

THE S.C.C. ANSWERS WHAT IS A “CLAIM”

by Michael Teitelbaum

In *Jesuit Fathers of Upper Canada v. Guardian Insurance Company of Canada*, 2006 S.C.C. 21, released June 1st, the Supreme Court of Canada revisited claims-made policies and addressed the question of what constitutes a “claim”. The Court also reiterated, in *obiter dicta*, rules it had previously stated regarding the interpretation of insurance policies while putting a new gloss on them. Their comments may affect the recent judicial statements regarding policy interpretation.

The Facts

The Jesuits operated and administered an aboriginal residential school. They purchased a Comprehensive General Liability policy which provided for errors and omissions insurance with respect to professional services. By January 1994, the Jesuits had become aware of both general and specific allegations of abuse of students at the school. By letter dated January 27th, 1994, the lawyer of a former student, Peter Cooper, advised the Jesuits of his client’s claim. Counsel for

the Jesuits wrote to their insurer, Guardian, on March 18th, 1994 to raise the possibility that they might be facing other claims in the near future. The letter included information about the nature of the possible claims and the names of the ten alleged victims, including Cooper. Following the receipt of this information, Guardian refused to renew the policy beyond September 30th, 1994. Numerous additional claims making similar allegations were made after the expiration of the policy.

The policy’s Insuring Agreement stated that the coverage provided “shall apply only to claims which are first made against the Insured during the policy period . . .”.

With the exception of Cooper’s claim, the insurer refused to defend any claims arising from the operation of the school because those claims were only “first made” after the expiry of the policy and so were not covered by the policy. At first instance, Whitten J., found that Cooper’s claim and the claims on behalf of the nine other

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alleged victims mentioned in the March 18th, 1994 letter fell within the temporal limit of the policy and that the insurer had a duty to defend against them. The Court of Appeal upheld that decision.

The Supreme Court's Decision

The Supreme Court held that except for Cooper's claim, the insurer had no duty to defend the actions against the Jesuits resulting from the administration of the school.

The Court agreed that the subject policy was first and foremost a claims-made policy which had certain occurrence-based elements; for example, the obligation to provide notice of an accident or occurrence. However, these elements did not expand the coverage available.

The Court held that there was no ambiguity in the policy as even in a claims-made policy, an "insurer may insist that it be informed of relevant circumstances or accidents prior to any related claim".

In respect of what constitutes a "claim", the court noted that this word is not defined in the policy. However, the language used in the policy, for example, "one or more claims resulting from the same circumstances or the same event", "suggests a clear difference between the

event or circumstance giving rise to a claim and the actual claim". The Court also observed that in the Conditions section of the policy, there were two different reporting provisions. The first required that the insured notify the insurer of any accident, occurrence or alleged injury to which the insurance applies. The second requires the insured to forward to the insurer any documentation received by the insured relating to a claim or suit against the insured.

The Court also noted that in showing this difference between an "accident or occurrence" and a "claim or suit", the clauses also provide insight into the meaning of a "claim". The provision requiring notice of a claim or suit does not require a description of the claim, but the actual "demand, notice, summons or other process received". The Court states that while not determinative, this wording "implicitly suggests that, absent a demand or other process received, there would be no claim or suit".

LeBel J., on behalf of a unanimous seven-member panel, amplifies upon the Supreme Court's decision in Reid Crowther [1993] 1 S.C.R. 257, which dealt with what is required for a claim to be made. He notes that based on the subject policy wording, a "claim must be actively made

as opposed to merely being discovered". Moreover, at common law, a claim "requires a third party to communicate an intention to hold the insured responsible for damages". The Court continues:

Naturally, the third party may communicate through a representative, whether a legal representative such as a lawyer or any other advocate such as a band leader, a friend or a counsellor. The key is that the representative be accurately communicating the intent of the claimant and that it be done with the claimant's full knowledge and approval.

Thus, advising an insurer of potential claims which have not been advanced in some way by the claimants themselves does not constitute a "claim".

As a result of this finding, the Court noted that the judge at first instance had erred in holding the nine claims in respect of which the claimants had not given notice had to be defended. However, because this was not appealed, the point was moot. The Court also observed that what happened in respect of these

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claims is not clear, and comments from counsel during the Supreme Court hearing suggested that these claims were moot.

Other Matters Addressed and our Commentary

Aside from dealing with insurance policy types and the meaning of “claim”, the Court’s reasons are of interest in respect of comments on the rules of policy interpretation.

Insofar as the policy interpretation rules are concerned, the Court reiterated the principles reviewed in their decision of *Non-Marine Underwriters, Lloyd’s of London v. Scalera*, [2000] 1 S.C.R. 551, while placing emphasis on certain points and, in our view, adding a gloss to them.

First, the court noted that the principles “apply only where there is an ambiguity in the terms of the policy”. When this occurs, “the courts should be aware of the unequal bargaining power at work in the negotiation of an insurance contract and interpret it accordingly” by applying the *contra proferentem* rule and through the broad interpretation of coverage provisions and the narrow interpretation of exclusions.

The Court further notes that these rules require that

ambiguities be construed against the drafter, usually the insurer. For the first time, the Court addresses the question of what happens where, in a case like this one, it appears the policy was negotiated and drafted, in part, by an insurance broker who selected from standard clauses so that the identity of the drafter is less obvious. The Court notes that in *Reid Crowther*, ambiguities were interpreted against the insurer even though the custom policy was arranged through a broker. The Court indicates that this may be “in part, a recognition by this Court that even where an insurance broker is involved, an imbalance in negotiating power may remain a characteristic of the relationship between insurer and insured”. Thus, the Court appears to suggest that unless it is clear, the tendency will be to take the view that the policy was more the product of the insurer. In the end result, however, no final determination was made on this point because the Court found there was no ambiguity in the policy and that it was, therefore, unnecessary to resort to these principles.

The second rule, as reformulated by these reasons, is that the courts “should try to give effect to the reasonable expectations of the parties, without reading in windfalls in favour of any of them”.

The final rule is that “the context of the particular risk must be taken into account”. This appears to be the Court’s indirect effort at addressing the approach taken to policy interpretation in recent Ontario Court of Appeal decisions.

In *Jesuit Fathers*, the insured emphasized the “context” factor in their argument on the scope of their coverage. The appellant argued that given the “public purpose served by insurance”, the meaning of the word “claim” should be interpreted broadly in order to recognize the reality of abuse claims made in the context of residential schools. Keeping in mind that the Court found the policy wording was unambiguous and, therefore, this rule did not apply, the Court notes that while there is a “public interest served by the compensation of victims of different forms of abuse in residential schools, courts must remain mindful of the rules and principles governing insurance law. In the long run, a contextual but unprincipled approach would render a disservice not only to the industry, but also to insureds and to victims. It would lead to further difficulties in obtaining coverage and compensation. Both parties to an insurance contract are entitled to expect that well-established principles will be reflected in the interpretation

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and application of that contract. In this respect, another form of public interest is also at stake. For these reasons, courts must pay close attention to the structure and actual wording of the policy, read as a whole”.

These comments are potentially significant. They may constitute a signal from Canada’s highest court that Canadian courts should be cautious in their interpretation of insurance policies and not immediately

turn to consideration of the parties’ reasonable expectations, particularly where the policy wording is clear and unambiguous. The Court may be indicating, for example, that the notion of “connotative contextual construction” raised by the Ontario Court of Appeal in *Zurich Insurance Co. v. 686234 Ontario Ltd.*, 62 O.R. (3d) 447, may not be the wave of the future. Having said that, the views and principles expressed by the Supreme Court still appear to be sufficiently broad enough to

afford the courts leeway and flexibility when interpreting an insurance policy to arrive at what they believe is the most equitable result in the facts and circumstances of a particular case.

As always, the Supreme Court’s decisions will likely provide much food for thought and fodder for future cases. It will be interesting to see how the Court’s latest comments on the rules of policy interpretation are treated by the courts across the country.

FIRM NEWS

Congratulations to Paul French on his appointment as a judge of the Ontario Court of Justice. We all wish Paul well as he takes up this new challenge.

On Sunday, August 20, 2006, Mario Pietrangeli participated as cross-examining counsel in the Expert Evidence module of the Diploma in Forensic and Investigative Accounting (DIFA) program offered by the Rotman Executive Programs of the University of Toronto. Mario is Certified as a Specialist in Civil Litigation by the Law Society of Upper Canada. His practice includes the defence of claims against accountants, Trustees in Bankruptcy, financial advisers and other professionals.

Jamie Trimble will be chairing a seminar for the Civil Litigation Section of the OBA on September 25, 2006 entitled “Conducting a Civil Action Efficiently and Effectively: Practical Strategies”. At the same seminar Mary Teal will be giving a presentation entitled “Preparing and Handling the Trial Efficiently”.