

TECK COMINCO AND THE WISDOM OF DEFERRING TO THE COURT FIRST SEISED, ALL THINGS BEING EQUAL

Janet Walker*

I. INTRODUCTION

One of the joys of life as a common lawyer comes with engaging in the dynamic interplay between the facts of individual cases and the legal rules that apply to them. With each new case the rules are tested against the instinctive sense of the justice or injustice that comes from applying them to the facts. In cases of sufficient importance to be granted leave to appeal to the Supreme Court of Canada, the interplay can be particularly exciting. A good case can make very good law, and a decision of the Supreme Court can be given very broad application. It is fortunate, then, that the Supreme Court granted leave in *Lloyd's Underwriters v. Cominco Ltd. (Teck Cominco)*¹ because its facts are particularly illuminating in respect of two key premises on which the support for the first-seised rule is based.

This article is about the wisdom of deferring to the court first seised, all things being equal, because the *Teck Cominco* appeal will determine whether, *all things being equal*, the proceeding commenced later in time should be stayed when the two proceedings are commenced in different countries, one after another, in the same case. The wonderful thing about the *Teck Cominco* case is that its facts make us look more closely at the two underlying premises: that the proceedings have been commenced *one after another*, and that they

* Professor, Osgoode Hall Law School. Although I have considered the questions of parallel proceedings in the past as a text writer in *Castel and Walker: Canadian Conflict of Laws*, looseleaf ed. (Markham: LexisNexis, 2005), §13.6, as a commentator in "Parallel Proceedings — Converging Views" (2000), 38 Can. Y.B. Int'l Law 155, and even as an assistant to counsel to one of the respondents in this matter, this article tries to take a closer look at issues not canvassed in any detail in those other contexts.

1. *Lloyd's Underwriters v. Cominco Ltd.* (2007), 279 D.L.R. (4th) 257, [2007] 7 W.W.R. 281, 398 W.A.C. 218 *sub nom. Lombard General Insurance Co. of Canada v. Cominco Ltd.* (B.C.C.A.), leave to appeal to S.C.C. granted 284 D.L.R. (4th) vii.

have been brought in *the same case*. It gives us a special insight into the way the first-seised rule operates in practice and whether it is in fact suitable for use by common law courts in Canada when parallel proceedings are ongoing in another country. Although it may seem difficult to dispute the logic of the first-seised rule in principle, the *Teck Cominco* case shows how all things may not actually be equal in situations of parallel proceedings and, as a result, the first-seised rule may be useful in far fewer situations than we might once have thought.

II. DEFERRING TO THE COURT "FIRST SEISED"

Turning to the first of these two premises, the facts of *Teck Cominco* are particularly thought provoking because the two proceedings were commenced on the same day and because this was no accident. The parties had entered into a standstill agreement by which, until a specified date, they undertook not to commence proceedings so as to be free to resolve their differences without litigation. As the deadline for negotiations approached, they readied themselves for action. When the agreement expired, both parties immediately commenced proceedings — *Teck Cominco* in the State of Washington,² and *Lloyd's* in the province of British Columbia.³

Since it was not happenstance that the matters were commenced on the same day, the first-seised rule could not be justified as a potentially arbitrary but neutral means of distinguishing between the parties' entitlement to select the forum.⁴ On the contrary, the *Teck Cominco* scenario shows how parallel proceedings are likely to become increasingly commonplace in cases involving serious jurisdictional contests and how it is unlikely that the two proceedings will just happen to be commenced close in time to one another. The standstill

2. *Pakootas v. Teck Cominco Metals Ltd.*, 452 F. 3d 1066 (9th Cir. 2006) (*Pakootas*).

3. *Underwriters, Lloyd's v. Cominco Ltd.*, [2006] B.C.J. No. 1917 (QL), [2006] 12 W.W.R. 486, 60 B.C.L.R. (4th) 261, *sub nom. Lloyd's Underwriters v. Cominco Ltd.* (S.C.), *affd* 79 D.L.R. (4th) 257, [2007] 7 W.W.R. 281, 398 W.A.C. 218 *sub nom. Lombard General Insurance Co. of Canada v. Cominco Ltd.* Other insurers who have been parties to this proceeding are Lombard General Insurance Company of Canada, The Dominion of Canada General Insurance Company as successor to The Canadian Indemnity Company, ING Insurance Company of Canada f/k/a The Halifax Insurance Company, American Home Assurance Company as successor to New Hampshire Insurance Company, and Seaton Insurance Company. The insured parties, who are compendiously described in this paper as "*Teck Cominco*," include *Cominco Ltd.*, *Teck Cominco Limited* and *Teck Cominco Metals Ltd.* and "TCML."

4. Such as might be the case for, say, the application of the *lex loci delicti* as the law governing a tort.

agreement and the inevitable race to the courthouse that follows its expiry are themselves a product of the concern that the first-seised rule will be used to determine which party's choice of forum will prevail.

If chance does not provide a good rationale for the use of the first-seised rule, could the parties' relative diligence provide a better one? Perhaps so — at least where the first proceeding is well underway before the second is commenced. The commencement of a proceeding in another forum long after the first proceeding was brought could indicate that the plaintiff in the second proceeding does not earnestly desire to resolve the dispute and has not chosen the alternative forum because it is genuinely more appropriate, but rather has commenced the second proceeding in order to frustrate the first.⁵ Perhaps a party who does not take the opportunity to object to jurisdiction in the first court and yet, when the proceedings are well advanced, takes steps to commence a parallel proceeding elsewhere, should be presumed to have waived the right to object to the other party's choice of forum. In addition to the inferences that may be drawn about the *bona fides* of the parties' choices of forum, a considerable lapse of time may raise concerns about administrative efficiency. To the extent that it is appropriate for courts to concern themselves with judicial economy in other fora, a court may be reluctant to exercise jurisdiction in a situation where it will be bound to give rise to duplicative litigation and, therefore, waste. In the United States, the relevance of a parallel proceeding commenced in another court is assessed in terms of the extent of its progress.⁶

However, in the *Teck Cominco* case, as seems likely to be the case in other situations where the matters are commenced close in time to one another, there was nothing to indicate that either party lacked diligence. In *Teck Cominco*, both parties commenced proceedings at the earliest possible moment in their respective fora. Indeed, from this perspective, it might be said that the proceedings were commenced at the same time.

Still, a bystander with a stopwatch would note that the proceedings were not commenced simultaneously. In fact, they were commenced several hours apart. One can imagine various scenarios in which this might occur. For example, the courts may open at 9h00 in London when it is only 4:00 a.m. in New York because they are in different

5. See *Henry v. Henry* (1996), 185 C.L.R. 571 at para. 18, [1995] HCA 64 (Aust. H.C.).

6. N. Jansen Calamita, "Rethinking Comity: Towards a Coherent Treatment of International Parallel Proceedings" (2006), 27 U. Pa. J. Int'l Econ. L. 601.

time zones. Even though New York and Toronto are in the same time zone, the court houses were open in New York City on Tuesday, July 1, 2008, but not in Toronto, and *vice versa* on Friday, July 4, 2008. Even in places in the same time zone on days when both courts are open, the opening hours may differ. For example, the courts in Washington State might open at 8:30 a.m., and the courts in British Columbia might not be open until 9:00 a.m.⁷ In short, if diligence was the justification for using the first-seised rule, it would be necessary to find a way of addressing the potential for systemic unfairness arising in situations in which the earliest possible moment for commencing the proceedings differs from one forum to another.

The potential for systemic unfairness arose in the European Union where the first-seised rule is used. Article 27 of the Brussels I Regulation provides that, “where proceedings involving the same cause of action and between the same parties are brought in the courts of different member states, any court other than the court first seised shall of its own motion stay the proceedings until such time as the jurisdiction of the court first seised is established.”⁸ The systemic unfairness arose in Europe from the provision in the Brussels Convention that made the definition of the moment at which a proceeding was commenced a matter of the national law of the member states. In some member states, a proceeding is regarded as commenced when the notice is served upon the defendant, but in other member states the proceeding is regarded as commenced when the notice is issued by the court. As a result, the finish line in the race to the courthouse would always be closer in some countries than in others. Eventually, the resulting systemic unfairness was addressed by an amendment to the Brussels regime that harmonized the standards for determining when a proceeding had been commenced.⁹

A concern for systemic unfairness also arises in situations like that in the *Teck Cominco* case, but not from different definitions of the moment of seisin in Canada and the United States. The facts of the *Teck Cominco* case are more interesting than that: the reason that there was a chronological difference in the commencement of the proceedings is that the Washington proceeding was commenced by giving the papers to a judge at his home shortly after the clock struck midnight.

7. Indeed, as jurisdictions transition to e-filing, differences in operating hours are becoming commonplace.
8. Council Regulation (EC) No. 44/2001 of December 22, 2000 on jurisdiction and the recognition of judgments in civil and commercial matters, art. 27(1).
9. See Article 30, *ibid.* See Lawrence Collins, ed., *Dicey, Morris and Collins on the Conflict of Laws*, 14th ed. (London, Sweet & Maxwell, 2006), pp. 495-98.

It is unlikely that the practical implications of encouraging this sort of ingenuity will be missed by judges reading about it. Still, quite apart from the concerns about providing an incentive for counsel to lurk on a judge's porch late at night, the practice of resolving jurisdictional disputes with a stopwatch raises other logistical concerns for administering the first-seised rule. Even where the earliest possible moment on which proceedings could be commenced in two fora is the same, it would become necessary to establish protocols for recording the time as well as the date on which proceedings are commenced and for resolving disputes over the accuracy of such records. This could add significantly to the challenges of administering the process of commencing proceedings generally and of administering the first-seised rule in particular in cases where the race ends in a photo-finish.

One alternative might be to treat the commencement of proceedings on the same day as simultaneous and, instead, to apply some special tie-breaker rule. Surely, one might think, a sophisticated means of doing so would have been devised in Europe where the first-seised rule has been in operation for many years. Sadly, the situation seems to be far more pedestrian than one might expect. In what appears to be the only pronouncement on the question of cases commenced on the same day, the Oberlandesgericht (appellate court) of Koblenz simply read and applied the relevant article of the Brussels Convention.¹⁰ No clever solution emerged. Article 27 of the Convention required the court to stay its proceedings where another court was first seised. Since no other court had been seised on a day before it was seised, the court in Koblenz decided that it had no obligation to stay its proceeding. The *lis pendens* provisions of the Convention contain no tie-breaker rule and, as a result, the parallel proceedings continued. With the failure of the mechanism in the Convention that was intended to replace a race to judgment with a race to the courthouse, the multiplicity remained to be resolved by a race to judgment.

Still, all may not be lost. There is another potentially useful precedent for approaching this problem to be found closer to home—in the law of divorce jurisdiction in Canada. Divorce in Canada is subject to federal legislation,¹¹ but the legislation is applied in proceedings brought in the superior courts of the provinces. These proceedings produce decrees concerning the status of persons that, under the Divorce Act, have effect throughout Canada.¹² The

10. *S.A. C.N.V. (A Belgian Firm) v. S. GmbH* (Case 2 U 1072/89), [1991] 1.L.Pr. 588.

11. *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

12. *Ibid.*, s. 13.

Divorce Act addresses this concern about the potential for inconsistent results through provisions for *lis pendens*, but it does not attempt to distinguish between proceedings commenced on the same day.¹³ Instead, it provides that parallel proceedings commenced on the same day are transferred to the Federal Court to be consolidated into a single proceeding. The Federal Court can accept jurisdiction over divorce cases because divorce is a matter of federal law,¹⁴ but this solution would not work in other areas of private law that are not within its jurisdiction.

Perhaps, in the end, the greatest benefit of considering whether the first-seised rule is the best response to parallel proceedings commenced on the same day is that it highlights the practical challenges of administering the first-seised rule in a principled way. This prompts us to reflect on what is to be said for the merits of the rule more generally.

Granting stays in favour of other courts already seised may be the only certain way of eliminating every instance of multiplicity — that is, without interfering with proceedings in other fora by granting injunctions, as is appropriate only in extraordinary circumstances.¹⁵ In Europe, where the courts have a fixed obligation to enforce one another's judgments and cannot use stays or injunctions to eliminate multiplicity, the first seised rule is necessary. Still, as Lord Goff pointed out, it comes at a price: "The price is rigidity, and rigidity can be productive of injustice."¹⁶ Is eliminating every instance of multiplicity worth the price for Canadian courts?

III. IN "THE SAME CASE"

To the introductory remarks about the joys of life as a common lawyer, a word or two should be added about the joys of life as an *academic* lawyer that come with the variety of roles played in advancing the understanding of the law. *Text writers* take disparate pronouncements in particular cases and weave them together in a sound and coherent way to fashion the fabric of the common law and to develop a narrative of the law on which others will rely — sometimes uncritically. But with the need to generalize, they may

13. *Ibid.*, ss. 3(2), 3(3), 4(2), 4(3), 5(2) and 5(3).

14. The jurisdiction of the Federal Court is based on a statute promulgated under s. 101 of the Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, which authorizes the federal government to create courts "for the better administration of the laws of Canada."

15. *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 102 D.L.R. (4th) 96, [1993] 3 W.W.R. 441.

16. *Airbus Industrie GIE v. Patel*, [1998] 2 W.L.R. 686 (H.L.).

wonder whether the narrative adequately reflects the complexities arising on the facts of real cases. In contrast, *commentators* provoke discussion of current issues, poking holes in the text writers' carefully woven fabric so as to shed light on unexplored questions. They enjoy imagining alternative scenarios, speculating on the outcome of particular approaches and making recommendations. But in a rapidly developing area of the law, real cases can soon emerge against which these musings are tested. The thrill of discovering in one case that speculative observations have been useful to judges in assessing matters of first impression can be matched by the shoulder-shrugging acceptance in another case that if they had anticipated its particular facts, they might have taken a very different approach to the issues.

Turning to the second of the two premises put in issue by the *Teck Cominco* case — that the two cases are “the same”—the question arises as to whether the two proceedings are, in fact, *parallel*. At the time of the scuttled Supreme Court of Canada appeal in the *Westec* case,¹⁷ the law of jurisdiction and judgments in Canada seemed to be evolving towards a state in which the standards for direct and indirect jurisdiction might be truly correlative.¹⁸ That is, the bases on which courts would take jurisdiction would be the same as those that they would accept as capable of supporting the recognition and enforcement of a judgment by another court. Coupled with forum neutral choice of law rules,¹⁹ there would be a reasonable expectation of decisional harmony, *i.e.*, that the same result would be expected to be reached in either forum. Such conditions would obviate any justification for parallel proceedings. Some might even say that we have now reached that stage within Canada as between the provinces. But that is not the question that is before the Supreme Court in *Teck Cominco*, because the parallel proceeding in the *Teck Cominco* case is in another country.

Still, at the time of the appeal in the *Westec* case, the law on the international front appeared to be moving as rapidly as it was on the interprovincial front. Those were the days when delegations from the member states of the Hague Conference on Private International Law were still actively negotiating a comprehensive multilateral judgments convention.²⁰ The increasing drive to reduce the barriers

17. *Westec Aerospace Inc. v. Raytheon Aircraft Co.* (2001), 197 D.L.R. (4th) 211 (S.C.C.). At the time of the hearing of the appeal, the matter in the foreign forum had been determined and, therefore, the issue of parallel proceedings was moot.

18. As envisaged by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256, [1991] 2 W.W.R. 217.

19. As discussed in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, 120 D.L.R. (4th) 289, [1995] 1 W.W.R. 609.

to the recognition of foreign judgments appeared to warrant proactive steps on the part of courts. We were on the way to achieving a situation in which, all things being equal, a stay should be granted, and where this was not appropriate, the court would consider granting an injunction. In other words, in situations of parallel proceedings, comity called for action — of one sort or another — to eliminate the multiplicity.²¹

All of that seems much further off today. The Hague Conference project to produce a comprehensive multilateral judgments convention was reduced dramatically in scope so that the resulting convention applies only to business-to-business disputes where the parties have agreed on the forum.²² No new initiatives for bilateral arrangements with the United States — the country in which parallel proceedings are most likely to be commenced — have been undertaken. In the absence of a formal regime such as exists in Europe, the only justification for eliminating multiplicity would seem to be that the proceedings are, in fact, duplicative and, accordingly, wasteful.

Once again, it is fortunate that the Supreme Court will consider the issues raised by parallel proceedings on the basis of the facts of the *Teck Cominco* case, because these facts highlight the error in assuming that all cases between the same parties that are similarly framed are duplicative.²³ It is true that parties sometimes commence duplicative proceedings to take advantage of the logistical conveniences that they might enjoy in a forum other than that selected by the opposing party. It is also true that parties sometimes commence duplicative proceedings to take advantage of the logistical

20. See Preliminary Doc. No 11 of August 2000 — *Report on the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*, drawn up by Peter Nygh and Fausto Pocar, online: Hague Conference on Private International Law, <www.hcch.net>. Although it was unclear at the time that the conditions necessary for decisional harmony would, in fact, emerge on the international plane: J. Walker, “Parallel Proceedings — Converging Views” (2000), 38 *Can. Y.B. Int’l Law* 155 at p. 187.
21. One of the flaws in this approach that becomes evident on closer reflection is that the reverse may also seem to be suggested: that if resolving a multiplicity of proceedings is imperative, then a court that is not persuaded that it is sufficiently inappropriate for a matter to go forward in another jurisdiction to warrant issuing an injunction, by implication, should grant a stay of the local proceeding.
22. Convention on Choice of Court Agreements (concluded June 30, 2005), available online: <www.hcch.net>.
23. This analysis does not address the distinctions between the proceedings in this or other cases of parallel proceedings that arise from an incomplete congruity between the parties or the particular instances of the claims. This issue could be important on the facts of other cases but it was not highlighted as among the most significant distinctions between the proceedings in this case.

inconveniences that the opposing party might suffer in a particular forum. But the existing jurisprudence already equips the courts to consider whether a stay or an injunction is needed to address the parties' relative capacities to present their claims or defences in the alternative fora. It is fortunate, therefore, that the parties in the *Teck Cominco* case all seem readily capable of presenting their claims and defences in both fora, and so these issues are not complicating features of this appeal.

The beauty of the *Teck Cominco* appeal is that it raises the far more challenging question of whether in view of the broader legal context in which the issues arise, the two cases are, in fact, the same. In *Teck Cominco*, the dispute that the insurers propose to try in British Columbia concerning their liability to indemnify Teck Cominco under the contracts of insurance is notionally the same as the dispute that Teck Cominco proposes to try in Washington. However, that is where the similarities between the two cases end. This may be seen from a brief review of the history of the litigation on both sides of the border.

Teck Cominco is a mining company based in British Columbia, which, over the years, pursuant to government permits, discharged slag into the Columbia River from its smelter at Trail in British Columbia. Yes, for those readers who have taken a basic course in public international law this is *the* Trail Smelter, the one whose discharges into the atmosphere gave rise to the famous international arbitration over state responsibility for transboundary pollution.²⁴ Those who are familiar with the Trail Smelter arbitration may wonder how a complaint regarding transboundary pollution caused by a company operating under a government licence in Canada could come to be determined in a U.S. court as a claim by the State of Washington against the company for breach of a U.S. regulation.²⁵ After all, it was once a dispute between the two governments over the state responsibility for transboundary pollution incurred by granting the permits authorizing the discharges. They may wonder whether it is permissible so many years after the fact to revise the basic understanding of the mutual rights and obligations of the various parties involved. Could intergovernmental responsibilities ordinarily addressed between governments or in international fora come to be the subject of a claim by a government in its own courts against a

24. *Trail Smelter (U.S. v. Canada)* (1938), 3 R.I.A.A. 1905 (Trail Smelter Arbitral Trib.); *Trail Smelter (U.S. v. Canada)* (1941), 3 R.I.A.A. 1938 (Trail Smelter Arb.), reprinted in (1941), 35 Am. J. Int'l L. 684.

25. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.S. §§ 9601-9675.

private corporation operating in another country? This seems to depend upon whether the question is asked north or south of the border.

The answer from the perspective of U.S. law in this case has consistently been resolved in the affirmative. This has been so from the time that Teck Cominco first failed to persuade the Washington courts that this application of U.S. environmental regulation was impermissibly extraterritorial.²⁶ And it continued as far as the denial of *certiorari* by the U.S. Supreme Court.²⁷

The answer from the perspective of Canadian law would appear to have been resolved in the negative by the Supreme Court of Canada some 30 years ago. In *Interprovincial Co-operatives Ltd. v. Manitoba*²⁸ the court held that one province did not have the authority to pass legislation granting a right to seek relief for environmental damage caused by discharges into the rivers in other provinces under licences granted by those provinces because such legislation would be impermissibly extraterritorial. Indeed, this view was reasserted in the U.S. proceedings in this case by British Columbia in its *amicus curiae* brief in support of Teck Cominco's application for *certiorari*, when it submitted that, "whatever CERCLA's statutory structure, environmental regulation of discharge and cleanup of pollutants that cross the U.S.-Canada border in either

26. As the judge at first instance noted ". . . plaintiffs are not attempting to tell Canada how to regulate defendant's disposal of hazardous substances into the Columbia River, simply that they expect defendant to assist in cleaning up a mess in the United States which has allegedly been caused by those substances. Plaintiffs' use of CERCLA is not intended to supersede Canadian environmental regulation of the defendant. Canada's environmental laws are intended to protect Canadian territory, including the 10 miles from Trail, B.C. to the U.S. border. Those laws do nothing to remedy the damage that has already occurred in U.S. territory as a result of defendant's disposal of hazardous substances into the Columbia River": *Pakootas v. Teck Cominco Metals, Ltd.*, 2004 WL 2578982 (E.D. Wash.), 59 ERC 1870, 35 Env'tl. L. Rep. 20,083.

27. *Teck Cominco Metals Ltd. v. Seaton Ins. Co.*, 2006 U.S. Dist. LEXIS 26834; application for reconsideration dismissed 2006 U.S. Dist. LEXIS 26834.

28. *Interprovincial Co-operatives Ltd. v. Manitoba*, [1976] 1 S.C.R. 477, 53 D.L.R. (3d) 321, [1975] 5 W.W.R. 382. In 1996, the Ontario Court of Appeal upheld a ruling enforcing a judgment in respect of the application of the same environmental legislation that is put in issue in the main claim in Washington. This case involved a situation in which a Canadian defendant had engaged in environmentally harmful activities in the United States, but the question in that case was whether the legislation was a foreign public law, which would preclude a judgment based on it from ever being enforced (*i.e.*, even if the legislation had not been applied extraterritorially): *United States of America v. Ivey* (1995), 26 O.R. (3d) 533, 130 D.L.R. (4th) 674, 27 B.L.R. (2d) 221 (Gen. Div.), *aff'd* 30 O.R. (3d) 370, 139 D.L.R. (4th) 570, 93 O.A.C. 152 (C.A.), leave to appeal to S.C.C. refused 145 D.L.R. (4th) vii.

direction should be addressed, wherever possible, through bilateral negotiation and agreements between the two countries, not private lawsuits in one country's courts."²⁹ In fact, to the extent that the Washington proceeding was understood as a claim that was initiated to give effect to a foreign public law, the resulting judgment might be regarded as unenforceable in Canada on that basis.³⁰

In one sense, all of this is nothing more than background. It is not directly relevant to the question at hand because the case brought *against* Teck Cominco in Washington State is not the parallel proceeding in question. The parallel proceeding in question is the ancillary claim brought *by* Teck Cominco in Washington to recover on its policies with its insurers. In another sense, though, this background is crucial to understanding the context in which the ancillary claim would be decided if the matter went ahead in Washington.

In challenging the suitability of the Washington forum, the insurers noted several differences in the law that would be applied by the Washington court from the law that would be applied in British Columbia. For example, under Washington law, any liability that they might be found to have would not be limited to their share of the risk, but would include joint liability up to the policy limits. In addition, "sudden and accidental" events in insurance policies are assessed differently under Washington law, "response costs" are treated as damages, and a "continuous trigger" approach is taken to property damage.³¹ Important as these specific differences in the applicable law may be to the parties, they pale in significance from a commentator's perspective against the differences in the broader context in which the legal issues would be addressed in the respective fora.

In the Washington proceeding, the court declared that the State of Washington had an interest in the action against Teck Cominco

29. *Teck Cominco Metals, Ltd. v. Joseph A. Pakootas, Donald R. Michel, and State of Washington*, No. 06-1188, May 2, 2007, Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit (Brief of *Amicus Curiae*, Her Majesty the Queen in Right of the Province of British Columbia). A similar view was expressed by the Canadian government in its *Amicus Curiae* Brief, and in Austen L. Parrish, "Trail Smelter Déjà Vu: Extraterritoriality, International Environmental Law, and the Search for Solutions to Canadian-U.S. Trans-boundary Water Pollution Disputes" (2005), 85 B.U. L. Rev. 363.

30. To the extent that the Washington proceedings were regarded as giving impermissibly extraterritorial reach to U.S. governmental policies in ways that breached Canadian sovereignty, the enforcement of a judgment might also be regarded as the kind of eventuality for which the Foreign Extraterritorial Measures Act, R.S.C. 1985 c. F-29, was enacted.

31. *Lloyd's Underwriters v. Cominco Ltd.*, *supra*, footnote 1, at para. 78.

because this would promote timely remediation of the environmental harm. The Washington court also noted that the state's interest in the coverage action was tied to the state's interest in the environmental action against Teck Cominco.³² This is not to suggest that announcing such an interest forecasts an intention to treat the question of coverage as subsumed under the question of liability, *i.e.*, that if Teck were found liable, liability for its insurers would inevitably follow. Of course, the Washington court would need to be shown sufficient evidence to meet the requisite burden of proof under U.S. law for the liability of each defendant. However, it is to say that the court in Washington regarded the dispute between Teck Cominco and its insurers as bound up with the questions of whether local residents had suffered from harm caused to the environment and if so, whether Teck Cominco should be held liable, and if it could not pay, whether its insurers should be required to do so.

In the British Columbia proceeding, the issues seem likely to be seen in a different light. The case would not be an extension of a claim for environmental harm but a case about the rights and obligations of commercial parties to one another in respect of an insurance policy. It would not be a case primarily about whether Teck Cominco was liable to the State of Washington under the U.S. environmental legislation, but whether such liability was a risk that the insurers undertook to cover in the policies in dispute. Again, this is not to forecast the result in a case in which the record has not yet even been established. It is, however, to say that the issues pleaded and the facts adduced in the British Columbia proceedings seem likely to be considered in a different context. The focus of the issues would not be on recovering the costs of remediating environmental harm, but on the reasonable expectations of commercial parties arising from their contractual dealings with one another.³³

In other words, *Teck Cominco* is a wonderful case for considering the appropriate response to parallel proceedings because it demonstrates that, even in similarly framed claims, there may be a real question about whether the cases are the same. It shows how the

32. *Ibid.*, at para. 24.

33. Indeed, one view of the case might be that three wrongs do not make a right: it may have been wrong for Trail Smelter to have caused environmental harm in the United States despite its authorization to discharge slag into the Columbia River, but it is unclear how this justifies sweeping aside a long history of intergovernmental cooperation in addressing environmental harm by applying CERCLA extraterritorially and retroactively, and it is equally unclear how the issue is resolved by imputing foreseeability to this application of CERCLA to Teck Cominco's insurers.

equities of the parties and the broader social concerns that shape the analysis of the legal issues may vary significantly from one forum to another.

IV. ALL THINGS BEING EQUAL

That there can be significant differences in the perspectives of American and Canadian courts on similarly framed claims may be an inconvenient truth for Canadian courts. A deeply rooted feature of Canadian legal traditions is the ideal of forum neutrality. Canadian courts do not readily regard their mandate in commercial disputes as one of accepting or retaining jurisdiction for the purpose of giving effect to local social policies.³⁴ They focus on other questions — questions about which court is in a better position to decide the case as a result of the location of the evidence and in which court the parties are best able to present their claims and defences.

It is difficult to pinpoint where the idea of forum neutrality came from. Whatever its source, the idea seems so fundamental to Canadian legal traditions that it is accepted as the norm, and even understood as a basic feature of any legal system deserving respect. It would seem vaguely absurd to suggest to a Canadian court that, in making jurisdictional determinations in civil matters, it should be motivated by local policies. And to suggest to a Canadian court that a court in another legal system might be so motivated seems likely to be heard as a criticism of that court, one that is likely to be rejected unless definitively proved. And yet it is clear that some legal systems, such as those in the United States, operate on different assumptions.³⁵ As is frequently observed in the United States, one of the courts' accepted roles is to serve the needs of local communities and vindicate the policies of the forum.

Here is the conundrum: how does a court that is committed to the principle of forum neutrality evaluate the relative merits of

34. See *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 at para. 35, 109 D.L.R. (4th) 16, [1994] 1 W.W.R. 129 where this observation was made in a slightly different context.

35. Indeed, the full faith and credit clause in the U.S. Constitution is a direct response to the parochial tendencies of the governments and judiciaries of the several states at the time of the Union, which threatened the very prospect of the states uniting together to form a single country. So significant was this concern that the provision enjoys pride of place in the U.S. Constitution in Article IV.1, immediately following the outline of the three branches of government in the first three articles. The decision to introduce a constitutional mechanism to produce decisional harmony as a result of the awareness of the lack of forum neutrality also gave rise to constitutional provisions such as diversity jurisdiction, under which parties from different states need not subject their disputes to the state courts at all, but can have them removed to the federal courts.

competing jurisdictional claims where the alternative forum has declared an interest in deciding the case in order to support local social policies? If each court regarded it a matter of duty to exercise jurisdiction, the question would be no sooner asked than answered: each court would act as mandated despite the irreconcilable conflict of jurisdictions. How could Canadian courts, reluctant to regard themselves as motivated by local social concerns, articulate reasons why, in refusing to stay their proceedings, they are not themselves acting on the basis of parochial interests. The British Columbia courts, both at first instance and on appeal, seemed strongly motivated to retain jurisdiction. Would it be wrong to suggest that British Columbia should assert an interest in providing a forum in which the liability under the insurance policies would be determined on the basis of contract law principles and not on the basis of promoting the efficacy of the environmental remediation efforts in Washington? Would this be parochialism?

Perhaps not when viewed in the context of two other recent appellate decisions. In *GreCon Dimter Inc. v. J.R. Normand Inc.*,³⁶ the Supreme Court of Canada emphasized the need to show respect for party autonomy in international contracts and to give effect to the reasonable expectations of the parties. The exclusive jurisdiction clause in the contract between the defendant and the guarantor nominating another court for the resolution of disputes prevented the Quebec court from exercising jurisdiction over the claim against the guarantor even though it had jurisdiction over the main claim.³⁷

And in *Society of Lloyd's v. Saunders*, the "Names" sought to have their contracts with Lloyd's rescinded on the basis that they had been recruited in Ontario to participate without adequate disclosure of the risks of contractual undertakings of unlimited liability and, therefore, in breach of the provincial security laws.³⁸ The Court of Appeal for Ontario noted the local policy interest favouring the exercise of jurisdiction to permit a proceeding in which the concerns underlying local securities laws would be vindicated. However, this

36. [2005] 2 S.C.R. 401, 255 D.L.R. (4th) 257.

37. It is true that the *GreCon* case, *ibid.*, was different from this case in that it involved a contract containing an exclusive jurisdiction clause, but on the assumption that a Quebec court would have applied the law chosen or reasonably expected by the parties, the refusal to exercise jurisdiction over the action on the guarantee acknowledged the rights of parties contracting for indemnification to have their dispute resolved as they might reasonably have contemplated at the time of contracting.

38. *Society of Lloyd's v. Meinzer* (2001), 55 O.R. (3d) 688, 210 D.L.R. (4th) 519, 148 O.A.C. 362, *sub nom. Society of Lloyd's v. Saunders* (C.A.), leave to appeal to S.C.C. refused 212 D.L.R. (4th) vii.

interest was outweighed by the “potential mass confusion and damage to the domestic insurance market that such a ruling would have”³⁹ by interfering with the parallel proceeding in England seeking to enforce the contractual obligations of the Names.

It could be suggested that the result in that instance of parallel proceedings was easier to reach for a common law court in Canada than one upholding jurisdiction in the British Columbia courts in this case. It was consistent with the result reached in many similar proceedings involving the Names in other countries,⁴⁰ and it involved *declining* jurisdiction rather than *asserting* it in the face of a parallel foreign proceeding. However, it could also be suggested that the result reflects the support consistently shown by Canadian courts for party autonomy and for the reasonable expectations of parties to international commercial contracts.

This was the policy choice made by the English Court of Appeal in *Midland Bank* when, following the controversy over the reach of U.S. antitrust legislation in the Laker Airways insolvency,⁴¹ the Midland Bank was joined in the U.S. litigation. The U.S. litigation against the airlines, who were said to have conspired to put Laker Airways out of business, was expanded to include English banks as a result of their having lent money to Laker Airways pursuant to the direction of the Bank of England. The Court of Appeal in England agreed that the dealings between the Banks and Laker Airways were commercial dealings in England, which the parties might reasonably expect to be assessed under English law. These dealings were not to be made the subject of the U.S. antitrust litigation in which the banks might be found liable pursuant to the application of the U.S. legal principles. As a result, the English court granted an anti-suit injunction.⁴² Indeed, in a number of situations where the law governing the matter would be applied more reliably in one court than it would in another, the English courts have held that court to be the natural forum.⁴³

Perhaps, in the end, the contrast between forum neutrality and parochialism is too simplistic for a world in which crossborder

39. *Ibid.*, at para. 88.

40. See Genevieve Saumier, “What’s in a Name? Lloyd’s, International Comity and Public Policy” (2002), 37 C.B.L.J. 388.

41. *British Airways Board v. Laker Airways Ltd.*, [1984] 3 All E.R. 39 (H.L.); *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (1984).

42. *Midland Bank plc v. Laker Airways Ltd.*, [1986] 1 All E.R. 526, [1986] Q.B. 689 (C.A.).

43. *Dacey, Morris and Collins on the Conflict of Laws*, *supra*, footnote 9, at pp. 478-79 and cases cited in footnotes 26-30.

dealings entail an increasingly complex mix of economic and social concerns. Under these circumstances, all things are rarely equal.

V. COMITY AND THE WISDOM OF DEFERENCE

On a closer look, the question in the *Teck Cominco* appeal may well be whether Canadian courts are prepared to exercise jurisdiction and risk producing inconsistent results in order to give effect to policies such as party autonomy in international contracts where a foreign court in a parallel proceeding seems likely to be guided by different priorities. It is a difficult question because, in permitting the conditions that produce inconsistent results, it could eventually become necessary to revisit the deference shown to foreign judgments.

And it remains an open question. There has been scant occasion in the last two decades when Canadian courts have used the word “comity” to describe anything but a reason for greater deference to foreign courts in questions of jurisdiction and judgments. And yet, a version of comity that requires the assumption that all things are equal when it is clear that they are not is remarkably unworldly for Canadian courts. It is all the more remarkable in view of the history of the relations more generally between Canada and the United States, in which Canada has not hesitated to exercise independent judgment and to engage in principled dissent on important matters of social and economic policy.

In a recent review of the question of parallel proceedings from the U.S. perspective, one commentator concluded that the first-seised rule should be used as no more than a presumption that was subject to other considerations.

[T]he courts should look to see whether the circumstances of the case suggest that deference to the foreign court would violate domestic public policy, prejudice the rights of those entitled to the protection of U.S. law, or whether the facts indicate that the foreign action was contrived to usurp the “natural” plaintiff’s choice of forum by bringing a preemptive claim for a declaration of non-liability.⁴⁴

It is difficult to see why such an approach would not be equally suitable for Canadian courts or, at least, why it should not be taken into account in formulating an approach that is suitable.

It is open to the Supreme Court in this appeal to stay the British Columbia proceedings and, in this way, to endorse the perspective on the issues that will be taken by the court in Washington. However, it would be unfortunate if the appeal were allowed on the basis that

44. N. Jansen Calamita, “Rethinking Comity”, *supra*, footnote 6, at p. 675.

Canadian courts should continue to presume that all things are equal and may not take cognizance of differences in perspective between the fora, particularly where this could result in compromising important Canadian policies if deference is shown. This would be to fail to take up the challenge of developing a more sophisticated approach to comity—one that is much needed in an increasingly globalized world.

VI. POSTSCRIPT: THE DIALOGUE BETWEEN COURTS AND COMMENTATORS

The release of the Supreme Court of Canada decision in *Teck Cominco* creates a further opportunity to comment on the benefits of collaboration and dialogue among the various participants in the development of the common law.

A senior academic colleague (now a highly distinguished jurist) once observed in a light-hearted way that academics were in a singular position of authority because only they could purport to “overrule” the pronouncements of the highest appellate courts — sometimes as casually as in the course of a footnote. At the time, it seemed unlikely that I would ever be in such utter disagreement as to seek to develop the law by purporting to “dismiss” a decision in that way, but it seemed even less likely that I would be in such utter agreement with a decision commented upon that the commentary would be cast in the role that this article now appears to serve. For although it seems that the conclusions reached in the *Teck Cominco* decision and the approach to the issues recommended in the article (which was submitted before the hearing) are entirely consistent with one another, the decision is such a model of succinct common law reasoning that the article now reads almost like additional discussion that might have been trimmed from a previous draft of the reasons.

Embarrassing as that might be for a commentator, it would be unfortunate to conclude, either presumptuously, that the only thing that stands between the article and the judgment is good editing, or despondently, that the contents of the article are pure surplusage. Rather, it is hoped that some of the discussion (such as that concerning the relevance to the *forum non conveniens* analysis of the approach to the applicable law likely to be taken in the alternative forum) will be understood to be of the kind that an academic is better placed to articulate than a court at this stage in the development of the law. To the extent that this is so, the explanation in this article of the possible motivation for the decision that was reached could be useful in developing the law further in the time ahead.