was located, and whether the courts in those locations had agreements with British Columbia to recognize judgments issued in British Columbia. As can be seen, the considerations the Court considered paramount focused instead on where the directors and officers

and those making claims against them were located, what law provided the legal basis for the claims made, and where the insured’s operations were primarily conducted. When issuing worldwide coverage the Court noted that the insurer must have some expectation and should, in fact, “foresee the potential for litigation in a foreign jurisdiction.”

The most influential factor when determining the law to apply to coverage was the wording of the policies themselves. All the policies, in some form, contained language that did not limit jurisdiction. In fact, some language seemed to anticipate the possibility of claims in multiple jurisdictions.

In order to avoid substantial litigation costs in resolving jurisdictional issues and to have coverage disputes resolved in jurisdictions with the most favourable law insurers are well advised to incorporate jurisdictional exclusivity clauses into the general conditions sections of their policies for insureds operating at a multinational or national level as opposed to a provincial or state level. Ideally the jurisdictional exclusivity clause will require that policy disputes be resolved in a jurisdiction where both the insurer and the insured have significant connection, where the law is as favourable as possible for insurers and where issues on an insured’s other policies can be determined. Finally, from a claims handling perspective, senior claims staff should familiarize themselves with issues facing a court in determining jurisdiction, which in British Columbia are enumerated in the *Court Jurisdiction and Proceedings Transfer Act* and the potential effect of other policies on jurisdiction. In respect of the latter, if the combined effect is that each policy separately favours a different jurisdiction then the location where the claim arose may be even more appealing to a court.

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