CITATION: Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada, 2022 ONSC 12
COURT FILE NOs.: CV-21-666020
CV-21-665931
CV-21-664805
DATE: 20220104

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
VALE CANADA LIMITED (f/k/a INCO LIMITED, f/k/a INTERNATIONAL NICKEL COMPANY LIMITED), VALE JAPAN LIMITED, PT VALE INDONESIA TBK, AND VALE EUROPE LIMITED Plaintiffs	*Christopher Hubbard, Hovsep Afarian, Atrisha Lewis and Alexa Jarvis* for the plaintiffs Vale Canada Limited (f/k/a Inco Limited, f/k/a International Nickel Company Limited, Vale Japan Limited, Pt Vale Indonesia Tbk, and Vale Europe Limited
– and –	
ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA (f/k/a ROYAL INSURANCE COMPANY OF CANADA), OMEGA GENERAL INSURANCE COMPANY (as successor to BRITISH NORTHWESTERN INSURANCE COMPANY), LLOYD'S UNDERWRITERS, CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON (listed in Schedule A), SOMPO JAPAN INSURANCE INC. (f/k/a THE NIPPON FIRE & MARINE INSURANCE COMPANY LIMITED), GENERAL REINSURANCE CORPORATION, THE NORTH RIVER INSURANCE COMPANY, ZURICH INSURANCE COMPANY LIMITED (UK BRANCH) (as successor to EAGLE STAR INSURANCE COMPANY LIMITED),	*Mark M. O'Donnell and Cameron L. Foster*, for the Defendants Royal & Sun Alliance Insurance Company of Canada (F/K/A Royal Insurance Company of Canada *Joshua Henderson, Roderic McLauchlan, and Max Ebrahim,* for US Fire Insurance Company and The North River Insurance Company *Christopher J. Rae, David C. Rosenbaum, and Mahdi Hussein*, for Employers Insurance Company of Wausau. *Tom Donnelly and Joyce Tam,* for Fireman's Fund Insurance Company *David Wilson and Anthony Gatensby*, for the defendants Riverstone Insurance (UK) Limited (as successor

RIVERSTONE INSURANCE (UK) LIMITED (as successor to MIDLAND ASSURANCE LIMITED), EMPLOYERS INSURANCE COMPANY OF WAUSAU (f/k/a EMPLOYERS INSURANCE COMPANY OF WAUSAU, A MUTUAL COMPANY), ALLSTATE INSURANCE COMPANY (f/k:/a NORTHBROOK EXCESS & SURPLUS INSURANCE COMPANY), FIREMAN'S FUND INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, and the JOHN DOE INSURANCE COMPANIES Defendants CV-21-665931	to Midland Assurance Limited), Zurich Insurance Company Ltd. f/k/a Midland Assurance Ltd., Zurich Insurance Company Limited (UK Branch) (as successor to Eagle Star Insurance Company Limited) *Marc D. Isaacs, Arie Odinocki and Erik Shum* for the defendants Omega General Insurance Company (as successor to British Northwestern Insurance Company) and for Certain Underwriters at Lloyd's, London.
AND BETWEEN ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA Plaintiff	*Mark M. O'Donnell and Cameron L. Foster*, for the Plaintiff Royal & Sun Alliance Insurance Company of Canada
- and – VALE CANADA LIMITED, AIU INSURANCE COMPANY, AIG COMMERCIAL INSURANCE COMPANY OF CANADA (as successor for American Home Assurance Company), AVIVA INSURANCE COMPANY OF CANADA (f/k/a CGU INTERNATIONAL INSURANCE PLC f/k/a COMMERCIAL UNION ASSURANCE COMPANY F/K/A EMLOYER'S LIABILITY ASSURANCE CORPORATION LIMITED, GRANITE STATE	*Douglas Stewart, Deepshikha Dutt*, *Rebecca Curcio, A. J. Freedman and Raphael Eghan* for Travelers Insurance Company of Canada, Travelers Casualty & Surety Company and St. Paul Mercury Insurance Company *Marcus B. Snowden and Akash D. Brijpaul,* for AIG Commercial Insurance Company of Canada, as successor for American Home Assurance Company, Granite State Insurance Company, Insurance

INSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, THE NORTH RIVER INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, EMPLOYERS INSURANCE COMPANY OF WAUSAU, FIREMAN'S FUND INSURANCE COMPANY, GENERAL REINSURANCE CORPORATION, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, CERTAIN UNDERWRITERS AT LLOYD'S OF LONDON (listed in Schedule A), SOMPO JAPAN NIPPONKOA INSURANCE INC. (f/k/a THE NIPPON FIRE & MARINE INSURANCE COMPANY LIMITED, ALLSTATE NORTHBROOK INDEMNITY COMPANY (f/k/a NORTHBROOK INDEMNITY COMPANY,TRAVELERS CASUALTY & SURETY COMPANY, TRAVELERS INSURANCE COMPANY OF CANADA, ST. PAUL MERCURY INSURANCE COMPANY and JOHN DOE INSURANCE COMPANIES Defendants	)	Company of the State of Pennsylvania, National Union Fire Insurance Company of Pittsburgh, Pa. *Joshua Henderson, Roderic McLauchlan,* and *Max Ebrahim* for The North River Insurance Company, and U.S. Fire Insurance Company *Douglas O. Smith, Sarah Sweet*, and *Zoe Aranha* for Allstate Insurance Company (f/k/a Northbrook Excess & Surplus Insurance Company) and General Reinsurance Corporation *Kim E. Stoll and Rui Fernandes*, for Sompo Japan Nipponkoa Insurance Inc. (aka Sompo Japan Insurance Inc.), f/k/a Nippon F&M (The Nippon Fire & Marine Insurance Company Limited **HEARD:** November 22, 2021 and December 17, 2021

F L MYERS J.

The Motions

[1] There are three actions before the court. In the first, Vale Canada Limited, previously known as Inco Limited, and certain of its subsidiaries, sue their many insurers for reimbursement of environmental expenses they have incurred. The bulk of the claimed expenditures relate to six Ontario lawsuits in which Inco was alleged to have damaged the natural environment in Ontario in violation of Ontario law.

[2] Royal & Sun Alliance Insurance Company of Canada ("RSA") is one of the two insurers that provided the primary layer of coverage to Inco for its Canadian liabilities. It has commenced a separate lawsuit against all of Inco's insurers seeking interpretation of the respective degrees of responsibility of each of the numerous insurers as among themselves. This involves not only insurers of liabilities that arose in Ontario. Some of the insurers insured Inco and/or its subsidiaries for expenditures incurred globally so that the determination of their positions vis-a-vis Ontario expenditures may also involve interpretations of the relationships between and among the various insurers in other "towers" of insurance coverage (i.e. the multiple layers of insurance coverage put in place for Inco's environmental liabilities in Japan, Indonesia, UK, and US.

[3] There is a third claim by Vale Canada and others against Travelers Insurance Company of Canada under Court File No. CV-21-664805. This was the first claim that Vale Canada commenced quickly to respond to an action commenced by Travelers in New York. This first action is or will be subsumed in the more comprehensive claim advanced by Vale Canada discussed in para. [1] above.

[4] Ten of the 22 excess insurers sued by Vale Canada and RSA have attorned to the jurisdiction of this court. Nine of the 22 excess insurers submit that this court lacks jurisdiction over them in these actions. Alternatively, they ask the court to stay these actions based on the doctrine of *forum non conveniens* in favour of Traveler's New York action. The remaining three. Lloyds, Firemans' Fund, and General Re, concede this court's jurisdiction over them, but join in the request for a stay of these actions in favour of the New York action.

[5] Finally, Zurich Insurance plc (U.K. Branch) and Riverstone Insurance (U.K.) Limited, submit that the claims against them should be stayed pending an arbitration in the UK under the terms of their insurance policies.

The Outcome

[6] Vale Canada's claims against Zurich and Riverstone are stayed pending the outcome of the UK arbitration. The claims by RSA against Zurich and Riverstone are not subject to the arbitration agreement and are not stayed.

[7] This court does not have jurisdiction to entertain the claims made against North River Insurance Company. In all other respects the motions are dismissed.

[8] For the reasons set out below, I find that this court has jurisdiction over all of the other moving defendants in these actions and that the moving defendants have not established that New York is a more convenient forum for the claims advanced by RSA and Vale Canada in these actions.

International Nickel Company of Canada Limited, Inco Limited, Vale Canada Limited

[9] For the last 80 years, International Nickel Company of Canada Limited, later re-named Inco Limited, is and was a major Canadian mining company. Its head office is located in Toronto.

[10] In 2006 and 2007 Inco was purchased by Vale S.A.. Inco Limited has changed its name to Vale Canada Limited and is a wholly owned subsidiary of Vale S.A.

[11] Inco/Vale Canada has incurred environmental expenditures in relation to 26 sites around the world for which it claims insurance coverage. Of those, 22 are in Canada with 19 being in Ontario. It also has claims for sites operated through subsidiaries in Japan, Indonesia, New Jersey, and Wales.

[12] Over several decades. Inco placed some 92 policies of insurance worldwide to cover the types of liabilities in issue. They are "occurrence" policies that respond to losses that may have arisen or been caused by events that occurred during the policy term despite the fact that claims were not made for losses arising from those events until many, many years later.

[13] For the past 20 - 30 years, Inco/Vale Canada has had to make expenditures to remediate environmental damage that its operations allegedly caused. For example, it was required to spend some $500 million to modernize its refinery in Sudbury Ontario. It has also been sued for environmental damage.

[14] Inco/Vale Canada says it incurred costs and losses in six major class actions and putative class actions for damage caused to land in Ontario from Inco's operations in Port Colborne and Sudbury Ontario. These were very large claims. All are completed now.

[15] The claims advanced by Vale Canada and its subsidiaries under the insurance policies in issue relate predominantly to environmental expenditures incurred in Ontario concerning Ontario operations. There are claims for expenditures related to the foreign sites too. All of Vale Canada's information and documents about all of the insurance claims for environmental expenditures is in Ontario. Witnesses about the expenditure claims are in Ontario (with the exception of four people in Manitoba and one person in New Jersey). There is no Vale Canada employee with personal knowledge of the insurance claims in New York. There is one person in the UK with knowledge of the claim related to the refinery in Wales

[16] I borrow the following statistics from the factum of Vale Canada:

(a) **More than 50%** of the losses claimed pursuant to the Travelers policies relate to the Ontario Sites (the six sites with the largest losses are all in Ontario);

(b) **85%** of the losses claimed pursuant to the RSA policies relate to the Ontario Sites;

(c) **85%** of the losses claimed pursuant to the Aviva policies relate to the Ontario Sites;

(d) **80%** of the losses claimed pursuant to the North River policies relate to the Ontario Sites (the Copper Cliff Smelter alone accounts for almost a third of the losses claimed pursuant to the North River policies);

(e) **83%** of the losses claimed pursuant to the U.S. Fire policies relate to the Ontario Sites;

(f) **84%** of the losses claimed pursuant to the General Reinsurance policies relate to the Ontario Sites; and

(g) **92%** of the losses claimed pursuant to the Fireman Fund's policies relate to the Ontario Sites.

[17] RSA and Aviva provided the primary layer of insurance for Inco's Canadian operations. They both have attorned to the jurisdiction of this court. All but three of the excess insurance policies issued by the moving excess insurers sit above the RSA and Aviva polices in the Canadian tower or program of insurance.

[18] A very important piece of evidence was provided by Michael Butler, the Manager, Insurance and Risk – Base Metals at Vale Canada. In para. [8] of his affidavit, Mr. Butler swore:

> 8. Vale Canada's Registered Head Office has always been located in Ontario, either in Copper Cliff, Sudbury or in Toronto. Vale Canada's Head Office is currently located in the South Tower of the Royal Bank Plaza at 200 Bay Street, Toronto, Ontario (about 1.2 kilometers from the court in which these three Ontario Actions have been filed). Vale Canada's management and executive team is located in this Toronto office. The majority of Vale Canada's directors are Ontario residents, and all but one maintain at least a residential address in the province. **Accordingly, all important decisions regarding Vale Canada's business and operations, including regarding insurance coverage, environmental damage and remediation, related litigation, and insurance claims, have and continue to be made in Ontario.** [Emphasis added.]

[19] Some of the excess insurers provided evidence from witnesses who have reviewed the underwriting files. There is no doubt that Inco managed its foray into international insurance markets from its office in New York. William Finnerty was Inco's Manager of Insurance at the relevant time. He worked out of the New York office. Moreover, Inco was represented by a US insurance broker, Johnson & Higgins, from its New York offices.

[20] Ignoring that the reviews of the historical files are hearsay at best, the witnesses who reviewed them provide no evidence contradicting Mr. Butler's attestation above. The insurers' evidence that the files show that Inco was represented in negotiations by its employee in New York, often in the name of its US subsidiary, and by a broker in New York, does not undermine or challenge Mr. Butler's evidence that internally, Inco made decisions about insurance coverage, environmental damage and remediation, related litigation, and insurance claims in Ontario.

No Narrow Common Law Jurisdiction

[21] Historically, this court's jurisdiction was based on the defendant's presence in Ontario when served with the originating process or its voluntary attornment to the Court's jurisdiction. These grounds continue to be available despite the widening of the test for jurisdiction in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (CanLII). None of the particular subsidiaries of the international insurance businesses who are challenging jurisdiction in this case was served at a fixed place of business (or anywhere) in Ontario and none has attorned as yet.

[22] The court's jurisdiction therefore turns on the plaintiffs establishing jurisdiction under the "real and substantial connection" tests set out in *Van Breda*. In sum, the plaintiffs must establish that there is a presumptive connecting factor linking each defendant to Ontario in the circumstances that is not then rebutted by each of the defendants.

Eliminating Most of the Presumptive Factors Claimed by Vale Canada.

The Excess Insurance Contracts were not Made in Ontario

[23] It is not strongly contested that, in the main, the policies delivered by the moving excess insurers were negotiated principally in the US or UK, delivered to a US or UK office of Inco, and provided for notice to the parties to be given in the US or UK.

[24] Inco cannot show even a good arguable case at common law to say that the excess policies of the moving insurers were made in Ontario.

[25] I understand that the New York office of Inco was still Ontario-based Inco. But a Canadian is free to go to the US or the UK and make contracts there. That appears to be what happened in this case. I do not make any findings about the particular state in which any insurance contracts were made. It is sufficient for these purposes to find that none of the contracts of excess insurance in issue was made in Ontario.

[26] Section 123 of the Ontario *Insurance Act*, RSO 1990 c I.8, provides:

> **Contracts deemed made in Ontario**
> **123** Where the subject-matter of a contract of insurance is property in Ontario or an insurable interest of a person resident in Ontario, the contract of insurance, if signed, countersigned, issued or delivered in Ontario or committed to the post office or to any carrier, messenger or agent to be delivered or handed over to the insured or the insured's assign or agent in Ontario shall be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all money payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insurer in lawful money of Canada.

[27] This section deems insurance contracts to be made in Ontario and payable in Ontario if they were delivered in Ontario, or mailed or couriered to Ontario, or delivered to an agent for delivery to the insured in Ontario.

[28] Vale Canada argues that delivery of insurance policies to Inco's Insurance Manager in New York was delivery to an agent for delivery to the head office in Ontario. The problem is that the evidence does not support this submission. The insurers were dealing with Inco in New York – either its US subsidiary or Inco Limited itself, through its officer stationed there. There is no suggestion anywhere in the evidence that anyone expected, required, or intended the policies delivered to New York to be physically delivered to Ontario

[29] In my view, this statute is expressing properly Ontario's constitutional limits to deal with property and civil rights in the province. It deems contracts subject to Ontario law if made here or given to someone to be sent here. It is not a great leap of constitutional law to postulate that there would be a significant *vires* issue raised by a provincial statute that says that any policy of insurance entered into by an Ontario resident or a subsidiary of an Ontario resident anywhere in Canada or throughout the world is subject to Ontario law.

[30] I also understand that corporations are incorporeal and act through agents. To the extent that Mr. Finnerty was an employee of Inco Limited, he was its agent. The statute says delivery to an agent in Ontario is sufficient. Foreign agents are only included to the extent that a policy is "committed to the post office or to any carrier, messenger or agent to be delivered or handed over to the insured or the insured's assign or agent in Ontario".

[31] Reading the statute in its express words and *ejusdem generis*, delivery to foreign-based agents is only sufficient when the purpose of the delivery is for transmission of the policy to Ontario. I see no evidence that any policy was delivered to Mr. Finnerty, not as principal, but as a courier or agent to deliver the policy to Ontario.

The Claims are not Property Claims in Respect of Real Property in Ontario

[32] The claims made by Vale Canada against its insurers relate to expenditures incurred to remediate or compensate for environmental harm. These are not property insurance claims for damage to the mines or refinery properties themselves. The subject of these contracts is liability insurance for litigation defence costs and monetary liabilities incurred as a result of environmental losses at the various sites. Accordingly, the claims being made are not in respect of real property in Ontario.

Breaches in Ontario and Damages Sustained in Ontario are Insufficient

[33] The location of a breach of contract is an amorphous question. Did the breach occur where payment was due or in the office that decided not to make the payment? Case law supports both. Under the excess insurance policies in issue, payment is not due in Ontario; at least not yet. Vale Canada has not even given notice of claim under most of the relevant policies. This is because Travelers launched it New York lawsuit unexpectedly leading Vale Canada and RSA to respond by bringing these claims before taking other formal steps. So, it is not clear yet that there are breaches of contract or that payments have been demanded at a particular place.

[34] Assuming that payments are or will be due in Ontario given the structure of Vale Canada today, that is just another way of saying that if it is not paid, then it will suffer damages here. The difficulty with considering the location of damages as a presumptive connecting factor for a jurisdictional analysis is that it is generally synonymous with the location of the plaintiff or the plaintiff's ultimate parent company. No matter where Vale Canada or its subsidiaries carry on business throughout the world, Vale Canada is always the ultimate party damaged economically by breaches of contract suffered or torts committed upon it or one of its subsidiaries elsewhere. That would mean that this court's jurisdiction presumptively extends to the resolution of all disputes that an Ontario resident or any of its affiliates has with anyone, anywhere. This would exceed the constitutional limits of this court's jurisdiction to say the least.

RSA's Claim

[35] RSA sues all of Vale Canada's excess insurers claiming,. In effect, contribution and indemnity. It is not advancing a claim for breach of contract *per se*. Rather, it seeks an interpretation of all of the contracts of all of the insurers to see how they fit together. There are issues of exhaustion, allocation and aggregation in insurance cases – that just mean each insurer's position needs to be assessed in light of its own policies and in light of the others with whom those policies interact. RSA says, for example, that it has a $22 million policy limit. It expects the excess insurers to argue that the limit is $22 million for each occurrence, in each year, at each site in Canada. They will argue that their excess policies are not reached until RSA's limits of $22 million in each of numerous occurrences are exhausted.

[36] The inter-insurer issues raised by RSA are not confined to just the insurers who participate in the same tower or local program. If, for example, an insurer has provided excess coverage to Vale Canada globally, then the amount of its coverage that is available to respond to Ontario claims may turn on, or be affected by, whether its policies are required to respond to claims in other towers or local programs (Japan, UK, Indonesia. or US). The rights of the global insurers against others whose coverage is restricted solely to foreign sites will be relevant to determine how much, if any., of the global insurer's policy coverage limits remains available to respond here.

[37] Therefore all of the policies may interact and be relevant to the determination of liabilities here even if some of the other policies are limited to foreign liabilities arising only from foreign sites. That is why RSA has sued all the others and Vale Canada's non-Canadian subsidiaries are plaintiffs in Vale Canada's action.

[38] Case law recognizes that it is efficient and desirable for all of the claims of all of the relevant insurers to be heard together. In *Century Indemnity Co. v. Viridian Inc*., 2013 ONSC 4412 (CanLII) Pierce RSJ wrote:

> [33] As Century has demonstrated, there are a multitude of issues common to the Toronto, Winnipeg and Thunder Bay actions. These include a consideration of proof of the policies issued; how the policies interact; whether the regulator's action is covered by the terms of the relevant policies; the extent of damages; the extent of future liability; whether any exclusions apply; whether disposal of mine tailings was intentional and therefore not covered by insurance; when coverage started and stopped; whether there was timely notice of claims; whether damages have been mitigated; whether Viridian is entitled to coverage available to Sherritt; the application of any limitation periods; and the allocation of findings of liability, if any, among other issues.
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> [34] If RSA is found to be liable to Viridian, Century will only be called on to pay if RSA's limits are exhausted. Thus, recognition and enforcement of the judgment favours having one comprehensive place for trial.
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> [35] In my view, a multiplicity of proceedings and the risk of inconsistent verdicts could be avoided by the Ontario court taking carriage of the action, rather than having litigation about the same issue split between the courts of two provinces. Consider, for example, if the Manitoba court determined that the environmental damage was caused intentionally by Viridian or its predecessor, but the Ontario court found that it was unintentional. Consider if the Manitoba court awarded Viridian damages of five million dollars, but the Ontario court awarded damages of two hundred million dollars on the same claims. The contradictions would be exacerbated by any duplication of appeals heard by the courts of appeal in two provinces.
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> [37] The existence of the Toronto litigation cannot be ignored when discussing the most convenient forum. **The Toronto action creates a centre of gravity for the entire cluster of litigation.** From the perspective of the court, there are efficiencies in keeping all relevant parties together. For example, there will be one pretrial judge and one trial judge instead of two. The matter could be case-managed to keep it moving forward and make best use of court time. [Emphasis added.]

[39] While *Century Indemnity* was a decision about finding the *forum conveniens*, all of the parties agree with the proposition that there should be one comprehensive proceeding to resolve all of the matters if possible. RSA and Vale Canada say that these proceedings are the "centre of gravity of the entire cluster of litigation". The moving insurers submit that Traveler's New York proceeding is preferable.

[40] RSA asserts that the moving excess insurers are just forum shopping to try to get away from Inco's and RSA's "home" court. Many have voluntarily participated in litigation before this court previously. All sold insurance to Canadian Inco or its subsidiaries. For several of the named insurers, while the particular subsidiary that issued Inco's policies is not physically present here, the parent company plainly carries on business here through other affiliates. Ontario residents are used to seeing Traveler's big, red umbrella trade mark for example. The parent holds itself out as carrying on business in Canada. It advertises, sells insurance policies, and has places of business here through other subsidiaries.

[41] The moving excess insurers rely heavily on out-of-court negotiations that were conducted among Vale Canada and many of the insurers from 2018 to 2021. The negotiations were conducted under the terms of a tolling agreement. The agreement and the negotiations were held and managed largely in the US. The excess insurers argue that the initial issuance of the policies in the US and the recent negotiations in the US show that the "centre of gravity" of Inco's global insurance programs is in the US.

[42] Travelers brought the tolling agreement to an end and promptly sued Vale Canada and many of the insurers in New York as mentioned above. Vale responded quickly with a claim against Travelers and then launched its more comprehensive claim. RSA did so as well.

[43] RSA's claim is the only one that names all of the relevant insurers. Counsel for Travelers advises that his client is willing to add others to its US claim if necessary to make it as comprehensive. However, Zurich's counsel advises that although it has yet to plead in Traveler's New York action, its position is that its liability to Vale Canada can be determined only in the UK arbitration proceeding that it has already commenced.[1]

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[1] Zurich will not say if it intends to attorn to the New York proceeding later this month when it is required to plead there. In formal interrogatories, it clearly waffled. If it asserts the arbitration as a jurisdictional limit here but not in the New York lawsuit, one could see great force in RSA's allegations of gamesmanship and

[44] As a result of the UK arbitration, neither Vale's action here nor Traveler's action will have 100% of the insurers in all of their capacitates before the court regardless of the desirability of doing so.

[45] RSA's action is the most comprehensive at this time. As noted above, many of the excess insurers have already attorned to these proceedings. The proceedings will continue unless stayed for *forum non conveniens.* RSA is not bound to arbitrate its inter-insurer issues with Zurich.

[46] RSA argues that Ontario is the centre of gravity of the actions. All of the excess insurers will be taking aim first and foremost at RSA and Aviva as the primary insurers. Some excess coverage follows form of the primary insurers' policies and others do not. Regardless, they all undertook excess coverage in a predominantly Ontario-based global insurance program.

[47] In my view, RSA's action is the centre of gravity as that term was used by Pierce RSJ. These actions will involve consideration of whether Vale Canada's claims are proper claims as against the primary insurers; whether the primary insurers are liable; and, if so, to what extent. The insured and primary insurers are here.

[48] While liability of the insured is a precondition to coverage, it is not correct to submit that the facts underlying the insured's liabilities are no longer relevant in coverage claims. Coverage issues will include assessing whether the environmental liabilities asserted by Vale Canada were accidental occurrences; whether claims for such things as clean-up costs are insured "damages"; what is the proper quantum of each loss claimed; when did each loss occur etc.

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forum shopping. I note, for example, that Zurich seeks an exceptionally aggressive form of anti-suit injunction from the UK courts against Vale Canada to try to prevent it from suing in this court. But Zurich has not sought that relief against Travelers and its US litigation. However, counsel for Zurich before this court was clear, unequivocal, and definitive submitting that Zurich's position is that its liability to Vale Canada, if any, under its insurance policies is to be determined in arbitration in the UK. Should that position somehow change in the next few weeks only in relation to New York, I would question the good faith of the client allowing the lawyer to make that submission and I would expect counsel to be very embarrassed before this court.

[49] All of the insurers will have the same interests as against Vale Canada to minimize insured liabilities. The Ontario-based facts underlying the vast bulk of the Ontario insured's insurance claims are central and integral to the issues being litigated.

[50] These actions will see the excess insurers targeting Vale Canada and the primary insurers RSA and Aviva first and foremost. They all agreed that issues of coverage, exhaustion, allocation, and aggregation, among others, will be comprehensively contested. It is only once the primary layers of insurance are exhausted and different excess layers are reached that issues among the excess insurers even arise. Similarly, while there are some issues in the foreign towers (involving claims arising in Wales, NJ, Indonesia, and Japan), the big ticket issues are the determinations of how liabilities of the global excess insurers will be allocated and whether any will have room left in their limits to respond to the Ontario claims after foreign claims are dealt with.

[51] Although RSA's action seeks interpretations of multiple contracts largely concerning losses caused by Ontario-based choses in action, RSA does not rely on Rule 17.02 (c) to submit that a presumptive connecting factor is, "the interpretation…of a…contract…in respect of (i)…personal property in Ontario".

[52] Rather, it bases its' jurisdiction arguments principally on the notion that the excess insurers are multinational carriers who sold policies to Inco and now seek to avoid accountability for tail liabilities under those policies by technically structuring their affairs to avoid current day contacts with Ontario. RSA says that as a multi-national carrier, it cannot and has not challenged the jurisdiction of the New York court. It does raise a *forum non conveniens* argument there. But it takes exception to the artificiality of the positions advanced by the moving excess carriers to avoid their liabilities that will be premised on an assessment of insurance coverage for an Ontario insured involving principally questions of exhaustion, allocation, and aggregation, among other issues with the Ontario primary insurers.

The Excess Insurers Must be Taken to Have Carried on Business in Ontario

"Carrying on Business" is a Presumptive Connecting Factor Separate from its Role in Assessing Presence-based Jurisdiction

[53] In *Van Breda,* the Supreme Court of Canada agreed that carrying on business in Ontario can be a presumptive connecting factor for the purpose of assumed jurisdiction. This is separate from the question of whether the defendant was present in Ontario at the time of service of the originating process.

[54] The concept of “carrying on business” for the purpose of considering presence-based jurisdiction under the old, but surviving, common law tests is narrower than the concept of “carrying on business” for the purposes of assessing whether there is a presumptive connecting factor under the modern “real and substantial connection” approach outlined in *Van Breda*. The Supreme Court of Canada has recently confirmed this point expressly in *H.M.B. Holdings Ltd. v. Antigua and Barbuda*, 2021 SCC 44 (CanLII):

> [39] It should be noted that the term “carrying on business” appeared in *Van Breda* as a presumptive connecting factor in the tort context for the purposes of *assumed* jurisdiction. Although this Court in *Chevron* cited *Van Breda* for the meaning of that term in the context of *traditional presence-based* jurisdiction, it is important to remember that traditional presence-based jurisdiction is an independently sufficient ground of jurisdiction that operates alongside the assumed jurisdiction of *Van Breda* (para. 79). If the term “carrying on business” held the same meaning in both contexts, this would create overlap between the two tests (see Pitel and Rafferty, at p. 94). If a corporate defendant were carrying on business in a jurisdiction such that a plaintiff could simply serve that defendant *in juris* and establish traditional presence-based jurisdiction, it is not clear why that plaintiff would ever try to establish “carrying on business” as a mere presumptive connecting factor going to assumed jurisdiction. This suggests that “carrying on business” as it appears in *Van Breda*, as a mere presumptive connecting factor for assumed jurisdiction, may be a less onerous standard than “carrying on business” for the purpose of establishing traditional presence-based jurisdiction.
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> [40] I need not decide here whether the term “carrying on business” as it appears in *Van Breda* carries the same meaning as in the case law on traditional presence-based jurisdiction. However, it is safe to say that if the *Van Breda* standard is different, it is lower...

[55] In my view, the principal difference between the two usages of “carrying on business” is temporal. When considering presence-based jurisdiction to support service of process, the court is looking at the present day. It uses some historical factors to inform a factual decision as to whether the defendant is present and properly served with court papers within the jurisdiction today.

[56] However, in considering whether the defendants carried on business here to support an objectively determined presumptive connecting factor, the court is assessing whether there is a real and substantial connection between the defendants, the substance of the lawsuit, and the jurisdiction of Ontario. This is a historical question. Just as one looks at the *situs* of the tort at the time it was committed and where a relevant contract was made at the time it was entered

into, the assessment of the real and substantial connection under the *Van Breda* approach considers all of the relevant facts in their temporal context.

[57] In *HMB* the Supreme Court of Canada, the Supreme Court of Canada was assessing presence-based jurisdiction. As made clear in *Van Breda,* this assessment requires that the defendant have be a fixed place of business here. But the Court also looked at a list of historical facts drawn from the decision of Slade LJ for the Court of Appeal of England and Wales in *Adams v. Cape Industries Plc*., [1990] 1 Ch. 433, to interpret the meaning of "carrying on business" Chief Justice Wagner explained:

> [37] In cases involving a representative, the question of whether the representative has been carrying on the foreign corporation's business or has been doing no more than carry on their own business will necessitate an investigation of the functions they have been performing and all aspects of the relationship between them and the foreign corporation (p. 530). In particular, the following questions are relevant to the assessment of whether the representative has been carrying on the foreign corporation's business:
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> (a) whether or not the fixed place of business from which the representative operates was originally acquired for the purpose of enabling them to act on behalf of the foreign corporation;
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> (b) whether the foreign corporation has directly reimbursed the representative for the cost of their accommodation at the fixed place of business and the cost of their staff;
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> (c) what other contributions, if any, the foreign corporation makes to the financing of the business carried on by the representative;
>
> (d) whether the representative is remunerated by reference to transactions (e.g., by commission), by fixed regular payments or in some other way;
>
> (e) what degree of control the foreign corporation exercises over the running of the business conducted by the representative;
>
> (f) whether the representative reserves part of their accommodation and part of their staff for conducting business related to the foreign corporation;

> (g) whether the representative displays the foreign corporation's name at their premises or on their stationery, and if so, whether the representative does so in a way as to indicate that they are a representative of the foreign corporation;
>
> (h) what business, if any, the representative transacts as principal exclusively on their own behalf;
>
> (i) whether the representative makes contracts with customers or other third parties in the name of the foreign corporation or otherwise in such manner as to bind it; and
>
> (j) if so, whether the representative requires specific authority in advance before binding the foreign corporation to contractual obligations (pp. 530-31).

Lord Justice Slade further held that even this list of questions is not exhaustive and that the answer to any of them is not necessarily conclusive as to whether a representative has been carrying on a foreign corporation's business in a certain jurisdiction (p. 531).

There is no Universalist Jurisdiction for Related Insurance Claims

[58] Before assessing any facts related to the various moving excess insurers, I am cognizant that Canada does not subscribe to a universalist approach to jurisdiction in which all aspects of a particular multi-national subject matter are assigned to one court due to the convenience and efficiency of doing so. While universalism is recognized as a good idea in many areas, the Supreme Court of Canada rejected the use of universalism as a basis to displace the *Van Breda* tests in the multi-national insolvency field in *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90 (CanLII).

[59] It has taken a treaty and then statutory amendments to implement a form of universalism in cross-border insolvencies. See, for example, Part XIII of the *Bankruptcy and Insolvency Ac*t, RSC 1985, c B-3. There is nothing analogous in the multi-national insurance field.

[60] In *Van Breda* itself, LeBel J. cautioned against use of the "carrying on business" factor to create a universal jurisdiction:

> [87] Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order **to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity**. [Emphasis added.]

[61] Accordingly, I must assess the relevant objective facts in relation to each of the moving excess insurers to determine if it was carrying on business in Ontario at the relevant time sufficient to ground jurisdiction. It is not enough to say simply that they are all connected insurers in a global insurance scheme that ought to be interpreted by one court.

[62] In *Central Sun Mining Inc. v. Vector Engineering Inc.*, 2013 ONCA 601 (CanLII), the Court of Appeal considered the jurisdiction of this court in Ontario to deal with a claim of negligent misrepresentation arising from representations contained in certain engineering reports and studies that were delivered to the plaintiff's office in Vancouver, B.C. Goudge JA wrote:

> [30] The core of the tort of negligent misrepresentation is that the misrepresentation is received and acted upon. There is no dispute that the appellant did indeed receive these studies from the respondents and that the recommendations made by the appellant's Vancouver office to the appellant's Toronto office were based on those studies. The motion judge did not address whether the respondents' studies were forwarded from the appellant's Vancouver office to the appellant's Toronto office. However, there is evidence that would support such a finding. It is fair to conclude that the studies were therefore received by the appellant, not only in Vancouver but also in Toronto where they were relied on.
>
> [31] There can be no question that the appellant acted on these studies in Ontario. That is where it relied on the studies to take the decisions about where to locate the mine and how to build and operate it.
>
> [32] The inevitable conclusion is that the misrepresentations were received and relied on in Ontario. The respondents do not contest that if that were so, Ontario is the *situs* of the tort of negligent misrepresentation. This constitutes a presumptive connection between the action against the respondents and Ontario.
>
> [33] **I am inclined to think that even if the respondents' studies had been received only in Vancouver and only the recommendations based on those studies were transmitted to Toronto, the negligent misrepresentation would still have been committed in Ontario. The**

> **respondents foresaw that their studies would be received by the appellant and acted on in Toronto. They should have expected to be called to account in Ontario. In the modern world where corporations have various offices in various locations, corporate defendants should not escape liability simply because they send their studies to an office of the plaintiff outside Ontario with the clear understanding that it will be acted on in Ontario.** [Emphasis added.]

[63] In my view, these same holdings can be made in this case. I have already found that the policies were not delivered to Mr. Finnerty in New York as a deliveryman. Nevertheless, unless wilfully blind, all of the excess insurers had to have known from their underwriting activities that their policies were part of a global insurance program for a Canadian multi-national company. The policies would necessarily ultimately be received and acted on in Toronto.

[64] While there is no universalism in the liability insurance subject matter, the fact that all of the insurers participated in a global insurance program for an Ontario-based company with its mining assets largely held in Ontario provides context informing the assessment of whether the various insurers were carrying on business here at the relevant time.

[65] Unlike *Central Sun* however, that finding that insurers knew that their policies would be used and acted upon in Toronto does not establish the *situs* of a tort in Ontario. But the insurers all knew that their policies or policies that they bought or to which they succeeded, carried long tail liabilities. If a policy was sold by an insurer who carried on business here at the time, the moving insurers cannot have expected that by moving, or transferring the policies to someone outside Ontario, they could escape liability here

[66] Foreign insurers also know or are deemed to know that there are federal and provincial registration and licensing requirements imposed on anyone who sells insurance in Canada and Ontario. No insurer can properly claim to be ignorant of the law.

[67] Both the federal and provincial regimes require foreign insurers to have an agent for service here. By itself, this is not enough to establish presence-based jurisdiction. Moreover, neither Vale Canada nor RSA purported to serve their statements of claim on the moving excess insurers by serving a local agent for service. The requirement of having local agents for service are therefore just one factual aspect of the analysis for each defendant.

Travelers

[68] Two affiliates of Travelers Indemnity Company of Canada are defendants in these actions: Travelers Casualty & Surety Company (formerly Aetna Casualty) and St. Paul Mercury Insurance Company. They sold insurance to Inco between 1973 and 1985.

[69] There is no doubt that the Travelers carries on part if its international insurance business here. But the two defendants have no physical presence here at all.

[70] Aetna was headquartered in Connecticut and was licensed to carry on business selling insurance in Ontario at the relevant time. St. Paul's was headquartered in Minnesota. Its parent company was licensed to sell insurance here. St. Paul's also appointed a chief agent for its Canadian business and had a registered chief office in Toronto when it sold its policies.

[71] 30 of Aetna's 31 policies list Inco Limited as named insured. The St Paul's policies relate to Indonesia.

[72] It is the height of technicality for Travelers to assert that the particular subsidiaries that placed or that have succeeded to the policies did not and do not carry on business here. Travelers holds itself out as carrying on business in Canada and specifically advertises that its Canadian customers are serviced through its US offices. It holds insurance policies issued by insurance businesses that operated in Ontario under prevailing local laws in relation to an Ontario company for Ontario-based liabilities and foreign liabilities that are integrated into the enterprise's global insurance program.

[73] This case is nothing like *HMB* in which the connection between the local business and the defendant was tenuous. In this case, Travelers is fully carrying on the international insurance business. To the extent that the factors listed in *HMB* apply to a wholly-owned and integrated business (as opposed to a local independent contractor) all of the factors are readily met. It is sophistry to submit that it was not and is not carrying on business here fully and completely for the purpose of considering whether there are sufficient links between the defendants and the issues in the lawsuit to support a reasonable and frankly, obvious, expectation that they would be called to account on their insurance policies here.

Wasau

[74] Employers Insurance Company of Wasau sold policies to Inco between 1981 and 1986. Unlike Travelers, it had no physical presence in Ontario at the time. It not only was registered federally as a foreign insurer, it was licensed to carry on business of insurance in Ontario when it sold its policies to Inco.

[75] It seems to me to be inescapable that when a foreign compony comes to Ontario voluntarily to be licensed to sell insurance to an Ontario resident in relation to Ontario liabilities, and it is sued on those policies in relation to those very liabilities, that it is properly found to have been carrying on business here for the purpose of considering whether there is a real and substantial connection between the parties, the issues, and the jurisdiction. There are sufficient links between the defendants and the issues in the lawsuit to support a reasonable expectation that they would be called to account on their insurance policies here. I was not shown any law here or of any other country with whom we share comity finding otherwise.

North River

[76] North River Insurance Company sold Inco policies between 1975 and 1985. It is owned by Fairfax Group which is an Ontario-based company.

[77] On the evidence before me, North River had no connections at all with Ontario at the time that it sold its policies. It did not register or obtain a license to sell the insurance here. Whether its sales might have violated regulatory laws is not before me. But unless I am going to find that anyone who sells insurance to a company with an Ontario head office is subject to this court's jurisdiction or that Ontario accepts universally all claims related to an Ontario-based global insurance program, there is no basis for this court to have jurisdiction over North River.

[78] The fact that North River is now owned by a company with an Ontario presence that is not in the insurance business does nothing to advance a real and substantial connection between North River's position in this litigation and this court.

[79] The plaintiffs have not proven any presumptive connecting factor for this defendant. Accordingly, *Van Breda* dictates that this court does not have jurisdiction to hear the claims made against it.

[80] Accordingly, the actions against North River are dismissed.

Others

[81] All of the other moving excess insurers (US Fire, Northbrook (by merger into Allstate Insurance Company), Zurich Insurance Company Limited [properly Zurich Insurance plc (UK Branch)] (as successor to the assets and liabilities of Midland Assurance Ltd.), and Riverstone Insurance (U.K.) Limited (as successor to Zurich) are properly found to have been carrying on business here through their own licensure, international operations, or purchase of Midland policies in circumstances described para. 114 (a) of the Omnibus Factum of Vale Canada. All had objectively available facts supporting a finding that in selling their polices in issue, they were carrying on business here for the purpose of considering whether there are sufficient links between the defendants and the issues in the lawsuit to support a reasonable expectation that they would be called to account on their insurance policies here

No Rebuttal of the Presumptive Connections

[82] *Van Breda's* presumptive connecting factors are rebuttable. However, none of the defendants whom I have held are subject tot his court's jurisdiction , has provided a basis in evidence to find that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points to a weak relationship between them. To the contrary, in light of the recognition by all of the parties that comprehensive proceedings are desirable, the connections to the subject matter of the litigation and each defendant is strong.

Arbitration by Zurich Insurance plc (U.K. Branch) and Riverstone Insurance (U.K.) Limited

[83] Zurich and Riverstone have commenced an arbitration under the arbitration clause contained in their relevant policies. The process set out in the policies is not one with which this court is familiar. However, I am not prepared to accept the submission by Vale Canada that the process is inoperable. It may appear to be cumbersome if two full hearings are required as submitted. However, I doubt that anyone would proceed that way in reality. Moreover, if that is indeed the process to which the parties agreed, it is not for this court to say that it is inoperable just because it may appear to be expensive or cumbersome.

[84] Neither am I prepared to exercise a discretion to decline a stay assuming that the court has the discretion to do so without a finding that the arbitration clause is void or inoperable. The most recent pronouncements from the Supreme Court of Canada in *TELUS Communications Inc v Wellman*, 2019 SCC 19, as discussed in subsequent Court of Appeal decisions such as *Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636*, 2020 ONCA 612 (CanLII) and 2021

ONCA 360 (CanLII) mandate that civil litigation be stayed pending arbitration even where a multiplicity of proceedings may result. The policy favouring respect for the parties' right to choose their dispute resolution process overwhelms the statutory policy to guard against the inefficiency of multiplicity "as far as possible". See s. 138 of the *Courts of Justice Act*, RSO 1990, c C.43.

[85] Moreover, I see nothing objectionable or even difficult with the idea that the UK insurers' principal liability to their insured in relation to the claims arising from the site in Wales be determined in arbitration. The result will then be received in the comprehensive proceedings here as a pre-determined claim value.

[86] It may be that the arbitrators may make findings beyond the simple liability of the two UK insurers who are before them. Or they may make a foray into allocation and other issues involving parties whom the arbitration will not bind. Should that occur, all parties will maintain their rights to seek whatever legal relief they may be entitled to.

[87] Moreover, RSA is not bound to arbitrate its inter-insurer claims. It may be that the UK insurers are entirely successful in their arbitration and adjudged to have no liability whatsoever to any Vale entity. If that is so, everyone recognizes that the UK insurers will then have no place in the remaining claims whether here or in New York. But, otherwise, all of the inter-insurer issues remain for consideration in RSA's action. It may be that RSA and the UK insurers can agree on a timing protocol to see what happens in the arbitration process if it proceeds quickly. But, if not, there are too many parties to let one outlier hold up the entire process. Accordingly, the UK insurers may find themselves dealing with two litigation fronts at the same time. That is a simple reality of their decision to proceed with arbitration in face of these claims. I do not know if New York has a costs regime like ours. But here, any wasted costs incurred by the UK insurers will be readily assessable in due course if appropriate.

The Moving Excess Insurers have not Demonstrated the New York is the Clearly Better Forum

[88] The moving excess insurers (including the three that did not challenge jurisdiction) submit that due to the initial delivery of most policies to Mr. Finnerty in New York and the recent settlement negotiations being run through US counsel establishes that New York is clearly the most appropriate forum for the litigation.

[89] I disagree. As noted above, I have found that this litigation represents the "centre of gravity" as that phrase is used by Pierce RSJ. Moreover, it is not relevant that Travelers was first off the mark by a few days. See: *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11 (CanLII).

[90] The best argument for the moving parties is that efficiency leans to one comprehensive action where possible as discussed by Pierce RSJ. But, given the UK arbitration, and the fact that Travelers did not name all of the insurers in the New York action, a single action is not likely. While the indication that Traveler's may add parties to its US claim is interesting, nothing stopped it from doing so by now. The indication is confirmation that RSA's action is the most comprehensive.

[91] Of equal or greater significance however, is that Vale Canada's action too is tightly tied to this court. The underlying liabilities arose here in litigation and regulatory actions here. The evidence supporting the claims is here. This court is the natural forum for assessment of the laws and practicalities behind all of the various litigation, settlements, regulatory actions, and, most especially, the claims between the Ontario insured and its two Ontario primary insurers.

[92] The law of the excess policies is not decided as yet. None of the moving excess insurers is based in New York. Different state laws may apply to the policies. Like Canada, the US is not a unitary state. The fact that negotiations took place among lawyers in many different states and also some in Ontario from 2018 to 2021 is not a very relevant factor. Separate litigation counsel will be needed for New York litigation.

[93] I have no doubt at all that the New York court would be well and truly able to manage the litigation and to resolve it justly in accordance with whatever law of the various contracts is found to apply to each. But for this court to exercise discretion to deprive parties of access to justice here when the court has jurisdiction, all counsel agreed that *Van Breda* requires that the other forum be clearly more appropriate.

[94] The New York action is not more comprehensive than the combined actions here. None of the parties say there is evidence or documents available in New York as a result of negotiations thirty or more years ago at offices that no longer exist. None of the Vales' relevant mining operations sites is located in New York State. None of the underlying losses on which Vales' insurance claims are based occurred in New York.

[95] Accordingly, I find that New York is not clearly the more appropriate forum for this litigation and I dismiss the motions for a stay on that basis.

Costs

[96] I invite RSA, Vale Canada, North River, Zurich and Riverstone to deliver costs submissions by January 14, 2022. All against whom costs are claimed may respond by January 28, 2022. Submissions shall be no longer than five double-spaced pages, in 12-point font or higher, inclusive of footnotes, endnotes, appendices, and schedules. Every party who delivers a submission *shall* provide a Costs Outline for comparison. No case law is to be provided to me. References to case law or statutory material, if necessary, shall be made by way of hyperlinks in the submissions.

[97] Submissions and accompanying Costs Outlines shall be filed through the Civil Submissions Online portal and uploaded to Caselines.

F. L. Myers, J.

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CITATION: Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada, 2022 ONSC 12
COURT FILE NOs.: CV-21-666020
CV-21-665931
CV-21-664805
DATE: 20220104

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

VALE CANADA LIMITED et al

Plaintiffs

– and –

ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA et al

Defendants

REASONS FOR JUDGMENT

F L Myers J.

Released: January 4, 2022