

**RECENT DEVELOPMENTS
IN CANADIAN INSURANCE COVERAGE
LITIGATION**

CONSIDERATION OF SELECTED ISSUES

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Introduction

Past opening remarks at Canadian insurance coverage conferences by the authors have often reflected a perceived dearth of coverage law in Canada relative to that south of the border. We frequently noted that in respect of certain important issues, coverage practitioners were left to speculate about what approach Canadian courts would take in respect of a specific issue. However, we also noted that Canadian coverage lawyers have been able to anticipate solutions to emerging issues, by reviewing United States and to a lesser extent Commonwealth developments. Times are changing. A considerable volume of Canadian coverage jurisprudence has emerged. As well, coverage issues more frequently arise for the first time in Canadian courtrooms.

One factor driving the increase in coverage litigation is the globalized nature of business. Canadian policyholders are expanding their risk exposure in all parts of the globe. Global companies, particularly resource companies, are expanding their operations in Canada. It is to be expected that Canadian insurers are facing the novel coverage questions or complex issues of the type their counterparts in the United States, the United Kingdom and the rest of the world experience.

We have included in this paper a discussion of cross-border coverage issues which have arisen in the past number of years. The *Pope & Talbot* litigation in British Columbia has demonstrated the emerging interplay between both the business but also coverage law in Canadian and American jurisdictions. The series of cases demonstrate the manner in which insurance companies must accommodate differing legal regimes. We also address developing, but still unsettled, case law from the U.S. Supreme Court in respect of when Canadian companies (and their insurers) will be subject to the jurisdiction of American courts.

We then review a notable development in the law respecting invasions of privacy from the Ontario Court of Appeal, and its coverage implications. The *Jones v. Tsige* litigation recognizes a “new” broadly structured tort - “Intrusion upon Seclusion”. The new tort constitutes a significant expansion in the law’s ability to compensate individuals for unwarranted intrusions into their private affairs. The elements of the tort set out in *Jones* closely mirror a broadening of privacy torts in the *Restatement (Second) of Torts* in the United States in 2010. It appears that the development of this area of law will be contemporaneous in both countries and the myriad legal jurisdictions in each. We then explore the emerging coverage implications for insurers arising from the tort(s) of privacy invasion.

We start, however, with an area of coverage litigation which has retained vitality over the course of decades: pollution exclusions. The active versus passive polluter distinction has been considered and sometimes differently treated by Canadian courts. Other interpretative principles have been enunciated. However, the law continues to evolve. The Ontario Court of Appeal recently issued its judgment in *ING Insurance Co. of Canada v. Miracle (c.o.b. Mohawk Imperial Sales)*, which denotes a move away from the passive versus active dichotomy. We consider this and another recent case from Ontario.

I. **MIRACLE AND THE POLLUTION EXCLUSION**¹

1. Introduction

On April 26, 2011, the Ontario Court of Appeal released its decision in *ING Insurance Co. of Canada v. Miracle (c.o.b. Mohawk Imperial Sales)*.² Overturning the lower court decision, the Court of Appeal enforced a pollution liability exclusion, thereby upholding the insurer's coverage denial under a Commercial General Liability policy.

North American courts have adopted a restrictive approach to application of the pollution exclusion. By way of example, the Ontario Court of Appeal decision in *Zurich Insurance Co. v. 686234 Ontario Ltd.*, determined that "dictionary literalism" should be rejected in favour of a "connotative contextual construction" approach when interpreting the exclusion.³ Rather than applying dictionary meaning of policy terms to the underlying facts/allegations, the court preferred a "common sense test for determining what is pollution".⁴

A review of American and Canadian coverage jurisprudence prior to *Miracle* discloses the adoption by courts of a number of practices and principles, in addition to "connotative contextual construction", which have had the effect of limiting the application of the pollution exclusion in a number of loss scenarios. One such interpretative technique has been the tendency to limit the exclusion to industrial-type business activity of the insured. Another approach was to treat the exclusion as precluding coverage in respect of "active" polluters only. In other words, the passive polluter who inadvertently permits the escape of a pollutant was not caught by the pollution exclusion. In contrast the polluter directly responsible for discharge of a pollutant as part of its business activity was caught by the exclusion.

Does the appellate decision in *Miracle* represent a return to a more literal interpretation of the language of the pollution exclusion? *Miracle*, at a minimum, may represent a step away from a trend to a marked restrictive interpretation and application of this exclusion.

In *Miracle*, the Court of Appeal clearly rejected application of this exclusion based on the supposed distinction between the "active" versus "passive" polluter. Both active and passive polluters are said to be subject, in certain factual circumstances, to application of the pollution exclusion. On the other

¹ An earlier version of this paper by Lori D. Mountford, entitled "*MIRACLE* -- Is It What Insurers Have Been Waiting For?", was first included in materials presented by Mark G. Lichty and Jason P. Mangano on CGL Policy Interpretation Principles at the Canadian Defence Lawyers Insurance Coverage Primer held in Toronto on September 30, 2011. An updated version was subsequently included in a paper co-authored by Dominic T. Clarke, Lori D. Mountford and Kyra R. Leuschen entitled "Commercial General Liability Insurance Policies - The Duty to Defend Post-*Progressive Homes*". It was presented at the Osgoode Professional Development National Update on Commercial Insurance Law and Coverage Disputes held in Toronto on November 3, 2011.

² *ING Insurance Co. of Canada v. Miracle (c.o.b. Mohawk Imperial Sales)*, 2011 ONCA 321, [2011] OJ no. 1837 (QL) [*Miracle*].

³ *Zurich Insurance Co. v. 686234 Ontario Ltd.* (2002), 62 OR (3d) 447, 222 DLR (4th) 655, [2002] OJ no. 4496 (QL), leave to appeal to SCC refused, [2003] SCCA no. 33 (QL) [*Zurich*].

⁴ *Ibid.*

hand, the Court of Appeal appears to continue to advocate the “connotative contextual construction” approach advocated in *Zurich*. A hyper-literal interpretative approach is not to be adopted. Judicial interpretation of “context” continues.

Whether the industrial-type business activity restriction will continue to apply to limit the reach of the pollution exclusion is unclear. The Court of Appeal did not expressly address this doctrine in *Miracle*. However, the underlying claim arose out of a fuel leak at a commercial gas bar. Loss involved a typical leaky storage tank claim. The underlying claim arose from business-related business activity of the insured. Accordingly, the holding in *Miracle* is consistent with continued application of the industrial-type business activity principle but the reasons of the Court of Appeal do not necessarily advocate such limitation.

(a) **Pre-*Miracle***

Before considering the *Miracle* decision and its impact, a brief review of the key cases is in order.

In *Zurich*, the policyholder owned an apartment building in which the furnace leaked carbon monoxide. Two proposed class actions were brought alleging carbon monoxide poisoning and negligence on the insured’s part for failure to maintain and properly inspect the furnace. The Ontario Court of Appeal held that the pollution exclusion contained in the CGL insurance policies at issue did not apply. The insurer had a duty to defend and indemnify.

In so finding, the Court of Appeal reviewed the history of the absolute pollution exclusion. It concluded that the exclusion was intended to eliminate coverage for the cost of government-ordered clean up under legislation making industry responsible for its pollution of the natural environment. The Court of Appeal quoted, with approval, U.S. case law to the effect that the exclusion applies only to traditional industrial environmental pollution. Reference was also made to the Court of Appeal’s refusal, in the past, to enforce a clear and unambiguous exclusion clause where to do so would be inconsistent with the main purpose of the insurance coverage and contrary to the reasonable expectations of an ordinary person as to the coverage purchased.

The critical reasoning of the Court of Appeal in denying the application of the pollution exclusion in *Zurich* is contained in two paragraphs of the judgment. Both the industrial-type business activity restriction and the active versus passive polluter dichotomy are evident therein. Borins J.A. wrote:

There is nothing in this case to suggest that the respondent’s regular business activities place it in the category of an active industrial polluter of the natural environment. Put simply, the respondent did not discharge or release carbon monoxide from its furnace as a manufacturer discharges effluent, overheated water, spent fuel and the like into the natural environment. It was discharged or released as a result of the negligence alleged in the underlying claims, which remains to be proved. As I have pointed out, the history of the exclusion demonstrates that it would produce an unfair and unintended result to conclude, in the context of a CGL policy, that defective machinery maintenance constitutes “pollution”, even when it

gives rise to carbon monoxide poisoning. In this regard, it is necessary to understand that the exclusion focuses on the act of pollution, rather than the resulting personal injury or property damage.

Accepting for the purpose of my conclusion that carbon monoxide is a “pollutant” within the meaning of the exclusion, although it is arguably clear in its plain and ordinary meaning, the exclusion is overly broad and subject to more than one compelling interpretation, as is evident from its construction by American courts. Given that the exclusion is capable of more than one reasonable interpretation, it is ambiguous and should be interpreted in favour of the respondent. The historical context of the exclusion suggests that its purpose is to bar coverage for damages arising from environmental pollution, and not the circumstances of this case in which a faulty furnace resulted in a leak of carbon monoxide. Based on the coverage provided by a CGL policy, a reasonable policyholder would expect that the policy insured the very risk that occurred in this case. A reasonable policyholder would, therefore, have understood the clause to exclude coverage for damage caused by certain forms of industrial pollution, but not damages caused by the leakage of carbon monoxide from a faulty furnace. In my view, the policy provisions should be construed to give effect to the purpose for which the policy was acquired.

The Ontario Superior Court of Justice followed *Zurich* in *Hay Bay Genetics Inc. v. MacGregor Concrete Products (Beachburg) Ltd.*⁵ In the latter case, the insured was a subcontractor who supplied and installed a concrete tank for the storage of pig manure on a hog production farm. The tank leaked and the farm operator was ordered by Environment Canada to clean up the resultant environmental damage. The farm operator commenced an action against the insured. The policyholder was insured under two CGL policies. Both insurers denied coverage on the basis of total pollution exclusion clauses. The court denied application of the clauses and ordered both insurers to defend.

Like the Court of Appeal in *Zurich*, the Superior Court of Justice took a contextual approach to the exclusion rather than simply applying its terms literally to the facts before it. The Superior Court of Justice accepted the intent of the pollution exclusion to be avoidance of the enormous exposure presented by increased environmental litigation. The court picked up and expanded upon the active v. passive polluter dichotomy. The passive polluter who inadvertently permits the escape of pollutants but is not directly responsible for same was not caught by the pollution exclusion. The court also relied upon the industrial-type activity restriction. In the case before it, the insured was not in the business of polluting the environment as a result of the nature of its business. In other words, it was not an active industrial polluter.

Sheffield J. wrote:

⁵ (2003), 6 CCLI (4th) 218, [2003] OJ no. 2049 (QL).

Turning then to the pollution clause, on a literal interpretation, it can easily encompass an environmental pollution exception. “Waste” could cover just about every conceivable item. Even accepting that waste covers animal waste, particularly, “pig manure”, it is against the interests of justice to apply “hyperliterally” the terms of the exclusion clause without taking into account the specifics of this situation, as stated by Justice Borins in *Zurich*, supra at paras. 10 and 36. MacGregor would not have taken out this insurance coverage if it were not to cover potential pollution risks. Just as in the *Zurich*, supra, situation, MacGregor is not in the business of polluting the environment as a result of the nature of its business. Pollution may have been a risk, but it was not a probable consequence of carrying out its business. The pollution that occurred here was unplanned and could have occurred for a variety of reasons.

If MacGregor is not an active industrial polluter and if the damage was caused as a result of pure accident or perhaps negligence, this would render an ambiguity in the exclusion clauses such that the insurance companies cannot invoke the protection of the pollution exception clause. Thus, the interpretation of this exclusion clause should be dealt with at trial on the basis of evidence presented by all parties.⁶

The Alberta Court of Queen’s Bench adopted the Ontario Court of Appeal’s interpretive approach to the pollution exclusion from *Zurich* in *Palliser Regional School Division No. 26 v. Aviva Scottish & York Insurance Co.*⁷ In *Palliser*, the insured acquired ownership of land on which there was an inactive coal bed covered by soil and vegetation. The insured operated a school on the land. Through no fault of the insured, the coal bed became exposed and coal dust was blown onto an adjacent subdivision. An action was commenced on behalf of some residents alleging damage to property and persons. The court found the pollution exclusion in a comprehensive liability insurance policy did not negate the insurer’s duty to defend the underlying action.

⁶ In its reasons, the Ontario Superior Court of Justice held that the reasonable expectations of the parties ought to be taken into account when interpreting the pollution exclusion even where the exclusion is clear and unambiguous. An exclusion should not be enforced where to do so would defeat the main purpose of obtaining insurance. Note that the Supreme Court of British Columbia was critical of this proposition in *Corbould v. BCAA Insurance Corp.*, 2010 BCSC 1536, 90 CCLI (4th) 257, [2010] BCJ no 2125 (QL) [*Corbould*]. There, the court held that the reasonable expectations doctrine is an interpretative tool to be applied only in the event of ambiguity in the policy. Like *Miracle*, *Corbould* arguably signals a more inclusive approach to the pollution exclusion. A pollution exclusion under an all-risks property policy was held to negate coverage for a property damage claim arising out of a fuel oil leak from an above-ground storage tank. The spill of oil into the soil was held to meet the common sense definition of pollution. If the exclusion was not read to catch a heating oil tank leak on the insured’s residential property, then what was it intended to catch? The oil was being stored for home-heating as opposed to business purposes. Unlike under a CGL policy, however, an industrial-type business activity restriction could not be read in. The policy at issue was a residential property policy. Accordingly, this B.C. case may not be as prophetic with respect to future treatment of the pollution exclusion under a CGL policy as one might first assume.

⁷ *Palliser Regional School Division No. 26 v. Aviva Scottish & York Insurance Co.*, 2004 ABQB 781, 370 AR 294, 18 CCLI (4th) 98, [2004] AJ no. 1356 (QL) [*Palliser*].

Reliance was placed on the passive v. active polluter dichotomy as well as the industry-related business activity restriction by the court. It was emphasized that the insured did not cause the alleged pollution as a result of its business activities. The coal dust was not created nor was it permitted to escape as part of the insured's business activities in operating a school. There was no connection between the insured's business activities and the coal dust. Park J. wrote, "[i]t is my view that the airborne coal dust is not industrial pollution or pollution to which the Pollution Exclusion clause should apply." The court also noted that the coal bed was not exposed nor was the coal dust released by any direct action on the insured's part. The Alberta Court of Queen's Bench disagreed with an earlier decision of the Ontario Court of Appeal in *Ontario v. Kansa General Insurance Co.* in which any attempt to distinguish between active and passive polluters was rejected.⁸

B.C. courts have engaged the passive versus active debate. The prime example is Justice Goepel's decision in *Dave's K. & K. Sandblasting (1988) Ltd. (c.o.b. K&K Sandblasting Ltd.) v. Aviva Insurance Co. of Canada*, where-in the British Columbia Supreme Court held that the pollution exclusion precluded coverage.⁹ In that case, the policyholder carried on a sandblasting business on leased premises. The sandblasting residue stored on the property resulted in unacceptable concentrations of antimony and chromium in the soil. The lessor was required to clean up the property. It sued the policyholder for the cost of remediation. The policyholder sought coverage from Aviva. Aviva relied on a pollution exclusion clause within its CGL policy. The British Columbia Supreme Court agreed that the pollution exclusion clause precluded coverage.

The court determined that the insured's direct business activities caused contamination to the outdoor environment. Applying the principles developed in various cases, inclusive of *Palliser* and *Zurich*, it determined that the exclusion had application in such circumstances. In other words, the insured was an active industrial polluter.

B.C. Courts have also demonstrated a willingness to apply pollution exclusions in first party policies, wherein the insured is not a business directed at contaminating the environment. Acknowledging that Justice Sigurdson's judgment in *Corbould v. BCAA Insurance* 2010 BCSC 1536 was addressing a pollution exclusion in a property policy, not CGL, the decision nevertheless suggests that while the active versus passive polluter distinction retains vitality in British Columbia, it may receive a very narrow application. Sigurdson J. wrote at paragraph 95 of his reasons:

I do not see in the language or the surrounding circumstances an ambiguity in the insurance coverage as it relates to this particular incident. I do not find that the case at bar is similar to *Palliser*. The finding in *Palliser* was that the coal dust was in no way related to the activities of the insured in the operation of a school. Is there a similar type of ambiguity that could be said to exist here? In the case at bar, Mr. Corbould obviously intended to bring the heating oil onto his property and would use it to heat his home. I am also unable to find an

⁸ *Ontario v. Kansa General Insurance Co.* (1994), 17 OR (3d) 38, 111 DLR (4th) 757, [1994] ILR 2719, [1994] OJ no. 177 (CA) [*Kansa*], leave to appeal to SCC refused, [1994] SCCA no. 123. Under Ontario law, the passive polluter permitting pollution to occur was just as much a polluter as the active polluter who discharged the pollution.

⁹ 2007 BCSC 791, 51 CCLI (4th) 229, [2008] 2 WWR 163, [2007] BCJ no. 1203 (QL).

ambiguity like that found in Zurich where the court found it to be ambiguous because the exclusion there focused on the act of pollution rather than the resulting personal injury or property damage and because the historical context of the exclusion suggests that its purpose was to bar coverage for environmental pollution, not a faulty furnace that resulted in a leak of carbon monoxide.

It would seem in B.C., pleas of “reasonable expectations” and assertions of the insured’s status as a “passive” polluter cannot generally be employed to overcome clear language in the policy.

(b) ***Miracle***

This brings us to the recent Ontario Court of Appeal decision in *Miracle*. The insured operated a self-service gas bar. Gasoline leaked from an underground storage tank on the insured’s property and contaminated adjacent lands. The adjacent property owner brought an action against the insured seeking damages for loss of property value, the costs of conducting an environmental assessment and the costs of clean up. The claim was advanced in nuisance, negligence and strict liability. The pleading specifically relied upon environmental protection statutes. The CGL carrier brought an application seeking a declaration that it had no duty to defend or indemnify the insured on the basis of the pollution exclusion in the policy.

The wording of the “Pollution Liability Exclusion” at issue was typical. It provided that the insurance did not apply to:

2. Pollution Liability

- a. “Bodily injury” or “property damage” or “personal injury” or “advertising liability” arising out of the actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of pollutants:

...

- (2) At, or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any Insured;

...

- (5) At or from any premises, site or location on which any Insured or any contractors or subcontractors working directly or indirectly on any Insured’s behalf are performing operations:

- (a) if the pollutants are brought on to the premises, site or location in connection with such operations by such Insured, contractor, or subcontractor; or

- (b) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify, decontaminate, stabilize, remediate or neutralize, or in any way respond to, or assess the effect of the pollutants.
- b. Any fines or penalties assessed against or imposed upon any Insured arising out of the actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of pollutants.
- c. Any loss, cost or expense arising out of any request, demand or order that any Insured or others test for, monitor, clean up, remove, contain, treat, detoxify, decontaminate, stabilize, remediate or neutralize or in any way respond to, or assess the effect of pollutants unless such loss, cost or expense is consequent upon “bodily injury” or “property damage” covered by this policy.
- d. “Pollutants” means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapour, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

The Ontario Superior Court of Justice held the pollution exclusion not to apply. The lower court reasoned that the insured did not release the gas into the environment as a result of its regular business activities. It was not an industrial polluter. Rather, it was alleged in the underlying action that the insured was negligent in allowing the gasoline to escape from its tank. In essence, the insured was characterized as a passive, non-industrial polluter.

The Court of Appeal allowed the appeal. No duty to defend or indemnify was found to be owed by the insurer. In so holding, the Court of Appeal expressly held that the *Zurich* decision could not be read to restrict application of the CGL pollution exclusion to the conduct of “active industrial polluters” only. Rather, the Court of Appeal confined the *Zurich* case to its particular facts. R.J. Sharpe J.A. wrote:

... *Zurich* must be read in the context of the specific issue the court was addressing. Borins J.A. rejected what he quite appropriately described as a “hyperliteral” argument that the claim was excluded because it arose from the “escape” of “gas”. The court refused to accept the insurer’s strictly literal interpretation of the clause in favour of one that determined the meaning and reach of the exclusion, given its historical purpose and a common sense assessment of the insured’s business activity. The exclusion’s ordinary meaning in those circumstances was found to be ambiguous and contrary to the insured’s reasonable expectations.

The facts before the court in *Miracle* were distinguishable. The activity of the insured, namely, underground storage of gasoline for resale at a gas bar, carried with it an “obvious” and “well-

known” risk of pollution and environmental harm. This activity was held to fall squarely and unambiguously within the language of the pollution exclusion.

R.J. Sharpe J.A. reasoned:

Unlike *Zurich*, in this case, the insured was engaged in an activity that carries an obvious and well-known risk of pollution and environmental damage: running a gas station. Indeed, the statement of claim is framed as a claim for damage to the natural environment caused by a form of pollution. While the respondent Canada now attempts to characterize its claim as if it primarily, if not exclusively, sounds in negligence, that ignores the fact that the statement of claim asserts the causes of action commonly associated with pollution-based claims for environmental damage: strict liability (presumably on the basis of *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330) and nuisance as well as negligence. The negligence claim is based in part upon alleged breaches of both provincial and federal environmental legislation and regulation. The damages claimed are for harm to the environment: the loss of property value due to contamination of the soil, the cost of investigating, testing and monitoring the contamination caused by the migration of a hazardous product from the lands of the insured, and the cost of rectifying the contamination and remediating the plaintiff’s property. Such a claim fits entirely within the historical purpose of the pollution exclusion, which was “to preclude coverage for the cost of government-mandated environmental cleanup under existing and emerging legislation making polluters responsible for damage to the natural environment”: See *Zurich*, at para. 13.

The Court of Appeal went on to reject the active v. passive polluter distinction. Reliance was placed on *Kansa*. *Kansa* is continued authority for the proposition that the pollution exclusion applies to the passive polluter who permits pollution to occur and the active polluter who discharges or causes the discharge of the pollution was confirmed.

The Ontario Court of Appeal decision in *Miracle*, therefore, appears to mark a return to application of this exclusion in circumstances in which the policyholder’s activity has contributed to the escape, discharge, etc. of known pollutants. The decision in some respects restores underwriters’ intent to preclude coverage, under the CGL policy, for loss attributable to recognized pollution harm, whether caused by active or passive conduct.

(c) **Post-*Miracle***

Miracle restores previous Ontario authority finding that the distinction between an “active” and “passive” polluter is not relevant to the exclusion analysis. The “active” element in the “active industrial polluter” restriction has been eliminated. Query, however, whether the “industrial

polluter” requirement survives? Based on *Miracle*, the pollution exclusion applies where the insured is engaged in an activity that carries with it a known risk of environmental harm. Running a gas station is such an activity. It also, however, happens to be a business if not an industrial activity. By its very nature, the insured’s business carried with it a risk of pollution. Query whether, post-*Miracle*, there will remain a tendency by the courts to limit application of the pollution exclusion to industrial or business activity of the insured.

Post-*Miracle*, the pollution exclusion still would not apply to circumstances in which a furnace in an apartment building operated by the insured leaks carbon monoxide. *Zurich* was distinguished in *Miracle*. *Zurich* was not overturned. A number of insurers have recognized and accepted this limitation. They have placed an exception within the pollution exclusion which precludes application of this clause to escape of deleterious substances from internal heating and related sources.

The question is whether a case like *Hamelin v. Commercial Union Assurance Co.*, for example, would be decided differently today.¹⁰ In *Hamelin*, approximately 800 litres of heating oil escaped from a rupture to an outside storage tank on the insured’s commercial premises. The owners and occupiers of the abutting residential lands sought recovery for contamination of their water supply in the underlying action. The court held that a rider exclusion relating to the escape of pollutants was not a bar to the insurer’s duty to defend or indemnify.

The Ontario Court of Justice, General Division reasoned that the intent of the exclusion was “to deal with pollutants actually applied or which were a part of the business activity of the insured”. The fuel oil which leaked was used to heat the insured’s premises as opposed to being used as part of the insured’s business activity. Therefore, the pollution exclusion did not apply.

In light of *Miracle*, characterization of the insured in *Hamelin* as a passive polluter is no longer relevant to application of the pollution exclusion. Rather the question becomes whether the polluting activity arises from a well-known risk associated with the insured’s business. While storage of oil in a tank on one’s premises carries with it a well-known risk of environmental harm should the tank leak, the leakage of oil used to heat an insured general contractor’s premises is not a known risk of the industry-related business activity of the insured. Storage of fuel oil in these circumstances is not an industrial-type business activity.

The Ontario Superior Court of Justice recently had occasion to revisit application of the pollution exclusion, but with the benefit of the Court of Appeal’s guidance in *Miracle*. In *699982 Ontario Ltd. v. Intact Insurance Company*, the pollution exclusion was held to apply in relation to a claim for property damage caused by a dry cleaning business operated by the insured’s tenant.¹¹ The tenant was alleged to have put PCE and VC on the insured’s property which migrated to adjacent

¹⁰ *Hamelin v. Commercial Union Assurance Co.*, [1995] OJ no. 4969 (QL) (Ct J (Gen Div.)) [*Hamelin*].

¹¹ *699982 Ontario Ltd. v. Intact Insurance Company* (October 3, 2011), Toronto CV-10-409536 [*699982 Ontario Ltd.*].

property. PCE and VC were accepted to be “pollutants”. As well, it was alleged that the insured knew about pre-existing damage which it failed to remediate or report to the subsequent owner.

In finding the pollution exclusion to preclude coverage under the policy, Justice Roberts reasoned that the tenant’s use, storage and disposal of PCE in its dry cleaning operations, for which the insured owner is responsible, carries a known risk of pollution and environmental harm. Handling of PCE is a closely regulated by environmental protection legislation because of the known risks.¹²

Like *Miracle*, therefore, *699982 Ontario Ltd.* demonstrates a readiness of the courts to apply the pollution exclusion to passive polluters in respect of activity carrying a known risk of pollution and environmental harm. *699982 Ontario Ltd.*, like *Miracle*, does not answer the question whether the courts will continue to limit application of the pollution exclusion to environmental harm flowing directly from the insured’s industrial-type business activity. It could be submitted that dry cleaning operations involving the discharge of PCE into the groundwater would fall within the concept of industry-related business activity. Justice Roberts’ reasons distinguishing *Zurich* and *Palliser* suggest the restriction may continue:

The present case is completely different from the instances of an accidental discharge of carbon monoxide from a broken furnace (*Zurich Insurance Co. v. 686234 Ontario Ltd.* (2002), 62 O.R. (3d) 447) or the unexpected escape of coal dust from a school’s coal bed (*Palliser Regional School Division No. 26 v. Aviva Scottish & York Insurance Co.*, [2004] A.J. No. 1356), where the pollution was not released as a result of any direct action on the part of those claimants or **as a by-product of their respective business activities.**

Here, there is a clear connection pleaded between the dry cleaning operations of 699982’s tenants and the alleged pollution. [emphasis added]

Accordingly, *699982 Ontario Ltd.* leaves open the possibility that an industry-like business activity restriction continues.¹³

2. Conclusion

The Ontario Court of Appeal decision in *Miracle* may represent a limited “step back” from the highly restrictive or narrow interpretation of the pollution exclusion as adopted in cases such as *Zurich* and *Palliser*. Having said that the requirement that pollution result from the policyholder’s industrial-type business activity may continue to apply. What constitutes a “business activity” and whether loss flows from same may be fact specific issues.

¹² With respect to the pre-existing pollution, the pleadings were held to allege “discharge, dispersal, release or escape of pollutants” while the insured owned the property. In particular, the pleadings referred to continuing discharge of PCE and VC into the groundwater and natural environment.

¹³ The Ontario Court of Appeal is expected to hear an appeal brought by the insured in *699982 Ontario Ltd.* in mid-March or early May, 2012.

II. **CROSS BORDER COVERAGE ISSUES**

Canadian policyholders are frequently engaged in U.S. operations, just as American companies are commonly engaged in activities north of the border. These cross-border activities pose a range of concerns for policyholders and insurers. The *Pope & Talbot* litigation in British Columbia identifies cross-border jurisdiction issues in the context of Directors & Officers insurance. As well, a recent decision from Saskatchewan addressed coverage issues arising under a CGL policy in respect of a Canadian company facing “blastfax” litigation in Illinois. We discuss in this section of the paper a few of the issues which can arise in cross border matters.

1. **Pope & Talbot Ltd. I and II**

The decisions of the British Columbia Supreme Court in the *Pope & Talbot (Re)* matter provide an example of the increasing complexity of coverage issues which arise out of the ever expanding interplay between Canadian insurers, American losses, and courts in both jurisdictions. Canadian businesses, and the insurers who insure them, are increasingly facing liability in, and exposure to the American legal system. The reverse scenario also exists leading to an increasing need for careful inter-jurisdictional judicial “management”, if one may so call it, of cross border underlying and coverage disputes. The authors suggest that the realities of 21st century commerce and litigation require “communication between and co-ordinated direction from” not just various Canadian but also U.S. courts.

The British Columbia Supreme Court’s 2009 *Pope & Talbot Ltd., Re*^{[1] [2]} decisions serve as an example of complex cross border underlying and coverage issues requiring judicial involvement and co-operation across jurisdictions. These matters addressed conflict of laws issues in the insurance coverage context. Specifically, the B.C. Supreme Court considered insurance coverage arising in respect of a number of Directors and Officers Liability policies issued by American insurers to the bankrupt Pope & Talbot entity. Pope & Talbot was domiciled in the United States, but its primary operations were in Canada.

Pope & Talbot’s four U.S.-based D&O insurers, issued various layers of directors and officers (“D&O”) liability insurance to Delaware holding company Pope & Talbot Inc. and its subsidiaries during a single policy term. Pope & Talbot became insolvent. Insolvency proceedings were first brought in Ontario but subsequently transferred to B.C. pursuant to the *Court Jurisdiction and Proceeding Transfer Act*, S.BC 2003, c. 28 (“CJPTA”). A proposed restructuring failed and, both Pope & Talbot Ltd. and Pope & Talbot Inc. were assigned into bankruptcy in Canada and the United States. The assignment brought the claims against the Directors and Officers within the jurisdiction of American courts. However, the U.S. Bankruptcy Court for the District of Delaware acknowledged the Canadian proceeding as a “foreign main proceeding” and deferred to the jurisdiction of the British Columbia Court. In doing so, the Delaware Court acknowledged PriceWaterhouseCoopers (“PWC”) as the Receiver and Monitor of both Pope & Talbot Inc. and Pope & Talbot Inc. Ltd..

As part of the insolvency proceedings, Pope & Talbot employees sought nearly \$10 million for unpaid vacation pay pursuant to s. 119 of the *Canadian Business Corporations Act*, R.S.C. 1985, c.C-44 (“CBCA”). In response to that claim, PWC filed a coverage application in the B.C. Supreme Court for a declaration that the D&O policies issued by the insurers covered the s. 119 claims. The primary policy provided up to \$10 million in coverage. Thus the two potentially responsible insurers were Federal and XL, who had issued primary and drop-down coverage respectively.

The insurers asked the Court to stay the PWC application and declare that the proper law of policies was the law of Oregon. In the first of a series of rulings, Justice Walker of the B.C. Court characterized the coverage issues in the *Pope & Talbot Ltd. I* decision as follows:

- (a) does the B.C. Supreme Court have jurisdiction to hear and determine coverage?;
- (b) if jurisdiction did lie with the B.C. court, should the Court nevertheless decline jurisdiction on the basis that Oregon is the forum conveniens?;
- (c) if the Court did hear the coverage dispute, what jurisdiction’s law would apply to each insurance policy?; and
- (d) what was the effect the ADR clause in one insurer’s (National Union’s) policy?

The insurers submitted that the B.C. court did not possess jurisdiction over the coverage matters in question. They argued that the claim related to policies issued by U.S. insurers that did not operate in Canada. Their argument was not accepted.

Justice Walker started his analysis with review of section 3 of the CJPTA. That section provides that a B.C. Court “has territorial competence in a proceeding that is brought against a person only if... there is a real and substantial connection between British Columbia and the facts on which the proceedings against that person is found.”

To determine the meaning of “real and substantial connection”, Justice Walker reviewed Section 10 of the CJPTA. That section sets out some of circumstances where a “real a substantial connection” is presumed to exist. Subsection 10(e) establishes a presumption of a real and substantial connectoin if the proceeding concerns contractual obligations that were to be performed in B.C. A similar presumption is made under subsection 10(h), if the proceeding concerns a business carried out in B.C. Noting that not all cases will fit within the circumstances set out in section 10 of the CJPTA, Justice Walker cited the “Muscutt Criteria”, taken from the Ontario Court of Appeal decision *Muscutt v. Courvelles* (2002), 60 O.R. (3d) 20 (Ont. C.A.). These non-binding factors are:

- (a) the connection between the forum and the Plaintiff’s claim;
- (b) the connection between the forum and the Defendant;
- (c) unfairness to the Defendant in assuming jurisdiction;
- (d) unfairness to the Plaintiff in not assuming jurisdiction;
- (e) the involvement in other parties to the suit;

- (f) the Court’s willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdiction basis, whether pursuant to principles of common law or any applicable legislation;
- (g) whether the case is interprovincial or international in nature; and
- (h) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

The Ontario Court of Appeal made it clear that a central theory underlying its criteria is that the “forum has an interest in protecting the legal rights of its residents.” Citing *Muscutt*, Justice Walker noted that “the connection between the forum and the defendant provides a strong basis for assumed jurisdiction.” However, he also noted that the “twin goals of avoiding multiplicity of proceedings and avoiding the risk of inconsistent results are relevant considerations.”

Justice Walker ultimately concluded that the B.C. Supreme Court did possess jurisdiction. In his reasons he explained how the “deeming provisions” of s. 10(e) and (h) of the CJPTA were met, and also that the *Muscutt* criteria were satisfied. Central to his analysis was that the insurers undertook an obligation to pay out claims on a worldwide basis. The s. 119 claim was based on a Canadian statute and was advanced against Pope & Talbot’s Canadian subsidiary. The claim also involved allegedly wrongful acts that took place in Canada. These facts favoured B.C. jurisdiction.

On the issue of fairness, the insurers submitted it was unfair for the B.C. Court to have jurisdiction in a case, because they would have to call an expert witness from Oregon to adduce evidence with respect to proof of law in a Vancouver court. Justice Walker disagreed and found to the contrary that it would be unfair to the s. 119 claimants and PWC to have the matter heard in Oregon because an Oregon court would have to examine the nature of s. 119 and consider detailed factual evidence respecting a form of liability that does not exist in Oregon. It was also noted that since each insurer had a head office in a different U.S. state, it was possible out of state experts would have to opine on the application of the proper law if the Oregon court assumed jurisdiction.

Having concluded that B.C. had a real and substantial connection with the dispute, the next issue the Court had to address was whether another jurisdiction would be a more appropriate forum. In this regard, reference was made to s. 11(1) of the CJPTA which codified the non-exhaustive list of factors of the Canadian common law test for *forum non conveniens*:

- (a) comparative convenience and expense for the parties to the proceeding and for their witness, litigating in this or any alternative forum;
- (b) the law to be applied to the issues in the proceeding;
- (c) the desire to avoid multiplicity of proceedings;
- (d) the desire to avoid conflicting decisions in different Courts;
- (e) the enforcement of an eventual judgment; and
- (f) the fair and efficient working of the Canadian legal system as a whole.

The Court was satisfied that the comparative convenience and expense factor [factor (a)] favoured B.C. on the basis that fact witnesses would be required in Oregon regarding the nature of s. 119 liability. It was noted that both PWC and quite possibly the s. 119 claimants would have to adduce evidence in this regard. This finding in favour of B.C. was made notwithstanding the prospect that proof of Oregon coverage law may have to be adduced before the B.C. Court.

The policies' "proper law" [factor (b)] was the next factor to be considered. However, the Court noted that it was not essential to establish the proper law of the policies before determining whether it should decline to exercise its jurisdiction. Nevertheless, the Court did make note that the policies did not contain choice of forum clauses and proceeded with its analysis.

The next factor, multiplicity of proceedings [factor (c)], was held to favour B.C. because the United States Bankruptcy Court had ruled the insolvency issues should be resolved in Canada.

Finally, in regards to judgment enforcement [factor (e)] Justice Walker took note that Oregon and B.C. were reciprocating jurisdictions. The insurers were criticised for their submission that other jurisdictions potentially related to the dispute such as New Jersey, Connecticut and Indiana were not reciprocating jurisdictions, and the judgment might not be enforceable. Justice Walker wrote at paragraph 112:

I would not expect an insurer who underwrites potential risks arising from the business operations of B.C., on a 'pay on behalf of' basis, to raise the prospect of non-reciprocating forums to resist territorial competence, forum conveniens, or payment of claims – particularly where that insurer operates and markets itself within an umbrella of companies where one or more companies within that umbrella do, in fact, carry on business in Canada.

The B.C. Court ultimately concluded the PWC's application would not be stayed on the basis there was a "more convenient" forum. However, Justice Walker did state that the highly fact specific proper law inquiry could only be resolved at a further hearing because all evidence and submissions had not been submitted.

That analysis was undertaken in the November 2009 *Pope & Talbot Ltd. II* decision. The insurers submitted that the proper law of the policies was Oregon law. PWC and both policyholders submitted that the dépeçage principle applied and that B.C. law ought to govern the policies. The dépeçage principle recognizes more than one proper law of contract may apply.

"The Court emphasized that it was necessary to ascertain the intentions of the parties by examining the contract as a whole. When the parties have failed to expressly identify applicable law, Canadian courts will "determine whether the proper law can be inferred from the circumstances, or failing this, determine the system of law which has the closest and most substantial connection with the subject matter."

Justice Walker acknowledged this analysis was an inherently fact-specific exercise which included consideration of the factors cited in *Cheshire on Private International Law*, 7th ed. at p. 448:

[T]he domicile and even the residence of the parties; the national character of a corporation and the place where its principal place of business is situated; the place where the contract is made and the place where it is to be performed; the style in which the contract is drafted, as, for instance, whether the language is appropriate to one system of law, but inappropriate to another; the fact that a certain stipulation is valid under one law but void under another; the economic connexion of the contract with some other transaction; the nature of the subject matter or its *situs*; the head office of an insurance company, whose activities range over many countries; and, in short, any other fact which serves to localize the contract.

Specific note was also made of the fact that modern case law focuses more on factors other than where the contract was made. The place the contract is made is only one of the several factors to be considered.

Justice Walker concluded the policies demonstrated the principle of *dépeçage* did in fact apply given that each of the three policies at issue provided for the application of different legal regimes. A few of the facts that lead Justice Walker to this conclusion include the language in the “Loss” definitions in the Federal and XL policies. Both those definitions contemplated different laws applying to the policy. Moreover, the ADR clause in National Union’s policy only required the Court resolving coverage to give “due consideration” to the law of the jurisdiction *Pope & Talbot Inc.* was incorporated (i.e. Delaware).

The policies were found to be connected to more than one jurisdiction and legal regime. British Columbia, Ontario, Delaware, Oregon, Indiana, New Jersey, Pennsylvania, New York and Connecticut were cited as examples. In Justice Walker’s opinion, the circumstances presented “an extraordinary case, one where the parties intended that a court having taken jurisdiction over the claim or matter in dispute would determine the proper law according to its own laws.” As noted by Justice Walker at paragraph 99:

From examining each policy as a whole, and in particular, contractual language allowing for different policy sections, claims, and "matters" to be interpreted according to different legal regimes, it is clear that the parties intended the proper law to be determined in connection with the substance of the claim made (including relief sought) or matter at issue.

Having concluded that the *dépeçage* principle applied, Justice Walker proceeded to apply the B.C. factor based “real and substantial” analysis test. The five factors considered were:

- (a) where the policy was made;
- (b) the form of the policy;
- (c) where the parties’ operations are located;
- (d) the subject matter of the contract; and,

(e) where the claim might be expected to arise.

The court determined the policies' locus through analysis of Section 5 of the British Columbia *Insurance Act* R.S.BC 1996, c. 226. Section 5 deemed the policies to have been made in B.C., a presumption that the insurers did not rebut. The fact that Pope & Talbot, the insurance broker and Federal had offices in Oregon did not displace the presumption of a B.C. locus, nor did it suggest contracts were made in Oregon.

In analyzing the "form of the policy", the Court was not satisfied that the English insurance forms were American or unique to a particular jurisdiction. It was noted that the concepts expressed in the policies were widely used in D&O policies issued in Canada. Moreover, the fact the premium was expressed in U.S. dollars was found to be a neutral fact because Justice Walker found it is not uncommon for non-American companies do business in U.S. currency. Consequently, the "form of policy" factor was neutral from the Court's perspective.

The third factor to be considered was where the parties' operations were located. The evidence showed that the insurers head offices and principal states of business were in the states of New York, New Jersey, Indiana, Pennsylvania, and Connecticut. Federal was the only insurer that had an office in Oregon. While the head office of Pope & Talbot Inc. was located in Oregon, it was a Delaware corporation. Moreover Federal's underwriting materials contained information demonstrating that a substantial amount of Pope & Talbot Inc.'s business operations took place in Canada. It was found that the Federal was aware that strength of the Canadian dollar contributed to the insolvency of the company as whole. Ultimately, it was held that the operations location factor favoured the application of B.C. law.

The Court was of the view that the subject matter of the contract factor also favoured B.C. because the majority of the operations of Pope & Talbot Group were located in B.C. Moreover, the Court was also satisfied that the "where claims might be expected to arise" factor favoured B.C. law given the nature and location of the operations of the Pope and Talbot Group at the time the policies were issued. Justice Walker ultimately held that B.C. law applied to the policies.

2. ***Pope & Talbot Ltd. (Re) (III)***, 2011 BCSC 548

In a subsequent decision released in April 2011, the Court considered whether XL Specialty should be permitted to participate in the underlying liability proceeding (the Harmac action) brought by former union and salaried employees against the former directors and officers of Pope & Talbot Ltd. and its parent company, Pope & Talbot, Inc. The Court also considered whether XL Specialty could defend itself and its insured, P & T Inc. in the Harmac action through the Vancouver law firm that had been acting as XL's coverage counsel.

The Court began its analysis by stating that in policies containing duty to defend language, which are typically CGL policies, "courts have stressed the importance of ensuring that a coverage neutral defence is afforded to an insured where the insurer has reserved its rights under the policy." (para 6)

This principle arises from the conflict of interest that exists when an insurer defends on a reservation of coverage rights basis. It stated at para 8:

Where an insurer affords a defence to its insured on a reservation of rights basis, divergent interests exist between them. Those divergent interests may create conflict for defence counsel retained by an insurer to defend an insured. The existence of divergent interests does not allow an insurer to put its coverage interests ahead of its insured's liability exposure in an underlying action in British Columbia courts. Consequently, insurers are prohibited in British Columbia courts from having coverage issues determined in the underlying litigation.

The Court further expressed that defence counsel would be in conflict if it engaged in the role of providing coverage advice or passing along confidential information that may be used by the insurer to deny coverage. The principle is to avoid the "possibility of real mischief or prejudice" or the "appearance of impropriety" due to an inherent conflict of interest. The Court also recognized that at the same time, insurers whose policies contain duty to defence language do have a say in the choice of counsel and the nature of the defence to be mounted. In Justice Walker's opinion, it flowed as a matter of general principle from the case law that "a liability insurer should not be permitted to participate in the defence of the underlying action as a party or through its coverage counsel because this could permit the insurer, even unwittingly, to sculpt the case in a manner that vitiates coverage." (para 18)

The court recognised that there are a few exceptional instances where courts have permitted coverage to be determined in advance of the determination of the issues in the underlying action but that it is rarely done and only when there is a complete absence of a factual controversy in the underlying action.

The Court considered two cases from Ontario, *Uniroyal Chemical Ltd. v. Kansa General Insurance Co.*, [1992] O.J. No. 4003 (CJ) aff'd (1996), 89 O.A.C. 311 and *Hendrich v. Kitchener Public Library Board* (2005), 39 C.C.E.L. (3d) 262 and the Alberta case of *P.C.S. Investments Ltd. v. Dominion of Canada General Insurance Co.* (1996) 37 Alta. L.R. (3d) 38 cited by XL where the courts permitted intervention by a liability insurer in an underlying action. In the Court's opinion, these cases take a different approach than the courts in B.C. because they effectively conclude that an insurer's interest in an underlying action is more than a "commercial interest".

In setting out the background facts, the Court concluded that two different types of D & O insurance were purchased. The first provided coverage to the individual directors and officers. The primary insurer was Federal. National Union Fire Insurance Company of Pittsburgh, PA, XL, and ACE provided excess coverage through excess insurance policies. Those D & O policies did not require the insurers to defend. Rather, they required the insurers to fund the defence of directors and officers on certain conditions (such as pre-approval of defence costs). The other type of policy was issued by XL and known as a "Cornerstone A-Side Management Liability Insurance Policy" (the "Cornerstone policy") provided primary coverage to directors and officers when there was a gap in

coverage in the first group of policies. The Cornerstone policy was also a funding policy, as opposed to a duty to defend policy. XL's obligation was not to unreasonably withhold its consent to settlement and to pay covered defence expenses upon request by the insured.

According to the Court, if coverage existed for the claims made by the Harmac employees against P & T Inc. as a de facto director, it would arise under the Cornerstone policy because of the particular definition of insured in that policy. The Cornerstone policy was silent as to any right XL may have to satisfy its obligation to fund the defence of an insured who was bankrupt by having its coverage counsel defend the underlying claim. Nor did the policy address any right XL may have to intervene or participate as a party in underlying proceedings in order to protect its own coverage interests when its insured was bankrupt.

The Court considered XL's reservation of rights in respect of the claims advanced against P & T Inc to be very broad. (para 96)

Next, the Court noted that P & T was insolvent and that there was no director or officer who was empowered to speak for the company and that PwC's position at this stage of the insolvency proceedings was that it had no interest in the claim of the Harmac employees against P & T Inc.

The Court then looked to XL's conduct leading up to the present application and noted that XL had only recently sought to add itself as a party to the action brought by the Harmac employees, but that it previously declined to involve itself in the proceedings that led up to the determination of the Litigation Protocol. It further pointed to XL's initiated proceedings in the U.S. Bankruptcy Court which had already recognized the B.C. Court as the proper jurisdiction. After the conclusion of a joint hearing conference between the B.C. court and the U.S. Bankruptcy Court, Judge Sontchi of the U.S. court dismissed XL's complaint, stating that the overwhelming reason for the U.S. Bankruptcy Court to abstain from exercising its jurisdiction over XL's complaint was because XL was engaging in forum shopping.

The Court concluded that the law in British Columbia did not permit XL to be added as a party or intervener. XL did not specifically reserve for itself in the Cornerstone policy the right to defend an insured with the choice of its counsel in the event of bankruptcy. The Court further stated that if XL were added as a party or intervener to the litigation, it would be allowed the opportunity to sculpt or "sway" the presentation of the evidence and findings of fact in the underlying action that could vitiate coverage for P & T Inc. as well as the individual directors and officers and that XL's direct participation in the underlying action could prejudice the individual directors and officers. (para 122-129) Accordingly, liability insurers who defend on a coverage reservation must await the outcome of the underlying action. (134)

As to the issue of whether XL should be permitted to defend P & T Inc. with its coverage counsel, the Court held that its "greater concern" was to preserve the integrity of its own process and the administration of justice, and to prevent mischief and impropriety. In its view, there would be an appearance of impropriety to permit XL's coverage counsel to defend the liability claims, given they had been involved in advising XL on the coverage issues. It further held that the notion of

conducting a coverage trial parallel with trial of the underlying action ran contrary to B.C. case law and the approach taken in insurance law decision in Canada and the U.S., stating: “the prohibition against deciding coverage issues before the underlying action is determined is pervasive, and goes so far as to prohibit their consideration on duty to defend applications where an insured has provided a statement which has the effect of vitiating coverage”. (para 143)

In the Court’s view, the only practical reason for XL to seek to defend P & T Inc. by its coverage counsel were a) to use the opportunity to sway the outcome of the liability issues to vitiate coverage; and/or b) to save the expense of paying for two sets of counsel (defence and coverage). With respect to the latter, the Court expressed that insurers who underwrote liability policies routinely retained more than one counsel when coverage was in issue and that it was their rights to do so in situations where they chose to raise coverage issues. (144)

Thus, the Court did not permit XL to defend P & T Inc. with its coverage counsel in the circumstances. It is to be noted that while the B.C. Court of Appeal has granted leave to appeal this decision it is the writer’s (potentially erroneous) understanding that the claim has settled and will not be appealed.

3. ***Saskatchewan Mutual Insurance Company v. Homegrown Advertising Inc.***, 2009 SKQB 358 (CanLII)

Cross-border litigation has also arisen in Saskatchewan in recent years. Saskatchewan Mutual Insurance Company (“SMI”), issued CGL cover to Homegrown Advertising Inc. (“Homegrown”). Homegrown became embroiled in a “blastfax” class action in Illinois. The plaintiff in the underlying action, CE Design Ltd., sued under the Illinois *Telephone Consumer Protection Act*. Illinois courts took jurisdiction because Homegrown transacted business in Illinois which violated the law complained about and sent the unwanted faxes to Illinois residents on Illinois fax machines. A settlement occurred between CE Design, Homegrown and the other defendants, which provided a judgment of \$5 million, on the condition that it would be satisfied only from the proceeds of any insurance policies owned by Homegrown and assigned to CE Design on behalf of the class in the judgment.

CE Design commenced an application to register its judgment in Saskatchewan under the *Enforcement of Foreign Judgment Act*, S.S. 2005, c. E-9.121. Prior to this application, the settlement agreement was approved by the 19th Judicial Circuit Court in Illinois. In a supplementary proceeding to that judgment, CE Design applied to the court for a judgment against SMI, on the basis that the claim represented by the class action was covered under the CGL policy issued by SMI to Homegrown. Judgment against SMI was set aside on the ground that SMI did not have notice of the proceeding. SMI received notice of a second supplementary proceeding in Illinois and SMI applied to the Illinois court to dismiss the second supplementary proceeding on jurisdictional grounds. In Saskatchewan, CE Design now applied for an order that the Saskatchewan court had no jurisdiction over CE Design, and that it had no jurisdiction over the subject of the statement of claim in the matter and that in any event, the Illinois court was a more appropriate forum for hearing the matter. CE Design relied on the provisions of *The Court Jurisdiction and Proceedings Transfer Act*, S.S. 1997, c. C-

41.1. (the “CJPTA”) SMI asserted the opposite, submitting that the Saskatchewan court had territorial competence and that the court was a more appropriate forum.

According to the court, under s. 4 of the CJPTA, only s. 4(e) was relevant. That section provided that a court had territorial competence in a proceeding that was brought against a person only if there was a real and substantial connection between Saskatchewan and the facts on which the proceeding against that person was based. Relevant factors considered by the court under s. 9 of the Act included whether the proceeding concerned contractual obligations and whether the contract was made in Saskatchewan.

The court held that it was important to keep in mind the nature of the action, namely that the action was not about whether Homegrown breached Illinois law by sending out unwanted faxes. Rather, the action was about whether Homegrown had coverage for such conduct under its insurance contract with SMI. In other words, the action would be determined by an interpretation of the insurance contract.

In the court’s opinion, the connection between Saskatchewan and the facts on which the action was based included a) the insurance contract was made in Saskatchewan; b) SMI was a Saskatchewan corporation with its head office in Saskatchewan; c) Homegrown was a Saskatchewan corporation with its head office in Saskatchewan; d) any evidence required relating to the interpretation of the contract, including circumstances of its creation, would involve representatives of the Saskatchewan insurer and Saskatchewan insured, and possible representatives of the Saskatchewan insurance agency.

Under section 9, a real and substantial connection existed. Thus, the court concluded it had territorial competence in the matter.

The court’s consideration of whether to exercise its territorial competence was governed by s. 10 of the Act, which provided that a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state was a more appropriate forum in which to try the proceeding. The factors to consider by a court under this analysis include:

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
- (b) the law to be applied to issues in the proceeding;
- (c) the desirability of avoiding multiplicity of legal proceedings;
- (d) the desirability of avoiding conflicting decisions in different courts;
- (e) the enforcement of an eventual judgment; and
- (f) the fair and efficient working of the Canadian legal system as a whole.

The court noted that four of the five parties to the action were located in Saskatchewan. As mentioned, if witnesses were required with respect to the interpretation of the insurance contract, those witnesses would be from Saskatchewan. The comparative convenience and expense favoured Saskatchewan as the more appropriate forum.

The court found that the law of Saskatchewan was likely to be the law to be applied to the issues in this action. The issues were issues of interpretation of the insurance contract which was made in Saskatchewan, by Saskatchewan persons. In addition, a review of the insurance contract revealed that its subject matter included property in Saskatchewan. The law to be applied favoured Saskatchewan as the more appropriate forum.

The court also found that there was no certainty that the Illinois court would proceed with interpretation of the insurance contract and that the court may conclude that the decision as to granting judgment against SMI in the Illinois class action would await an interpretation of the contract by the Saskatchewan court. Moreover, the prospect of additional steps in enforcement favoured Saskatchewan as the more appropriate forum.

The court found that the fair and efficient working of the Canadian legal system was served by the Saskatchewan court exercising its territorial competence with respect to the action.

In conclusion, the court held that Saskatchewan was the more appropriate forum in which to try the action. The primary reasons for its conclusion was the fact that the action involved the interpretation of a contract made in Saskatchewan between Saskatchewan parties, and that the interpretation would be conducted under Saskatchewan law. Accordingly, the Saskatchewan court refused to decline to exercise its territorial competence over the coverage matter and dismissed CE Design's application.

4. ***Van Breda v. Village Resorts Ltd.***, 2010 ONCA 84 leave to appeal granted [2010] S.C.C.A. No. 174

Despite not being an insurance case, brief reference should be made to the *Van Breda* decision of the Ontario Court of Appeal. Leave was granted to appeal this decision to the Supreme Court of Canada. Arguments were heard last year. No decision has yet been issued.

In this case, the Ontario Court of Appeal clarified, modified and reformulated the test to determine when a court in Ontario can assume jurisdiction against an out-of-province defendant previously set out in *Muscutt v. Courcelles*, [2002] O.J. No. 2128. Justice Sharp, writing for the majority, mentioned that since the 2002 decision of *Muscutt*, a number of developments occurred making it appropriate for the court to consider whether the test should be revisited. Many scholars had written on the subject had expressed disagreement with the *Muscutt* test; there was a perception that the test was unduly complex and that it lacked predictability. (paras. 50-58) After a review of post *Muscutt* case law, scholarly papers and arguments and submissions of counsel, the court indicated that it was possible and desirable to simplify the test.

A new “refined” Muscutt test is briefly described in the following paragraphs. (A concise summary of the full approach is set out by the Court at para 109 of the decision.)

At the first stage, the court should determine whether the claim falls under Rule 17.02 of the Ontario Rules of Civil (with the exception of subrules (h) and (o)) to determine whether a real and substantial connection with Ontario is presumed to exist. The presence or absence of a presumption will frame the second stage of the analysis. If one of those connections is not made out, the burden falls on the plaintiff to demonstrate that, in the particular circumstances of the case, the real and substantial test is made.

The second stage of the analysis requires consideration of the connections between Ontario and the plaintiff’s claim and the defendant, respectively. The remaining considerations should not be treated as independent factors having more or less equal weight but as general legal principles that bear upon the analysis. In summary, the factors to consider are:

- 1) The core of the test: the connection between the forum, the plaintiff’s claim and the defendant;
- 2) Fairness of assuming or refusing jurisdiction;
- 3) The relevance of the involvement of other parties to the suit;
- 4) The court’s willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
- 5) Whether the case is interprovincial or international in nature;
- 6) Comity and the standards of jurisdiction, recognition and enforcement

The Court maintained the distinction between jurisdiction simpliciter and forum non conveniens but reformulated the Muscutt test.

5. Canadian Companies and Insurers in U.S. Courts

Canadian companies and their insurers are also facing new challenges from the conduct of business south of the border. Two major cases were decided by the U.S. Supreme Court last year which dictate the circumstances in which American courts can assert long-arm jurisdiction over Canadian and other foreign companies.

In the companion decisions *J. McIntyre Machinery, Ltd. v. Nicastro* No. 09-1343 and *Goodyear Dunlop Tires Operations S.A. v. Brown*, both decided June 27, 2011, the U.S. Supreme Court set the boundaries applicable to American courts when those courts seek to assert personal jurisdiction over foreign entities.

Most states have statutes which allow their courts to assert personal jurisdiction over out of state and foreign companies to the maximum extent available under the federal constitution (certain states

e.g. New Jersey - - have no long arm statute *per se*, but rather follow a functionally equivalent judicial practice). It has, therefore, fallen to the U.S. Supreme Court over the years to determine what the maximum extent of the federal constitution is in that regard.

The *J. McIntyre* decision pertained to a U.K. manufacturer of machinery. That manufacturer sold machinery to a distributor. The distributor sold the machinery to a company in New Jersey. The plaintiff was injured by the machinery in New Jersey and sought to have the New Jersey Court assert personal jurisdiction over J. McIntyre.

The *Goodyear* decision concerned a bus accident in France which killed two North Carolina teenagers. The bus accident was purportedly the result of the failure of Goodyear tires manufactured in Turkey by a foreign subsidiary of Goodyear. The parents of the teenagers sought to bring their claim in North Carolina, asserting that some of the same tires were also distributed in North Carolina.

In both cases, the U.S. Supreme Court ruled that the state courts could not assert personal jurisdiction over the foreign defendants (though the fact that multiple decisions issued in *J. McIntyre* means that no clear decision was reached in those circumstances).

The Court's decision in *Goodyear* was premised on the existing rule, first set down in *International Shoe Co. v. Washington* 326 U.S. 310 (1945), that before personal jurisdiction can be asserted over a foreign defendant, that defendant must have "continuous and systematic" contacts with the jurisdiction such that the defendant can properly be said to have "purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws".

The Court's *Goodyear* decision ruled that simply putting a product into the "stream of commerce", and having that product end up in the forum state was insufficient contact to justify the assertion of jurisdiction. In this regard, the Court settled a long debate which started with its 1987 decision in *Asahi Metal Industry Co. v. Superior Court* 480 U.S. 102 in which the "stream of commerce" issue was first raised. In *Asahi* four Justices suggested that personal jurisdiction would be appropriate where it was "foreseeable" that a manufacturer's product would end up in the United States. No majority opinion was reached in *Asahi*, and so the "stream of commerce" analysis remained as a potential basis for the assertion of jurisdiction. *Goodyear* states clearly that the fact that a manufacturer's product ended up in the United States can, in the absence of additional evidence, no longer be a valid basis under which to hale foreign defendants into U.S. courts.

The Court's decision in *J. McIntyre*, however, demonstrates that the stream of commerce argument still has legs. While the judgment is a plurality decision, when each Justice's views are assessed, a majority of the Court can be seen to have rejected the argument that jurisdiction could be premised on a manufacturer's mere awareness that its products might be sold in an American jurisdiction. Five of the nine Justices found that there remained a possibility that appropriate facts in a different case could warrant the application of a stream-of-commerce theory to assert jurisdiction over a non-resident manufacturer, if there were sufficient indicia of minimum contacts with the forum.

Notably, Justice Kennedy joined by three other Justices rejected “fairness” as a guiding principle in the analysis. The jurisdiction analysis is, to the four Justices, premised on authority, not fairness. Did the defendant in question target jurisdiction seeking to assert jurisdiction, such that the defendant can be said to have “purposefully availed” itself of the protection and benefits of the forum state? In a strange-bedfellows concurrence, Justices Breyer and Alito agreed with the result, but not the analysis suggesting that it did not sufficiently account for modern electronic/internet commerce.

Justices Kagan and Sotomayor joined Justice Ginsberg’s dissent. Justice Ginsberg criticised the plurality for ignoring fairness and reason in their decision. In her opinion, it was reasonable for New Jersey to assert jurisdiction over J. McIntyre in the circumstances, because J. McIntyre had to know that by using the services of a distributor, its products would enter the U.S. market. J. McIntyre should have reasonably expected that it could be sued in any state court in such circumstances.

Thus, personal jurisdiction analysis must address the defendant’s particular conduct and knowledge (not foreseeability as per *Asahi*) that its product would end up in a particular U.S. jurisdiction.

What does this mean for Canadian insurers and insureds?

Well organized and careful Canadian policyholders can benefit from this ruling by carefully structuring their organization and distribution system to mirror that of J. McIntyre. Such a structure should insulate them from facing liability directly in U.S. Courts. According to the Kennedy decision, a strength of the Goodyear structure was that it did not target any state in particular. While it may have suspected, or even known, that its products would end up in New Jersey, it did not particularly target New Jersey: “[a]t no time did petitioner engage in any activities in New Jersey that reveal an intent to invoke or benefit from the protection of its laws.” J. McIntyre had not targeted New Jersey for its products.

While J. McIntyre seems to offer a safe harbour for foreign companies, in practice, it may be difficult for policyholders properly structure their cross-border ventures. To avoid U.S. state courts, the policyholder must avoid targeting specific U.S. states. Once evidence is available demonstrating that the policyholder is seeking business in the target state, it has purposefully availed itself of the protections of that state. Even functioning through an independent distributor may not protect a policyholder from being haled into a state court if it can be shown that the policyholder was targeting the forum state as a sales venue.

Where policyholders may enjoy a safe harbour from American justice, it is increasingly apparent that insurers will not. The question as to whether a defendant has “purposefully availed” itself of the protections of a state is, in essence, a factual one. Courts in a number of jurisdictions have found that insurers providing Canada/U.S. or “worldwide” policy territory coverage have purposefully availed themselves of each American jurisdiction.

On its face, the typical insurance policy providing coverage in the U.S. might not seem different from the J. McIntyre structure which did not target any specific U.S. state. J. McIntyre was, of course, a plurality decision offering no binding rule. Because of this, American courts are still able to

fashion their own rules within existing precedent. It is this uncertainty which has enabled American courts to draw a factual distinction between product manufacturers and insurers:

Unlike the automobile sellers in *World-Wide Volkswagen*, automobile liability insurers contract to indemnify and defend the insured for claims that will foreseeably result in litigation in foreign states. Thus litigation requiring the presence of the insurer is not only foreseeable, but it was purposefully contracted for by the insurer. Moreover, unlike a product seller or distributor, an insurer has the contractual ability to control the territory into which its “product -- the indemnification and defense of claims -- will travel.

6. ***Farmers Ins. Exchange v. Portage La Prairie Mut. Ins. Co.*** 907 F.2d 913 at 914 (9th Cir. 1990)

In essence, if an insurer wishes to avoid suit in a particular jurisdiction, it should exclude that jurisdiction from its policy territory.

If Justice Kennedy’s view ultimately prevails it will no longer be open to American courts to suggest that foreseeability is a relevant part of the analysis in respect of jurisdiction over Canadian insurers as the 9th Circuit did in *Farmers Ins.*. If the foreseeability analysis falls by the wayside, it may be open to question why an insurance policy providing coverage for a policyholders in the U.S., but in no state in particular, should be any different from J. McIntyre’s machinery. An additional interesting question posed by the *J. McIntyre* decision is whether an insurer can be subject to personal jurisdiction in a particular state because of its policy territory clause, while its policyholder (structured like J. McIntyre) is not.

For the time being, however, it appears that Canadian insurers can generally expect to be brought into the courts in which their policyholders are facing liability. It is open to question whether Canadian insurers and policyholders are increasingly going to face the situation which arose in the *Teck Cominco Metals Ltd. v. Lloyd’s Underwriters*, 2009 SCC 11 case. There the parties found themselves engaged in parallel proceedings where courts on both sides of the border declined to cede jurisdiction to the other.

III. ***COVERAGE IMPLICATIONS ARISING OUT OF PRIVACY TORTS***

1. **Introduction**

The Ontario Court of Appeal's January decision in *Jones v. Tsigie* 2012 ONCA 32 recognized the tort of "Intrusion upon Seclusion" as a cause of action in Ontario. This decision will have significant implications for policyholders and insurers.

Recognition of the tort is new in Canadian law. However, American jurisdictions have recognized the existence of such a cause of action for more than 100 years. The American recognition of privacy torts has influenced the drafting of Canadian liability policies. The Personal and Advertising Liability section of many Commercial General Liability policies extends coverage to "invasion of a right of privacy". The authors anticipate that Canadian insurers will face, with increasing frequency, coverage demands in respect of underlying litigation. Policyholders will with increasing frequency claim that an underlying matter alleges an "intrusion upon seclusion" or analogous privacy tort. We consider in this section of the paper American jurisprudence treating the availability or not of CGL coverage for so-called privacy offences. However, we first review the recent Ontario decision.

2. ***Jones v. Tsigie***

The *Jones v. Tsigie* case concerned the activities of a Bank of Montreal employee, Winnie Tsigie. Ms. Tsigie began a relationship with the Plaintiff's former husband. She became embroiled in a financial dispute with him. Over the course of about four years Ms. Tsigie accessed the bank records of the Plaintiff no less than 174 times, stating she wanted to determine if he was making child support payments.

The Plaintiff asserted that Ms. Tsigie's conduct "irreversibly destroyed" her privacy and confidentiality interest in her banking information. Justice Robert Sharpe reviewed the history of privacy torts in Canada, the United States and Commonwealth Jurisdictions, before determining that it was appropriate to recognize a broadly expressed tort in line with American law. Expressly motivated by the Court's sense that the facts presented a situation that "cried out for a remedy", Sharpe J.A. wrote at paragraphs 70 and 71 of his reasons:

I would essentially adopt as the elements of the action for intrusion upon seclusion the *Restatement (Second) of Torts* (2010) formulation which, for the sake of convenience, I repeat here:

One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.

The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to

the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

Having broadly construed the tort, the Court expressed concern over having created the opportunity for a flood of litigation from opportunist plaintiffs. It may be that this concern motivated the Court to comment on limits to the scope of the tort, and establish limits to the damages available as a remedy. In respect of limitations on the scope of the tort, the Court wrote at paragraph 72:

These elements make it clear that recognizing this cause of action will not open the floodgates. A claim for intrusion upon seclusion will arise only for deliberate and significant invasions of personal privacy. Claims from individuals who are sensitive or unusually concerned about their privacy are excluded: it is only intrusions into matters such as one's financial or health records, sexual practices and orientation, employment, diary or private correspondence that, viewed objectively on the reasonable person standard, can be described as highly offensive

Not only were damage awards considerably circumscribed by the Court, guidance was offered at paragraph 87 of the reasons in respect of the manner of determination of such awards:

In my view, damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest but sufficient to mark the wrong that has been done. I would fix the range at up to \$20,000. The factors identified in the Manitoba Privacy Act, which, for convenience, I summarize again here, have also emerged from the decided cases and provide a useful guide to assist in determining where in the range the case falls:

1. the nature, incidence and occasion of the defendant's wrongful act;
2. the effect of the wrong on the plaintiff's health, welfare, social, business or financial position;
3. any relationship, whether domestic or otherwise, between the parties;
4. any distress, annoyance or embarrassment suffered by the plaintiff arising from the wrong; and
5. the conduct of the parties, both before and after the wrong, including any apology or offer of amends made by the defendant.

Applying these factors to the facts before the Court, Justice Sharpe determined that a \$10,000 award would be appropriate.

3. TYPES OF PRIVACY INTERESTS

Prior to reviewing the coverage jurisprudence, we briefly identify the legal foundation of the privacy interests which underlie the formulation in the Restatement (Second) of Torts (now forming the basis of the tort in Ontario).

Scholars trace the modern American invasion of privacy tort to the writings of law partners Samuel Warren and (future U.S. Supreme Court Justice) Louis Brandeis. Their Harvard Law Review Article *The Right to Privacy*¹⁴ outlined the evolution of the law towards recognition of the private sphere, and a privacy tort to defend it. Their conceptualization would reserve to the individual the right to limit the access of others to the individual's personal affairs. They wrote:

Thus, in the very early times, the law gave a remedy only for physical interference with life and property, for trespass vi et armis. Then the "right to life" served only to protect the subject from battery in its various forms; liberty meant freedom from actual restraint; and the right to property secured to the individual his lands and his cattle. Later, there came a recognition of a man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life — the right to be let alone; the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession — intangible, as well as tangible

The tort they proposed would create legal protection for the individual to decide "whether that which is [theirs] shall be given to the public".¹⁵

In 1960, scholar and Reporter for the *Second Restatement on Torts*, William Prosser identified four distinct forms of invasion of privacy, which were widely accepted by American courts:

- (i) intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
- (ii) public disclosure of embarrassing private facts about the plaintiff;
- (iii) publicity which places the plaintiff in a false light in the public eye; and
- (iv) appropriation, for the defendant's advantage, of the plaintiff's name or likeness.

In 2010 § 652B of the *Restatement (Second) of Torts*, which reflects tort protection of privacy rights, was updated to better reflect the modern expansion in potential privacy violations. The formulation is virtually identical to that adopted by Justice Sharpe. *Restatement* § 652B now states:

One who intentionally intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the invasion would be highly offensive to a reasonable person.

Canadian law is not devoid of torts relating to invasion of privacy. Justice Sharpe noted a series of judicial decisions protecting the individual's right to privacy: *Saccone v. Orr* (1981), 34 O.R. (2d) 317 (Co. Ct.), (recording of a private conversation without the knowledge or consent of the plaintiff); *Roth v. Roth* (1991), 4 O.R. (3d) 740 (Gen. Div) (interference with the plaintiffs' ability to use and

¹⁴ 4 Harv. L. Rev 193 (1890).

¹⁵ See Also: Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 Cal. L. Rev 1804 (2010).

enjoy their cottage property); *Athans v. Canadian Adventure Camps Ltd.* (1977), 17 O.R. (2d) 425 (H.C.J.) (reproduction of a distinctive photograph of the plaintiff water skiing).

Further, some provinces, for example British Columbia, Manitoba, Saskatchewan, and Newfoundland and Labrador, have enacted statutes which address privacy.

4. SOME IMPLICATIONS OF *JONES V. TSIGE*

It is clear that modern concepts of privacy, and more importantly, the concept of what constitutes a violation of privacy, have expanded beyond the fixed parameters of Prosser's four forms of privacy violations. Canadian tort law has not kept pace. Justice Sharpe's review of the Canadian case law which employed tort law to protect individual privacy rights demonstrates how narrow that tort protection has traditionally been.

The Ontario Court of Appeal's decision broadens the reach of the tort considerably. A plaintiff must establish only three broadly drawn elements:

- the defendant's conduct must be intentional or reckless;
- the invasion, without lawful justification, the plaintiff's private affairs or concerns; and
- a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish

Policyholders and insurers will watch with interest as each of these factors is reviewed by courts, and the scope of each is determined. Perhaps none will be so closely watched as the development of the term "private affairs or concerns". What constitutes "private affairs and concerns"? The *Jones* decision clearly demonstrates that bank accounts fall within the scope of the term. What implications does the term hold for social media sites? Can a Facebook page or Twitter account, where a person may have hundreds or thousands of "friends" or "followers", constitute "private affairs or concerns"? Does spam email constitute an "invasion" of a person's privacy? What about taking a picture of a neighbour sunbathing in their back yard?

Despite Justice Sharpe's effort to provide examples of the Court's intended limits of the term, the scope of "private affairs and concerns" is unlikely to be capable of specific restriction. One of the United States' leading thinkers on privacy, Donald J. Solove recently published an article in the *Chronicle of Higher Education* in which he described privacy as a "plurality of different things":

Most attempts to understand privacy do so by attempting to locate its essence—its core characteristics or the common denominator that links together the various things we classify under the rubric of "privacy." Privacy, however, is too complex a concept to be reduced to a singular essence. It is a plurality of different things that do not share any one element but nevertheless bear a resemblance to one another. For example, privacy can be invaded by the disclosure of your deepest secrets. It might also be invaded if you're watched by a peeping Tom, even if no secrets are ever revealed. With the disclosure of secrets, the harm is that your concealed information is spread to

others. With the peeping Tom, the harm is that you're being watched. You'd probably find that creepy regardless of whether the peeper finds out anything sensitive or discloses any information to others. There are many other forms of invasion of privacy, such as blackmail and the improper use of your personal data. Your privacy can also be invaded if the government compiles an extensive dossier about you.

Privacy, in other words, involves so many things that it is impossible to reduce them all to one simple idea.¹⁶

A further concern is the inclusion of “reckless” within the scope of conduct which can trigger the tort. In what circumstances will loss of financial information from a financial institution, health related information from a health care provider, educational information from schools, colleges and universities, or electronic usage information from internet providers constitute reckless conduct? If a bank has insufficient firewall protection on its electronic systems, has it been “reckless” when it gets hacked? Is a hospital “reckless” when medical records are found in a dumpster? In such circumstances where the victims may number in the hundreds or thousands, the Court’s limitation on damages to \$20,000 may not be as much protection as it seems on first review.

5. **COVERAGE IMPLICATIONS ARISING OUT OF THE TORT OF INTRUSION UPON SECLUSION**

These concerns are particularly acute for insurers and their policyholders. Intrusion upon Seclusion considerably broadens the potential scope of liability faced by each. The American experience is informative of what Canadian insurers and policyholders may expect.

(a) *Publication or Making Known Material that Violates a Person’s Right of Privacy*

The narrow traditional view of actionable invasion of privacy was reflected in the coverage contained in Canadian policy forms. Policies issued in Canada, often provide very circumscribed protection to their policyholders for invasion of privacy interests. The coverage found in the IBC Form 2100 is limited to “oral or written publication, in any manner, of material that violates a person’s right of privacy”.

“Publication” (i.e. making information known to a third person) is not an element of the tort. There is a great deal of actionable conduct which will not fall within the scope of the tort. By way of example, Ms. Tsige’s conduct almost certainly would not have fallen within this coverage. This policy structure or limitation may be of concern to policyholders who may have considerable uninsured potential liability.

Insurers, none-the-less should be concerned about this judicial development for numerous reasons. First, the duty to defend is triggered when an allegation, if proven true, would potentially fall within the scope of the coverage provided. Reckless conduct can trigger personal injury coverage (as, in

¹⁶ Daniel J. Solove: *Why Privacy Matters Even if You Have ‘Nothing to Hide’*; The Chronicle of Higher Education, May 15, 2011.

some circumstances, can intentional conduct). The cost of defence of tort invasion litigation has proven significant in U.S. jurisdictions.

Further, one need only look to the American experience to find examples of claims which could or are advocated to fall within the scope of coverage. Leaving aside defence cost issues, tort invasion claims have generated significant coverage litigation in the United States. A claim that a policyholder sent unsolicited emails to an individual's private email account could conceivably trigger coverage. Sending an email would be intentional (satisfying the first factor); a private email account is arguably the individual's private affair or concern (satisfying the second element); and depending on the content of the email, a person may regard the invasion as being "highly offensive" and "distressing" (the third element). By sending the email to the recipient, the sender is arguably "publishing" the email. Coverage is potentially triggered. A demand for cover may well be asserted.

One need look no further than the "Blast Fax" claim litigation which followed, in the United States, passage of the *Telephone Consumer Protection Act* ("TCPA") passed by Congress in 1991. The TCPA forbids sending unsolicited faxes from being sent to consumers.

The policyholder, who finds itself the subject of a Blast Fax suit, typically tenders the claim to its CGL insurer. It is submitted that defence and, should liability be imposed, indemnity is payable pursuant to the Personal and/or Advertising Injury section of the CGL policy. In particular it is typically submitted that the communications constitute a violation of a right of privacy. The communication is often said to violate a right to seclusion (intrusion upon the plaintiff's seclusion or solitude).

A person's right to seclusion is infringed when he or she is disturbed by an unwanted interruption. When an unsolicited fax arrives, the person who receives it has had his or her right to seclusion breached.

The right of a policyholder, named as a defendant in the Blast Fax suit, to coverage is dependent, in the first place, upon the precise wording of the CGL policy. For example, Courts have generally interpreted the words "making known to any person or organization written or spoken materials that violates an individual's right of privacy" differently from "oral or written publication, in any manner, of material that violates a person's right of privacy". The former offence definition has been held generally not to trigger a coverage obligation. The latter phrase has frequently been held to require defence of a Blast Fax claim. Of interest, the latter language is generally employed in the 2005 revision of the IBC Form 2100. In addition the outcome of a coverage demand is frequently dependent upon the Court's determination of whether communication of an unsolicited Blast Fax violates a "right to seclusion" or "right to secrecy".

This distinction can be seen in review of two American cases: *Hooters of Augusta Inc. v. American Global Ins. Co.*¹⁷ and *Cynosure, Inc. v. St. Paul Fire & Marine*¹⁸.

¹⁷ No. 04-11077, 2005 U.S. dist. LEXIS 26765 (11th Cir. Dec. 6, 2005).

In *Hooters of Augusta*, the Hooters restaurant chain in Georgia was sued for having bought advertising space on flyers faxed to businesses in Augusta Georgia. The fax transmissions violated the TCPA, exposing Hooters to a trebled damages fine of \$1500 per fax (the ultimate fine amounting to more than \$11,000,000). The definition of personal injury in the Hooters policy included “oral or written publication of material that violates a person’s right to privacy”. The 11th Circuit determined that the claim fell within the scope of the personal injury coverage:

American Global claims, however, that even if the TCPA protects privacy rights, the insurance contract’s reference to “oral or written publication of material that violates a person’s right to privacy” does not cover Hooters’s conduct because there was no act of “publication.” American Global first says that an intrusion into the private sphere fundamentally contradicts the very notion of “publication,” which suggests a public act of dissemination of information. This argument simply conflates two distinct perspectives. The act of transmitting an unsolicited fax indeed involves a public act by the sender. But the act is thought to violate the recipient’s privacy. There is no contradiction. The conduct by which Hooters was found to violate the TCPA, and for which it now seeks coverage under the insurance policy, is using a fax machine “to send an unsolicited advertisement.”

American Global also argues that we should interpret the term “publication” in a narrow, legal sense, as an element of three privacy-related torts: public disclosure of private facts, portrayal of a plaintiff in a false light, and misappropriation. As we have noted, though, Georgia law suggests that a reviewing court must consider both the ordinary and legal meanings of a term in an insurance contract and, when faced with ambiguity, adopt the interpretation that favors greater coverage. While it may be reasonable to read the terms “publication” and “privacy” in a technical legal sense, it is at least equally plausible to read both terms in their ordinary non-technical sense. Plainly, Georgia law directs us to adopt the interpretation that favors greater coverage.

Hooters’s conduct amounted to an act of “publication” in the ordinary sense of the word. American Global cites three definitions of the term “publish” found in Webster’s Ninth New Collegiate Dictionary: “to make generally known,” “to make public announcement,” and “to place before the public: disseminate.” Webster’s Ninth New Collegiate Dictionary 952 (1984). Hooters purchased advertising space on weekly fliers disseminated by fax to nearly 8,000 businesses. This course of conduct squarely fits at least the third of American Global’s definitions and arguably fits the other two as well. Notably, the dictionary that American Global cites also includes a fourth definition of “publish” not mentioned in the appellants’ brief: “to produce or release for publication; specif[ically] : print.” *Id.* Hooters’s conduct fits this definition even more closely

This decision stands in contrast to the 1st Circuit’s decision in *Cynosure* (notably authored by Former U.S. Supreme Court Justice David Souter, sitting by special appointment). *Cynosure*, like Hooters before it, was alleged to have sent unsolicited advertising faxes to consumers in violation of the TCPA. *Cynosure*’s policy with St. Paul, however, defined the covered personal injury coverage

¹⁸ 2011 U.S. App. LEXIS 9713 (1st Cir. May 12, 2011).

offence as “making known to an person or organization covered material that violates a person’s right of privacy”.

Justice Souter determined that the claim did not fall within the scope of coverage. He noted that the effect of the “making known” formulation was different from the “publication” formulation . The structure of the “making known” form implies that the content of the transmission must be reviewed in order to determine whether or not the communication included disclosure of private information. If the material was not of a confidential nature, violating the person’s privacy, coverage was not available:

By distinguishing “person” and “organization” and thus providing that a covered advertising injury occurs when an insured makes known to an “organization” some material that violates a “person’s” right of privacy, the policy provision describes a communication to a recipient (organization) that violates the right of a non-recipient third party (person). Since a mere intrusion into the recipient’s repose does not violate any right of a non-recipient, in practical terms this means that the communication to the recipient violates the non-recipient’s right of privacy only if it is a communication about the non-recipient. In order to give rise to tort liability for violating the third party’s right of privacy, the material communicated must therefore reveal some fact the third party reasonably wishes to keep others from being told.

Policyholders and insurers should look to their forms to determine the scope of coverage provided.

(b) *Intrusions on a Plaintiff’s Seclusion or Solitude*

Solitude or seclusion has been a hallmark of the right to privacy in American law, and is a central issue in coverage litigation. The right of privacy has, in some jurisdictions, been very broadly construed. For example in *St. Paul Fire & Marine Ins. Co. v. Green Tree Financial Corp.*¹⁹ Texas, mobile home purchasers made claims against the insured alleging wrongful debt collection, negligence, and a violation of legislation prohibiting deceptive trade practices. The Court held that the purchasers’ allegations focusing upon the insured’s placement of numerous rude and abusive telephone calls to them and to their family members potentially stated a cause of action for invasion of privacy. The CGL policy at issue provided personal injury coverage for “written or spoken material made public which violates an individual’s right of privacy”. The abusive phone calls violated a right of seclusion or solitude.

However, policyholders have been frequently unsuccessful in establishing that circumstances in underlying litigation are actually based on privacy torts.

In *Nova Casualty Co. v. Able Construction*²⁰ the principal of a developer/contractor filed restrictive covenants on lots on which a home was built. The home was then sold to the plaintiffs. The plaintiffs then began to operate a psychotherapy business from the home. Subsequently, the

¹⁹ 249 F.3d 289 (C.A.5 (Tex.) 2001).

²⁰ 983 P.2d 575 (Utah 1999).

architectural committee of the subdivision informed the plaintiffs that restrictive covenant barred the operation of the psychotherapy business and demanded that they cease running it. The plaintiffs refused, claiming that the developer/contractor principal had assured them that the subdivision's restrictive covenants would allow them to operate the psychotherapy business from their home. The architectural committee then proceeded to file an action against the plaintiffs. A Court ordered them to stop operating the business from their home. The plaintiffs sued the developer/contractor for misrepresentation. The developer/contractor, seeking coverage under its CGL policy, argued that the misrepresentation alleged against them fell within the concept of invasion of privacy. The plaintiff homeowners were not able to conduct themselves "in a private manner" in their home. The alleged misrepresentation had led to a Court order requiring them to alter their lifestyle within their home. There was a privacy infringement. The Court held that coverage was not available to the developer/contractor. Specifically the underlying allegations did not fall within the advertising injury concept of "oral or written publication of material that violates a person's right of privacy". To find that the misrepresentation allegations fell within the privacy right would be to expand the definition of invasion of privacy beyond recognition.

*Allstate Ins. Co. v. Dana Corp.*²¹ the liability policy in question covered injury arising out of "invasion of rights of privacy". The insured brought an application for declaratory judgment seeking coverage in connection with allegations that it had permitted the entry of contaminants onto the underlying plaintiff's property. The contaminants allegedly violated the plaintiff's right of seclusion thus triggering Personal Injury coverage. The Court held that the invasion of a plaintiff's right to privacy takes the form of intrusion upon the occupants "physical solitude or seclusion as by invading his home or conducting an illegal search". The entry of contaminants onto the plaintiff's land did not constitute an invasion of privacy of the kind for which coverage was to be provided under the policy. The Court noted that coverage would not have been provided if the insured had been alleged to have launched a missile onto the plaintiff's property.

In *Corn Ins. PLC v. Valsamis, Inc.*²² the privacy provision in question provided coverage for injury arising from a "publication utterance ... in violation of an individual's privacy". Predicting the evolution of the *Restatement*, the Court held that in order for one to state a claim amounting to an invasion of the right to privacy on the basis of "intrusion", there must have been "an intentional intrusion upon the solitude or seclusion of another or his private affairs or concerns that are highly offensive to a reasonable person". The Court took the position that this type of invasion of privacy "is generally associated with either a physical invasion of a person's property or eavesdropping on another's conversation with the aid of wiretaps, microphones or spying". Since the underlying plaintiff made no such allegation in her complaint, alleging only that offensive comments and inappropriate advances had been made towards her, a cause of action for invasion of privacy had not been made out under Texas law. There was no coverage under the CGL policy for personal injury arising out of a publication or utterance in violation of an individual's right to privacy.

²¹ 759 N.E.2d 1049 (Ind. 2001).

²² 106 F.3d 80 (C.A.5 (Tex) 1997).

In *Allstate Ins. Co. v. Ginsberg*²³ an employer sought coverage under the Personal Injury section of the CGL policy. The employer was accused by the employee of sexual touching and sexually aggressive comments. The policyholder submitted that such conduct fell within the invasion of privacy offence. The Court held that the allegations did not fall within any of the four enumerated privacy categories. In particular there was not a claim advanced alleging intrusion of a right of seclusion or solitude. The offence required evidence of intrusion into a place for which there is a reasonable expectation of privacy. Such "place" does not include a body part. Coverage was denied to the employer.

(c) *Public Disclosure of Embarrassing Private Facts About the Plaintiff*

Policyholders have also sought coverage, under the privacy offence, alleging that the underlying allegations fall within the privacy category of public disclosure of embarrassing private facts.

In *Marlean v. Truck Ins. Exchange*²⁴ the CGL policy contained a typical personal injury privacy offence. Specifically the policy stated that personal injury arising from "oral or written publication of material that violates a person's right to privacy" constituted a personal injury offence. The policyholder was alleged to have intentionally inflicted emotional distress upon the plaintiff. The policyholder submitted that it was entitled to a defence under the personal injury section of the CGL policy. Verbal statements constituted a public disclosure of private facts about the plaintiff. The verbal disclosure also painted the plaintiff in a "false light". The Court dismissed the policyholder's claim for coverage. The privacy category in question requires that the facts disclosed be wrongful and false. The underlying litigation did not allege that the statements said to have been communicated by the policyholder were in fact false or wrong.

In *Ananda Church of Self Realization v. Everest Nat. Ins. Co.*²⁵ the policy in question provided coverage for personal injury arising out of "[o]ral or written publication of material that violates a person's right of privacy". The underlying litigation involved allegations of trespass onto private property and review of private documentation. The policyholder sought coverage under the personal injury section of the CGL policy. After listing the four violations of privacy actionable under California law, the Court held that only one, public disclosure of private facts, was covered by the policy in question. The Court held:

[The language of the coverage provision], which we find clear and unambiguous, covers only oral or written publications which violate a plaintiffs right to privacy. Allegations of privacy intrusion, such as placing the plaintiffs under surveillance, trespassing onto their property, and stealing or reading private documents are not publications, and thus are not even potentially covered by the policy.

A layperson reading [the coverage provision in question] would have no reasonable expectation that its coverage extended to privacy claims not involving publication or disclosure of private facts.

²³ 351 F.3d 473 (C.A. 11 (Fla.) 2003).

²⁴ 37 P.3d 148 (Or. 2001).

²⁵ 2003 WL 205144 (Cal.App. 3 Dist 2003).

In *Lextron, Inc. v. Travelers Cas. and Sur. Co. of America*²⁶ the insured was a veterinary products distributor. The insured's president sued the CGL insurer for breach of contract and bad faith for refusing to defend an action brought against the company by one of their customers. The customer complained of the sale of defective vaccines. The customer alleged, in retaliation, the insured president had attempted to persuade a bank to call the customer's loans immediately. The president suggested if it did not do so, the customer could do harm to the bank. The privacy offence was defined to include "[o]ral or written publication of material that violates a person's right to privacy". The Court held that because the customer alleged that the president only "publicized" his opinion to one person, the bank's representative, the allegations in question failed to satisfy the breach of privacy requirement. The customer's private matters were not sufficiently publicized. There was not a claim advanced respecting another's private life.

(d) *Claims for Employment Discrimination or Sexual Harassment*

Innovative policyholders' counsel have endeavoured to secured coverage under the invasion of privacy offence for claims involving employment discrimination or sexual harassment. In *Transamerica Ins. Co. v. KMS Patriots, L.P.*²⁷ the plaintiff in the underlying action complained of alleged discriminatory comments made by a superior. The policyholder sought coverage under its CGL policy alleging that the conduct fell within an invasion of privacy offence. The Court held that the comments identified in the pleading did not amount to "unreasonable, substantial, or serious interference" with the employee's right of privacy, hi the circumstances the statutory definition of invasion of privacy could not be satisfied. There was no coverage entitlement.

In *Maine State Academy of Hair Design, Inc. v. Commercial Union Ins. Co.*²⁸ an employee brought a sexual harassment suit against her employer. The employee alleged that her employer negligently inflicted severe emotional distress through its extreme and outrageous conduct and discriminatory actions. As well, the employee lost her professional reputation. The employer sought coverage under a CGL policy which defined the personal injury offence as "[o]ral or written publication of material that violates a person's right to privacy". The Court determined that the insurer was obligated to defend. The allegations potentially fell within the invasion of privacy offence.

In *Fieldcrest Cannon, Inc. v. Fireman's Fund Ins. Co.*²⁹ the Court held that allegations of intimidation and harassment contained in a sexual discrimination and retaliatory discharge action brought by an employee did not constitute personal injury arising out of a "publication or utterance in violation of an individual's right of privacy". Thus the allegations did not satisfy the invasion of privacy requirements in the jurisdiction issue.

²⁶ 267 F.Supp.2d 1041 (D.Colo. 2003).

²⁷ 52 Mass.App.Ct. 189 (2001).

²⁸ 699 A.2d 1153 (Me. 1997).

²⁹ 124 N.C. App. 232 (1996).

In *Cornbill Ins. PLC v. Valsamis, Inc.*³⁰, it was held that, under Texas law, a claim of sexual harassment did not constitute a "publication or utterance ... in violation of an individual's privacy". Coverage was not available under the privacy offence of the policy in question.

In *Owners Ins. Co. v. William Benjamin Trucking, Inc.*,³¹ the CGL policy in question defined personal injury as injury arising out of, among other things, the "[o]ral or written publication of material that violates a person's right of privacy". The Court stated that the plaintiff employee did not allege that the employer had invaded his privacy. Rather, the plaintiff merely alleged that the actions of the employer constituted "an outrageous invasion of [the plaintiff's] personal rights". The plaintiff had not amended his complaint to state which personal rights were violated by the employer or to state clearly that the employer had invaded his rights to privacy. The Court held that the plaintiff's Complaint did not allege a personal injury as defined in the relevant policy.

(e) *Inducing Others to Violate Another's Right of Privacy Not Covered*

In *Butts v. Royal Vendors, Inc.*,³² it was held that allegations that an employer had induced a physician to breach his fiduciary duty towards one of the employer's employees did not fall within personal injury coverage for "[o]ral or written publication of material that violates a person's right of privacy". The Court found that in order for coverage to be available pursuant to this provision, the employee would have had to allege that the employer published material that invaded the employee's privacy. However, a fair reading of the employee's complaint suggested that the employer induced a third party physician to publish material that violated the employee's right of privacy. As the complaint did not allege that the employer itself published the material, coverage was not available.

(f) *Coverage Available Only for Violations of Right to Privacy of Natural Persons, Not Organizations*

In *Fibreboard Corp. v. Hartford Accident & Indemnity Co.*³³ the Court held that an organization does not enjoy privacy rights:

[W]e concur with Hartford that the plaintiffs in the underlying cases have no protectable privacy interest because they are corporations, partnerships and public entities, not natural persons. "The right protected by the action for invasion of privacy is a personal right, peculiar to the individual whose privacy is invaded." (Rest.2d Torts, § 6521, com. a, at p. 403.) "A corporation, partnership or unincorporated association has no personal right of privacy." (*Id.*, com. c, at p. 403.) Therefore, as a matter of law the plaintiffs pursuing the underlying claims cannot state a cause of action for invasion of privacy.

³⁰ 106 F.3d 80 (C.A.5 (Tex) 1997).

³¹ 2005 WL 1398836 (Ohio App. 9 Dist. 2005).

³² 202 W.Va. 448 (1998).

³³ 16 Cal.App.4th 492 (Cal.App. 1 Dist 1993).

In *Heritage Mut. Ins. Co. v. Advanced Polymer Technology, Inc.*,³⁴ the insured argued that the plaintiff company's allegations of invasion of privacy were covered as injury arising from "oral or written publication of material that violates a person's right of privacy". The Court did not agree. The Court's reasoning was based in part on its conclusion that coverage for invasion of the rights of privacy under the insurance policy in question applied only where the privacy rights at issue were those of an individual and not of an organization.

In *Ananda Church of Self Realization v. Everest Nat. Ins. Co.*,³⁵ the relevant invasion of privacy provision provided coverage for personal injury arising out of "[o]ral or written publication of material that violates a person's right of privacy". The Court refused to find coverage in relation to the publication of facts embarrassing to a law firm because "neither a law firm nor any other business entity possesses a cause of action for violation of the right of privacy", since such right is vested exclusively in natural persons.

The Court added that although the two individual plaintiffs had a right to privacy, none of the documents stolen could have disclosed shameful facts about the private life of either of them because they were all "law firm documents" which revealed only "confidential attorney-client communications and other private information in their case files ..." It was stressed that the documents were firm documents stolen from the firm's business premises and pertaining to internal affairs of the firm. In the opinion of the Court, any disclosure of these documents to others could not have revealed "truthful but embarrassing private facts" about either individual plaintiff's past, much less facts which the average person would find offensive or objectionable.

IV. **CONCLUSION**

Canadian Courts have not frequently been required to consider the availability or not of coverage for invasion of privacy. That situation appears to be about to change. Canadian policyholders face the potential of suits based on the new tort of intrusion upon seclusion. Canadian insurers can, in turn, expect to face insurers can anticipate demands for coverage focused on the right of privacy offence.

Review of American jurisprudence suggests that the present IBC 2005 CGL form makes use of relatively broad offence language. Such language leaves open the question of whether innovative policyholder arguments, particularly in respect of the defence obligation, will trigger coverage under the right of privacy offence. Query whether this scope of this personal injury offence requires further "refinement" intended to limit the extent to which coverage may be available, or re-evaluation of the premiums charged for provision of such coverage.

³⁴ 97 F.Supp.2d 913 (S.D.Ind. 2000).

³⁵ 2003 WL 205144 (Cal.App. 3 Dist 2003).