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Canadian Property Insurance Update

An Overview of Cutting Edge Developments in Canadian Insurance Litigation

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Canadian Property Insurance Update

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AREAS OF EXPERIENCE

- Subrogation & Recovery
- Property Insurance
- Commercial General Liability
- Fidelity and Surety

EDUCATION

- LL.M., University of London, England, 1975
- LL.B., University of Toronto, Dean's Key, 1974
- A.B., Princeton University, *magna cum laude*, 1971

BAR ADMISSIONS

- Ontario Bar
- Saskatchewan Bar
- New Brunswick Bar

COURT ADMISSIONS

- Supreme Court of Canada

MEMBERSHIPS

- Coalition Against Insurance Fraud
- International Association of Arson Investigators
- DRI
- Canadian Defence Lawyers

Jamie Halfnight joined the firm as a Member in May 2005, when the lawyers of Poss & Halfnight, Barristers & Solicitors, combined their practice with Cozen O'Connor to form an international office in Toronto. He is the Chair of Cozen O'Connor's Canadian Subrogation Group.

Jamie has an exclusive insurance litigation practice, which includes providing coverage advice and defense in the areas of property insurance with specialized emphasis on subrogation, commercial general liability insurance, fidelity insurance and excess and reinsurance. He regularly appears at all levels of trial and appellate courts, including the Supreme Court of Canada. Jamie's practice is centered in Ontario, but he has been called to the bars of other provinces for various cases.

Jamie is a former director of the Advocates' Society, chairing its Insurance Committee. He is also a member of the Coalition Against Insurance Fraud, International Association of Arson Investigators, DRI, and Canadian Defence Lawyers. In addition, Jamie has taught at the Bar Admission Course in civil litigation and has lectured and published on insurance and litigation subjects on numerous occasions.

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AREAS OF EXPERIENCE

- Subrogation & Recovery

EDUCATION

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- J.D., Villanova University, 1981

BAR ADMISSIONS

- Pennsylvania
- New Jersey
- New York

MEMBERSHIPS

- Pennsylvania Bar Association
- New Jersey Bar Association
- New York State Bar Association
- Camden County Bar Association
- Philadelphia Bar Association
- Brehon Law Society

AFFILIATIONS

- Philadelphia Squash Racquets Association, Vice President [99-present]
- Elfreth's Alley Association, President [99-01]
- Appointed Member of the Investigation Division of the Phila. Bar Ass'n Commission for Judicial Selection and Retention
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PUBLICATIONS

- "Practice Tips for Subrogation Counsel in the New Jersey State Courts"
- "Circumventing Waivers of Subrogation, Exculpatory Clauses and Other Limitations"

Vincent R. McGuinness, Jr. is the Administrative Managing Partner of Cozen O'Connor and a Member in the Subrogation and Recovery Department. An attorney with Cozen O'Connor since 1981, he has also served as vice-chair of the Subrogation and Recovery Department for the firm's Philadelphia, Cherry Hill and West Conshohocken offices, and formerly co-directed the firm's Canadian alliance, Cozen O'Connor Subrogation Consultants, Inc., in operation from 2004-2005.

Vince focuses his legal practice on the prosecution of property damages claims, and has tried to verdict in excess of 30 subrogation cases throughout various state and federal courts in the United States. He also coordinates the defense of several hundred asbestos claims asserted against various manufacturers and suppliers of asbestos-containing products.

Vince developed the Subrogation and Recovery Department's many educational seminars and workshops, including the comprehensive 20 month Life of Subrogation Case® program, which traced the life of a subrogation claim from the moment the loss occurs through trial. He is a frequent lecturer and author in the property insurance subrogation industry, including addressing members of the Loss Executives Association, Pennsylvania Bar Association's Insurance Committee, for which he served as the editor-in-chief of the inaugural *Pennsylvania Insurance Journal*, and the Insurance Society of Pennsylvania, for which he received its Distinguished Advocate Award for his lecturing and written contributions.

Vince particularly enjoys use of film clips to highlight his lectures and seminars. His recent presentations include: Hollywood Presents Expert Witnesses; When Catastrophe Strikes – How Hollywood Portrays Property Disasters; and How "Hollywood's Lawyers" Comply with the Code of Ethics.

Vince earned a Bachelor of Arts degree from Drew University in 1978 and a law degree from Villanova University in 1981, where he was a member of the *Villanova Law Review* and authored a Comment titled "Insurance Law-Asbestos Duty to Indemnity and to Defend," which was published in volume 26 of the *Villanova Law Review*. Vince is admitted to practice in Pennsylvania, New Jersey and New York, and before the United States District Courts for the Eastern District of Pennsylvania, the District of New Jersey and the Southern District of New York, the New York Court of Appeals, and the United States Court of Appeals for the Third Circuit.

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AREAS OF EXPERIENCE

- Arson & Fraud Defense
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- Commercial General Liability
- Construction Liability
- Fidelity and Surety
- Property Insurance
- Subrogation & Recovery

EDUCATION

- LL.B., University of Toronto, 2002
- B.A., University of Manitoba, 1999

BAR ADMISSIONS

- Ontario Bar

MEMBERSHIPS

- Law Society of Upper Canada
- Advocates' Society
- Metropolitan Toronto Lawyers Association
- Osgoode Society for Canadian Legal History

Christopher McKibbin joined the firm as an Associate in May 2005, when the lawyers of Poss & Halfnight, Barristers & Solicitors, combined their practice with Cozen O'Connor to form an international office in Toronto. Prior to joining Poss & Halfnight, Christopher articled at a large downtown Toronto firm. He has also worked at firms in Alberta, Manitoba and British Columbia.

Called to the Bar of Ontario in July 2003, Christopher was awarded the Osgoode Society for Canadian Legal History Prize as one of the top 25 Bar Admission Course students in Ontario.

Christopher attended the University of Toronto Faculty of Law, where he received the Cary S. Stern Prize in Civil Procedure and the Jacob Finkelman Prize in Labour Law, and earned Dean's Honour List standing in his third year. In addition, he was an assistant editor for the *University of Toronto Faculty of Law Review* and participated in the Women and the Law Working Group, raising money for a Toronto battered women's shelter.

Prior to law school, Christopher studied at the University of Manitoba, where he earned the Faculty of Arts Medal for highest standing in his program and was shortlisted as a Regional Finalist (Alberta-Saskatchewan-Manitoba) for the Rhodes Scholarships.

Christopher has appeared before the Court of Appeal for Ontario and the Superior Court of Justice.

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AREAS OF EXPERIENCE

- Insurance Litigation and Coverage

EDUCATION

- LL.B., University of Toronto, 1979

BAR ADMISSIONS

- Ontario

MEMBERSHIPS

- Advocates' Society
- Canadian Defence Lawyers
- Defence Research Institute
- Women's Law Association

Sheila McKinlay joined the firm in May 2005, when the lawyers of Poss & Halfnight, Barristers & Solicitors, combined their practice with Cozen O'Connor to form an international office in Toronto. She is the Office Managing Partner of the Toronto office.

Sheila has more than 20 years of experience in insurance litigation and coverage advice. An experienced trial and appellate counsel in the Ontario courts, Sheila's practice in recent years has focused on assisting insurers with the challenges presented by the investigation and defence of fraudulent first party claims, including arson cases, and in the litigation of a wide range of coverage-related disputes arising under both property and liability policies.

A graduate of the University of Toronto Law School, Sheila was called to the Bar of Ontario in 1981.

Sheila is a frequent lecturer on a wide variety of insurance topics, and has presented in-house seminars to insurance clients, assisting them in developing effective claim-handling procedures for the current insurance and legal environments. She is a member of the Advocates' Society, the Canadian Defence Lawyers and the Defence Research Institute.

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AREAS OF EXPERIENCE

- Advertising Liability and Personal Injury
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- Business Torts
- Commercial General Liability
- Commercial Litigation
- Construction Liability
- Construction Litigation
- Personal Lines
- Products Liability
- Professional Liability
- Property Insurance
- Punitive Damages

EDUCATION

- LL.B., University of Saskatchewan, 1998
- B.A., University of Western Ontario, *with honours*, 1994

BAR ADMISSIONS

- Ontario Bar

COURT ADMISSIONS

- Ontario Superior Court of Justice
- Ontario Court of Appeal
- Supreme Court of Canada

MEMBERSHIPS

- Advocates' Society
- Metropolitan Toronto Lawyers Association
- Canadian Defence Lawyers
- Defence Research Institute

Christopher Reain joined the firm as an Associate in May 2005, when the lawyers of Poss & Halfnight, Barristers & Solicitors, combined their practice with Cozen O'Connor to form an international office in Toronto.

Acting for clients in a broad range of civil, commercial and insurance-related matters, encompassing both trial and appellate advocacy, Christopher has appeared before all levels of courts in the Province of Ontario.

Christopher earned a Bachelor of Arts degree from the University of Western Ontario in 1994, and was accepted into the Masters of Sociology Program at the University of Western Ontario, specialising in demographic statistical research, where he was the recipient of a Special University Entrance Scholarship. He earned a Bachelor of Laws degree from the University of Saskatchewan in 1998, and while attending, represented the university at the Gale Cup Moot Competition in Toronto, and was a teaching assistant for a first year written and oral advocacy program.

Called to the Bar of Ontario in 2000, he is a member of the Advocates' Society, the Metropolitan Toronto Lawyers Association, Canadian Defence Lawyers and the Defence Research Institute.

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AREAS OF EXPERIENCE

- Arson & Fraud Defense
- Products Liability
- Property Insurance
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EDUCATION

- LL.B., University of Western Ontario, 1999
- B.A., McMaster University, *with honors*, 1996

BAR ADMISSIONS

- Ontario Bar

MEMBERSHIPS

- Advocates' Society
- Canadian Defence Lawyers
- Defence Research Institute
- Toronto Lawyers Association

COURT ADMISSIONS

- Ontario Court of Appeal
- Ontario Superior Court of Justice
- Supreme Court of Canada

Brett Rideout joined the firm as an Associate in May 2005, when the lawyers of Poss & Halfnight, Barristers & Solicitors, combined their practice with Cozen O'Connor to form an international office in Toronto. Prior to joining Poss & Halfnight, Brett worked as a commercial litigator in Toronto.

Brett has experience in litigating matters at the Superior and Divisional Courts of Ontario, representing clients on a broad range of insurance matters, including fraud and arson defenses, products liability and property insurance claims.

Brett now focuses his practice on subrogation and recovery actions. He has successfully obtained both Anton Piller orders and Mareva Injunctions on behalf of the firm's recovery clients.

A graduate of the University of Western Ontario, Brett was called to the Ontario Bar in February 2001. He is a member of the Advocate's Society, Toronto Lawyers Association, Canadian Defence Lawyers and Defence Research Institute.

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AREAS OF EXPERIENCE

- Subrogation & Recovery
- Casualty Defense
- Tort Law
- Contracts

EDUCATION

- J.D. Duquesne University School of Law, 1982
- B.A. Pennsylvania State University, *cum laude*, 1978

MEMBERSHIPS

- American Bar Association
- ABA Litigation and Tort and Insurance Practice Committees
- Pennsylvania Bar Association
- Philadelphia Bar Association
- Board of Trustees and Treasurer - Philadelphia Bar Foundation
- Board of Directors - Philadelphia Diversity Law Group
- Board of Directors - The Justinian Society

PUBLICATIONS

- "Apportionment of Recovery Between Insured and Insurer in a Subrogation Case,"
- "Regional Subrogation Practice Update: Law and Procedure in New England States,"
- "21st Century Problems – 21st Century Solutions: Insuring Large Complex Property Accounts – Life of a Complex Subrogation Case,"

Elaine M. Rinaldi joined the firm in 1982 and is a Member of the Subrogation and Recovery Department in the Philadelphia office. She is the Director of Strategic Expansion, responsible for the implementation of the firm's strategic expansion plan, continuing the firm's growth in key markets nationally and internationally. In addition, Elaine formerly co-directed the firm's Canadian alliance, Cozen O'Connor Subrogation Consultants, Inc., in operation from 2004-2005. Her practice focuses on litigation where she represents insurers and corporations who have sustained damages as a result of catastrophic events. She has broad experience in insurance, casualty defense, tort law, contracts and property subrogation. Elaine has successfully handled property subrogation cases in more than 20 jurisdictions across 10 states. She is a frequent lecturer in the insurance industry, as well as the ABA TIPS Committee.

Elaine is a member of the American Bar Association, the ABA Litigation and Tort and Insurance Practice Committees, as well as the Pennsylvania and Philadelphia Bar Associations. She is a member of the Pennsylvania Commission on Women in the Profession. Elaine is also a Trustee of the Philadelphia Bar Foundation where she holds the position of Treasurer. She is also on the Boards of the Philadelphia Diversity Law Group in which she co chairs the summer associate program and is on the Board of the Justinian Society.

Elaine is a *cum laude* graduate of Pennsylvania State University and Duquesne University School of Law where she was awarded the Order of the Barristers and was the Recent Decisions Editor of the *Duquesne Law Review*. She is admitted to practice in Pennsylvania, the United States District Courts for the Eastern, Western and Middle Districts of Pennsylvania, and the United States Court of Appeals for the Second, Third and Six Circuits.

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MANAGING THE BUSINESS OF RECOVERY LITIGATION CONTROLLING COSTS, GETTING RESULTS

presented by

Jamieson Halfnight.

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Managing the Business of Recovery Litigation

by Jamieson Halfnight

Introduction

In the continuous search for improvements to the bottom line, insurers are increasingly turning to the recovery area, seeking to maximize the recoupment of monies paid out on first-party losses. Traditionally, subrogation and recovery work was considered an afterthought, to be undertaken when and if the claims department decided a case was strong enough to warrant the pursuing of recovery claims. Unfortunately, too often good recovery chances were lost through the passage of time, the failure to investigate property or at all, or just straight organizational inertia.

Generally speaking, the traditional approach is no longer acceptable to most insurers. With every first-party loss comes a potential opportunity to shift the loss to some other responsible parties, an opportunity that must be properly evaluated and pursued. The role of specialised counsel in assisting with these efforts is becoming more appreciated as time progresses.

I propose to exam a number of issues relating to the conduct of recovery actions in Canada. My remarks are not directed at the many smaller claims where a more administrative process, not involving the time and trouble inherent in legal assistance, is appropriate. Rather, we are here contemplating cases with sufficient money at stake that a more comprehensive effort to pursue recovery is warranted. In our firm, we use the benchmark of $100,000 as being the rule-of-thumb dividing these categories of cases. The point being examined is how insurers can go about obtaining the best results in the most cost-efficient fashion.

Investigation and Early Intervention

It is not possible to develop a comprehensive checklist that details all the activities or procedures that need to be performed when investigating a loss, be it fire or building collapse, etc. Common sense and experience will usually suggest procedures that are generally desirable to

follow during the investigation of any loss. There may also be procedures specifically applicable to various kinds of property losses, including fires, building collapses and "acts of God".

The reality is that the appropriate procedure to follow in any particular loss will always vary depending on the circumstances. As well, the extent of property damage suffered by the insured, the number of potential recovery targets which are identified as the investigation progresses, the potential for an ongoing criminal or quasi-criminal regulatory investigations, the extent of various potential hazards at the site, the urgency of commencing site restoration activities, and countless other factors will all influence the format the investigation takes.

Given that there is no uniform investigation checklist to be used in all losses, the people investigating and supervising the investigation of a loss must rely heavily upon their experience and common sense. It is safe to say, however, that it is not possible to be sure an adequate, complete, investigation is being performed, unless one is able to:

(a) recognize the potential liability theories;

(b) build the right team of experts and direct it appropriately; and

(c) identify the evidence that must be preserved and determine how that should safely be done.

The legal theories pertinent to each of these three major considerations are continually evolving and an experienced legal counsel will be able to guide the insurer through this potential minefield. Each of these three points is addressed below, with some practical, everyday, examples given to help highlight the issues.

Recognizing all Potential Liability Theories

When conducting property loss investigations, the logical first step is to determine the relevant facts and then determine possible targets for recovery. This requires the insurer's representatives to get to the scene and begin investigation as soon as possible and to communicate with legal counsel to determine what factual inquiries are truly important. This is because it is not always possible at the outset of an investigation to determine which facts are important unless there is an appreciation of the potential liability theories. If those in charge of conducting the investigation are not aware of all the potential liability theories, vital evidence

and potential recovery opportunities may be lost forever early in the investigation. It is always important to bear in mind that there can be more than one cause of a loss and early, proper investigation is necessary to identify the various potential causes.

The following are some types of losses and examples of how investigation efforts should be focused:

1. In fire losses, even where the cause and origin of the fire cannot be conclusively determined, or there is no responsible party with a "deep pocket", or the fire was started by the insured, there may be avenues of recovery that can be identified with proper investigation. For example:

   (a) There may have been delay in detecting the fire because of a defective fire alarm

   (b) The fire may have been permitted to spread because of an improperly designed or malfunctioning fire prevention and/or fire suppression system(s).

      (i) A severe fire in a sprinklered structure or in an installation equipped with automatic fire suppression systems, is a situation calling for detailed inquiry.

      (ii) A fire in a large structure such as a warehouse or factory is also a situation calling for detailed inquiry, as often large structures will have to meet National Building Code and National Fire Code design requirements intended to lessen potential fire damage. Such requirements are the installation of firewalls and the use of building materials designed to be fire resistant.

      (iii) The occupant of the building, if different than the insured, may be a target, as their activities may have contributed to the cause or spread of the fire. For example, the occupant may improperly store its stock or delay notifying the fire department.

2. In "Act of God" losses, appropriate investigation can often reveal potential recovery targets that were not, on first review, identified.

   (a) In the case of a roof collapse due to excessive snow load, consider whether the mass of the snow exceeded the Building Code design standards. Often, Building Codes require portions of a roof's supporting structure where drifting can be expected to occur, to be specially constructed. The fact that a roof collapsed on an insured's building, but not on buildings in

the same area, is a signal that design and/or construction could have been improper.

(b) Where high winds cause damage to buildings, it is important to determine if similar damage was caused in the vicinity of the loss. If not, there may have been design or construction problems that caused the building to not meet Building Code requirements. It is also desirable to determine, if possible, actual wind speed at the loss site at the loss time; Environment Canada data, while convenient to obtain, is often of limited use as wind speed can vary over short distances.

(c) In the case of plumbing freezes, something usually has gone wrong somewhere, often because of somebody else's negligence. A furnace may have malfunctioned, the heat may have been turned down, a window could have been left open, a pipe may not have been adequately insulated, or an unprotected pipe may have been inadvertently left filled with water.

One crucial step in the investigation of losses, particularly the type described above, is choosing the right experts to help investigate and identify theories of liability.

Building the Right Team of Experts:

Identifying the proper expert to retain is an important first step in any investigation. Usually, common sense determines which type of experts are appropriate for particular losses. The crucial consideration is to ensure the need for each type of expert is identified early enough so the expert can be of maximum assistance. This is not as easy as some assume: many of the expert companies that work for the insurance industry purport to be expert in all matters and will not readily admit that the case should be referred elsewhere. Also, there are some experts who will undertake a broad-based investigation, when a narrower, more focused effort is called for, because of a desire for billings, confused thinking, lack of real expertise in the relevant area, or all of the above. An insurer can benefit significantly from having a lawyer experienced in putting together and presenting recovery claims, do the work to select, brief and control the expert team.

Early successful intervention usually requires that an expert must be retained immediately following a loss so that they can get on site as soon after the loss as possible, before any crucial evidence is lost or altered. The following are two examples of the need to have the expert attend the loss site as fast as possible:

1. In fire loss cases, often the first expert to be chosen is a cause-and-origin expert who can determine the cause of the fire. However, in cases where the cause-and-origin expert may identify the insured as the cause of the fire, it may become necessary to retain an engineer who can determine whether the building and its fire suppression systems complied with the applicable Fire Code and Building Code provisions. It is very important that this engineer be able to inspect these systems and the remnants of the building before clean-up occurs, so that they can see the systems in as close to their pre-fire state as possible.

2. In "Act of God" cases it is important that the expert be retained as soon as possible so that they can examine the loss before remediation begun. In snow-collapse cases, the expert will need to get on site quickly to determine the snow load at the time of the collapse, as well as to see the building components in their collapsed state, before site remediation begins.

General Tips for Retaining Experts

There is no generally applicable checklist for choosing and retaining experts but the following tips should be kept in mind when retaining an expert, regardless of the type of loss:

1. Stay away from "generalist" or "jack-of-all-trade" experts who claim to be experts in everything. Expert witnesses who spread their expertise across many areas are susceptible to attack by a competent defence counsel. There is also a greater possibility that such an expert can overlook a crucial piece of evidence during their investigation, than a more-focused expert who is a true specialist.

2. Experts with strong credentials in their field, but who do not appreciate the limits of their own abilities and want to do it all for you, should be avoided. Many fire loss cases require the services of a qualified cause-and-origin investigator. Often, these investigators are relied on to conduct a preliminary investigation during which the need for other experts is identified. For example, the determination of a fire's cause and origin can require the elimination of alternative causes, such as electrical failure. Eliminating these causes may fall beyond the expert's abilities.

3. "Full service" consulting firms should be used with some caution. These firms often have qualified personnel on staff, but this does not mean that every expert at the firm is the particular expert you want to work on a particular loss. The benefits of individually selecting the most appropriate experts outweigh the efficiency of using multiple experts from the same firm, if some of those experts are not appropriate for the task at hand. One wrong step in an expert's analysis can be disastrous for a case.

When the right team of experts has been put in place and has conducted their investigation, the next step is to obtain a report, but the timing for this must also be kept in mind.

When to Obtain an Expert Report

Consider carefully whether and when an expert should issue a written report, and for what purpose. Assuming that the expert is providing adequate oral updates either directly, or through legal counsel, on the state of their investigation and analysis, writing a report before completion of discovery may not be necessary and could be potentially dangerous. Often, only after examinations for discovery are complete can one be sure that there is a proper and full factual background for an expert to issue an opinion. It is not that the facts will change, but there may simply not be adequate access to all the important facts, particularly those known only to the defendant, until after discovery has been conducted. In the Ontario litigation process, an expert report often does not need to be served on a defendant until 90 days before trial is to start.

Another problem with having an expert report prepared prior to the commencement of litigation, is that courts can take a liberal view regarding the discoverability of expert's reports and the scientific work underlying them. Addressing the reports to counsel can assist in protecting reports from production through privilege; however, there is no guarantee that the defendant will never see the report, if it is unfavourable and, if the expert is produced as a witness at trial, report will likely be the subject of inquiry. At trial, the court may order the expert's entire file, including his notes, to be produced. It is prudent to assume that any written reports prepared by an expert will eventually fall into the hands of an opposing party.

Some experts like to issue preliminary reports based upon their first impression of the circumstances of a loss. Often these reports are not necessary and can be dangerous to a case as they are usually based on an incomplete or inaccurate understanding of the important facts. Such reports can damage the expert's credibility and opinion, as a competent defence counsel will attack the expert as pre-judging the circumstances of the loss and tailoring their investigation to lead to a pre-determined conclusion. At the very least, the expert will have to justify any changes in view between the preliminary and final reports.

Another potential problem is an expert report which focuses exclusively on pinning responsibility on a party with no assets or insurance coverage or which is protected by a

limitation of liability or waiver of subrogation in a commercial contract or lease. These reports can significantly harm recovery efforts against defendants with "deep pockets". It may be that these reports are better left un-written so that the expert can focus on other parties.

Identifying the Evidence Which Must Be Preserved and How to Preserve It

Identifying and gathering important evidence can be a time-consuming and, at times, mundane task. It is, however, a vital part of a successful recovery effort. Like determining which steps to take when investigating a loss, experience and common sense will be important elements that guide the recovery team. The following factors are generally applicable to gathering evidence after a loss although there is, again, no standard checklist:

1. Whenever possible, loss sites should be thoroughly photographed. Videotaping, when possible, can also be extremely helpful.

2. A surprising number of fires and disasters are videotaped while in progress. It is not uncommon for news media, bystanders, curious neighbours or freelance photographers/videographers who are nearby to take interest and bring their camera, so asking people on site for any pictures or video they have is worthwhile.

3. Critical dimensions should be diagrammed in cases involving structural damage. This is because the dimensions of a structure may lead to specific Building Code requirements.

4. Identifying and interviewing all potentially important witnesses and taking witness statements while the witnesses are available, willing to talk and their memories are still fresh is very important. Interviewing witnesses can help put the events in context as well as give a good idea of whether their evidence is capable of belief and will be accepted by a court. Taking written or recorded statements is also helpful as litigation can occur many years after a loss occurs and witnesses may rely on their statement taken at the time of the loss to refresh their memory at trial.

5. Gather as many important documents from the insured or other interested people and entities as soon as possible. Occasionally, potentially important information, such as recordings of "911" calls and burglar and fire alarm records, can help establish good timelines of when important events occurred. In the events of fires and building collapses, municipalities may have important designs and drawings in their records relating to the approval of building permit applications. Sometimes, it can take a while to go through the Freedom of Information request process.

6. The light fixture, toaster, or other device that is alleged to have caused the fire could well have been purchased and installed on the premises at the same time as one or more essentially identical devices that may have been manufactured at the same time as the device in issue. Examining undamaged exemplars is of invaluable assistance in identifying the failure mode in the accused product, and will assist in levelling the playing field against a product manufacturer who is going to be intimately familiar with that product. Exemplars of the same model and vintage as the accused product are often hard to come by, if they are not available at the loss site.

The Spoliation Defence

In many instances, an expert investigates a loss scene, takes pictures of whatever the expert deems must be photographed, and saves whatever physical evidence the expert thinks should be saved. The expert may then conduct whatever destructive testing they feel is necessary to verify their theory and then wrap up their investigation. At some later point, usually after the loss site has been cleaned up and rebuilt, the subrogation action commences. At that time, the defendant retains an expert but, because the loss site is no longer available, the defence expert can only rely on the plaintiff's expert's photographs and any physical evidence that was preserved during the investigation of the loss, to develop an opinion that contradicts the plaintiff's expert's theory. The defence expert (and defence counsel) might also challenge the adequacy of the plaintiff's expert's investigation and analysis, and might also challenge the adequacy of the evidence supporting the plaintiff's expert's theory.

There is an increasing trend in Canadian recovery litigation for defendant's to raise evidence-spoliation arguments. The basis for the argument is that there should be a "level" playing field, as far as the gathering, documentation and preservation of evidence is concerned. Typically, a defendant's counsel will argue that because a defendant was not permitted to examine the site after the loss occurred and that it was not given an opportunity to test its product or work, the plaintiff should not be allowed to lead its evidence. While it is clear that there is no independent tort of spoliation of evidence, this area of law is still evolving in Canada; the likely consequence of spoliation is trial judge-imposed limitations on what evidence and opinion can be lead at trial to support the plaintiff's case. In the United States, there are many cases where the plaintiff's case was dismissed for spoliation of evidence.

The best way to avoid evidence spoliation arguments is to let potentially adverse parties examine the loss site before it has been disturbed, under the insurer's supervision. The potentially adverse party can be put under whatever constraints may be necessary in the circumstances. That way, the potentially adverse party's representative(s) can examine and document whatever evidence it wishes. They can also ask to have preserved any physical evidence that they wish. This will tend to preclude a potential defendant from later complaining about something being unavailable, because they had the opportunity to examine it for themselves.

The downside to this approach is that it can slow the investigation and make it more costly, especially in an investigation where potentially responsible adverse parties are identified as the investigation progresses. When the benefit of these extra costs are weighed against the detriment - a possible failed recovery action because of evidence spoliation - it seems clear that the extra expense is worthwhile.

Often times, the site of fire or other property losses cannot be maintained in an undisturbed setting for very long. The insured will often wish to have their business or home restored as soon as possible, so that they can resume business or rebuild their life. This is often in conflict with the subrogating insurer's need to take careful steps to conduct a proper investigation and prevent evidence spoliation.

Most courts should be sympathetic to these real-world concerns, so long as some effort and consideration to the opposing parties' points of view has been made. It is hard to imagine a court expecting a policy-holder to delay restoration efforts to keep a site available for inspection, assuming that an appropriate effort has been made to identify and notify potentially responsible parties and give them a fair chance to inspect the site.

Dealing with Insured and Uninsured Losses

There is an increasing trend in the insurance industry for large corporations to have complex insurance schemes. It is not uncommon to see large self-insured retentions and multiple layers of coverage. Many large companies are becoming more comfortable with insuring themselves for very large amounts. In cases where there is a large self-insured retention or

losses which, for business or other reasons, the insured decided it was comfortable not insuring itself against, the insured may attempt recovery of its own losses. In these situations, the insurer must proceed carefully with its recovery efforts. In situations involving losses not caused by fire, the insured will likely have the right to be made whole, before the insurer has any right to the recovery proceeds. In these situations, the aggressive insurer will be at risk of going to significant expense and effort, but not bearing any fruits of recovery. The following are examples of some of the problems that can arise when there are uninsured losses:

1. The insured will usually make getting back in business its primary goal following a loss. This means quickly cleaning up the loss site and starting the necessary re-building as soon as possible. The insured may not be concerned or equipped to fully investigate the cause of a loss. This goal is at odds with the insurer's obligation to investigate the circumstances of a loss and to be as thorough and careful as possible when doing so, in order to maximize recovery possibilities. The insurer will also be under pressure to get the insured back in business to minimize indemnity, further complicating matters.

2. In situations where the insured is not made whole, it will usually have the right to drive the recovery investigation and litigation. In these circumstances, if the insured is not equipped with the knowledge or resources to conduct a proper and full investigation, avenues of recovery can go undiscovered, leaving potential sources of recovery untapped and increasing the possibility that the insurer will not be able to recover its losses.

3. In situations where there is a substantial uninsured loss, the insurer is in an even worse position because it might go to great effort and expense to fully investigate the loss and drive recovery efforts, but because the insured must be "made whole" before the insurer can recover, the insurer runs the risk that only the insured will benefit from the insurer's recovery effort and expense. This can occur in situations where the most responsible third party does not have adequate insurance coverage or is insolvent, such that its pockets are not sufficiently "deep" to cover both the insured and uninsured losses. In those situations, the insured will recover first, leaving the insurer in the position of going to great expense for little, if any, recovery.

4. The insured may seek to inflate its uninsured losses as much as possible, which can make settlement with defendants more difficult. Further, if the responsible parties do not have sufficient insurance coverage to pay both the insured and uninsured losses, the inflated uninsured loss will likely reduce the insurer's recovery.

5. The insurer has to sue any responsible third-parties in the name of the insured, it cannot commence its own separate lawsuit. As a result, it is virtually impossible for the insurer and insured to commence separate lawsuits against the same third-

parties. Instead, they must work together to conduct the litigation. This can be difficult when a defendant makes an offer to settle which is suitable to the insured, but not the insurer. If the insured is not made whole, it may have the right to settle the litigation, leaving the insurer with little recourse to recover its losses.

Pro Rata Agreements

In situations where there are uninsured losses, a useful tool to protect the insurer's ability to recover is a pro-rata agreement. Under a pro-rata agreement, the insurer and insured agree to share in recovery from the first dollar based upon an agreed percentage. Normally, but not always, the percentage corresponds to the provable, recoverable damages claimed by each party. Expenses incurred in pursuing the joint claim can be allocated according to the same percentages, subject to any costs recovery at the end. In many cases, however, the insurer will bear the expenses during the course of the case, and obtain reimbursement of the insured's share of expenses out of the insured's share of the recovery at the end of the case. In other cases, the insurer will agree to bear all the expenses in return for the insured entering into the pro-rata agreement.

Both parties will benefit from a fair pro-ration agreement. The insurer avoids the potential that the insured will have to be made whole, which will reduce or eliminate the insurer's recovery. The insured benefits too, because it will often not have the resources or expertise to properly investigate a loss and make efforts to recover its loss. Because the insured has a definite stake in the litigation, the insured has more incentive to cooperate actively in the subrogation case, which can drag on for years after the insured's 1st-party claim has been paid.

There is no standard pro-rata agreement that covers all situations, but, generally speaking, the following principles should be kept in mind when negotiating a pro-rata agreement.

1. A pro-rata agreement should have a mathematical formula that details how any recoveries will be allocated between the insurer and insured. A key to arriving at this formula is to accurately determine each party's losses. This will have an added benefit of crystallizing the actual value of the uninsured losses, such that the insured cannot inflate them.

2. The key to negotiating a fair pro-ration agreement is to verify what the actual "uninsured" losses are. This means that, even when a loss clearly exceeds policy

limits or sub-limits, the adjuster should nevertheless establish the total amount of the losses sustained for each element of the insured's claim, both on an actual cash value and replacement cost basis.

3. The power to settle any litigation must be clearly outlined in the pro-rata agreement.

4. The insurer should ensure that the insured waives any right it may have to first recovery in exchange for the fruits of the insurer's investigation. This is often the major reason an insured is willing to enter into a pro-rata agreement, as it may not have the resources, knowledge or desire to conduct proper investigation itself.

5. Clearly outline the degree to which any party will be responsible for the expenses of the recovery efforts.

When a pro-rata agreement has been finalized, the parties are free to put their resources into their mutual goal of recovery. At this stage of the game, the goal will be moving the case ahead as efficiently as possible to a conclusion which maximizes the cost/benefit ratio.

Developing the Damages

An essential component to being paid sooner rather than later is a presentation of the damages claim. Too often, the claim outline and substantiation that results from the settlement of the first-party loss, governs the recovery action, at least in its early stages. This is a mistake: the liability targets or their insurers will not be interested in dealing with the claim until the quantum of it has been properly put together and presented. In this jurisdiction, most first-party losses are settled on a replacement-cost basis. Because of the first-party relationship, estimates and rounded numbers are often used. Claims are negotiated without proper substantiation from time to time. All of these factors are significant difficulties for the prosecution of the recovery action, since the target defendants will not accept this manner of quantifying the claims against them.

Further, Canadian law is that the measure of quantum of loss for purposes of a first-party insurance claim is not necessarily the same as the measure of damages in a tort or breach of contract action; in fact, in some circumstances the measure of damages can be quite different. Therefore, it cannot be assumed that the process of setting quantum that arose between insured and insurer, even with some modification, can be readily used to prosecute a recovery action.

If attention is paid to possible recoveries from the early stages of a claim, issues relating to the development and quantification of the damages can be dealt with efficiently and in a timely manner. For example, to the extent an ACV measurement of loss assists in the potential recovery action, it can be worked out on a proper basis during the course of the adjustment. Too often, the ACV is not terribly relevant or useful to the first-party adjustment and is given short shrift in that process; this can be hard to deal with some months or years later, when it comes time to deal with the presentation of the recovery claim as against the target defendants.

Just as the preservation of physical evidence to prove liability is important, the financial and documentary evidence required to prove the loss must be preserved from early on. This is particularly true in the case of insureds whose business may be failing or about to be sold or merged. Early advice and direction from experienced recovery counsel can be essential in making sure the insurer's interests are protected in these circumstances.

Uninsured losses are often a subject of controversy in dealing with both first-party and recovery claims. It is not unusual for an insured to feel that a significant proportion of its loss was not compensated in the first-party adjustment. Such an insured often wishes to pursue its claim against the perceived responsible parties. While including an uninsured claim in the insurer's recovery action can be fraught with problems, it is generally a good thing from the point of view of encouraging interest and assistance in the litigation from the insured. The proper quantification, support for and evaluation of the uninsured loss is another feature which good recovery counsel can bring to bear in dealing with the claim from an early time.

Controlling Costs: The Role of Contingency Fees

Although contingency fees have been legal in various parts of Canada for some time, it is only recently that their use in Ontario has been fully sanctioned by the legislature, the Law Society and our courts. Generally speaking, the culture of the insurance community here has called for hourly-rate billing on recovery matters and this has had the following effects:

(a) Because of an intense desire not to "throw good money after bad", insurers have tended to refer matters to counsel for recovery action in only the clearest of cases;

(b) Again to avoid legal expense, insurers have tended to establish their own recovery departments, staffed by claims people who have or develop expertise in pursuing recovery claims. In at least some instances, this had the effect of having claims personnel making numerous decisions on what is or is not a good recovery claim without the expertise to properly judge the liability situation, or the chances of recovering through the court processes;

(c) Depending on internal workloads, personnel changes etc. and depending on the personal views of those handling the claims, an insurer's claims department can close many files without seriously examining potential recoveries;

(d) Even where recovery possibilities are examined, the examination is often seriously hampered by the failure, during the first-party adjustment, to pay proper attention to the investigation and development of recovery possibilities;

(e) Even where a recovery action is commenced, an insurer has the pleasure of paying regular and perhaps sizable legal bills without any idea of whether there will be a pot of gold at the end of this particular rainbow;

(f) Where lawyers work on an hourly-fee basis, there is always the suspicion that the lawyer's interest lies in maximizing the number of hours spent on a matter, since that has the effect of maximizing the billings to the client.

It is not surprising that insurers have, in recent times, looked for some alternatives.

Probably the best alternative is the contingency fee arrangement. This arrangement can take many and different forms, depending on the negotiations between counsel and client. However, some typical features are:

- The law firm collects a fee for its work in the recovery action only if a recovery is made;
- The fee collected by the law firm is in proportion to the recovery made, with the result that an insurer is not faced with the prospect of making a recovery that is then eaten up by legal costs;
- The lawyers' and insurers' interests are bound up together in what amounts to a joint enterprise on the claim. There is congruence between the insurer's and a law firm's desire to get the matter settled or otherwise resolved on the best possible basis within the shortest possible time;

- The insurer client bears only the expenses (including expert expense) of proceeding with the recovery action, such expenses being billed on an interim basis;

- Some mechanism is usually provided (in our experience, unnecessarily) for the situations that may arise where insurer and law firm have a falling out or a disagreement as to the handling of the matter;

- Normally, the contingency percentage varies according to the stage of the claim proceedings the settlement has reached, sometimes the size of the claim and sometimes if a regular flow of recovery work is directed to the law firm by the insurer.

At our firm, we firmly believe in the efficacy of the contingency fee arrangement for a regular client and, in fact, for most clients who wish to conduct recovery actions. The arrangement allows recovery counsel to focus on what will cause the case to succeed, without sacrificing any essential element of the preparation of the case. It provides motivation for counsel to do an effective and competent job at early intervention as described earlier, as well as in the conduct of any negotiations or lawsuit. The client can generally rest assured that the matter is being prosecuted properly in the mutual interests of the insurer and law firm involved.

By retaining recovery counsel under a contingency fee arrangement, the insurer can save significant out-of-pocket costs that it would otherwise pay. For example, the conduct of an effective liability investigation, including selection, briefing and supervision of experts, can consume a significant amount of independent adjuster's time and/or company employee's time. What may well be a better job can be achieved, for no out-of-pocket cost, by having expert recovery counsel do the work under a contingency fee arrangement.

In our experience, the best form of contingency fee arrangement governs a flow of business, rather than an individual case. This has the advantage of allowing the insurer to obtain top-quality review of its claims files, for recovery purposes, without paying an immediate or direct price for such review. It suits the law firm's interests in that both good and bad cases will be referred under the contingency arrangement, will be properly evaluated for potential recoveries and will benefit from early intervention. It creates the sort of ongoing joint venture or partnership that allows for the achieving of optimal results and the ready straightening out of any problems that arise.

Parenthetically, you might be interested to know that our firm offers to its clients that have not been under a flow-of-business arrangement, the possibility of a review of first-party claims that were closed without the undertaking of any recovery activity, essentially in order to see whether there is undiscovered potential that should be pursued. This provides something of a check on the claims department's handling of recovery possibilities and can lead to some successful recoveries that are truly "found money". For all practical purposes, this service is free to the insurer.

Some insurers purport to be unenthusiastic about contingency fees, because of the notion that the law firm may make a "killing" on a successful larger case. In our view, this is misguided thinking. First, the law firm risks the entirely of its fee on such a successful result and no one knows at the beginning whether the case will be won or not; there should be some reward for that risk. Secondly, larger cases usually require larger effort to prosecute and this leads to greater out-of-pocket cost for the law firm, as well as greater risk; a large fee is justifiable in these circumstances. Thirdly, the incentive provided to the law firm from the potential of a large fee is a highly desirable element to achieve the insurer's purposes – to get the law firm to work efficiently for the best possible result at the earliest possible time and at the least possible cost. Finally, our legal-costs system provides for a good opportunity for an insurer to recoup from the unsuccessful defendant a significant proportion of its legal costs of having proceeded with the subrogated action.

This represents another advantage of the flow-of-business model: the insurer takes advantage of the small number of lucrative successes for the law firm, by having the firm do a substantial amount of review and prosecution work which is, essentially, completely for free. The benefits of such a program are tangible and counterbalance any windfall nature of a large loss successfully recovered.

One of the measures of the potential benefit of contingency fees for an insurer, is to look south of the boarder. In the U.S., a high proportion of recovery work is done on a contingency fee basis and the insurers there generally tend to think only in these terms in pursing recoveries. It is our view that, given the advantages of the contingency fee arrangement for both parties to

the agreement, we are likely to see a substantially increased use of this device in recovery actions in the insurance business here.

The Large Document Case

As commercial transactions become ever more complex, the quantity of relevant documentation for any recovery claim – and particularly for the litigation of such claims – gets ever larger. As any litigation counsel will tell you, the collecting, cataloguing and handling of the documents in a larger case consumes a significant and increasing amount of time - and someone's money - in this era of more complex claims litigation.

To address this money-eater, smart law firms have in recent years increasingly turned to electronic litigation support assets – i.e. the hardware and software necessary for the convenient cataloguing, reproduction and searching of large document databases. Any firm that is not equipped with this capability is simply not in the game.

Some large-document cases are sheep in wolves' clothing: they still boil down to a small number of documents that are crucial to the liability and/or damages decisions. However, it is rarely obvious in the early stages of a matter that this is the case; usually, the documents must be collected, examined, analysed and distilled in order to determine what subset of the documents are the truly important ones. Accordingly, even in this sort of case, the ability to electronically store, retrieve and search documents is essential.

What electronic litigation support of this nature really does is to capture the intellectual product of those working on the documents, in a manner which preserves that product and makes it useable both by the same practitioner or others, in the future. This process is somewhat deceptive: it requires a larger up-front investment of time and effort to develop the database and annotate it properly, but this investment can pay off hugely down the road in a recovery claim. For example, a large collection of potentially relevant documentation must be reviewed by the clerks or the lawyers in a law firm, in order to determine what documents are to be produced to support the claim and/or as relevant to the pleaded issues. If this is done manually, any preservation of the intellectual product of that process depends upon the notes and memory of the personnel working on it and the huge task of preparing an affidavit of documents will

normally still be faced in the future. Under an electronic database system, much of the basic cataloguing of the document collection is done at minimum cost to the insurer, leaving the time of the more highly paid professionals to be engaged in actual analysis of the important documents. Further, once the electronic database has been created, an affidavit of documents can be generated in a fraction of the time required by the more traditional, manual approach.

Another example of the efficiency savings of proper electronic document database support is the reproduction of documents for client, expert or the opposing counsel. A disk of electronic copies of documents, together with any desired cataloguing or notes, can be produced in a few minutes and shipped conveniently to its intended destination. Compare this to the vastly more expensive process of producing photocopied versions of massive document collections (at .25¢ a page!), the shipping of it at significant expense and the difficulties in cost of storage at both ends of that process. In our experience, the savings in copying, shipping and storing costs alone can outweigh the initial cost of the creation of the electronic document database.

Entire programs have been done on the use of electronic litigation support in this area. My purpose here is to just simply demonstrate that this is one area in which specialized recovery counsel can keep costs down and more efficiently reach the optimal result.

Moving the Case

Probably the single biggest complaint about the conduct of recovery actions as traditionally practiced here, is the slow rate of progress of such cases towards a resolution. This starts from the beginning: subrogation/recovery is often not even thought about until after the first-party loss has been settled, often 1 to 2 years after the events. At that time, the matter is often shipped to litigation counsel who then set about evaluating and preparing the case for presentation and, if necessary, litigation. Because there is no deadline on this process (other than a limitation period which, until recently, was typically the rather generous 6-year period provided by statute), time urgency was lost and it has been absolutely customary for subrogated actions to not commence until 3 or 4 years after the events. Because most counsel handling such actions are not specialized to any great extent, and are working on an hourly basis, with interim billing, the claims and litigation are handled on a leisurely timeline with other matters often interfering.

A properly conducted recovery effort, especially under a contingency fee arrangement, significantly alters this equation. Recovery counsel are generally expert in and devoted to making recoveries for their clients. Especially under a contingency fee arrangement, the pay-off for the law firm generally comes at the end of the matter, creating a significant incentive for moving the case ahead. With consistent and persistent application of effort, these cases can be made to move much more quickly than the traditional pattern would indicate.

As anyone who is familiar with our litigation system will tell you, it is not designed to be a fast-moving beast. There are many ways in which a party who wishes to delay and defer, can do so. However, there are definite limitations on how long such delay tactics can go on, in the face of persistence by claimant's counsel. Essentially, claimant's counsel's objective is to settle the matter before litigation or, where that is not possible, to get the matter approaching trial. This is when many liability insurers are prepared to look seriously at settling a case.

It is also a near-universal pattern that the longer a matter persists in our litigation system, the more costly it is. A contingency fee arrangement creates a real incentive for the claimant's law firm to avoid this syndrome. Further, the recovery lawyer that moves the case along will benefit from the lessened cost in legal time.

Consequently, we have focused additional effort and thought to how matters can be moved along to avoid the traditional handling syndrome. Available measures include:

- early intervention, analysis and decision on the prosecution of a recovery claim;
- possible recovery/subrogation agreements with the insured, where there are still outstanding first-party issues;
- early preparation of the tort damages presentation and supporting brief;
- early notice to and involvement of the insurers of the recovery targets;
- one serious pre-litigation attempt to get the defendants and their insurers to pay attention and settle;

- early institution of litigation without waiver of defence for more than a modest amount of time;
- compelling documentary disclosure on a timely basis;
- moving to discoveries at the earliest possible time;
- taking all reasonable steps to maintain discovery dates once set;
- getting undertakings implemented at an early date;
- setting the matter down for trial as soon as possible;
- obtaining pre-trial conference and mediation dates at an early time.

That is the plan; it is not always possible to meet these objectives, but consistent effort along these lines should produce timely results at lower cost.

Conclusion

The cost-efficient handling of larger, more complex claim requires a commensurate response in terms of the application of talent and energy to the development and prosecution of the claim. The steps outlined in this paper will go a long way to limiting costs and maximizing benefits of the recovery efforts that all agree are worthwhile.

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Strategic Use of Summary Judgment Motions in Arson and Fraud Defences

Sheila McKinlay
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September, 2005

Prior to making a decision to deny for arson or fraud, insurers are now well aware of the high standards that must have been met in their claim-handling procedures. The scope of their investigation must have been comprehensive, and all inquiries carried out in a manner demonstrative of fairness to the insured and compliance with our complex privacy laws. Potentially significant physical evidence must be preserved, and the insurer's communications with public authorities handled with care.

When the investigation or adjustment processes ultimately reveal clear and cogent evidence of fraud or arson, insurers must then meet further challenges to successfully defend the claim on such a basis. With a high level of expense already incurred, and possibly bearing some 'scars' from the often-acrimonious interaction that arises with insureds, their legal advisors and public adjusters, the company then faces the daunting prospect of travelling down a long and potentially hazardous path to obtain a Court ruling on whether its denial was justified in law. The monetary stakes involved in the original property damage claim will dramatically increase once litigation commences, with claims for punitive, aggravated and other categories of damages inflating the amount at risk. The stakes in terms of the insurer's reputation or public image may also increase: 'high-profile' insurance cases are now attracting more notice, as the plaintiffs' Bar becomes sophisticated in its use of the media.

The time-line for any resolution of the claim may begin to stretch off into the horizon. Certainly in Toronto, case management has proven spectacularly unsuccessful in moving actions expeditiously to trial and we are again facing delays of 2 years or more in obtaining long trial dates. Other features of litigating the first party claim that should be within a defending insurer's

contemplation at the outset of an arson or fraud case are (a) the need to produce its internal records of communications relating to the particular claim; (b) where bad faith allegations are made, the possible disclosure of relevant claims handling procedural manuals and policies; and (c) its key personnel having to be produced for questioning on discovery, with the time and effort that must be invested in that process.

In spite of these acknowledged concerns and risks, it is absolutely clear that insurers must remain prepared to identify and fight fraudulent claims: the price paid for routinely 'opting-out' of such battles and paying all claims may be difficult to measure, but we all know it will be too high.

In our experience representing property insurers in arson, fraud and other coverage disputes, the two most troubling aspects of such litigation for insurers are frequently the following:

1. The relentless (and frequently successful) strategy of plaintiff's counsel to shift the focus away from the misconduct of the insured (upon which the denial will have been based) and onto the conduct of the insurer and its representatives (upon which allegations of bad faith and claims for punitive and aggravated damages will be put forward). It remains uncommon for bifurcation (or division) of the indemnity claim under the policy and the bad faith/punitive damages claim to be sanctioned by the Court and, typically, the whole 'package' will proceed together through discoveries and on to trial. In the result, what earlier presented as clear and cogent evidence of fraud or arson may become mired in, and its impact very significantly diluted by the microscopic scrutiny of the insurer's investigation and adjustment of the claim and the portrayal of the insured's personal circumstances, including the inconveniences and other adverse consequences of the insurer's allegedly wrongful refusal to pay. With the plaintiffs' Bar electing jury trials for such claims and the continuing public perception that insurers reap large profits from the premiums they charge to 'ordinary people' (such as the jurors and the plaintiff), the likelihood of even overwhelming evidence of arson or fraud prevailing at trial may appear quite remote;

2. The potential monetary consequences of taking an arson or fraud defence through trial. Even if the insurer succeeds and the claim is dismissed, there is often little likelihood of executing on a costs award against the insured. If the defence fails, the insurer bears its own expenses for legal and expert fees incurred through the years of litigation, the insured's costs (generally awarded on a 'substantial indemnity' basis and possibly now including a 'premium' for their successful counsel), interest on the claim and, where bad faith has been found, a punitive damages award that may completely overshadow the amount of the loss that was originally in issue.

One of the major contributions that resourceful and experienced defence counsel can make to an insurer's effort to resist payment of a fraudulent claim is to develop and effectively implement a strategy for the litigation that will neutralize or significantly reduce the risks and concerns identified above. With experience and skill accumulating on the part of the plaintiffs' Bar, fuelled by the potential for a very significant monetary reward accruing to a successful insured's counsel, a defence strategy that is reactive and not proactive, and that may involve nothing more thoughtful than proceeding through prolonged and unfocussed discoveries, fighting over disclosure of evidence, participating in fruitless mediations and then heading into a lengthy trial, with every factual and legal issue still 'on the table', can be a recipe for disaster for the insurer. Defence strategies need to be equally as sophisticated and focused as those that are being wielded against insurers.

Two recent decisions of the Ontario Court of Appeal, in which our firm represented the defending property insurers, demonstrate that summary judgment motions, utilized as part of a well-executed defence plan, can be an effective tool for achieving a favourable resolution, even in difficult arson and fraud cases. In both cases, the insureds were represented by prominent plaintiffs' counsel, known for aggressively and successfully pursuing bad faith allegations and recovering punitive damage awards. At the Motions Court level and, more significantly, in the Court of Appeal, our clients prevailed and obtained judgments dismissing the claims in their entirety, with costs being awarded to the insurers. The dismissals were based on the application by the Courts of fundamental insurance principles, and in the face of concerted challenges by the

insureds' counsel to those principles. In *Alavie* v. *Chubb Insurance Company of Canada*,[1] evidence of forged documents having been submitted by the insured to support a proof of loss was held sufficient to vitiate the claim in its entirety and to warrant a dismissal being granted on summary motion and without a trial. In *Torchia* v. *Royal Insurance Company of Canada*,[2] claims by the spouse of a convicted arsonist were similarly dismissed, the intentional act exclusion of a homeowner's policy being applied on a summary motion and upheld in the face of a challenge on public policy grounds.

Before taking a closer look at the context in which summary judgment motions were successful in achieving the dismissal of these two claims, it may be useful to first review the key features of Rule 20, which sets out the procedure in Ontario for such motions and establishes the test the Court will apply to determine whether they should be allowed.

Rule 20

- defendant may move any time after delivery of a defence;

- motion to be supported by affidavit material and other evidence, including discovery and cross-examination transcripts and productions;

- moving party must satisfy the Court that there is no 'genuine issue' requiring a trial;

- responding party must file affidavit or other evidence setting out specific facts showing why trial is required;

- Court shall grant summary judgment where it is satisfied that there is no genuine issue for trial.

Practical features to note:

- the motion will be heard by a Judge, not a jury;

- a hearing date can usually be obtained within a few months;

- the hearing generally involves 1 day (or less) for the Court attendance by counsel;

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[1] *Alavie* v. *Chubb Insurance Company of Canada* (2004), Toronto (S.C.J.) unreported; affd [2005] O.J. No. 776 (C.A.)

[2] *Torchia* v. *Royal Insurance Company of Canada* (2003), 64 O.R. (3d) 775 (S.C.J.); affd. (2004), 71 O.R. (3d) 511 (C.A.); leave to appeal dismissed [2004] S.C.C.A. No. 458

- there is no *'viva voce'* testimony by witnesses;

- if the motion is unsuccessful, the consequence will be an order to pay the opposing party's costs of the motion: such costs may not be awarded if the motion is held to have been brought on a reasonable basis.

Under Rule 20 the Courts have clearly established that the moving party bears the burden of demonstrating that, based on the legal principles applicable to the defence or claim and on facts regarding which there remains no genuine dispute, a trial is not required for a decision to be made of the proper outcome of the case. In practical terms, the Judge hearing the summary judgment motion must be persuaded that they are in as good a position as a trial Court will ultimately be to make a determination of the legal rights of the parties. The Motions Court Judge is limited to considering facts which have been conclusively established through the exchange of affidavits, the cross-examination of the deponents and documentary evidence filed for reference on the hearing. The Judge will not assess the competing credibility of deponents of affidavits, nor weigh the evidence on either side of a fact that truly remains in dispute. However, any issue of credibility that is raised in opposition to a summary judgment being granted must be "genuine" and of actual legal significance to the claim or defence that is in issue. Delivery by a responding party of a self-serving affidavit, conflicting with facts conclusively established in the documentary evidence or with admissions made on a cross-examination, will not serve to create a triable issue.[3]

Alavie* v. *Chubb Insurance Company of Canada

In the *Alavie* case, the insured (represented initially by Alfred Kwinter and latterly by Gary Will) sought to avoid the consequences of having been discovered to have submitted forged invoices and false statements in support of values claimed in her proof of loss by challenging Chubb's right to rely on the common law principle that fraud by an insured with respect to any portion of their claim will result in forfeiture of the entire claim. Responding to the summary judgment motion we brought on behalf of Chubb Insurance (following our discovery of the plaintiff but prior to any examination of the insurer being conducted by her counsel), solicitor Will argued that that common law principle had never been incorporated into the law of Ontario

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[3] *Guarantee Company of North America* v. *Gordon Capital Corp.* [1999] 3 S.C.R. 423
Dawson v. *Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.)
Rogers Cable T.V. Ltd. v. *373041 Ontario Limited* (1994), 22 O.R. (3d) 25 (Gen. Div.)

(or Canada), nor applied by the Ontario Court of Appeal in the absence of a statutory condition, and that it should be rejected, now, as constituting an unfairly harsh penalty for insureds. Apparently seeking to gain unending mileage out of the *Whiten v. Pilot* case, solicitor Will submitted that the fraud principle was somehow inconsistent with the reasoning of the Supreme Court of Canada in *Whiten*, by allegedly offending the position that the quantum of punitive damages or any other 'punitive' consequence (such as forfeiture of a claim) should be rational and proportionate to the wrongful conduct. Insured's counsel argued that the loss of Ms. Alavie's $1 million claim where fraud could only be proven with respect to $50,000 of its value was a disproportionate punishment and therefore inherently unfair.

The Court of Appeal rejected the insured's arguments in this regard and accepted our submissions on behalf of Chubb as to the fundamental importance for the viability of the insurance relationship that fraud on the part of an insured result in the loss of any entitlement to indemnity under the policy. In dismissing the appeal and affirming the decision of Mr. Justice Lissaman on the summary judgment motion, the Court of Appeal confirmed and applied the following 2 'cornerstone' principles of the law pertaining to first party insurance claims:

(1) that a duty of good faith is owed by an insured to their insurer throughout the presentation of a claim under the policy; and

(2) that fraud on the part of an insured relating to any component of their claim will result in forfeiture of their entire claim.

The fraudulent conduct engaged in by Ms. Alavie was particularly egregious, making this case a curious one to have been selected by counsel as the vehicle for an attack on the common law fraud principle. Briefly, the facts relevant to the fraud were as follows. The plaintiff sought to recover approx. $950,000 under a policy of tenants' insurance for personal property alleged to have been stolen from her residence in a break and enter. Very few of the items claimed in the proof of loss were ever supported by documentation or third party evidence of the insured's acquisition or ownership, or as to their actual value. The proof of loss included $50,000 for several pieces of artwork of the insured's own creation. From the outset of the claim, the insured asserted that the proof of loss values for her artwork had been based on her recent sales of comparable pieces to arms-length purchasers. To support this assertion, she ultimately produced a series of multi-page contracts and invoices, describing them as her business records for such sales, but blacking-out the identities of the purchasers.

On behalf of Chubb Insurance, and in the face of vigorous and prolonged opposition from the insured and her original counsel (Alfred Kwinter), we secured Court orders that compelled disclosure of the purchasers' names and other related records. This disclosure led us to evidence that the contracts and invoices were forgeries, and that the insured's discovery testimony concerning the sales had been false. Evidence was also uncovered of an attempt by the insured to suborn perjury from a third party, hoping to conceal her fraud from the insurer. With an eye to determining whether grounds for a summary judgment motion could be sufficiently developed on the record of the action, a strategic decision was made to confront the insured with the results of Chubb's investigation: i.e., not to 'hold the cards close to our vest' and await the opportunity to use them at trial. Any trial was on the far horizon, would involve a myriad of other evidence concerning the losses claimed and raise the risks for Chubb that have been discussed earlier in this paper. The strategy paid off and Alavie was forced to acknowledge that she had created the forged documents, although she also put forward an 'innocent' explanation regarding her motive for doing so. Her case had by then (for reasons unknown to the defence) been transferred from solicitor Kwinter to Gary Will. He aggressively pursued the claim and put forward 'new' evidence allegedly capable of supporting the same proof of loss values that were implicated in the fraud. On behalf of the insured, he argued that her misconduct had been "foolish", but certainly not "fraudulent". Bad faith accusations were repeatedly raised against the insurer, and it was clear that the road to any trial decision would indeed be long and costly.

On behalf of Chubb, we proceeded with a summary judgment motion, seeking a dismissal of the insured's action based on her admissions of the forgery of documents and false statements on her discovery. Mr. Justice Lissaman accepted our arguments, applying both the common law principle (as enunciated in an old English case of *Britton v. Royal Insurance*) and a General Condition contained in Chubb's policy (no statutory condition having been incorporated into the particular coverage) to dismiss the insured's claim.

Undaunted, solicitor Will launched an appeal of the dismissal, focussing his attack further on the legal principle of fraud vitiating an insured's claim. In a unanimous decision, the Court of Appeal rejected his arguments and the common law fraud principle as stated in the *Britton* case was expressly endorsed. The appellate judges disagreed with the submissions of Alavie's counsel that her false evidence was "immaterial" to her claim simply because she had procured

other evidence supposedly capable of supporting the same values. The Court of Appeal held that the forged documents that had been proffered by the insured related directly to the values claimed in her proof of loss, thereby satisfying the requirement of materiality.

The following statement of principle in the Court of Appeal's decision is worthy of special note:

> *The appellant owed a duty of utmost good faith to her insurer. By her wrongful conduct, the appellant breached this duty in her dealings with the respondent. As a result, no evidence of the value of any part of her claimed loss, even if now adduced, could be trusted or accepted by the insurer.*

This was an important affirmation for insurers to have received from the Ontario Court of Appeal. It implicitly recognizes that, in most claims, insurers must as a matter of practical necessity accept and rely upon the insured's own word and *bona fides* to determine the amount to be paid for a loss. Particulars of the acquisition, ownership and actual value of insured property lost or damaged are generally within the insured's knowledge and control, and cannot be readily and independently verified by an insurer, at least not without a great deal of expense and effort. In a case where clear evidence develops that an insured has been dishonest and deceitful in the preparation of the proof of loss or in the submission of documents or information to support their claim, it is essential that such misconduct attract the consequence of forfeiture of the entire claim, if there is to be any meaningful and effective disincentive for bad faith on the part of an insured.

The insured's counsel submitted (and it is believed to be the case) that this decision is the first from the Ontario Court of Appeal in which the common law principle of fraud of vitiating an insured's claim in its entirety has expressly been adopted and applied in the absence of a Statutory Condition dictating that consequence. The *Alavie* v. *Chubb Insurance* decision thereby preserves one of the essential weapons for the defence of insurers in the ongoing fight against escalating fraud in first party claims.

The decision was also significant because it was obtained through the vehicle of a summary judgment motion, based on affidavit evidence, cross-examination transcripts and productions made by the parties. On the motion, the Motions Court Judge and the Court of

Appeal could be presented with the insurer's evidence of fraud in a context which was uncluttered by considerations of the insured's personal circumstances and unfounded criticisms of Chubb's claims-handling procedures. Instead, the focus was appropriately on the admitted wrongful conduct engaged in by the insured, on the provisions of her policy and the applicable legal principles. The insurer could, in effect, test the persuasiveness and cogency of the evidence of fraud that had been developed without having to undertake the risks, costs and time delay of embarking on a trial.

Torchia* v. *Royal Insurance Company of Canada

The *Torchia* case involved the issue of whether an 'innocent' insured would lose their right of recovery under a property policy as a result of the fire having been caused by the intentional act of another insured. Mr. Torchia had committed arson, burning the family's multi-million dollar home to the ground. Mrs. Torchia presented her claim under the Royal policy, relying on an allegation that she was neither involved in nor did she have any knowledge of her husband's intentional act, and therefore ought not to be penalized for his misconduct. Bad faith was alleged and punitive damages were claimed.

Mrs. Torchia was represented by Alfred Kwinter, and the case was litigated at a time when that solicitor had successfully obtained two large punitive damages' awards against property insurers, in 'arson' cases. As well, he had earlier succeeded in an insurance case in the Supreme Court of Canada, based on a holding that Canadian law will not penalize an innocent insured for the wrongful act of a guilty insured unless the policy wording clearly and unequivocally compels that result. Further, Mrs. Torchia's claim against Royal was encouraged by a recent Ontario Court of Appeal decision which had held that the typical wording of the intentional act exclusion, in a liability policy, was ambiguous and not therefore applicable to deprive an 'innocent' insured of coverage.

The leading authority in this area was a 1989 decision of the Supreme Court of Canada in *Scott* v. *Wawanesa*. The Court in that case rejected an earlier public-policy based test for whether an innocent insured could recover and instead emphasized an interpretive approach, looking more to the intention of the insurance contract as revealed by the specific words used. Somewhat ominously, the 7-member Court in *Scott* had split on whether Wawanesa's intentional

act exclusion wording was sufficiently unambiguous to support the insurer's denial - the split was 4 to 3 in the insurer's favour, hardly a ringing endorsement of the decision to send the innocent insured away empty-handed. The plaintiffs' Bar was looking for an opportunity to bring this issue back before our Courts.

On behalf of Royal Insurance, we elected to present the issue of the proper interpretation and application of the intentional act exclusion to the Court on a motion for summary judgment, thereby isolating that legal issue from the plaintiff's bad faith allegations and ensuring that it would be determined by a Judge and not a jury. The motion was successful and the insured's action was dismissed. The plaintiff's counsel was looking for an appellate Court-level ruling and launched an appeal, relying heavily on 'public policy' arguments. The Court of Appeal was persuaded to reject those submissions, and affirmed the dismissal. The challenge was not over: an application was brought on the plaintiff's behalf for leave to appeal to the Supreme Court of Canada. The insurer's position again prevailed and the application for leave was dismissed. The *Torchia* case produced an affirmation of the enforceability of the typical intentional act exclusion, which is key to many property claim situations, and that outcome was efficiently achieved for the insurer through the vehicle of a summary judgment motion procedure.

In our practice, we have encountered quite a wide variety of situations in which an insurer's defence can appropriately be presented to the Court through a summary judgment motion: other examples include the application of proscription, the interpretation of a release and the consequences of breach of a policy warranty.

The benefits to insurers of securing Court rulings on such first party coverage defences through summary judgment motions are significant. The defence can be presented outside of the context of bad faith allegations and a dismissal of the motion will not be accompanied by a punitive damages award. The motion can be brought on for determination more quickly and at a much lower cost than any trial of the action. The challenge is to identify the potential for a

summary judgment motion, given the facts and issues that develop in any particular case, and then to implement a defence strategy capable of producing the evidentiary record necessary for such a motion to succeed.

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TIME LIMITATIONS IN PROPERTY CLAIMS

presented by

Brett Rideout

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Introduction

This paper focuses on several recent developments in the law surrounding the limitation periods relevant to property damage claims. The main focus of the paper is the law in Ontario, however, one should bear in mind that each province has developed its own specific legislation and law regarding limitation periods.

For reference, a chart outlining several limitation periods of the provinces and territories is attached to this paper. The chart is simply an illustrative tool, to demonstrate the different provincial limitation periods. It should not be relied on as determinative of all provincial limitation periods. Legal advice should always be obtained to determine the applicable limitation period to specific claims.

Provincial Limitation Legislation

Each province and territory in Canada has enacted legislation which sets out the various limitation periods for legal actions within that province or territory. The current legislation in Ontario is the *Limitations Act, 2002*.[1] The *Limitations Act, 2002* was proclaimed in force as of January 1, 2004 and substantially repealed the *Limitations Act, 1990*.

In Ontario, as a general statement, if a loss occurred before January 1, 2004, it remains subject to the former limitation period of 6 years. For losses that occur on or after January 1, 2004, the new *Limitations Act* will apply and the limitation period is 2 years.

As the *Limitations Act, 2002* has been in force for less then 2 years, it is common that current losses with which insurers are involved may have occurred either before, or after, the *Limitations Act, 2002* came into effect. To deal with this situation, several transitional rules have been created.

The transitional rules are contained in the *Limitations Act, 2002*. Under the transitional rules, if a cause of action arose before January 1, 2004 and no legal proceeding has yet been commenced, the following rules apply:

- Claim not "discovered" until after January 1, 2004, then the limitation period is 2 years from the date of discovery (section 24(5)(i))
- Claim "discovered" before January 1, 2004, then the limitation period is 6 years from the date of discovery (section 24(5)(iv))
- If the former limitation period expired prior to January 1, 2004, then no proceedings shall be commenced (section 24(3))

The *Limitations Act, 2002* defines the discovery of a claim as follows:

- A claim is discovered on the earlier of,

a) the date on which the person with the claim first knew,

   i) the injury loss or damage had occurred;

   ii) that the injury loss or damage was caused by or contributed to by an act or omission;

   iii) the act or omission was that of a person against whom the claim is made, and

   iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

b) the date on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

The "discoverability" of a claim as set out in the statute is really a codification of the common law discoverability rule. If a claim occurs but the cause of the loss is unknown, the claimant can argue that the limitation period does not start running until the cause is determined (i.e. the date it is known that the loss was caused by or contributed to by an act or omission). If the cause of the loss is known, or it is reasonable to assume it should be known, the limitation period will begin to run.

The *Limitations Act, 2002* contains a statutory "presumption" that a claimant has the requisite knowledge of the matters giving rise to the claim on the date the loss occurs, unless the claimant can prove otherwise. This section will likely give rise to disputes that potential claims are not "discovered" (for limitation purposes) until some time after the actual loss occurs. Each of these disputes will have to be handled by the insurer on a case-by-case basis as the issue is quite fact-specific.

Limitation Periods contained in Insurance Contracts

Under the *Limitations Act, 2002*, the general 2 year limitation period cannot be shortened by agreement or contract, unless that contract or agreement existed prior to January 1, 2004.[2] The *Limitations Act, 2002* also provides that any limitation period set out in or under another statute has no effect unless:

a) the provision establishing it is listed in the Schedule to the *Limitations Act*; or,

b) the provision establishing it,

   i) is in existence on the date this *Act* comes into force, and,

   ii) incorporates by reference a provision listed in the Schedule to this *Act*.[3]

The Schedule attached to the *Limitations Act, 2002* includes reference to section 148, Statutory Condition 14 of the *Insurance Act*.[4] Statutory Condition 14 states as follows:

> *Action*
>
> *Every action or proceeding against the insurer for the recovery of a claim under or by virtue of this contract is absolutely barred unless commenced within 1 year next after the loss or damage occurs.*

Generally, insurers rely on Statutory Condition 14 to maintain that any action against the insurer by its insured under a property policy must be commenced within 1 year. However, the recent Supreme Court of Canada decision of *K.P. Pacific Holdings Ltd.* v. *Guardian Insurance Company of Canada* [5] has caused some to question if this limitation period is still applicable in Ontario.

The *K.P. Pacific* decision flows from an action commenced in British Columbia. K.P. Pacific was insured under a multi-peril policy of property insurance. The question before the Supreme Court was whether or not the limitation period of 1 year contained in Part V (Fire Insurance) of B.C.'s *Insurance Act* applied exclusively to policies of fire insurance, or whether the limitation period in that Part also applied to multi-peril policies.

The Supreme Court held that the limitation period in B.C's Part V applied only to policies of fire insurance, and not to multi-peril policies of insurance. It further held that the relevant limitation period for K.P. Pacific's claim was the limitation period contained in Part II of B.C.'s *Insurance Act*, which contains the "general provisions" relevant to policies in B.C. Part II of the B.C. *Insurance Act* contains a 1 year limitation period commencing the date the proof of loss is delivered, rather then a 1 year period from the date of loss. As such, K.P. Pacific's claim was upheld, as it was commenced within this time frame.

Some have taken the *K.P. Pacific* decision to mean that similar provisions under other provincial *Insurance Acts* (i.e. the Ontario *Insurance Act*, section 148, statutory condition 14) only relate to fire policies and are not applicable to multi-peril policies. However, this may be over-extending the reasoning in *K.P. Pacific.*

K.P. Pacific is a B.C. case, and therefore deals with different statues than those which exist in Ontario. There are differences in the language of the B.C. legislation and that of Ontario, which would allow one to argue that the *K.P. Pacific* decision is of no relevance to the current state of the law in Ontario. One easy example is that the limitation period which exists in Part II of B.C's *Insurance Act* simply does not exist in the Ontario *Insurance Act.*

A second distinguishing feature is the common law which has developed in Ontario with respect to the wording of section 148 of the *Insurance Act*, how it is applied to contracts of insurance in Ontario, and whether it is applied exclusively to contracts of "fire insurance", or the more common multi-peril policies of insurance which we see today.

Third, the inclusion of the limitation period contained in the *Insurance Act* in the Schedule to the Ontario *Limitations Act* appears to denote a statutory approval of the 1-year limitation period in Ontario.

The *K.P. Pacific* decision is one which has yet to be tested in the Ontario courts. As of the date of this paper, the only reported Ontario decision which mentions *K.P. Pacific* deals with automobile policies of insurance, and is not particularly relevant to the issues discussed here. There are no other reported decisions in Ontario dealing with the ramifications of *K.P. Pacific.*

However, insurers should be cautioned at this time that insureds will likely raise the Supreme Court's decision in *K.P. Pacific* if their action has not been commenced within the 1 year period and a limitation defence is raised. As stated above, there are differences between the Ontario and B.C. law, which may distinguish *K.P. Pacific* in Ontario. It is likely that this issue will come before the Ontario courts in the near future. Insurers should be wary of the precedential value of the first case to be litigated on this issue.

A Comment on Third Party Contribution and Indemnity Claims[6]

The *Limitations Act, 2002* also has ramifications for claims for contribution and indemnity in Ontario court actions. Under section 8 of the *Negligence Act*[7], a defendant was entitled to commence an action for contribution and indemnity at any time within 1 year of the judgment or settlement of the main action. The only precondition to commencing an action of this nature was that the main action had to be commenced within the relevant limitation period (i.e. 6 years). This had the effect of allowing claims for contribution and indemnity to be brought many years after the original date of loss.

The *Limitations Act, 2002* repealed section 8 of the *Negligence Act.* The *Limitations Act, 2002* now provides that any claim for contribution and indemnity must be brought within 2 years of the date on which the defendant is served with the claim (section 18). Unfortunately, in complex actions involving multiple parties and large volumes of documentation, it is not uncommon that an action has not even reached the examination for discovery stage until after 2 years has passed. Given the abolition of section 8 of the *Negligence Act*, it will be difficult, if not impossible, to add parties to an action at that time. It is therefore of the utmost importance that insurers ensure that all potential parties are involved in the action from the earliest stage. Solid investigation into the causation of the loss and the responsible parties is invaluable.

Conclusions

Move quickly. Get counsel involved in your matters at the earliest stage possible. Aside from the usual initial questions with respect to causation, potential exposure, coverage and liability, insurers must now deal with a state of uncertain law regarding specific limitation periods and the interpretation of the new legislation. The earlier these issues are identified, the better, for avoiding being caught unprepared to deal with the now shorter deadlines under Ontario law.

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[1] *Limitations Act*, 2002, S.O. 2004, c. 41.
[2] *Limitations Act*, 2002, section 22.
[3] *Limitations Act*, 2002, 19(i)

[4] *Insurance Act*, R.S.O. 1990, c. I-8
[5] *K.P. Pacific Holdings Ltd.* v. *Guardian Insurance Company of Canada* [2003] S.C.C. 25
[6] For a recent commentary on the Ontario law on limitation periods in this context see *HSBC Securities (Canada) Inc.* v. *Davis, Ward and Beck* [2005] O.J. No. 277
[7] *Negligence Act*, R.S.O. 1990, c. N-1

PROVINCE	ACTIONS RE PROPERTY DAMAGE		INSURANCE CONTRACTS	
	General	**Ultimate**	**Actions against Insured to Recover Monies Payable under Contract**	**Fire Insurance**
New Brunswick	**6 years** commencing when **cause of action arises,** *Limitation of Actions Act,* R.S. N.B. 1973, c. L-8, s. 9	**None**	No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act,* R.S.N.B. 1973, c. I-12, s. 111.	**1 year** commencing at time **loss or damage occurs,** *Insurance Act,* R.S.N.B. 1973, c. I-12, s. 127(2), statutory condition 14.
Nfind. & Labrador	**2 years** commencing when cause of action is **discovered,** *Limitations Act,* S.N.L. 1995, c. L-16.1, ss. 5(b); 13; 14.	**10 years** commencing when **cause of action arises,** *Limitations Act,* S.N.L. 1995, c. L-16.1, s. 14 (3).	No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Contracts Act,* R.S.N.L.1990, c.I-12, s. 17	**1 year** commencing at time **loss or damage occurs,** *Fire Insurance Act,* S.N.L. 1990, c. F-10, s. 8, statutory condition 14.
N.W.T.	**6 years** commencing when **cause of action arises,** *Limitation of Actions Act,* R.S.N.W.T. 1988, c. L-8, s. 2(e).	**None**	No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act,* R.S.N.W.T. 1988, c. I-4, s. 53.	**2 years** commencing at time **loss or damage occurs,** *Insurance Act,* R.S.N.W.T. 1988, c. I-4, s. 64, statutory condition 14.
Nova Scotia	**6 years** ' commencing when **cause of action arises,** *Limitation of Actions Act,* R.S.N.S. 1989, c. 258, s. 2(1)(e)	**None**	No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act* R.S.N.S.1989, c. 231, s. 24.	**1 year** commencing at time **loss or damage occurs,** *Insurance Act,* R.S.N.S. 1989, c. 231, s. 167(2), statutory condition 14
	EXCEPTION: Within **4 years** of expiry of general limitation period, court may **disallow the limitation** having regard to circumstances of the case- Listed are enumerated factors to consider including date of "discovery" of claim, *Limitation of Actions Act,* R.S.N.S. 1989, c. 258, s. 3.			
Nunavut	**6 years** commencing when **cause of action arises,** *Limitation of Actions Act,* R.S.N.W.T. 1988, c. L-8, s. 2(e).	**None**	No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act (Nunavut),* R.S.N.W.T. 1988, c. I-4, s. 53.	**2 years** commencing at time **loss or damage occurs,** *Insurance Act (Nunavut),* R.S.N.W.T. 1988, c. I-4, s. 64, statutory condition 14.

The information provided in this chart is for comparative purposes only. It should not be relied on as legal advice.

PROVINCE	ACTIONS RE PROPERTY DAMAGE		INSURANCE CONTRACTS	
	General	**Ultimate**	**Actions against Insured to Recover Monies Payable under Contract**	**Fire Insurance**
Alberta	**2 years** commencing when cause of action is **discovered,** *Limitations Act,* R.S.A. 2000, c. L-12, s. 3(1)(a)	**10 years** commencing when **cause of action arises,** *Limitations Act,* R.S.A. 2000, c. L-12, ss. 3(1)(b); 11	No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act,* R.S.A. 2000, c. I-3, s. 520	**1 year** commencing at time **loss or damage occurs,** *Insurance Act,* R.S.A. 2000, c. I-3, s. 520, statutory condition 14.
British Columbia	**2 years** commencing when cause of action is **discovered,** *Limitation Act,* R.S.B.C. 1996, c. 266, ss. 3(2); 6.	**30 years** commencing when **cause of action arises,** *Limitation Act,* R.S.B.C. 1996, c.266, s. 8(1).	**1 year** commencing on **furnishing of proof of loss of claim,** *Insurance Act,* R.S.B.C. 1996, c. 226, s. 22(1). No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act,* R.S.B.C. 1996, c. 226, s, 22(2)	**1 year** commencing at time **loss or damage occurs,** *Insurance Act,* R.S.B.C. 1996, c. 226, s. 126
Manitoba	Damage to Real Property (direct or indirect) **6 years** commencing when **cause of action arises,** *Limitation of Actions Act,* C.C.S.M. c. L150, s. 2(1)(f) Damage to Chattels (direct or indirect) **2 years** commencing when **cause of action arises,** *Limitation of Actions Act,* C.C.S.M. c. L150, s. 2(1)(g). Actions on Recovery of Money on a Simple Contract **6 years** commencing when cause of action arises *Limitation of Actions Act,* C.C.S.M. c. L150, s. 2(1)(i)	**30 years** commencing when **cause of action arises.** *Limitation of Actions Act,* C.C.S.M. c. L150, s. 14(4).	No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act,* C.C.S.M. c. 140, s. 131	**2 years** commencing at time **loss or damage occurs,** *Insurance Act,* C.C.S.M. c. 140, s. 142(1), statutory condition 14
	EXCEPTION: Court can grant leave to continue or begin an action if not more than **12 months** have elapsed between date the action was "**discovered**" and date of application for leave, subject to ultimate limitation period. *Limitation of Actions Act,* C.C.S.M. c. L150, s. 14(1).			

The information provided in this chart is for comparative purposes only. It should not be relied on as legal advice.

PROVINCE	ACTIONS RE PROPERTY DAMAGE		INSURANCE CONTRACTS	
	General	Ultimate	Actions against Insured to Recover Monies Payable under Contract	Fire Insurance
Ontario	**2 years** commencing when cause of action is **discovered,** *Limitations Act, 2002,* S.O. 2004, c. 31, ss. 4, 5	**15 years** commencing when **cause of action arises,** *Limitations Act, 2002,* S.O. 2004, c. 31, s. 15	No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act,* R.S.O. 1990, c. I.8, s. 136	**1 year** commencing at time **loss or damage occurs,** *Insurance Act,* R.S.O. 1990, c. I.8, s. 148, statutory condition 14
	Transitional Rules: Apply if a cause of action arose before January 1, 2004 and no proceeding commenced: • Claim not "discovered" until after Jan 1, 2004, then **2 years from discovery**, s. 24(5)(1) • Claim "discovered" before Jan 1, 2004, then **6 years from discovery**, s. 24(5)(4) • If former limitation period expired before Jan 1, 2004, then no proceeding shall be commenced, s. 24(3).			
P.E.I.	**6 years** commencing when **cause of action arises,** *Statute of Limitations,* R.S.P.E.I. 1988, c. S-7, s. 2(1)(g)	**None**	No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act,* R.S.P.E.I. 1988, c. I-4, s. 100	**1 year** commencing at time **loss or damage occurs,** *Insurance Act,* R.S.P.E.I. 1988, c. I-4, s. 114, statutory condition 14
Quebec	**3 years** from time **right of action arises** ("extinctive prescription"), *Civil Code of Quebec,* S.Q. 1991, c. 64, art. 2923.			
Sask.	**6 years** commencing when **cause of action arises,** *Limitation of Actions Act,* R.S.S. 1978, c. L-15, s. 3(1)(e), (f)	**None**	No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Saskatchewan Insurance Act,* R.S.S. 1978, c. S-26, s. 114	**1 year** commencing at time **loss or damage occurs,** *Saskatchewan Insurance Act,* R.S.S.. 1978, c. S-26, s. 128, statutory condition 14
Yukon	**6 years** commencing when **cause of action arises,** *Limitation of Actions Act,* R.S.Y. 2002, c. 139, s. 2(1)(e), (f)	**None**	No action may be commenced until **60 days** after **proof of happening of event in which money becomes payable,** *Insurance Act,* R.S.Y. 2002, c. 119, s. 62	**2 years** commencing at time **loss or damage occurs,** *Insurance Act,* R.S.Y. 2002, c. 119, s. 71, statutory condition 14

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MATERIAL CHANGES IN THE LAW RELATING TO THE DISCLOSURE OF MATERIAL CHANGES IN RISK

By: Chris Reain

Introduction

All of the common law provinces in Canada have Statutory Conditions, which are contained in the Fire Insurance parts of each province's *Insurance Act.* These Statutory Conditions are deemed to be part of every contract of fire insurance, and in most multi-peril property policies are expressly incorporated into the terms and conditions applicable to all coverages under the policy.

One of the standard Statutory Conditions, Statutory Condition 4 ("SC4"), provides that:

> "any change material to the risk and within the control and knowledge of the Insured voids the contract as to the part affected thereby, unless the change is promptly notified in writing to the insurer or its local agent..."[1]

The purpose of SC4 is to place on the insured the duty to properly advise the insurer of changes in the risk that occur after the policy comes into effect, in order to allow the insurer to fairly assess whether to continue on risk and, if so, at what premium. Until recently, it was generally understood in the insurance industry that a failure by the insured to report a material change in risk to its insurer, in breach of SC4, would allow the insurer to void the policy, and thereby vitiate any right of recovery by the insured.

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[1] *Insurance Act* R.S.O. 1990 c.I8 s. 148(2) Statutory Condition 4.

That understanding may have changed significantly given two recent decisions from the Supreme Court of Canada.[2] In each of the cases, the Supreme Court of Canada found novel ways in which to preserve coverage under a policy in the face of clear failures to report material changes to the risk to the insurer. This paper will outline the principles arising from those cases.

The Use of the "Saving Provision" - *Marche v. Halifax Insurance*

In February, 1999, a fire occurred at the rental property owned by the insured in Sydney, Nova Scotia. During the insurer's investigation into the fire, it was determined that the insured's house had been vacant between September and December, 1998. During the three months prior to the fire, however, the house had been occupied by a relative of the insured.[3]

The insurer took the position that the fact that the premises had been vacant between September and December 1998 was a material change in risk, which was not communicated to it by the insured. The insured's policy was therefore declared void by the insurer, in reliance on SC4.

At trial, the judge held that if there had been a breach of the statutory condition, which he did not formally determine, such breach of the condition was not binding on the insured. In coming to this conclusion, the trial judge relied on Section 171 of the Nova Scotia *Insurance Act*[4] which provides:

> "Where a contract:
>
> (a) excludes any loss that would otherwise fall within the coverage prescribed by Section 144; or
>
> (b) contains any stipulation, condition or warranty that is or may be material to the risk including, but not restricted to, a provision in respect of the use, condition, location or maintenance of the insured property,

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[2] *Marche v. Halifax Insurance Co.* [2005] S.C.R. 47 (TAB A) ; *Royal Bank of Canada v. State Farm Fire and Casualty Co.* [2005] S.C.J. No. 34 (Q.L.) (TAB B).

[3] This appears to have been a significant factual point, since according to the Supreme Court, the material change in risk had been "rectified" as of the date of the loss.

[4] The same wording is used in section 151 of the Ontario *Insurance Act.*

> the exclusion, stipulation, condition or warranty is not binding upon the insured, if it is held to be unjust or unreasonable by the court before which a question relating thereto is tried."[5] (hereinafter referred to as the 'Saving Provision')

Essentially, the trial judge determined that it would have been unjust and unreasonable to give effect to the breach of SC4, given that there was no vacancy of the property at the time of the loss. The Nova Scotia Court of Appeal overturned the trial judge's decision, holding that the Saving Provision did not apply to breaches of Statutory Conditions, but only to conditions contained within the policy.

The case was appealed to the Supreme Court of Canada. In the majority decision, it was acknowledged that vacancy can be a material change to the risk.[6] Moreover, the majority accepted the principle that it is not essential that a breach of a statutory condition be causally be connected to the loss in order to deny an insured's claim.[7] Given these two acknowledgments, one would have expected that the voiding of the insured's coverage as a result of the vacancy of the building prior to the loss, even though it was not the cause of the loss, would have been upheld.

On the contrary, the five-member majority of the Supreme Court of Canada agreed with the trial Judge, and found that because the property was not vacant at the time of the fire, giving effect to voiding the consequences specified by SC4 would be "unreasonable and unjust". As a result, the Court relied upon the Saving Provision to relieve the insured of SC4.

The Court acknowledged that the purpose of Statutory Conditions enacted by a legislature is remedial and intended to enhance and protect both the rights of the insured and the insurer. As a result, one would have assumed that the Statutory Conditions would, by definition, have to be considered "just and reasonable", such that they could not be rendered inapplicable by

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[5] Section 171, *Insurance Act,* R.S.N.S. 1989 C. 231.

[6] *Marche, supra,* at p.63; see also *Arcand v. Grenville Patron Mutual Fire Insurance Co.* (1923) 25 O.W.N. 175 (H.C.).

[7] *Ibid,* at p.64; see also *Henwood v. Prudential Insurance Co. of America* [1967] S.C.R. 720.

the Saving Provision. In fact, this was the approach and interpretation accepted by the two-member minority of the Supreme Court.[8]

However, the majority of the panel held that the Saving Provision did apply to the Statutory Conditions. It also held that the Saving Provision applied to relieve against conditions that were unreasonable or unjust in their application not only at the time the policy was entered into, but also to the consequences of such application in the particular circumstances of each case.

In allowing the insured's action, and construing the application of the Saving Provision, the Supreme Court of Canada appears to have granted leeway to courts to examine factual issues such as the cause of the loss in determining whether a breach of policy conditions, including SC4, will be applicable in each case. In essence, every case relating to failures to report material changes in risk will have to be decided on its own facts. This will require an examination by the insurer or its counsel not only of the facts surrounding the technical breach of SC4, but also of the equities of the case, and specifically, whether the voiding of coverage will be construed by a Court or a jury as "unjust or unreasonable".

One major question which remains unanswered is whether or not the Saving Provision applies to the multi-peril insurance policies commonly used today. In an earlier case,[9] the Supreme Court of Canada held that all-risk or multi-peril policies were not "fire policies" and therefore not governed by the provisions in the Fire Insurance section of the British Columbia *Insurance Act*. Since the Saving Provision is contained in the Fire Insurance sections of each

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[8] *Ibid,* Per Basterache J. at page 77:

> "I agree with the insurer that it would be both illogical and incoherent to interpret Section 171 as applying to Statutory Conditions in Part VII. Like it, I believe it would be unreasonable and incongruous for the same statute to dictate, on the one hand, that Statutory Conditions are mandatory to assure fairness to both parties, but, on the other hand, to allow that the same conditions be avoided because they are unreasonable or unjust by virtue of Section 171. This would defeat the purpose of the Statutory Conditions and render them pointless and futile. We must presume that the legislature, in an attempt to protect the insured from shrewd tactics by the insurer in drafting its policy, provide for conditions which are just and reasonable for both the insured and the insurers, and wanted them applied and not defeated by its own legislative scheme."

[9] *K.P. Pacific v. Guardian Insurance* [2003] 1 S.C.R. 433 (TAB C).

province's respective statute,[10] there should be a valid argument to be made that it cannot be invoked to absolve an insured of the consequences of a breach of the conditions contained in a multi-peril policy, including any statutory conditions incorporated by reference into those policies. There is no case law yet in Ontario on this issue.

The "Untouchable Mortgagee" - *Royal Bank of Canada v. State Farm Fire and Casualty Co.*

The Insurance Bureau of Canada has approved the use of a "Standard Mortgage Clause" in property policies, the purpose of which is to ensure that the mortgagee's interest in the insurance remains in force notwithstanding any breach of a condition of the policy on the part of the insured. For instance, if the insured leaves its property vacant and does not advise the insurer of the vacancy, then even though the insured's coverage may be void as a result of a breach of SC4, the mortgagee is protected pursuant to the Standard Mortgage Clause. The clause provides, in part, as follows:

> This insurance and every documented renewal thereof – AS TO THE INTEREST OF THE MORTGAGEE ONLY THEREIN – is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured, including transfer of interest, any vacancy or non-occupancy, or the occupation of the property for purposes more hazardous than specified in the description of the risk; PROVIDED ALWAYS that the Mortgagee shall notify forthwith the Insurer (if known) of any vacancy or non-occupancy extending beyond thirty (30) consecutive days, or of any transfer of interest or increased hazard THAT SHALL COME TO HIS KNOWLEDGE; and that every increase of hazard (not permitted by the Policy) shall be paid for by the Mortgagee – on reasonable demand – from the date such hazard existed, according to the established scale of rates for the acceptance of such increased hazard, during the continuance of this insurance.
>
> . . .
>
> SUBJECT TO THE TERMS OF THIS MORTGAGE CLAUSE (and these shall supersede any policy provisions in conflict therewith BUT ONLY TO THE INTEREST OF THE MORTGAGEE), loss under this Policy is made payable to the Mortgagee. [Emphasis added.]

An issue arises, however, when the mortgagee itself is aware of the material change in risk (i.e. a vacancy), and does not pass this information on to the insurer. Does a mortgagee, who is a direct beneficiary of insurance coverage have a duty disclose this material change in

[10] Except for Quebec.

risk to the insurer? What is the consequence of the mortgagee's failure to disclose such a material change in risk? These questions were addressed in the Supreme Court of Canada's recent decision in *Royal Bank of Canada v. State Farm Fire and Casualty Co.*[11]

In the *Royal Bank* case, the insureds, the owners of a residential property, had vacated their property after defaulting on their mortgages, and after the mortgagees had commenced power of sale proceedings. The mortgagees subsequently secured the premises, and had maintained the property pending the power of sale proceedings. The building remained vacant for several months, after which time a fire occurred destroying the premises. The mortgagees were aware that the premises were vacant, but did not advise the insurer of the property of that fact.

The mortgagees made a claim under the terms of the Standard Mortgage Clause contained in the homeowner's policy of insurance. The insurer denied coverage on the basis of a breach of SC4, relating to a failure to report a material change in risk, on the basis that the mortgagees knew that the premises was vacant and did not advise the insurer of this fact.

In a unanimous decision, the Supreme Court of Canada held that there was a conflict between the wording of the Standard Mortgage Clause and SC4, and therefore the Statutory Condition could not be relied upon by the insured to avoid coverage in the circumstances. Specifically, the Court held that the insurer could not void policy coverage applicable to the mortgagee under SC4, while at the same time expressly providing coverage to the mortgagee in the event of any act of the mortgagor, including any acts causing a material change in risk. Furthermore, since the Mortgage Clause expressly provides that coverage to the mortgagee remains in force notwithstanding any non-occupancy attributable to the insured, the Court held that even if the vacancy amounted to a material change in risk, voiding coverage on the basis of that vacancy would "defeat the insurer's promise contained the mortgage clause of continued coverage in the event of a vacancy". [12]

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[11] [2005] S.C.J. No. 34 (Q.L.)

[12] *Royal Bank, supra,* at para. 29.

While not expressly stated by the Court, a significant consideration in the decision appears to have been that the Mortgage Clause contemplates the situation where the mortgagee fails to report a material change in risk, but merely provides that the penalty for such a failure is the payment of any increased premiums. Specifically, the clause provides:

> PROVIDED ALWAYS that the Mortgagee shall notify forthwith the Insurer (if known) of any vacancy or non-occupancy extending beyond thirty (30) consecutive days, or of any transfer of interest or increased hazard THAT SHALL COME TO HIS KNOWLEDGE; and that every increase of hazard (not permitted by the Policy) shall be paid for by the Mortgagee – on reasonable demand – from the date such hazard existed, according to the established scale of rates for the acceptance of such increased hazard, during the continuance of this insurance

The Court held that if voiding of coverage to the mortgagee was intended to be a consequence of a failure to report a material change in risk, the insurer should have inserted clear language to that effect:

> "If the insurer wished to be able to avoid a mortgagee's coverage in the event of a change material to the risk within that mortgagee's control and knowledge of which it was not notified, it should have used clear language to that effect. It cannot expect this Court to contort the mortgage clause and Statutory Condition 4 in order to fulfill its unreflected, but professionally true, intention."[13]

The bottom line, then, is that even if a mortgagee is aware of a material change in risk applicable to an insured property and does not report it to the insurer, it can nevertheless enforce coverage under the Standard Mortgage Clause in the event of a loss. The decision of the Supreme Court was based solely upon the plain reading of the wording of the Mortgage Clause in conjunction with SC4, which should send a signal to the drafters of the Mortgage Clause to have the clause re-worded to expressly provide for the voiding of coverage for the mortgagee in the event of a non-disclosure of a material change in risk of which it has knowledge. In recent discussions the writer has had with the Insurance Bureau of Canada, a sub-committee has been formed to look at re-wording the Mortgage Clause in this fashion.

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[13] *Ibid,* at para.30.

Conclusion

Even in the face of breaches of Statutory Condition 4 as a result of the non-disclosure of a material change in risk, the Supreme Court of Canada has found ways to allow coverage to insureds and mortgagees. The analysis involved in determining whether to void coverage as a result of a breach of Statutory Condition 4 has therefore become somewhat more complicated. Insurers would be well-advised to review cases prior to a voiding of coverage with a view to determining whether these recent decisions (or any subsequent cases) should have an impact on the decision to void coverage.

CR/ns

Tab A

Indexed as:

Marche v. Halifax Insurance Co.

Theresa Marche and Gary Fitzgerald, appellants;
v.
The Halifax Insurance Company, respondent.

[2005] 1 S.C.R. 47
[2005] S.C.J. No. 7
2005 SCC 6
File No.: 29754.

Supreme Court of Canada

Heard: November 2, 2004;
Judgment: February 24, 2005.

Present: McLachlin C.J. and Major, Bastarache, Binnie, Deschamps, Fish and Charron JJ.
(123 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Catchwords:

Insurance — Fire insurance — Statutory conditions — Material change to risk — Vacancy — Insured's property destroyed by fire — Insurer denying claim because insured failed to inform them of earlier vacancy — Statutory condition permitting avoidance of fire insurance contract if insurer not promptly notified of any change material to risk within control and knowledge of insured — Provision in insurance legislation giving court discretion to relieve insured from avoidance of fire insurance contract where stipulation, condition or warranty unjust or unreasonable — Whether relief provision applies to statutory conditions — Insurance Act, R.S.N.S. 1989, c. 231, s. 171, Sch. to Part VII, Statutory Condition 4.

Summary:

The insured purchased a house, converted it to two apartments and left Cape Breton to find work in British Columbia. The house remained vacant for a period of time before a tenant moved in. It was subsequently destroyed by fire and the insurer denied the claim, noting that the insured had failed to inform them of the earlier vacancy. The insurer maintained that the vacancy amounted to a change material to the risk which invalidated coverage pursuant to Statutory Condition 4 of Part VII (Fire Insurance) of the *Insurance Act* (N.S.). The trial judge found that, assuming the insured had breached Statutory Condition 4 by not advising the insurer of the [page48] earlier vacancy, the insured should be relieved from the consequences of that breach under s. 171 of the Act, which states that a policy condition is not binding on the insured if a court holds it to be "unjust or unreasonable". The Court of Appeal reversed the decision on the ground that s. 171 did not apply to statutory conditions, but applied

only to contractual conditions.

Held (Bastarache and Charron JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Major, Binnie, Deschamps and Fish JJ.: Section 171 of the *Insurance Act* applies to statutory conditions that are unreasonable or unjust in their application. First, s. 171's purpose is to provide relief from unjust or unreasonable insurance policy conditions and should be given a broad interpretation. Second, on its face, s. 171 appears to apply to both contractual and statutory conditions. The word "condition" in that section is not qualified by a restrictive adjective. Since statutory conditions are part of the insurance contract, they fall within the phrase "[w]here a contract ... contains any ... condition" that defines the application of s. 171. Furthermore, in light of the imprecise use of the word "condition" throughout the *Insurance Act*, a reading of the entire Act, including s. 33, does not support the contention that the word "condition" in s. 171 refers only to contractual conditions. Third, the precursor of s. 171 referred expressly to statutory conditions while the current version does not. The legislative history of s. 171 and the guiding rule of interpretation that legislative change is made for a purpose confirm that s. 171 was intended to apply to all conditions, statutory or otherwise. [paras. 13-27]

The expression "unjust or unreasonable" in s. 171 allows a court to look at the application of a statutory condition. While an insurance condition may on its face be reasonable and just, it may in its application be unreasonable and unjust. The expression "unjust or unreasonable" in relation to a condition means little unless it refers to the effects the condition may create. To hold that only the condition in the abstract must be unjust or unreasonable without regard to its effects when applied would not accord with the broad remedial purpose of s. 171 to protect the public against unjust or unreasonable insurance conditions. [paras. 30-35]

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In light of the finding that s. 171 applies to statutory conditions, there is no reason to interfere with the trial judge's conclusion that if the insurance contract was void by reason of Statutory Condition 4, the court should relieve against that result under s. 171 on the ground that the vacancy had been rectified prior to the loss. [para. 44]

Per Bastarache and Charron JJ. (dissenting):

Section 171 of the *Insurance Act* does not apply to statutory conditions. An analysis of the immediate, broader and external contexts of s. 171 leads to that conclusion. [paras. 58-111]

A term or expression cannot be interpreted without taking the surrounding terms into account. In this case, while the word "condition" standing alone could potentially have a broader connotation, its association in s. 171 with the words "stipulation" and "warranty" narrows its scope. Since, under the *Insurance Act*, the concepts of "statutory" stipulation or "statutory" warranty do not exist, a stipulation or warranty is necessarily contractual. Consequently, the list should be limited to the common denominator of all the terms: the contract. [para. 67] [para. 70]

The broader context supports that interpretation. The purpose of the statutory conditions is to provide fairness to both the insured and the insurer. These conditions, taken as a whole, and their mandatory nature shows that the legislature intended to create an equitable scheme. Each condition is just and reasonable, as it is necessary to ensure the balance of the regime. The consequences of the application of a statutory condition in an individual case are not to be examined under s. 171, as they do

not change the "just and reasonable" character of the condition. For the same statute to require on the one hand that statutory conditions be mandatory to assure fairness to both parties, but to allow on the other hand that the same conditions be avoided because they are unreasonable or unjust by virtue of s. 171 would defeat the purpose of the statutory conditions. Section 171 was enacted as a complement to the mandatory statutory conditions (s. 167) rather than as a curative provision applicable to such conditions. The scheme of Part VII of the *Insurance Act* can therefore only be interpreted as giving discretion to the courts to grant relief under s. 171 where a "contractual" condition is held to be unjust or unreasonable. This interpretation is consistent with s. 33 of Part II (Insurance Contracts in the Province) of the Act, which explicitly permits relief against forfeiture of insurance for imperfect compliance with a statutory condition. [paras. 77-94]

[page50]

With respect to the external context, the legislative history of s. 171 clearly demonstrates that its predecessor sections have always targeted contractual provisions as opposed to statutory conditions. This is also evidenced by the legislative evolution of s. 33 which was in the past a companion to the provision under scrutiny. [paras. 98-110]

Finally, the alleged good intentions of the insured in this case cannot have any impact on the determination of the applicability of s. 171 to statutory conditions. Ignorance of the obligation to disclose or failure to appreciate its materiality will not excuse the insured. [para. 117]

Cases Cited

By McLachlin C.J.

Referred to: Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co., [1989] 2 S.C.R. 778; Krupich v. Safeco Insurance Co. of America (1985), 16 C.C.L.I. 18; 528852 Ontario Inc. v. Royal Insurance Co. (2000), 51 O.R. (3d) 470; Nahayowski v. Pearl Assurance Co. (1964), 45 W.W.R. 662; Kekarainen v. Oreland Movers Ltd., [1981] 3 W.W.R. 534; Poast v. Royal Insurance Co. of Canada (1983), 21 Man. R. (2d) 67; Curtis's and Harvey Ltd. v. North British and Mercantile Insurance Co. (1920), 55 D.L.R. 95; Arcand v. Grenville Patron Mutual Fire Insurance Co. (1923), 25 O.W.N. 175; Henwood v. Prudential Insurance Co. of America, [1967] S.C.R. 720.

By Bastarache J. (dissenting)

Stubart Investments Ltd. v. The Queen, [1984] 1 S.C.R. 536; Canadian National Railway Co. v. Canada (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114; Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27; R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2; R. v. Ulybel Enterprises Ltd., [2001] 2 S.C.R. 867, 2001 SCC 56; Chieu v. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84, 2002 SCC 3; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42; Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn., [1993] 3 S.C.R. 724; 2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool), [1996] 3 S.C.R. 919; Brossard (Town) v. Quebec (Commission des droits de la personne), [1988] 2 S.C.R. 279; Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031; R. v. Daoust, [2004] 1 S.C.R. 217, 2004 SCC 6; R. v. Goulis (1981), 33 O.R. (2d) 55; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606; Dubois v. The Queen, [1985] 2 S.C.R. 350; Curtis's and Harvey Ltd. v. North British and Mercantile Insurance Co. (1920), 55 D.L.R. 95; City of London Fire Insurance Co. v. Smith (1888), 15 S.C.R. 69; Ordon Estate v. Grail, [1998] 3 S.C.R. 437; Gravel v. City of St-Léonard, [1978] 1 S.C.R. 660; [page51] Janzen v. Platy Enterprises Ltd., [1989] 1 S.C.R. 1252; Skoke-Graham v. The Queen, [1985] 1 S.C.R. 106; R. v. McIntosh, [1995] 1 S.C.R. 686;

Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co., [1989] 2 S.C.R. 778; Hirst v. Commercial Union Assurance Co. of Canada (1978), 8 B.C.L.R. 396, aff'd (1979), 70 B.C.L.R. (2d) 361; Nahayowski v. Pearl Assurance Co. (1964), 45 W.W.R. 662; 528852 Ontario Inc. v. Royal Insurance Co. (2000), 51 O.R. (3d) 470; Krupich v. Safeco Insurance Co. of America (1985), 16 C.C.L.I. 18.

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Insurance Act, R.S.N.S. 1989, c. 231, ss. 18, 21, 23, 32(1), 33, 159(1)(d), 163, 164, 166, 167(2), 169(3), 171, Sch. to Part VII, s. 4.

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Insurance Act, R.S.O. 1990, c. I.8, ss. 148, 151.

Insurance Act, R.S.P.E.I. 1988, c. I-4, ss. 114, 117.

Insurance Act, R.S.Y. 1986, c. 91, ss. 68, 71.

Insurance Act, S.N.S. 1962, c. 9, ss. 124, 127.

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APPEAL from a judgment of the Nova Scotia Court of Appeal (Glube C.J.N.S. and Oland and Hamilton JJ.A.) (2003), 214 N.S.R. (2d) 1, 47 C.C.L.I. (3d) 165, 671 A.P.R. 1, [2003] I.L.R. para. I-4197, [2003] N.S.J. No. 121 (QL), 2003 NSCA 32, reversing a decision of MacAdam J. (2002), 202 N.S.R. (2d) 345, 632 A.P.R. 345, [2002] N.S.J. No. 157 (QL), 2002 NSSC 62. Appeal allowed, Bastarache and Charron JJ. dissenting.

Counsel:

Derrick J. Kimball, Nash T. Brogan and H. Heidi Foshay Kimball, for the appellants.

Scott C. Norton, Q.C., and Daniela Bassan, for the respondent.

The judgment of McLachlin C.J. and Major, Binnie, Deschamps and Fish JJ. was delivered by

McLACHLIN C.J.:—

I. Introduction

¶ 1 This is the sad case of a couple, Ms. Marche and Mr. Fitzgerald, who purchased the latter's family home, converted it to two apartments and, having left Cape Breton to find work in British Columbia, suffered the loss of the house through fire. They had insured the house with the Halifax Insurance [page53] Company ("Halifax"). It denied their claim for the fire loss. Until shortly prior to the fire, the house was occupied. Halifax relied on an earlier vacancy which it said the owners should have advised them of under the policy, and claimed that this amounted to a change material to the risk which invalidated coverage pursuant to Statutory Condition 4.

¶ 2 The trial judge found that, assuming the owners had breached Statutory Condition 4 by not advising Halifax of the earlier vacancy, the owners should be relieved from the consequences of that breach under s. 171 of the Nova Scotia *Insurance Act*, R.S.N.S. 1989, c. 231, which states that a policy condition is not binding on the insured if a court holds it to be "unjust or unreasonable": (2002), 202 N.S.R. (2d) 345, 2002 NSSC 62. The Nova Scotia Court of Appeal reversed this decision on the ground that s. 171 did not apply to statutory conditions, but only to optional conditions in the policy: (2003), 214 N.S.R. (2d) 1, 2003 NSCA 32.

¶ 3 I conclude that s. 171 of the *Insurance Act* applies to statutory conditions, and that the trial judge's decision should be upheld.

II. Facts

¶ 4 There is no real dispute about the facts relevant to the appeal. It is clear that the owners left the house vacant when they left for British Columbia. They did not inform Halifax that the property was vacant and that they were looking for tenants for both flats. The property remained vacant between September and early December 1998, when Mr. Fitzgerald's brother, Danny, moved in. The rent not having been paid, Ms. Marche had the water to the property disconnected in mid-January 1999 and the electric power boxes removed at the end of January 1999. Although the intention was to induce Danny to move out, it was not established [page54] that he did so. At the time of the fire on February 7, 1999, his possessions were still in the house.

¶ 5 In these circumstances, Halifax could not establish a vacancy at the time of loss. However, it denied liability under the contract of insurance on the ground that Ms. Marche and Mr. Fitzgerald had not advised them of the earlier vacancy, prior to Danny moving in, and that this constituted a change material to the risk that voided the policy.

III. Analysis

¶ 6 The insurer argued the insured had breached Statutory Condition 4 by not advising of their earlier vacancy. The trial judge, without finding breach, stated he would have granted relief in any event under s. 171 of the *Insurance Act*. The main issue in the case as argued was whether s. 171 applies to statutory conditions. If it does, the issues arise of whether there was a statutory breach and whether relief against it should be granted.

A. *Does Section 171 of the Insurance Act Apply to Statutory Condition 4?*

¶ 7 Section 171 of the Nova Scotia *Insurance Act* provides:

> **171** Where a contract

...

(b) contains any stipulation, condition or warranty that is or may be material to the risk including, but not restricted to, a provision in respect to the use, condition, location or maintenance of the insured property,

the exclusion, stipulation, condition or warranty shall not be binding upon the insured if it is held to be unjust or unreasonable by the court before which a question relating thereto is tried.

¶ 8 The dispute about whether s. 171 applies to statutory conditions masks a deeper question: what does [page55] it mean to say that s. 171 applies, or does not apply, to a statutory condition?

¶ 9 For some, the question is whether s. 171 of the *Insurance Act* could be used to amend the contract and delete conditions that form part of every policy as a matter of law. Put that way, the question compels a negative answer: the legislature could hardly have intended to empower trial judges to declare unreasonable on their face conditions that the legislature has made mandatory for all contracts of insurance.

¶ 10 For others, the question is whether s. 171 applies not only to delete conditions that are unreasonable on their face (should there be any), but also to relieve against the results of applying conditions that, in the particular circumstances of the case, are unreasonable in their application or draconian in their consequences. Framed in these terms, the question takes on an entirely different complexion -- which I find more attractive because it avoids an inequitable result otherwise inescapable.

¶ 11 The wording of s. 171 permits the issue to be characterized either way, but the second, in my view, better corresponds with the remedial objectives of the provision.

¶ 12 It follows that the essential question is whether s. 171 applies to statutory conditions that are unreasonable or unjust in their application. For the reasons that follow, I conclude that it does.

(1) Arguments for the Application of Section 171 to Relieve Against the Unreasonable or Unjust Application of Statutory Conditions

(a) *Section 171 Is Remedial and Should Be Given a Broad Interpretation*

¶ 13 In *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.*, [1989] 2 S.C.R. 778, this Court held that the relief against forfeiture provision of the *Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26, s. 109, was not confined to "statutory conditions" and could include "contractual conditions" even though [page56] the provision explicitly referred to "statutory conditions". One of the key reasons was that the provision had a remedial purpose and should be interpreted broadly. Similarly, in this case, s. 171's purpose is to provide relief from unjust or unreasonable insurance policy conditions and should be given a broad interpretation. This approach to interpretation is supported by s. 9(5) of the Nova Scotia *Interpretation Act*, R.S.N.S. 1989, c. 235, which states that "[e]very enactment shall be deemed remedial and interpreted to insure the attainment of its objects ...".

(b) *The Wording of Section 171 Is Broad Enough to Cover Statutory Conditions*

¶ 14 Statutory Condition 4 is a term of the contract and hence falls within the phrase "[w]here a contract ... contains any ... condition" that defines the application of s. 171. "Condition" is not qualified by a restrictive adjective. Thus on its face, s. 171 appears to apply to both negotiated and statutory

conditions.

¶ 15 Including statutory conditions within the term "condition" in s. 171 may accord with the presumption in favour of the ordinary, non-technical meaning: R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 41. There is no automatic inference that the term "condition" excludes "statutory conditions"; thus the text of the legislation supports this interpretation.

¶ 16 The insurer raises several arguments against this "plain reading" argument. None are convincing.

¶ 17 First, the insurer argues that since statutory conditions are mandatory, the phrase in s. 171 "[w]here a contract ... contains" implies that the condition must be contractual since a contract must contain a statutory condition. However, this phrase is equally consistent with the intention to cover both mandatory statutory conditions as well as optional [page57] warranties, conditions and stipulations. Since statutory conditions are contained in the insurance contract, "[w]here a contract ... contains" can be read as including these conditions.

¶ 18 Second, the insurer points to the grouping together of the terms "stipulation, condition or warranty", and the absence of such a thing as a "statutory stipulation" or "statutory warranty". This, it submits, implies that the condition referred to is a contractual condition: respondent's factum, at para. 30. However, it is clear from reading the whole *Insurance Act* that there is little precision in the use of the term "condition". Statutory conditions refer to themselves as "conditions": e.g., *Insurance Act*, s. 167 (2) (see Appendix A). "Statutory conditions" are also referred to throughout the *Insurance Act* as "mandatory conditions": e.g., s. 159(1)(d). The fact that the term "condition" may include "statutory conditions" is reinforced by s. 32(1) which specifies "a condition, statutory or otherwise" and s. 169(3) which refers to "any contract condition": *Insurance Act*. Thus a reading of the entire Act fails to support the insurer's contention.

¶ 19 Third, the insurer argues that the only other relief provision potentially applicable to fire insurance contracts in the *Insurance Act*, s. 33 "relie[f] against forfeiture" (which it is agreed does not apply here), explicitly refers to statutory conditions, whereas s. 171 does not. The explicit reference to statutory conditions reinforces that s. 33 alone applies to statutory conditions, and s. 171 only applies to optional contractual provisions. This conclusion, however, is of limited relevance given the different legislative histories and objects of the two provisions, the broad interpretation of "statutory conditions" in *Falk Bros.*, and the generally imprecise use of the term "condition" throughout the *Insurance Act*.

[page58]

¶ 20 In summary, the wording of s. 171 includes statutory conditions.

(c) *The History of Section 171*

¶ 21 The Nova Scotia *Interpretation Act*, s. 9(5)(g), advocates considering the "history of legislation on the subject" as an aid to interpreting legislation. This is buttressed by the guiding rule of interpretation that legislative change is made for a purpose.

¶ 22 The precursor of s. 171 referred expressly to statutory conditions. It read:

> **11** Where the rate of premium is affected or modified by the user, condition, location or maintenance of the insured property, the policy may contain a clause not

> inconsistent with any statutory condition setting forth any stipulation in respect of such user, condition, location or maintenance, and such clause shall not be deemed a variation of any statutory condition. Such clause shall be binding on the insured only in so far as it is held by the court before which a question relating thereto is tried to be just and reasonable.
> (*Fire Insurance Policy Act*, R.S.N.S. 1954, c. 100, previously S.N.S. 1930, c. 7)

¶ 23 This provision (and its predecessors) permitted optional, non-statutory, conditions not inconsistent with statutory conditions, and held they were binding if the court found them to be "just and reasonable". The court could relieve, but only against optional, non-statutory, conditions.

¶ 24 In 1956, the legislature replaced s. 11 with what is now the present s. 171, which makes no distinction between statutory conditions and optional conditions, and provides that the court can relieve against conditions generally if it finds them "unjust or unreasonable". See *Fire Insurance Act*, S.N.S. 1956, c. 6.

¶ 25 Thus prior to 1956, the legislature clearly stated that courts could not relieve against statutory [page59] conditions. In 1956, the legislature stated that courts could relieve against conditions generally. The guiding rule of interpretation, as mentioned, is that legislative change is made for a purpose. This confirms that s. 171 was intended to apply to all conditions, statutory or otherwise.

¶ 26 In effect, the insurer argues that we should proceed as if the law had not been changed in 1956, and read as it did prior to that date. To do so runs counter to accepted canons of interpretation.

¶ 27 Far from supporting the insurer's position, the history of s. 171 demonstrates that it was intended to apply to statutory conditions.

(d) *Jurisprudence*

¶ 28 The cases that have considered whether s. 171 (or its equivalent) applies to statutory conditions have concluded that it does: *Krupich v. Safeco Insurance Co. of America* (1985), 16 C.C.L.I. 18 (Alta. Q.B.), at p. 27; *528852 Ontario Inc. v. Royal Insurance Co.* (2000), 51 O.R. (3d) 470 (S.C.J.), at para. 24 (it distinguishes its facts from *Krupich* on other grounds). To date courts have not adopted the interpretation of s. 171 submitted by the respondent insurer. Despite these decisions, legislatures have not acted to alter the wording. This has significance: *Falk Bros.*

¶ 29 In sum, while the cases are few, there is no decision other than the N.S. Court of Appeal decision appealed in this case that finds that s. 171 (or its equivalent) does not apply to statutory conditions. The cases cited by the insurer claiming that courts have decided that s. 171 does not apply to statutory conditions have not in fact decided that point: e.g., *Nahayowski v. Pearl Assurance Co.* (1964), 45 W.W.R. 662 (Alta. S.C.); *Kekarainen v. Oreland Movers Ltd.*, [1981] 3 W.W.R. 534 (Man. Q.B.); *Poast v. Royal Insurance Co. of Canada* (1983), 21 Man. R. (2d) 67 (Q.B.).

[page60]

(2) Arguments Against the Application of Section 171 to Relieve Against the Unreasonable or Unjust Application of Statutory Conditions

¶ 30 The insurer's arguments on the wording of s. 171, its history and the case law have been dealt with in the foregoing section. It remains to consider the insurer's strongest argument -- that statutory

conditions by definition cannot be unreasonable or unjust and that hence s. 171 cannot apply to them.

¶ 31 The insurer asserts that the purpose of statutory conditions is remedial and intended to enhance, as opposed to restrict, the rights of the insured. Therefore, the statutory conditions are, by definition, "just and reasonable", and s. 171 cannot apply: Court of Appeal decision, at paras. 53-54; *Curtis's and Harvey Ltd. v. North British and Mercantile Insurance Co.* (1920), 55 D.L.R. 95 (P.C.), at p. 99, supported by Professor J. A. Rendall in a critical annotation to *Krupich v. Safeco Insurance Co. of America* (1985), 16 C.C.L.I. 18, at p. 19.

¶ 32 This argument ignores the fact that an insurance condition may on its face be reasonable and just but in its application be unreasonable and unjust. For example, whether a change is "material to the risk" is a highly charged, fact-based question whose strict application may be unjust or unreasonable in the particular factual circumstances of a case. In this respect, C. Brown and J. Menezes conclude that "[o]ne basic statement of approach to the question of what is unjust or unreasonable, and which has appeared to have remained constant over the years, is that the question is to be determined on the facts in dispute in a particular case and not on purely abstract general terms": *Insurance Law in Canada* (2nd ed. 1991), at p. 190.

¶ 33 The concrete approach enunciated by Brown and Menezes is required by the words of the section itself. As discussed earlier, the legislature could hardly be intended to mandate clauses that are unjust on their face. The words "unjust" and "unreasonable" in relation to a condition mean little unless [page61] they refer to the effects the condition may create. For this reason few clauses in an insurance contract, viewed merely on their face without regard to their effect, could likely be called unjust or unreasonable. The question of how the clause will work when applied cannot be avoided, if we are to make sense of s. 171.

¶ 34 Finally, the principle enunciated by Brown and Menezes that "unjust or unreasonable" must be determined on the facts of particular cases and not in the abstract reflects the remedial purpose of s. 171. To hold that only the condition in the abstract must be unjust or unreasonable without regard to its effects when applied would not accord with the broad remedial purpose of the provision to protect the public against unjust or unreasonable insurance conditions.

¶ 35 Clearly "unjust or unreasonable" in s. 171 allows the Court to look at the application of the clause. It is not suggested that this would not be the case for optional, non-statutory, conditions. If this be so, there is no basis for arguing that when it comes to statutory conditions one must look only at the condition abstracted from the effects of its application. If one considers consequences, the argument that statutory conditions can by definition never be unjust or unreasonable vanishes. At this point the insurer's main argument -- that s. 171 cannot apply because statutory conditions must always be just and reasonable -- collapses.

(3) Conclusion on the Application of Section 171 to Statutory Conditions

¶ 36 The remedial purpose of s. 171, its wording, its legislative history and the jurisprudence support the conclusion that s. 171 applies to statutory conditions. The opposing arguments fail to displace these considerations. I conclude that s. 171 applies to Statutory Condition 4. Where their application produces unjust or unreasonable results, the Court can grant relief under s. 171.

[page62]

B. *Did the Trial Judge Err in Relieving Against the Statutory Condition?*

(1) Is Avoidance of the Policy Under Statutory Condition 4 Established?

¶ 37 Here we face a difficulty. The trial judge did not find that there was a change material to the risk that breached Statutory Condition 4. He simply stated:

> To the extent the vacancy may have avoided the policy, I am satisfied it would be both unjust and unreasonable to give effect to the exclusion of coverage by reason of the non-occupancy, in view of the circumstance the Property was later occupied until shortly before the fire and at the time of the loss there was no breach of the statutory condition. [para. 63]

¶ 38 Oland J.A. at the Court of Appeal concluded, however, that Halifax had shown that the vacancy was a change material to the risk within the meaning of Statutory Condition 4, which obliged the insured to advise their insurer that the property was vacant. Noting that the insured failed to notify their insurer and concluding that subsequent compliance could not cure the material change in risk, Oland J.A. held that the contract was avoided from the time of that breach.

¶ 39 Statutory Condition 4 provides:

SCHEDULE TO PART VII
STATUTORY CONDITIONS

> 4 *Material change* -- Any change material to the risk and within the control and knowledge of the insured shall avoid the contract as to the part affected thereby, unless the change is promptly notified in writing to the insurer or its local agent; and the insurer when so notified may return the unearned portion, if any, of the premium paid and cancel the contract, or may notify the insured in writing that, if he desires the contract to continue in force, he must, within fifteen days of the receipt of the notice, pay to the insurer an additional premium; and in default of such payment the contract shall no longer be in force and [page63] the insurer shall return the unearned portion, if any, of the premium paid.

¶ 40 It is well established in insurance law that vacancy can be a change material to the risk: e.g., *Arcand v. Grenville Patron Mutual Fire Insurance Co.* (1923), 25 O.W.N. 175 (H.C.), and this is reflected in the common and accepted practice of including 30-day vacancy exclusion clauses in insurance policies. Halifax, however, was presumably unable to rely on that clause in this case since MacAdam J. had found that the property was occupied until shortly prior to the time of the loss. Halifax could still, however, rely on Statutory Condition 4 to avoid the policy on the basis that "[a]ny change material to the risk and within the control and knowledge of the insured shall avoid the contract as to the part affected thereby": Schedule to Part VII of the *Insurance Act*.

¶ 41 The insured argue that a vacancy months prior to the actual fire should not disallow their claim to coverage for the fire that destroyed their house. There is no concrete evidence linking that earlier vacancy to the actual circumstances of the fire, which was presumed to constitute arson. The insured submit that upholding the Court of Appeal's decision could lead to situations where an unreported vacancy (e.g., for a vacation) prior to an unrelated fire would avoid the insurance policy. This could have serious implications for rental properties which may often remain vacant while landlords seek appropriate tenants. Moreover, while the first clause of Statutory Condition 4 states that the change "shall avoid the contract as to the part affected thereby ...", the balance of the provision suggests that the

contract continues in effect until further events, for example cancellation by the insurer. It follows, the argument continues, that the contract does not automatically cease to exist prior to the correction of the change material to the risk. The question then becomes whether the insurer was entitled to cancel the contract on the basis of the earlier, rectified change to the risk. It might be argued that where the change has been rectified, this is at best a debt and hardly [page64] justifies the draconian consequence of policy cancellation where the change material to the risk has been corrected.

¶ 42 On the other hand, the insurer might argue that lack of notification of a change cost it an opportunity to cancel the contract before the loss. Moreover, it is not essential that a statutory breach be causally connected to the loss: see *Henwood v. Prudential Insurance Co. of America*, [1967] S.C.R. 720, in which coverage was denied where the insured had not disclosed the fact that she suffered from clinical depression, and was later killed in an unrelated car accident. It might be argued that this reasoning does not apply to failure to advise of a change in the risk which has subsequently been rectified and hence is not in play at the time of the loss. Many events can temporarily change the risk -- for example, a short vacancy, or a sump pump breaking down. Are homeowners obliged, at the risk of losing coverage, to advise insurers of these temporary problems even after they have been remedied and are no longer of any consequence?

¶ 43 In conclusion, Statutory Condition 4 is not a model of clarity. Arguments can be put for and against the proposition that its application avoids the policy on these facts. Lacking as we do sufficient argument on the issue, the prudent course is to leave this issue to be resolved by legislative amendment or in another case.

(2) If the Insurance Contract Was Void for Breach of Statutory Condition 4, Should the Court Grant Relief Under Section 171 of the *Insurance Act*?

¶ 44 The trial judge held that if the insurance contract was void by reason of Statutory Condition 4, the court should relieve against that result under s. 171 of the *Insurance Act* on the ground that the vacancy had been rectified prior to the loss. This conclusion is [page65] not seriously contested; the insurer's main argument was that s. 171 did not apply to Statutory Condition 4. Having concluded that s. 171 is applicable, I see no reason to interfere with the trial judge's conclusion on this point.

IV. Conclusion

¶ 45 I would allow the appeal and affirm the decision of the trial judge with costs to the appellants/insured throughout.

The reasons of Bastarache and Charron JJ. were delivered by

BASTARACHE J. (dissenting):—

I. Introduction

¶ 46 The sole issue of contention in this appeal is the statutory interpretation of s. 171 of the Nova Scotia *Insurance Act*, R.S.N.S. 1989, c. 231, and its application to Statutory Condition 4. Section 171 gives the court discretion to relieve an insured from the avoidance of a fire insurance contract when it is determined that a stipulation, condition or warranty is unjust or unreasonable. Statutory Condition 4 will avoid a contract of insurance if the insurer is not promptly notified in writing of any change material to the risk within the control and knowledge of the insured.

¶ 47 Insurance has become an essential part of our society. "Whether public or private, compulsory or voluntary, insurance touches everyone on a daily basis": D. Boivin, *Insurance Law* (2004), at p. 1. But what is the objective of insurance law? Insurance law provides control and ensures "a proper balance between insurers' need to maintain sufficient financial viability and their customers' reasonable expectations": C. Brown, *Insurance Law in Canada* (loose-leaf ed.), vol. 1, at p. 1-1.

[page66]

¶ 48 The insurance business was one of the first regulated industries, the legislatures having sought to control the economic impact of insurance companies, the undesirable business practices and the insolvencies of the insurers: M. G. Baer and J. A. Rendall, *Cases on the Canadian Law of Insurance* (6th ed. 2000), at pp. 27-28. Incursion by the provincial legislatures in major aspects of the relations between insured and insurers was first observed in matters dealing with the substance and the form of the contracts made with respect to fire insurance. Indeed, the widespread public criticism of the marketing practices and the content of insurance policies were so prevalent that legislatures set out standard terms for fire insurance policies which paved the way to the statutory conditions as we now know them: Baer and Rendall, at pp. 74-75.

¶ 49 The scheme surrounding s. 171 and Statutory Condition 4 (material change in the risk) appears in all provincial insurance statutes dealing with fire insurance (with the exception of the province of Quebec, which deals with material change in risk under the *Civil Code of Québec*, S.Q. 1991, c. 64): *Insurance Act*, R.S.B.C. 1996, c. 226, ss. 129 ("Unjust exclusions") and 126; *Insurance Act*, R.S.A. 2000, c. I-3, ss. 552(1) ("Special stipulations") and 549; *The Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26, ss. 131 ("Special stipulations") and 128; *Insurance Act*, R.S.M. 1987, c. I40, ss. 145 ("Unjust exclusions") and 142; *Insurance Act*, R.S.O. 1990, c. I.8, ss. 151 ("Special stipulations") and 148; *Insurance Act*, R.S.N.B. 1973, c. I-12, ss. 130 and 127; *Insurance Act*, R.S.P.E.I. 1988, c. I-4, ss. 117 ("Unjust or unreasonable exclusions or conditions not binding, where) and 114; *Fire Insurance Act*, R.S.N.L. 1990, c. F-10, ss. 11 ("Special stipulations"), 8 and Sch., para. 4; *Insurance Act*, R.S.N.W.T. 1988, c. I-4, ss. 67 ("Special stipulations") and 64(2); *Insurance Act*, R.S.Y. 1986, c. 91, ss. 71 ("Special stipulations") and 68.

¶ 50 I maintain that the interpretation of s. 171 of the *Insurance Act* can lead to only one conclusion: s. 171 [page67] does not apply to statutory conditions. Therefore, the Court of Appeal's decision should be upheld.

II. Preliminary Remarks

¶ 51 Since the Chief Justice has succinctly summarized the relevant facts of this case, I need not repeat that part of her reasons. I nevertheless want to clarify a few important facts.

¶ 52 The Chief Justice describes the situation here as "the sad case of a couple" who suffered the loss of the house they had converted to two apartments (para.1). Without getting into a dispute over the facts, I take issue with this characterization. The property was vacant long before the fire and later occupied by Mr. Fitzgerald's brother, Danny, pursuant to a rental agreement. When Danny failed to make rental payments, the insured did not stand by, not knowing what to do; they were determined to have him evicted. In fact, Ms. Marche arranged for the water connections to the property to be disconnected and subsequently for the electric power boxes to be removed. While the insured may not have been pervaded with malice but only ignorance as to what their obligations were under the policy, this does not make this case singular in any way. They purposefully left the property vacant without water and electricity. One should bear in mind that it is the legislature that drafted the impugned section and that it

is a fact that Halifax Insurance did nothing but invoke the policy.

¶ 53 McLachlin C.J. indicates, at para. 4 of her reasons that although the intention of the insured was to induce Danny to move out, it was not established that he did so as his possessions were still in the house. In fact, the trial judge concluded that "[t]he fire at the Property apparently occurred shortly after Danny had vacated" and later added "Danny endeavoured to find other premises and may even have moved out of the Property shortly before the fire": (2002), 202 N.S.R. (2d) 345, 2002 NSSC 62, at para. 25. This is more consistent with the fact that there was no water or electricity in the home and that the events took place in February. I think it is reasonable to conclude that Danny had left the [page68] property even though at least some of his personal property remained behind.

III. General Principles of Statutory Interpretation

¶ 54 Much has been written about the interpretation of legislation in Canada (see R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002); P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000); R. N. Graham, *Statutory Interpretation: Theory and Practice* (2001)). This Court has repeatedly cited, and this across a wide range of interpretive settings, that the preferred approach to statutory interpretation is that set out by E. A. Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(See *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, *per* Estey J. (taxation); *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at p. 1134, *per* Dickson C.J. (administrative); *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, *per* Iacobucci J. (employment); *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, *per* McLachlin C.J. (criminal); *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 28, *per* Iacobucci J. (admiralty); *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27, *per* Iacobucci J. (immigration); *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, *per* Iacobucci J. (radiocommunication).)

¶ 55 Although the factors enumerated by Driedger create the framework that needs to be applied in order to interpret a statutory provision, this Court warned in *Chieu*, at para. 28, against a formulaic approach of the interpretive factors, given that they are closely related and interdependent.

[page69]

¶ 56 Furthermore, as pointed out by the insurer, the same approach was incorporated by the legislature in s. 9(5) of the *Interpretation Act*, R.S.N.S. 1989, c. 235, which requires an examination of the object of a section, the former law and the history of legislation on the subject when interpreting a provision:

> **9**... .
> **(5)** Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
>
> (a) the occasion and necessity for the enactment;

(b) the circumstances existing at the time it was passed;
(c) the mischief to be remedied;
(d) the object to be attained;
(e) the former law, including other enactments upon the same or similar subjects;
(f) the consequences of a particular interpretation; and
(g) the history of legislation on the subject.

¶ 57 While it is true that one can and should consider as context the former law and the history of the legislation, as noted in the *Interpretation Act*, these factors, especially in a non-constitutional context, are subordinate to the duty to interpret every provision according to its object as can be determined by examining the Act as a whole. Parliamentary sovereignty should guide the courts, as was confirmed in *Bell ExpressVu*, at para. 62:

> Statutory enactments embody legislative will. They supplement, modify or supersede the common law. More pointedly, when a statute comes into play during judicial proceedings, the courts (absent any challenge on constitutional grounds) are charged with interpreting and applying it in accordance with the sovereign intent of the legislator.

IV. Application of the Principles to Section 171

¶ 58 In order to determine the appropriate interpretation of the statutory provision at issue in this appeal, [page70] I will first consider the grammatical and ordinary sense of the words used in the section. I will then proceed to read this section in its context. This inquiry will include an examination of (i) the immediate context of the expression under scrutiny, (ii) the broader context of the section, which entails the object and the intention of the legislator, and (iii) the external context, i.e., the history of the impugned section. Although it appears at first blush that none of these factors are by themselves conclusive, it is their impact as an ensemble that is persuasive.

A. *Grammatical and Ordinary Sense*

¶ 59 The interpretation begins with the ordinary meaning. But what does this first stage involve? Professor Sullivan, at p. 21, explains:

> The expression "ordinary meaning" is much used in statutory interpretation, but not in any consistent way. Sometimes it is identified with dictionary meaning, sometimes with literal meaning and sometimes with the meaning that results after the words to be interpreted are read in total context. Most often, however, it refers to the reader's first impression meaning, the understanding that spontaneously emerges when words are read in their immediate context ... .

¶ 60 Hence, as expressed by Gonthier J. in *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735, the ordinary meaning is "the natural meaning which appears when the provision is simply read through".

¶ 61 The insurer observes that the opening words of s. 171(b) are "[w]here a contract contains", not "where a contract is deemed to contain". The former suggests provisions which have been negotiated between the parties, and hence are contractual, whereas the latter suggests statutory conditions that are automatically part of every contract pursuant to s. 167(2) of the *Insurance Act*.

¶ 62 The insurer also contends that, contrary to other provisions of the statute (which will be examined later), the words "any ... condition" are not qualified by the adjective "statutory" or by the phrase "statutory or otherwise". It concludes that in the absence of such a qualification, "any ... condition" [page71] reflects the ordinary definition of the concept in a contract, that is to say a contractual provision. In my view, the usage by the legislature of the word "condition" interchangeably -- sometimes to mean only statutory, at other times to mean statutory and contractual -- does not permit to draw a clear conclusion from this reading.

¶ 63 After this preliminary step, I acknowledge that it would be difficult to determine the issue; the scale does not seem to tip in favour of either party. Nevertheless, the analysis does not stop here. It has been recognized by this Court that this first step must be followed with a consideration of the total context of the words to be interpreted in every case (*Chieu*, at para. 34; see also Sullivan, at p. 20).

B. *Total Context*

¶ 64 The modern approach recognizes the important role that context must inevitably play when a court construes the written words of a statute. It is undoubted that words take their colour from their surroundings: *Bell ExpressVu*, at para. 27.

¶ 65 When read in its entire context, I am of the view that s. 171(b) does not purport to relieve an insured from a statutory condition. A number of contextual factors which I will now strive to canvass support this conclusion.

¶ 66 I will examine this second factor of the modern approach in three steps. First, I will scrutinize the immediate context of the impugned words: the provision in which the words appear and any closely related provisions. Second, I will follow with an inquiry into the broader context of the section, i.e., the Act as a whole to determine the intention of the legislator. Finally, I will review the external context, that is the historical settings in which s. 171 was enacted (see Sullivan, at pp. 260-62).

(1) Immediate Context: *Noscitur a Sociis* Rule

¶ 67 The insurer submits that when reading s. 171, it can be observed that the word "condition" is linked by "or" with the concepts of "stipulation" and [page72] "warranty". It is a well-known rule of interpretation that a term or an expression cannot be interpreted without taking the surrounding terms into account. "The meaning of a term is revealed by its association with other terms: it is known by its associates": *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 195 (emphasis omitted).

¶ 68 Professor Sullivan, at p. 173, defines the associated words rule, *noscitur a sociis*, as follows:

> The associated words rule is properly invoked when two or more terms linked by "and" or "or" serve an analogous grammatical and logical function within a provision. This parallelism invites the reader to look for a common feature among the terms. This feature is then relied on to resolve ambiguity or limit the scope of the terms. Often the terms are restricted to the scope of their broadest common denominator.

¶ 69 This rule of statutory interpretation was applied by this Court on numerous occasions: *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279, at pp. 328-29; *Ontario v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031, at para. 64; *2747-3174 Québec Inc.*, at para. 195; *R. v. Daoust*, [2004] 1 S.C.R. 217, 2004 SCC 6, at para. 51.

¶ 70 When applying the *noscitur a sociis* rule (associated words rule) to a term that is part of a list, one must look for a common feature among the terms, "the meaning of the more general being restricted to a sense analogous to the less general": *R. v. Goulis* (1981), 33 O.R. (2d) 55 (C.A.), at p. 61. Legislative provisions must not be considered in a vacuum. "The content of a provision 'is enriched by the rest of the section in which it is found ...'": *Canadian Pacific*, at para. 64; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 647. In the present case, while "condition" standing alone could potentially have a broader connotation, its association with the words "stipulation" and "warranty" narrows its scope. As submitted by the insurer, under the *Insurance Act*, the concepts of "statutory" stipulation or "statutory" warranty do not exist. A stipulation or warranty is necessarily contractual. Consequently, the list should be [page73] limited to the common denominator to all the terms: the contract. Every single one of these provisions is of a contractual nature. When addressing this factor, one must not confuse the immediate context with the broader context of the statute. These two factors, while linked, should be examined separately: one needs to address the specific context of an expression or word before referring to the entire context of the statute.

¶ 71 This rule needs to be kept in mind during the examination of the general context, i.e., s. 171 in the context of other provisions of the *Insurance Act* (and more specifically s. 33 which I will address fully later). "[W]ords in isolation are virtually meaningless": Sullivan, at p. 259. The same can be said for the provisions in the *Insurance Act* scheme.

(2) Broader Context: Scheme of *Insurance Act*, Object and Intention of the Legislator

¶ 72 "As the product of a rational and logical legislature, the statute is considered to form a system. Every component contributes to the meaning as a whole, and the whole gives meaning to its parts: 'each legal provision should be considered in relation to other provisions, as parts of a whole' ...": Côté, at p. 308. See also *Dubois v. The Queen*, [1985] 2 S.C.R. 350, at p. 365.

¶ 73 Obviously, the general scheme of the *Insurance Act* is to shape insurance contract law and the business of insurance in Nova Scotia. For the purpose of regulating contracts, insurance has been divided into several classes under the statute, each of which is governed by different rules. The Act contains 12 parts covering such issues as the licensing of insurance agents and adjusters, and the penalties arising from contraventions of the Act.

¶ 74 When dealing with fire insurance, the framework applicable can be found in the general provisions of Part II (Insurance Contracts in the Province) and the specific provisions of Part VII (Fire Insurance). It [page74] is important to note that while these two parts are now distinct and a fraction of the bigger insurance scheme in Nova Scotia, when first adopted, the complete legislative framework on fire insurance formed a single statute, the *Fire Insurance Policy Act*. I will review the historical foundation of the litigious section when analysing the external context.

(a) *Part VII -- Fire Insurance*

¶ 75 Part VII prescribes various aspects of a fire insurance contract including the extent of coverage against fire (s. 163), the contents of the policy (s. 164), and the renewal contract (s. 166). It also includes s. 171, the disputed section. Part VII is of great significance; it prescribes the mandatory statutory conditions. Section 167(2) deems a Schedule of 15 statutory conditions to be part of every contract for fire insurance. No variation, omission or addition to any statutory condition is binding on the insured. Therefore, part of a fire insurance policy is mandated in the form of statutory conditions which neither the insurer nor the insured may set aside.

¶ 76 In the case at bar, the statutory condition at the heart of the dispute is Statutory Condition 4. As earlier mentioned, it requires the insured to promptly notify in writing the insurer or its local agent of any change material to the risk that is within his control and knowledge. A failure to abide by that condition will result in the avoidance of the contract. The insurer submitted at trial that the insured had breached Statutory Condition 4 by failing to advise the insurer that the property in question was vacant. This position was upheld by the Court of Appeal. This conclusion is not in dispute before our Court.

¶ 77 The insurer submits that the object of the mandatory statutory conditions is to enhance, as opposed to restrict, the rights of the insured; therefore, by definition, statutory conditions are "just and [page75] reasonable". This argument was accepted by the Court of Appeal. I agree with the insurer because, in my view, and this will be further demonstrated below, the statutory conditions, taken as an ensemble, and their mandatory nature are the legislator's answer to creating an equitable scheme. Each condition is just and reasonable as it is necessary to ensure the balance of the regime. The Chief Justice takes the position that the fact that a statutory condition may on its face be reasonable and just ignores that in its application it can be unreasonable or unjust (para. 32). I respectfully disagree that this is the proper approach to the interpretation of this provision.

¶ 78 It is necessary to first consider the purpose of statutory conditions. The answer to this question is found in decisions of England's Privy Council as well as those of this Court. In *Curtis's and Harvey Ltd. v. North British and Mercantile Insurance Co.* (1920), 55 D.L.R. 95, Lord Dunedin states, at p. 99:

> The primary object of the statutory conditions is to prevent the insurer by means of exceptions skilfully worded and not particularly brought to the notice of the assured, avoiding liability which it is only just and reasonable he should undertake in a fire policy. Their Lordships agree ... that these conditions, if there is doubt, should be held rather as amplifying than as cutting down the insurer's liability.

¶ 79 In addition, this Court acknowledged in *City of London Fire Insurance Co. v. Smith* (1888), 15 S.C.R. 69, at pp. 79-80, the special nature of statutory conditions:

> The statutory conditions being themselves framed as being conditions just and reasonable to be exacted a variation which should make any such conditions to be less onerous, must of necessity be just and reasonable, and it is only in the case of a variation exacting something more onerous upon the insured than the statutory condition in the same matter enacts, that any question could arise calling for the decision of a judge or court to determine whether the variation is a just and reasonable one to be exacted by the company.
>
> [page76]

¶ 80 Consequently, the purpose of the statutory conditions is to provide fairness to both the insured and the insurance provider.

¶ 81 The author Brown, at pp. 20-8 and 20-9, clearly makes a distinction between a statutory condition and "stipulations, conditions or warranties" when discussing the above purpose:

> This consumer protection objective is underscored by the requirement that the statutory conditions be printed on the policy although this does not apply to interim receipts or binders. Whether printed or not, they are to be deemed part of the fire insurance contract and variations or omissions of conditions are not binding on the

> insured. This does not prevent certain stipulations, conditions, or warranties material to the risk and respecting the use, condition, location or maintenance of the insured property from being included in the contract, provided they are not inconsistent with statutory conditions (and provided they are not held to be unjust or unreasonable). Moreover, what may appear to be a possible variation and, therefore invalid, may merely be a valid limitation on the description of the risk, or an exclusion. [Emphasis added.]

¶ 82 Consequently, I agree with Oland J.A. of the Court of Appeal, when she expresses the view that statutory conditions, which are mandated by legislation to be incorporated into insurance contracts for the protection of the insured, must be considered just and reasonable: (2003), 214 N.S.R. (2d) 1, 2003 NSCA 32, at para. 54.

¶ 83 This said, it is important to reconcile the inclusion by the legislature of the statutory conditions in contracts for fire insurance with the terms of s. 171. This Court has recognized in *Rizzo & Rizzo Shoes*, at para. 27, that legislatures do not intend to produce absurd consequences:

> ... an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment... .
>
> [page77]

¶ 84 I agree with the insurer that it would be both illogical and incoherent to interpret s. 171 as applying to statutory conditions in Part VII. Like it, I believe it would be unreasonable and incongruous for the same statute to dictate, on the one hand, that statutory conditions are mandatory to assure fairness to both parties, but, on the other hand, to allow that the same conditions be avoided because they are unreasonable or unjust by virtue of s. 171. This would defeat the purpose of the statutory conditions and render them pointless and futile. We must presume that the legislature, in an attempt to protect the insured from shrewd tactics by the insurer in drafting its policy, provided for conditions which are just and reasonable for both the insured and the insurers, and wanted them applied and not defeated by its own legislative scheme. While some may not agree with the position taken by the legislature, absent any challenge on constitutional grounds, the interpretation process cannot be used to avoid the legislative scheme.

¶ 85 Professor J. A. Rendall adopted the same position in his annotation to the decision *Krupich v. Safeco Insurance Co. of America* (1985), 16 C.C.L.I. 18, at p. 20:

> It makes very good sense to include a statutory provision, by way of judicial discretion, to control the freedom of contract by which insurers might otherwise impose harsh terms in the form of policy exclusions and conditions. This, surely, is precisely what s. 238(1) [equivalent to s. 171 of the Nova Scotia *Insurance Act*] does and is directed at doing. It seems obvious that s. 238(1) was never intended to give a Court any role in deciding whether one of the statutory conditions, mandatorily incorporated as part of every fire insurance policy by s. 235(1), might be thought to be "unjust or unreasonable". The statutory conditions have been developed according to a legislative judgment of what insurance contract terms are "just and reasonable", and those conditions are made part of every contract by a clear legislative statement in s. 235(1). [Emphasis added.]

[page78]

¶ 86 Moreover, statutory conditions are a means of attaining one of the foundational objectives of the statutory regulation of the insurance industry: limiting the freedom of contract enjoyed by insurance companies. In this regard, Professor Boivin, at pp. 59-60, when addressing this legislative objective, expressed the following opinion:

> [This] legislative objective ... is designed to compensate for the fact that insurance consumers have only weak bargaining power compared to insurers. Insurance policies are contracts of adhesion in many important respects. Pre-contractual discussions tend to focus on the object of the insurance, the amount of coverage, and the resulting premium. However, the issues that give rise to most litigation -- the conditions, limitations, and exclusions of coverage -- are themselves imposed without negotiation. But this is only half the problem from the perspective of consumers. *Knowledge* is another disparity between insurer and insured... .
>
> Given this reality, the formation and enforcement of a contract constitute important dimensions of provincial and territorial insurance regulation concerns... .
>
> "Statutory conditions" constitute another important feature of this statutory framework... . [S]tatutory conditions are specific contractual provisions drafted by the legislature and deemed to be part of every contract issued in the corresponding province or territory that deals with accident and sickness insurance, automobile insurance, or fire insurance. These conditions can be compared to the implied conditions imposed by the judiciary, with the important exception that they are beyond the reach of the contracting parties. Insurers cannot make any additions, omissions, or variations with respect to these conditions. Regarding classes of insurance other than accident and sickness, automobile, or fire, the provincial and territorial legislatures have opted for a more conventional form of statutory intervention: they confer rights and impose corresponding obligations. [Underlining added.]

¶ 87 In my view, it is clear from the object of the statutory conditions that the legislature wanted to elevate a number of conditions to supreme grounds and make them untouchable by both insurers and insured. I contend that s. 171 was enacted as a complement to the mandatory statutory conditions [page79] rather than a curative provision applicable to such statutory conditions. The objective of the legislature was to frame the fire insurance contract and to shield the insured from the abuse and oppression of insurance companies (Rendall, at p. 20). In fact, the protection of the insured is provided for by two components: the mandatory statutory conditions (s. 167) and the relief provision (s. 171). Each has a particular end; together, they create a whole.

¶ 88 McLachlin C.J. argues that the presumption that the legislature enacted statutory conditions which are just and reasonable can be rebutted and refuted by examining the consequences the condition may create in a specific case. I believe this is contrary to the very wording of the provisions and the legislative intent. When dealing with consequences, the legislature was clear, as I will demonstrate shortly in discussing s. 33. I would add that in any event, the insured in the present case were not able to establish that the provision was unfair on its face or in its application. If it is unfair to apply Statutory Condition 4 when there is no misconduct by the insurer and nothing unusual about the breach of the condition or the fire, it is no longer a mandatory term of the contract. It cannot be that the unfairness simply results from the fact that the contractual breach occurred prior to the fire, for there would then be no meaning to the avoidance provision. The material change in the risk is a feature that is provided in order to exclude the necessity of establishing causality. There is no merit to the argument that it is unfair for the insurer to apply Statutory Condition 4 because there is no causality between the breach and the fire; the same could be said of most statutory conditions. In my view, the history of s. 171 and its

association with s. 33 precludes any inquiry into the effects of a statutory condition. Otherwise, every single one of the 15 statutory conditions would potentially be unreasonable or unjust, an outcome that would be inconsistent with the purpose of the Act, and create great uncertainty for both parties.

[page80]

¶ 89 In addition, I am of the view that policy concerns, which I will address in section VI of my reasons, go against a rebuttal of the presumption. One may be naturally inclined to protect the insured against the corporate entity in every case; nevertheless, one must not forget that the legislature has taken the steps it considered necessary to protect the insured and to assure fairness to both parties to the contract. It specifically took into consideration in drafting the mandatory provisions that the insurance company has no other choice but to rely on the information that it receives from the insured.

¶ 90 Thus, I conclude that the scheme in Part VII of the *Insurance Act* can only be interpreted as giving discretion to the courts to grant relief under s. 171 where a "contractual" condition is held to be unjust or unreasonable. Section 171 should not apply to statutory conditions because it will undermine them and deny the complementary approach of ss. 167 and 171 of the *Insurance Act*.

(b) *Part II -- Insurance Contracts in the Province*

¶ 91 Part II of the *Insurance Act* includes general provisions applicable to all insurance contracts in Nova Scotia (subject to certain exceptions which do not apply in this case) where not inconsistent with some other provision of the Act. Therefore, Part II applies to contracts of fire insurance.

¶ 92 Part II prescribes various aspects of the insurance contracts including delivery of the insurance policy (s. 18), the effect of default in paying a premium (s. 21) and the submission of forms for proof of loss (s. 23). I want to draw attention to s. 33, the provision for "relief against forfeiture". Section 33 provides that a court may relieve against forfeiture or avoidance of the insurance where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured (or other matter or thing required to be done or omitted by the insured), where the court considers it inequitable that the insurance should be forfeited or avoided. [page81] The insurer evokes a parallel between s. 33 and s. 171 which McLachlin C.J. dismisses quickly on the basis that the legislative histories and objects of the two provisions are different. I strongly disagree. Actually, I contend that the history of the sections corroborates their complementary nature. I will deal with this external factor later. For now, an examination of the language of s. 33 is indispensable:

> **33** Where there has been imperfect *compliance* with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss, and a consequent forfeiture or avoidance of the insurance in whole or in part, and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.

¶ 93 The language in s. 33 is explicit and clear: it permits relief against forfeiture of the insurance for imperfect compliance with a "statutory" condition after a loss. In contrast, s. 171 permits a "stipulation, condition or warranty" in a contract not to bind the insured if it is held to be unjust or unreasonable by the court. Compliance and nature of the provision are distinct notions, and the legislature did not ignore this. Another important divergence between the two sections is the determination of inequity: on the one hand, s. 33 speaks of what the courts consider inequitable in the consequences of the non-compliance with the statutory conditions; on the other hand, s. 171 deals only with unjust conditions, not their

consequences. The distinctions between these two types of relief provisions which apply to fire insurance contracts cannot be ignored or modified by judicial interpretation: it would be to feed into s. 171 the same language that the legislature only chose to include in s. 33.

¶ 94 While today ss. 33 and 171 are not in the same part of the *Insurance Act* (this was not the case not so long ago, as evidenced from the external context to be discussed later), they are a good indication of [page82] the intention of the legislature. One cannot interpret the explicit language in s. 33 as referring to statutory conditions but fail to notice the absence of such explicit language in s. 171. Their language is distinct.

(c) *Other Provisions*

¶ 95 The insurer contends that since the legislature has explicitly referred to "statutory conditions" throughout Part II, Part V and Part VII of the *Insurance Act*, if it had intended the phrase "stipulation, condition or warranty" in s. 171 to apply to "statutory conditions", an explicit reference would have been included. The pattern in the use of a phrase in other parts of an Act is a factor relied upon by the courts to determine the context in statutory interpretation. It is presumed that the legislature uses language carefully and consistently so that within a statute or other legislative instrument the same patterns of expression have the same meaning, and different patterns have different meanings: Sullivan, at pp. 162-66. An example of the application of this presumption is found in this Court's decision in *Ulybel Enterprises*, at para. 42, where Iacobucci J. writes :

> Indeed, had Parliament intended the phrase "any proceeds realized from its disposition" to be limited to proceeds of perishables in ss. 71(1) and 72(1), it could have done so expressly, as it did in s. 70(3), as well as ss. 72(2) and 72(3). Instead, a pattern in the use of the phrase at issue is evident whereby in some sections it is expressly limited to the proceeds of perishables and in other sections it refers more generally to all forms of property seized under the Act and proceeds thereof.

(See also *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at para. 60.)

¶ 96 McLachlin C.J. finds little precision in the use of the term "condition" when reading the Act as a whole (para. 18). I disagree. In my view, although the use of the word "condition" might not be totally unequivocal, one must presume, as I indicate above, [page83] that the legislature is consistent and coherent. In the present case, when the legislature wants to refer to "statutory conditions", it does so expressly. In this regard, I note eight examples extracted from the Act:

> **Notice to insured or insurer**
>
> **29** Subject to any statutory condition, where the mode of giving a notice for any purpose is not provided, the notice may, in the case of notice by an insurer, be given by mailing it by registered letter to the last known address of the insured on its records or, if there is no such record, to the address of the insured given in his application or by delivering it to the insured and, in the case of notice by an insured, be given by mailing it by registered letter to the last known address of the insurer in the Province or failing that by mailing it by registered letter or delivering it to a licensed agent of the insurer.
>
> **Court may relieve against forfeiture**
>
> **33** Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss, and a consequent forfeiture or avoidance of the insurance in whole or in part, and the court considers it inequitable that the

insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.

Statutory conditions

74 Subject to Section 75, the conditions set forth in the Schedule to this Part shall be deemed to be part of every contract other than a contract of group insurance and shall be printed on or attached to the policy forming part of such contract with the heading "Statutory Conditions".

Omission of statutory condition

75 (1) Where a statutory condition is not applicable to the benefits provided by the contract it may be omitted from the policy or varied so that it will be applicable.

Notice of statutory conditions

76 In the case of a policy of accident insurance of a non-renewable type issued for a term of six months or less or in relation to a ticket of travel, the statutory conditions need not be printed on or attached to the policy if [page84] the policy contains the following notice printed in conspicuous type:

> Notwithstanding any other provision herein contained, this contract is subject to the statutory conditions in the *Insurance Act* respecting contracts of accident insurance.

Imperfect compliance with statutory condition

102 Where there has been imperfect compliance with a statutory condition as to any matter or thing to be done or omitted by the insured, person insured or claimant with respect to the loss insured against and a consequent forfeiture or avoidance of the insurance in whole or in part, and a Court before which a question relating thereto is tried deems it inequitable that the insurance should be forfeited or avoided on that ground, the Court may relieve against the forfeiture or avoidance on such terms as it deems just.

"Policy" defined

167 (1) In this Section, "policy" does not include interim receipts or binders.

Statutory conditions

(2) The conditions set forth in the Schedule to this Part shall be deemed to be part of every contract and shall be printed on every policy with the heading "Statutory Conditions" and no variation or omission of or addition to any statutory condition shall be binding on the insured.

Notice of cancellation or alteration

168 ...

(2) The length of and manner of giving the notice under subsection (1) shall be the same as notice of cancellation to the insured under the statutory conditions in the contract.

¶ 97 The latter demonstrates how the legislature is not shy to explicitly refer to the specific type of condition in other sections of the Act. This additional factor further steers the analysis toward the non-application of s. 171 to statutory conditions.

(3) External Context: Legislative History

¶ 98 According to Professor Sullivan, "[o]ne of the most effective ways of establishing legislative purpose is to trace the evolution of legislation from its [page85] inception, through successive

amendments, to its current form": Sullivan, at p. 218. The author asserts as well, at p. 218:

> Tracing may expose the legislature's past decision to adopt a new policy or strike out in a new direction; it may reveal a gradual trend or evolution in legislative policy; or it may reveal the original purpose of legislation and show that this purpose has remained constant through successive amendments to the present. [Emphasis added.]

¶ 99 It is well established that the legislative evolution may be used to interpret a statute as prior enactments may throw some light on the intention of the legislature in repealing, amending, replacing or adding to a statute: *Ulybel Enterprises*, at para. 33; *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660, at p. 667; Sullivan, at pp. 471-72.

¶ 100 The insurer, in its submissions to this Court, detailed the legislative evolution of s. 171. I reproduce in Appendix B the different enactments of the section from 1899 to the last consolidation in 1989. The evolution of s. 171 shows how predecessor sections have always targeted contractual provisions as opposed to statutory conditions.

¶ 101 The Chief Justice adopts the view that the only accepted canon of interpretation is the one that presumes "that amendments are specifically intended to change the substance of an enactment": Côté, at p. 421. I respectfully disagree. While there might be a presumption of substantive change at common law, it is a presumption which can be rebutted: see Sullivan, at p. 473; Côté, at p. 423. Hence, it is erroneous to presume that in all circumstances legislative amendments signal a change in the law. In fact, amendments could be adopted in order to clarify and educate rather than alter the interpretation of the legislation or, as this Court put it in *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at p. 1286, "to make express and explicit what had previously been implicit".

[page86]

¶ 102 An example of only "formal change" (contrary to "substantive change") is found in the reasons of Wilson J. in *Skoke-Graham v. The Queen*, [1985] 1 S.C.R. 106. In that case, this Court had to interpret the expression "anything that disturbs the order or solemnity" in s. 172(3) of the *Criminal Code*, R.S.C. 1970, c. C-34, and more specifically decide whether a non-disorderly act that nonetheless disturbed other worshippers because of its ideological significance should be prohibited by the section. Before concluding that it should not, Wilson J. relied on the legislative evolution of the section. She writes at pp. 130-31:

> It is noteworthy that in legislation dating from 1869 disturbance, interruption or disquiet of a religious assembly was only punishable if it took place "by profane discourse, by rude or indecent behaviour, or by making a noise". The Crown argues that the 1953-54 amendment to the section, as part of a major revision to the *Criminal Code*, broadened the section and such restrictions are no longer applicable. This does not, however, appear to have been Parliament's intention.
>
> It seems to me that all Parliament intended to do in enacting s. 161(3) of the 1953-54 *Code* was to use general rather than specific words to cover the types of things which were considered capable of disturbing the order or solemnity of a meeting. I do not believe they were seeking to expand the scope of the provision to cover peaceful acts of defiance of religious authority. I am reinforced in this view by the fact that s. 161 of the 1953-54 *Code* (like s. 172 of the present *Code*) is one of a series of offences falling under the heading "Disorderly Conduct". I believe, therefore, that the word "anything" must be read down so as to extend only to things in the nature of profane

> discourse, rude or indecent behaviour or making a noise. Where, as in this case, the appellants' acts were peaceful and orderly I would be reluctant to find that an offence had been committed even if the acts did disturb the order or solemnity of the service to the minimal extent found by the trial judge. [Emphasis added.]

¶ 103 Thus, it is possible to conclude that "even dramatic changes in wording are meant to simplify or otherwise modernize the style rather than to change the substance of the provision": Sullivan, at p. 477; see also *R. v. McIntosh,* [1995] 1 S.C.R. 686, at paras. 62-75. I maintain this is the case in the present appeal.

[page87]

¶ 104 During its history, as it is evidenced from Appendix B, the relief provision, s. 171, has taken three different forms: one in 1899, another in 1930 and a last one in 1956. In my view, the forms as enacted in 1899 and in 1930 are clear and explicit: the legislature was targeting contractual provisions. The reference to "any condition other than or different from the conditions set forth in section 2 of this Act" in 1899 and then to " the policy may contain a clause not inconsistent with any statutory condition" in 1930 confirm the distinction between statutory and contractual conditions. Both "condition" and "clause" referred to contractual provisions negotiated between the parties, these provisions being different from the statutory conditions mandatorily included in the insurance policy by the legislature. While the legislature may have labelled the contractual provisions from 1899 to 1989 "stipulations", "clauses", "conditions" and "warranties", I contend that at no time did it intend to include statutory conditions under s. 171.

¶ 105 C. Brown and J. Menezes in the second edition of their book *Insurance Law in Canada* (1991), at p. 178, explain why this remedial section evolved over the years:

> The much reduced list of statutory conditions remains an unalterable part of the policy as it has been since the 1920's. However, since far fewer matters are now covered by statutory conditions the necessity and freedom of the insurer to deal with the items not mentioned has increased. As a reflection of this, the wording of the section dealing with judicial discretion over the terms of fire policies has been widened so as to preserve that mechanism of control.

Later, at p. 188, they state:

> The use of a statutory contract to protect against abuses by insurers in the drafting of policies clearly had to suffer the consequences of being overly rigid and sometimes unworkable. The courts mitigated this rigidity by drawing on the distinction between conditions in a policy and the description of the risk. Where a term in the policy with respect to the use or location of the subject matter seemed eminently reasonable and just, the courts could [page88] by-pass the failure to meet the formal requirements with respect to variation of statutory conditions by characterizing the term as part of the description of the risk.

¶ 106 Indeed, the number of statutory conditions went from 25 in 1900 to 15 in 1956, the latter being the date when the legislature modified s. 171 to its present form. Hence, with a relatively smaller number of statutory conditions that are mandatory, the legislature, by amending the discretionary relief under s. 171, sought to protect the insured from the increase in contractual conditions that would ensue.

¶ 107 Hence, s. 171 was always directed at contractual conditions or, as referred by the Chief Justice, optional conditions.

¶ 108 An inquiry into the legislative evolution of s. 33 is also very revealing. The section pinpointed in time is reproduced in Appendix B. Foremost, it is important to note that the relief from forfeiture provision, now s. 33, was in the past a companion to the provision under scrutiny in what was a statute exclusively applicable to fire insurance. From 1899 to 1968, these two provisions were only sections apart, when not one after the other.

¶ 109 In 1930, the legislature modified s. 33 (then s. 10) to what is now its current form and more specifically qualified the condition with the word "statutory". At no time did the legislature introduce the same amendments to s. 171, not even in 1956 when the legislature modified s. 171 to adopt the present language and format. It is only in 1966 that the legislature, in s. 2 of *An Act to Amend Chapter 9 of the Acts of 1962, the Insurance Act*, S.N.S. 1966, c. 79, decided to move s. 33 to Part II of the *Insurance Act* and thus give the section application over other classes of insurance beside fire insurance. This amendment was proclaimed on December 17, 1968 and came into force on the 1st day of January 1969. Nonetheless, this does not change the fact that from 1956 to 1968 (and this after the consolidation of all the insurance legislation in 1962 into one Act), [page89] both relief sections were found in the same part of the Act and each had distinct language. They were obviously complementary. Besides, the legislature is presumed to avoid superfluous or meaningless words: Sullivan, at p. 158. In this case, it is clear that the legislature intended to use distinct language differentiating both relief sections.

¶ 110 Section 33 is very specific; it applies to statutory conditions. It is also very wide in its scope, referring to "the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss". The equivalent provision in Saskatchewan has been given a broad interpretation by this Court in *Falk Bros. Industries Ltd. v. Elance Steel Fabricating Co.*, [1989] 2 S.C.R. 778. To extend the application of s. 171, as suggested by the Chief Justice, to cover statutory conditions and the effect of their application in individual cases, would change its character and considerably diminish its value and utility. In my view, the Chief Justice's reasoning leads to the overriding of the legislative intent regarding the character of two parallel and distinct provisions.

¶ 111 In sum, the immediate, broader and external context demonstrate the intention of the legislature to establish a scheme in which s. 171 does not apply to statutory conditions. Section 171's role as a companion to the Statutory Conditions and s. 167(2) is depicted through the evolution of the impugned section. Thus, each section has a special function, and altering their specific exercise would destroy their purpose, but more importantly annihilate the harmony underlying the complete insurance scheme.

V. Precedent

¶ 112 Section 171 and its equivalent in the other provinces has been very rarely tested: Baer and Rendall , at p. 642. The insured argue that the line of cases on the question of relief supports their position.

¶ 113 I am of the view that these decisions fail to support their argumentation. A number of those cases, [page90] apart from being distinguishable on the facts, dealt with a "vacancy exclusion clause" and not a statutory condition (see *Hirst v. Commercial Union Assurance Co. of Canada* (1978), 8 B.C.L.R. 396 (S.C.), aff'd (1979), 70 B.C.L.R. (2d) 361 (C.A.)), or, in some cases, both with a statutory condition and an exclusion clause (see *Nahayowski v. Pearl Assurance Co.* (1964), 45 W.W.R. 662 (Alta. S.C.); *528852 Ontario Inc. v. Royal Insurance Co.* (2000), 51 O.R. (3d) 470 (S.C.J.)). Not only

was an exclusion clause not at issue in this case, but there was no finding regarding its presence in the policy, its applicability or its breach.

¶ 114 Moreover, the decisions cited by the insured dealt with the operation of the principles in s. 171 -- asking whether a situation was unjust or unreasonable -- rather than the nature of the section on statutory conditions (see *Hirst* (C.A.) ; *528852 Ontario*). McLachlin C.J. refers to the decision of the Alberta Court of Queen's Bench in *Krupich v. Safeco Insurance Co. of America* (1985), 16 C.C.L.I. 18. First, the court in *Krupich* addressed the issue of the relief provision only in *obiter*, after having concluded that the insured had not made a misrepresentation. This occurred in the context of an examination of the consequences of the application of the statutory conditions: *Krupich*, at pp. 27-28. This lower court decision was heavily criticized by Professor Rendall in the annotation to *Krupich*; he maintained, at p. 21, that the reasoning of the Alberta Court of Queen's Bench was very unsound and created confusion between contractual provisions (policy exclusion) and statutory conditions:

> It is not entirely clear whether Moshansky J. intends to say that he is exercising the discretion given him by s. 238(1) [equivalent to s. 171 of the Nova Scotia *Insurance Act*] to defeat a defence under statutory condition 1, a defence under statutory condition 4, or a defence based on a contractual term removing coverage in respect of vacancy extending beyond 30 days. Quite clearly, it is only the third defence which is amenable to Moshansky J.'s discretion under s. 238(1). One would be inclined to think that Moshansky J.'s last statement concerning the [page91] injustice or unreasonableness of giving effect to "the exclusion of coverage by reason of non-occupancy" is the dominant passage and conveys the meaning that he is only purporting to give relief under s. 238(1) from the effect of a contractual exclusion clause. Unhappily, there is the earlier passage in which Moshansky J. quite clearly says that he would apply s. 238(1) even if he had found a material non-disclosure which would render the contract voidable at the instance of the insurer.

(The same language was used by MacAdam J. of the Supreme Court of Nova Scotia who concluded that it would be both unjust and unreasonable to give effect to the exclusion of coverage by reason of the non-occupancy (para. 63).)

¶ 115 Thus, I echo Professor Rendall's comment and maintain that *Krupich* was wrongfully decided; in any event, the comments of the Alberta Court of Queen's Bench were *obiter*.

¶ 116 Consequently, I conclude, as previously observed, that this is an appeal where none of the previously decided cases can shed light on the issue and act as precedent.

VI. Policy Concerns

¶ 117 In this appeal, the alleged good intentions of the insured cannot have any impact on the determination of the applicability of s. 171 to statutory conditions. Ignorance of the obligation to disclose (which the insured ought to have known) or the failure to appreciate its materiality will not excuse the insured: E. R. H. Ivamy, *General Principles of Insurance Law* (6th ed. 1993) , at p. 174. The fact that the insured did not advise the insurer that the property was vacant because they did not know they had to disclose the information cannot impact on the application of s. 171 to statutory conditions because it would in fact nullify the conditions. By the same token, it is not alleged that Halifax Insurance acted in bad faith when handling the claim of the insured. I reiterate that the consequences of Statutory Condition 4 are not to be examined under s. 171; what must be examined is the condition itself. The conduct of the insured [page92] could only be a factor if the Court determined that the relief

provision was applicable to statutory conditions; the Court would then have to determine if, in the present case, Statutory Condition 4 was just and reasonable. Considering my conclusion on this first issue, there is no need to embark on the second enquiry.

¶ 118 McLachlin C.J. posits that, because s. 171 is unclear and remedial in nature, it should be interpreted in favour of the insured. While the remedial aspect of a section can be relevant in certain circumstances, I do not believe it holds any weight in this situation. In the insurance business, all players, insured as well as insurers, must fulfill their obligations in order to maintain a coherent and definite system. The insurer needs to be able to rely on the insured to provide it with all the material facts regarding the risk. The information that needs to be disclosed by the insured under Statutory Condition 4 is what he or she actually knows or ought reasonably to know. Evidently, the information disclosed is personal and not readily available to the insurer. Hence, how is the insurer supposed to learn of this information? The insurer may never discover the truth until after the loss has been incurred. The insurer has no other tool to determine any change in the risk. Some authors argue that facts which are material in ordinary circumstances may become immaterial if they could have been discovered by the insurer through inquiry: Ivamy, at pp. 154-55. While this may be the general rule, in the case at bar it would be inconceivable and unfair to compel the insurer to contact the insured on a regular basis to confirm no material change to the risk. Furthermore, one needs to remember that the insured were landlords. This business venture which they took upon themselves entailed obligations which they could not escape. Thus, this is not a case of an insurer neglecting the information it received and shutting its eyes to the reality. Halifax Insurance was not wilfully blind; on the contrary, it was completely in the dark.

[page93]

¶ 119 In the same vein, I adopt the comment of Oland J.A. where she writes, at para. 56:

> Moreover, the wording of Statutory Condition 4 clearly shows that it is the responsibility of the insured to notify the insurer. This reflects the reality that, except in unusual circumstances, the insurer will not otherwise become aware of a change in the risk. The insurer's ability to assess risk and to decline or make adjustments to coverage is an essential feature of the underwriting aspect of insurance. It is also likely that many insureds who think a change might be contrary to Statutory Condition 4 or any other term of their insurance already act cautiously by contacting their insurers. [First emphasis added; second emphasis in original.]

¶ 120 The insurer and the insured need certainty regarding the contract into which they have entered. Their obligations must be definite and precise. They have to be able to rely on the insurance contract without fear that an intervention of the court will modify their rights and obligations.

¶ 121 I am of the view that the interpretation of the *Insurance Act* and the jurisprudence do not support the insured's position.

VII. Conclusion

¶ 122 The *Insurance Act* is a very precisely drafted piece of legislation that is meant to create balance and equilibrium between the duty of disclosure and the tendency toward oppressiveness which freedom of contract permitted (Baer and Rendall, at p. 419). Nonetheless, this structure is not a constitutional requirement and, in the case at bar, the parties did not raise a constitutional issue.

¶ 123 I would dismiss the appeal with costs and affirm the decision of the Court of Appeal.

* * * * *

APPENDIX A

Insurance Act, R.S.N.S. 1989, c. 231

33 Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss, and a [page94] consequent forfeiture or avoidance of the insurance in whole or in part, and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.

167 ...

(2) The conditions set forth in the Schedule to this Part shall be deemed to be part of every contract and shall be printed on every policy with the heading "Statutory Conditions" and no variation or omission of or addition to any statutory condition shall be binding on the insured.

171 Where a contract

> (a) excludes any loss that would otherwise fall within the coverage prescribed by Section 163; or
>
> (b) contains any stipulation, condition or warranty that is or may be material to the risk including, but not restricted to, a provision in respect to the use, condition, location or maintenance of the insured property,

the exclusion, stipulation, condition or warranty shall not be binding upon the insured if it is held to be unjust or unreasonable by the court before which a question relating thereto is tried.

APPENDIX B

1899 -- *The Fire Insurance Policy Act*, S.N.S 1899, c. 30

[In certain cases conditions to be null and void]

26. In case a policy is entered into or renewed containing or including any condition other than or different from the conditions set forth in section 2 of this Act, if the said condition so contained or included is held by the court or judge before whom a question relating thereto is tried to be not just and reasonable, such condition shall be null and void.

[Provision, where by reason of necessity, mistake, etc., conditions as to proof not strictly complied with]

27. (1) Where by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this province as to the proof to be given to the insurer after the occurrence of a fire, have not been strictly complied with; or where, after a statement or proof of loss has been given in good faith by or on behalf of the assured in pursuance of any proviso or condition of [page95] such contract, the insurer, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions, or does not within a reasonable time after receiving such statement or proof, notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective,

and so from time to time; or where, for any other reason, the court or judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions, no objection to the sufficiency of such statement or proof or amended or supplemental statement or proof (as the case may be) shall, in any of such cases, be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into.

1900 -- *The Fire Insurance Policies' Act*, R.S.N.S. 1900, c. 147

[In certain cases conditions to be null and void]

6. Where a policy is entered into or renewed containing or including any condition other than or different from the conditions set forth in the first schedule to this Chapter, if the condition so contained or included is held by the court or judge before whom a question relating thereto is tried to be not just and reasonable, such condition shall be null and void.

[Provision, where by reason of necessity, mistake, etc., conditions as to proof not strictly complied with]

7. In any one of the following cases: --

(*a*) Where by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this province as to the proof to be given to the insurer after the occurrence of a fire, have not been strictly complied with; or

(*b*) Where, after a statement or proof of loss has been given in good faith by or on behalf of the assured in pursuance of any proviso or condition of such contract, the insurer, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions, or does not within a reasonable time after receiving such statement or proof, notify the assured in writing that such statement or proof is objected to, and what are the particulars in which the same is alleged to be defective, and so from time to time; or

[page96]

(*c*) Where, for any other reason, the court or judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by reason of imperfect compliance with such conditions,

no objection to the sufficiency of such statement or proof, or amended or supplemental statement or proof (as the case may be) shall, in any of such cases, be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into.

1923 -- *The Fire Insurance Policies' Act*, R.S.N.S. 1923, c. 211

[Conditions, when null and void]

6. Where a policy is entered into or renewed containing or including any condition other than or different from the conditions set forth in the first schedule to

this Chapter, if the condition so contained or included is held by the court or judge before whom a question relating thereto is tried to be not just and reasonable, such condition shall be null and void.
[Provision, where by reason of necessity, mistake, etc., conditions as to proof not strictly complied with]

7.In any one of the following cases: --

(a) where by reason of necessity, accident or mistake, the conditions of any contract of fire insurance on property in this province as to the proof to be given to the insurer after the occurrence of a fire, have not been strictly complied with; or

(b) where, after a statement or proof of loss has been given in good faith by or on behalf of the assured in pursuance of any proviso or condition of such contract, the insurer, through its agent or otherwise, objects to the loss upon other grounds than for imperfect compliance with such conditions, or does not within a reasonable time after receiving such statement or proof, notify the assured in writing that such statement or proof is objected to, and wha[t] are the particulars in which the same is alleged to be defective, and so from time to time; or

(c) where, for any other reason, the court or judge before whom a question relating to such insurance is tried or inquired into, considers it inequitable that the insurance should be deemed void or forfeited by [page97] reason of imperfect compliance with such conditions,

no objection to the sufficiency of such statement or proof, or amended or supplemental statement or proof (as the case may be) shall, in any of such cases, be allowed as a discharge of the liability of the company on such contract of insurance wherever entered into.

1930 -- *The Fire Insurance Policy Act, 1930*, S.N.S. 1930, c. 7

[Where rate affected or modified by user and etc.]

11. Where the rate of premium is affected or modified by the user, condition, location or maintenance of the insured property, the policy may contain a clause not inconsistent with any statutory condition setting forth any stipulation in respect of such user, condition, location or maintenance, and such clause shall not be deemed a variation of any statutory condition. Such clause shall be binding on the insured only in so far as it is held by the court before which a question relating thereto is tried to be just and reasonable.
[Where imperfect compliance with statutory conditions as to proof, court may relieve against forfeiture]

10. In any case where there has been imperfect compliance with a statutory condition as to the proof or (*sic*) loss to be given by the insured and a consequent forfeiture or avoidance of the insurance, in whole or in part, and the court deems it inequitable that the insurance shall be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as may seem just.

1954 -- *Fire Insurance Policy Act*, R.S.N.S. 1954, c. 100

[Where rate affected or modified by user and etc.]

11 Where the rate of premium is affected or modified by the user, condition,

location or maintenance of the insured property, the policy may contain a clause not inconsistent with any statutory condition setting forth any stipulation in respect of such user, condition, location or maintenance, and such clause shall not be deemed a variation of any statutory condition. Such clause shall be binding on the insured only in so far as it is held by the court before which a question relating thereto is tried to be just and reasonable.

[page98]

[Where imperfect compliance with statutory conditions as to proof, court may relieve against forfeiture]

10 In any case where there has been imperfect compliance with a statutory condition as to the proof or (*sic*) loss to be given by the insured and a consequent forfeiture or avoidance of the insurance, in whole or in part, and the court deems it inequitable that the insurance shall be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as may seem just.

1956 -- *Fire Insurance Act*, S.N.S. 1956, c. 6

[Relief from unjust or unreasonable provisions]

16 Where a contract,

(a) excludes any loss that would otherwise fall within the coverage prescribed by Section 5, or

(b) contains any stipulation, condition or warranty that is or may be material to the risk including, but not restricted to, a provision in respect to the use, condition, location or maintenance of the insured property,

the exclusion, stipulation, condition or warranty shall not be binding upon the insured if it is held to be unjust or unreasonable by the court before which a question relating thereto is tried.

[Relief from forfeiture]

19 Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured and a consequent forfeiture or avoidance of the insurance, in whole or in part, and the court deems it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as may seem just.

1962 -- *Insurance Act*, S.N.S. 1962, c. 9

[Relief from unjust or unreasonable provisions]

124 Where a contract,

(a) excludes any loss that would otherwise fall within the coverage prescribed by Section 113, or

(b) contains any stipulation, condition or warranty that is or may be material to the risk including, but not [page99] restricted to, a provision in respect to the use, condition, location or maintenance of the insured property,

the exclusion, stipulation, condition or warranty shall not be binding upon the insured if

it is held to be unjust or unreasonable by the court before which a question relating thereto is tried.

[Relief from forfeiture]

127 Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured and a consequent forfeiture or avoidance of the insurance, in whole or in part, and the court deems it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as may seem just.

1967 -- *Insurance Act*, R.S.N.S. 1967, c. 148

[Relief from unjust or unreasonable provisions]

126 Where a contract,

(a) excludes any loss that would otherwise fall within the coverage prescribed by Section 115, or

(b) contains any stipulation, condition or warranty that is or may be material to the risk including, but not restricted to, a provision in respect to the use, condition, location or maintenance of the insured property,

the exclusion, stipulation, condition or warranty shall not be binding upon the insured if it is held to be unjust or unreasonable by the court before which a question relating thereto is tried.

[Relief from forfeiture]

129 Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured and a consequent forfeiture or avoidance of the insurance, in whole or in part, and the court deems it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as may seem just.

1989 -- *Insurance Act*, R.S.N.S. 1989, c. 231

[Relief granted by court]

171 Where a contract

(a) excludes any loss that would otherwise fall within the coverage prescribed by Section 163; or

[page100]

(b) contains any stipulation, condition or warranty that is or may be material to the risk including, but not restricted to, a provision in respect to the use, condition, location or maintenance of the insured property,

the exclusion, stipulation, condition or warranty shall not be binding upon the insured if it is held to be unjust or unreasonable by the court before which a question relating thereto is tried.

[Court may relieve against forfeiture]

33 Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or

omitted by the insured with respect to the loss, and a consequent forfeiture or avoidance of the insurance in whole or in part, and the court considers it inequitable that the insurance should be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it considers just.

Solicitors:

Solicitors for the appellants: Kimball Brogan, Wolfville, Nova Scotia.

Solicitors for the respondent: Stewart McKelvey Stirling Scales, Halifax.

QL Update: 20050726
cp/e/qw/qllls

Tab B

** Preliminary Version **

Case Name:

Royal Bank of Canada v. State Farm Fire and Casualty Co.

Royal Bank of Canada, appellant;
v.
State Farm Fire and Casualty Company, respondent.
And between
Michael Ian Beardall Alexander, appellant;
v.
State Farm Fire and Casualty Company, respondent.

[2005] S.C.J. No. 34
2005 SCC 34
File Nos.: 30275, 30231.

Supreme Court of Canada

Heard: April 13, 2005;
Judgment: June 9, 2005.

Present: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Abella and Charron JJ.
(31 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Catchwords:

Insurance — Fire Insurance — Statutory conditions — Material change to risk — Vacancy — Mortgage clause — Insured house vacated by owners at time of fire — Insurer not notified of vacancy — Mortgagees making claim under insurance policy pursuant to standard mortgage clause — Statutory condition permitting avoidance of insurance contract if insurer not promptly notified of any change material to risk within control and knowledge of insured — Insurer denying claim, asserting vacancy was "change material to the risk" — Whether insurer may void coverage on basis mortgagees failed to notify it that house had been vacated — Insurance Act, R.S.O. 1990, c. I.8, s. 148, Statutory Condition 4.

Summary:

A fire destroyed a house. By the time of the fire, the insured house had been vacated by the owners

and was controlled by the mortgagees. The mortgagees made an insurance claim pursuant to the standard mortgage clause in the policy. The insurer denied the claim because it had not been informed of the vacancy of the house. It asserted that the vacancy was a "change material to the risk and within the control and knowledge" of the mortgagees and that, under Statutory Condition 4, it was entitled to void coverage. The mortgagees sued the insurer, alleging breach of the policy. The Ontario Superior Court of Justice found that although Statutory Condition 4 did not conflict with the mortgage clause it was not applicable in the circumstances of this case. The Court of Appeal set aside the decision and granted judgment in favour of the insurer.

Held: The appeal should be allowed.

Statutory Condition 4 cannot be relied on by the insurer to void coverage. In light of the wording of the mortgage clause, terms of the policy that conflict with that clause, including exceptions to the mortgagor's coverage, do not affect the mortgagees' coverage. Here, Statutory Condition 4 conflicts with the mortgage clause. The conflict arises because Statutory Condition 4 would permit the insurer to void coverage on the basis of a "change material to the risk and within the control and knowledge of the Insured" of which it was not notified. On the assumption that "Insured" means the mortgagor, this right cannot be reconciled with the mortgage clause, which provides that the mortgagees' coverage shall remain in force despite any act of the mortgagor -- including an act causing a "change material to the risk". The conflict remains if one assumes that the reference to "Insured" captures mortgagees as well as the mortgagor. While the conflict is avoided if "Insured" is read to mean only a mortgagee, such a reading is untenable.

Moreover, on the facts of this case, even if there were no conflict and the insurer could make out a "change material to the risk" within the control and knowledge of the mortgagees, it could not rely on that change to void the coverage insofar as the change related to vacancy or non-occupancy of the insured house. The mortgage clause clearly states that the mortgagees' coverage shall remain in force "notwithstanding ... any vacancy or non-occupancy" attributable to the mortgagor.

Cases Cited

Referred to: National Bank of Greece (Canada) v. Katsikonouris, [1990] 2 S.C.R. 1029.

Statutes and Regulations Cited

Insurance Act, R.S.O. 1990, c. I.8, Part IV.

History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (McMurtry C.J.O. and Doherty and Blair JJ.A.) (2004), 69 O.R. (3d) 591, 6 C.C.L.I. (4th) 20, 181 O.A.C. 134, [2004] I.L.R. para. I-4263, [2004] O.J. No. 91 (QL), reversing a decision of Wilton-Siegel J. (2002), 43 C.C.L.I. (3d) 274, [2003] I.L.R. para. I-4154, [2002] O.J. No. 4209 (QL). Appeal allowed.

Counsel:

Richard Horodyski and Amanda Jackson, for the appellant Royal Bank of Canada.

Michael Ian Beardall Alexander, on his own behalf.

David Zarek, for the respondent.

The judgment of the Court was delivered by

¶ 1 **MAJOR J.**:— A fire destroyed a house insured by the respondent, State Farm Fire and Casualty Company (the "Insurer"). By the time of the fire, the house had been vacated by its owners and controlled successively by the appellants, Royal Bank of Canada and Michael Alexander, who held respectively first and second mortgages over the property on which the house was located. The appellants claimed under the insurance policy issued by the Insurer pursuant to the standard mortgage clause contained in it.

¶ 2 This appeal asks whether the Insurer can avoid the policy, and thereby deny the appellants' claims, on the basis that the appellants failed to notify it that the house had been vacated. For the reasons that follow, it cannot. The appeal is allowed.

I. Facts

¶ 3 After purchasing a house near London, Ontario, in 1997, Julaine and Todd Deeks insured it against fire through a homeowner's insurance policy with the Insurer.

¶ 4 On April 16, 2000, the Deeks' house was destroyed by a fire of unknown cause. The Deeks were unharmed, having several months earlier defaulted on their mortgages with the appellants and vacated their house after the commencement of power of sale proceedings.

¶ 5 Between the time the Deeks vacated the house and the time of the fire, the house remained unoccupied at all times. However, the appellants, in succession, secured and maintained it.

¶ 6 While the appellants may have exercised some control over the Deeks' property in taking sensible steps to maintain its value, neither ever became its owner. While both appellants, at various times, could have sought an order for foreclosure, which would have transferred ownership of the property, neither opted for this remedy. Each chose to proceed by power of sale. At the time of the fire, the appellant Alexander had only commenced an action for payment under the mortgage and for possession of the property.

¶ 7 Neither the Deeks nor the appellants notified the Insurer that the house was vacant.

¶ 8 The Deeks' insurance policy with the Insurer included, in standard form, the following clause for the benefit of mortgagees such as the appellants (the "Mortgage Clause"):

> (Approved by the I.B.C.): This insurance and every documented renewal thereof -- AS TO THE INTEREST OF THE MORTGAGEE ONLY THEREIN -- is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured, including transfer of interest, any vacancy or non-occupancy, or the occupation of the property for purposes more hazardous than specified in the description of the risk; PROVIDED ALWAYS that the Mortgagee shall notify forthwith the Insurer (if known) of any vacancy or non-occupancy extending beyond thirty (30) consecutive days, or of any transfer of interest or increased hazard THAT SHALL COME TO HIS KNOWLEDGE; and that every

> increase of hazard (not permitted by the Policy) shall be paid for by the Mortgagee -- on reasonable demand -- from the date such hazard existed, according to the established scale of rates for the acceptance of such increased hazard, during the continuance of this insurance.
>
> ...
>
> In the absence of the Insured, or the inability, refusal or neglect of the Insured to give notice of loss or deliver the required Proof of Loss under the Policy, then the Mortgagee may give the notice upon becoming aware of the loss and deliver as soon as practicable the Proof of Loss.
> The term of this mortgage clause coincides with the term of the Policy; PROVIDED ALWAYS that the Insurer reserves the right to cancel the Policy as provided by Statutory provision but agrees that the Insurer will neither terminate nor alter the Policy to the prejudice of the Mortgagee without the notice stipulated in such Statutory provision.
> Should title or ownership to said property become vested in the Mortgagee and/or assigns as owner or purchaser under foreclosure or otherwise, this insurance shall continue until expiry or cancellation for the benefit of the said Mortgagee and/or assigns.
> SUBJECT TO THE TERMS OF THIS MORTGAGE CLAUSE (and these shall supersede any policy provisions in conflict therewith BUT ONLY TO THE INTEREST OF THE MORTGAGEE), loss under this Policy is made payable to the Mortgagee. [Emphasis added.]

¶ 9 The policy also included this provision ("Statutory Condition Number 4"):

> Any change material to the risk and within the control and knowledge of the Insured voids the contract as to the part affected thereby, unless the change is promptly notified in writing to the Insurer or its local agent, and the Insurer when so notified may return the unearned portion, if any, of the premium paid and cancel the contract, or may notify the Insured in writing that, if he desires the contract to continue in force, he must, within fifteen days of the receipt of the notice, pay to the Insurer an additional premium and in default of such payment the contract is no longer in force ... [Emphasis added.]

Statutory Condition Number 4 appears in every contract made in Ontario providing "insurance against loss of or damage to property arising from the peril of fire" by virtue of Part IV of the *Insurance Act*, R.S.O. 1990, c. I.8.

¶ 10 Pursuant to the Mortgage Clause, the appellants filed claims with the Insurer respecting the loss caused by the fire. The Insurer denied those claims. It asserted that the vacancy of the Deeks' house was a "change material to the risk" within the control and knowledge of the appellants of which it had not been notified, and that it was thus entitled to avoid payment under the policy pursuant to Statutory Condition Number 4.

¶ 11 The appellants sued the Insurer, alleging breach of the policy. All parties moved for summary judgment upon a determination by the court as to whether the Insurer could void the appellants' coverage.

II. Judicial History

A. *Ontario Superior Court of Justice* (2002), 43 C.C.L.I. (3d) 274

¶ 12 Wilton-Siegel J. stated that Statutory Condition Number 4 did not conflict with the Mortgage Clause. The Mortgage Clause dealt with changes in risk brought about by the mortgagor and within a mortgagee's knowledge, whereas Statutory Condition Number 4 spoke to changes in risk within a mortgagee's knowledge and control. In his view, Statutory Condition Number 4 would allow the Insurer to void the coverage of a mortgagee who failed to notify the Insurer of a "change material to the risk" within its control and knowledge.

¶ 13 Wilton-Siegel J. determined that Statutory Condition Number 4 was not applicable in the circumstances. The only "change material to the risk" occurred when the Deeks vacated their house. Neither of the appellants was in a position to reverse that change as neither had title. Accordingly, neither could be said to have had control over the change.

¶ 14 On that basis, Wilton-Siegel J. granted judgment in favour of the appellants.

B. *Court of Appeal for Ontario* (2004), 69 O.R. (3d) 591

¶ 15 Doherty J.A., speaking for the unanimous court, agreed with Wilton-Siegel J. that Statutory Condition Number 4 did not conflict with the Mortgage Clause. However, unlike Wilton-Siegel J., he considered that Statutory Condition Number 4 had been triggered by the appellants and that the Insurer could thus void the policy. In his view, the continued vacancy of the Deeks' house after the appellants gained control of it was a "change material to the risk" existing at the inception of the policy within the appellants' control and knowledge.

¶ 16 In the result, the court allowed the appeal, and granted judgment in favour of the Insurer.

III. Issues

¶ 17 The appeal raises two issues:

1. Does Statutory Condition Number 4 permit the Insurer to void the coverage granted to a mortgagee by the Standard Mortgage Clause in the event of a "change material to the risk" within the control and knowledge of that mortgagee of which the Insurer is not notified?
2. If so, was there a "change material to the risk" within the control and knowledge of either of the appellant mortgagees of which the Insurer was not notified?

¶ 18 In light of my conclusion respecting the first issue, I do not address the second.

IV. Analysis

¶ 19 Terms such as the Mortgage Clause are "the standard vehicle by which mortgagees insure their interest in encumbered property": *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, at p. 1047. They allow mortgagees to "piggyback" on the insurance purchased by mortgagors, and represent "the most economical, rational, and fair procedure for effecting insurance on the interest of mortgagees": *Katsikonouris*, at p. 1053.

¶ 20 The wording of the relevant mortgage clause determines the scope of coverage granted to a mortgagee. In *Katsikonouris*, La Forest J. held that the mortgage clause at issue protected the coverage

of the mortgagee from any misrepresentation by the mortgagor, including one made before the issuance of the policy. Though La Forest J. discussed the existence of an independent contract between the insurer and the mortgagee created by the mortgage clause, it is clear that the mortgagee's protection from misrepresentations contained in that contract was founded on the "simple and untechnical language" of the clause (p. 1038).

¶ 21 In this case, the Mortgage Clause provides that "loss under this Policy is made payable to the Mortgagee". Taken on its own, that statement suggests that mortgagees obtain by way of the Mortgage Clause coverage that is subject to all of the terms of the policy.

¶ 22 However, the Mortgage Clause also provides that its terms "shall supersede any policy provisions in conflict therewith BUT ONLY TO THE INTEREST OF THE MORTGAGEE". This means that terms of the policy that conflict with the Mortgage Clause, including exceptions to the mortgagor's coverage, do not affect the mortgagees' coverage.

¶ 23 Statutory Condition Number 4 conflicts with the Mortgage Clause. It therefore cannot be relied on by the Insurer to void the coverage granted to the appellants by the Mortgage Clause.

¶ 24 The conflict arises because Statutory Condition Number 4 would permit the Insurer to void coverage on the basis of a "change material to the risk and within the control and knowledge of the Insured" of which it was not notified. On the assumption that "Insured" means the mortgagor, this right cannot be reconciled with the first paragraph of the Mortgage Clause, which provides that the mortgagees' coverage shall remain in force despite any act of the mortgagor -- including, necessarily, an act causing a "change material to the risk" -- and that the mortgagee shall pay for any resulting "increase of hazard ... during the continuance" of coverage.

¶ 25 The situation does not change if one assumes that the reference to "Insured" in Statutory Condition Number 4 captures mortgagees as well as the mortgagor. The aforementioned conflict remains.

¶ 26 The only way the conflict between Statutory Condition Number 4 and the Mortgage Clause is avoided is if the word "Insured" in Statutory Condition Number 4 is read to mean only a mortgagee, and not the mortgagor. Such a reading is untenable, for two reasons.

¶ 27 First, the Mortgage Clause expressly distinguishes a mortgagee from the "Insured". It states:

> In the absence of the Insured, or the inability, refusal or neglect of the Insured to give notice of loss or deliver the required Proof of Loss under the Policy, then the Mortgagee may give the notice upon becoming aware of the loss and deliver as soon as practicable the Proof of Loss.

Such language accords with the policy's declarations page, which refers to the Deeks as "NAMED INSURED", and to the appellants as mortgagees.

¶ 28 Second, reading the word "Insured" to mean only a mortgagee where it appears in other parts of the policy leads to absurd results. For instance, the policy provides that it "may be terminated ... by the Insured at any time upon request". If, in relation to that term, "Insured" were read to mean a mortgagee and not the mortgagor, a mortgagee could unilaterally terminate the policy taken out by the mortgagor, while the mortgagor itself could not.

¶ 29 There is a further conflict between Statutory Condition Number 4 and the Mortgage Clause raised by the facts of this case. The "change material to the risk" within the control and knowledge of the appellants alleged by the Insurer stems from the Deeks' vacating the insured house. Yet the Mortgage Clause says the appellants' coverage shall remain in force "notwithstanding ... any vacancy or non-occupancy" attributable to the mortgagor (i.e., the Deeks). Even if Statutory Condition Number 4 did not more generally conflict with the Mortgage Clause, and the Insurer could make out a "change material to the risk" within the control and knowledge of the appellants, it could not rely on that change to void the appellants' coverage insofar as the change related to vacancy or non-occupancy of the insured house. To allow it to do so would defeat the Insurer's promise contained in the Mortgage Clause of continued coverage in the event of a vacancy.

¶ 30 If the Insurer wished to be able to void a mortgagee's coverage in the event of a "change material to the risk" within that mortgagee's control and knowledge of which it was not notified, it should have used clear language to that effect. It cannot expect this Court to contort the Mortgage Clause and Statutory Condition Number 4 in order to fulfill its unreflected, but professedly true, intention.

V. Conclusion

¶ 31 Statutory Condition Number 4 conflicts with the Mortgage Clause and is thus superseded in accordance with the latter's final paragraph. The Insurer cannot rely on it to void the appellants' coverage and deny their claims. The appeal is allowed with costs to the appellants throughout, on a party-and-party basis.

Solicitors:

Solicitors for the appellant Royal Bank of Canada: Gowling Lafleur Henderson, Hamilton.

Michael Ian Beardall Alexander, on his own behalf.

Solicitors for the respondent: Zarek Taylor Grossman Hanrahan, Toronto.

QL Update: 20050609
cp/e/qlplh

Tab C

Indexed as:

KP Pacific Holdings Ltd. v. Guardian Insurance Co. of Canada

KP Pacific Holdings Ltd., appellant;
v.
Guardian Insurance Company of Canada, Canadian Northern Shield Insurance Company, AXA Pacific Insurance, General Accident Insurance Company of Canada and Sovereign General Insurance Co., respondents.

[2003] 1 S.C.R. 433
[2003] S.C.J. No. 24
2003 SCC 25
File No.: 28815.

Supreme Court of Canada

Heard: February 18, 2003;
Judgment: May 1, 2003.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.
(22 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Catchwords:

Insurance — All-risks policy — Limitation period — Insured claiming for fire damage under all-risks policy — Part 5 (Fire Provisions) of British Columbia Insurance Act providing shorter limitation period than Part 2 (General Provisions) — Which part of Insurance Act, and by extension, which limitation period applicable? — Insurance Act, R.S.B.C. 1996, c. 226, Part 2, Part 5, s. 119.

Summary:

The insured claimed for loss by fire under its all-risks insurance policy. The claim was made more than one year after the loss occurred but within one year of filing proof of loss. The insurer took the position that the claim could not proceed on the ground that the applicable limitation period is one year from the date of the loss, according to Part 5 -- the Fire Insurance Part -- of the B.C. *Insurance Act*. At trial, the insured contended that its all-risks policy fell instead under the general provisions of Part 2, where the limitation period is one year from filing proof of loss. The trial judge held that the policy fell within Part 5 of the Act and dismissed the insured's claim. The Court of Appeal upheld the judgment.

[page434]

Held: The appeal should be allowed. The limitation period in Part 2 is applicable and the insured's claim is not statute-barred.

Neither the language of s. 119 in Part 5 nor the history of that provision supported the conclusion that the Legislature intended a multi-risk policy to fall within Part 5. Such policies cannot be shoehorned into that Part without contrived reconstruction and anomalous consequences. Section 119, despite its alterations, is based on the outmoded paradigm of discrete categories of insurance policies and is incapable of coherently addressing the modern multi-peril policy. Since the insured's policy does not fit into a specific category, it is governed by Part 2. Part 2, however, does not represent an ideal solution for multi-risk comprehensive policies and it would be highly salutary for the Legislature to amend the Act and to provide specifically for such policies. The fact that the contract of insurance specifies a limitation period of one year from loss did not oust the longer limitation period in Part 2 because s. 3(a) of the Act does not permit the insurer to substitute contractually harsher terms than those provided in Part 2.

Cases Cited

Referred to: Dressew Supply Ltd. v. Laurentian Pacific Insurance Co. (1991), 57 B.C.L.R. (2d) 198; Churchland v. Gore Mutual Insurance Co. (2001), 92 B.C.L.R. (3d) 1, 2001 BCCA 470.

Statutes and Regulations Cited

Insurance Act, R.S.B.C. 1996, c. 226, ss. 3(a), 119, statutory condition 14.

Insurance Act, S.B.C. 1925, c. 20, s. 2 "fire insurance".

Insurance Act Amendment Act, 1935, S.B.C. 1935, c. 38, s. 2 "fire insurance".

Insurance Act Amendment Act, 1938, S.B.C. 1938, c. 24, s. 3.

Insurance Act Amendment Act, 1957, S.B.C. 1957, c. 31, s. 7.

Insurance Classes Regulation, B.C. Reg. 337/90, s. 2 "fire insurance".

Authors Cited

Brown, Craig, and Julio Menezes. Insurance Law in Canada, 2nd ed. Scarborough, Ont.: Carswell, 1991.

Rendall, James A. Annotation to Briggs v. B.C.A.A. Insurance Co. (1990), 40 C.C.L.I. 282.

Rendall, James A. "Case Comment: Dressew Supply Ltd. v. Laurentian Pacific Insurance Co.: A Revisitation" (1995), 28 C.C.L.I. (2d) 220.

[page435]

History and Disposition:

APPEAL from a judgment of the British Columbia Court of Appeal (2001), 202 D.L.R. (4th) 235, 92 B.C.L.R. (3d) 26, 156 B.C.A.C. 58, [2001] I.L.R. para. I-4009, [2001] B.C.J. No. 1517 (QL), 2001 BCCA 469, supplementary reasons (2002), 210 D.L.R. (4th) 562, 99 B.C.L.R. (3d) 195, 165 B.C.A.C.

247, [2002] B.C.J. No. 509 (QL), 2002 BCCA 176, affirming a decision of the British Columbia Supreme Court (2000), 18 C.C.L.I. (3d) 196, [2000] I.L.R. para. I-3839, [2000] B.C.J. No. 833 (QL), 2000 BCSC 673. Appeal allowed.

Counsel:

Michael G. Armstrong and Janet E. Currie, for the appellant.

Donald W. Yule, Q.C., and Alex Sayn-Wittgenstein, for the respondents.

The judgment of the Court was delivered by

McLACHLIN C.J.:—

I. Introduction

¶ 1 The appellant owned a hotel. On June 6, 1997, the hotel was damaged by fire. The appellant made a claim for the loss under its insurance policy. The insurer took the position that the claim had not been brought within the applicable limitation period. The British Columbia Supreme Court dismissed the appellant's action: (2000), 18 C.C.L.I. (3d) 196, 2000 BCSC 673. The Court of Appeal upheld this decision: (2001), 92 B.C.L.R. (3d) 26, 2001 BCCA 469, supplementary reasons (2002), 99 B.C.L.R. (3d) 195, 2002 BCCA 176. The litigants now find themselves seeking final resolution before the Supreme Court of Canada.

¶ 2 The source of all the confusion, and the consequent delay and expense, is the British Columbia *Insurance Act*, R.S.B.C. 1996, c. 226. It is unclear. The insurer argues that the applicable limitation period is one year from the date of the loss, according to statutory condition 14 of Part 5, the Fire Insurance Part. The insured, by contrast, argues that this all-risks policy does not fit under Part 5, and [page436] falls instead under the general provisions of Part 2, where the limitation period is one year from filing proof of loss. On the first reading, the appellant's claim is out of time. On the second, it may proceed.

¶ 3 The *Insurance Act* was passed in 1925 (S.B.C. 1925, c. 20). Despite repeated housekeeping amendments, it remains essentially unchanged. It was designed for a world where insurers issued policies geared to specific risks and subjects, such as fire insurance, theft insurance, business loss insurance, and so on. Accordingly, it lays down rules, including limitation periods, based on different and discrete categories of insurance.

¶ 4 Insurance practices, by contrast, have changed. A dominant policy in today's world is the "all-risks" or "multi-peril" policy, which covers a panoply of perils. This is good for consumers. It minimizes the number of policies they need to buy and ensures comprehensive coverage at lower cost. But it is bad when legal issues arise. The outmoded category-based Act contains rules based on the old classes of insurance. The newer comprehensive policies are difficult if not impossible to fit into the old categories. The result is continued uncertainty about what rules apply. Claims stall. Litigation ensues. Courts struggle with tortuous alternative interpretations. The rulings that have emerged have been likened to a "judicial lottery": Professor J. A. Rendall, Annotation to *Briggs v. B.C.A.A. Insurance Co.* (1990), 40 C.C.L.I. 282, at p. 288 (commenting on B.C. case law prior to *Dressew Supply Ltd. v. Laurentian Pacific Insurance Co.* (1991), 57 B.C.L.R. (2d) 198 (C.A.)).

¶ 5 It would be highly salutary for the Legislature to revisit these provisions and indicate its intent with respect to all-risks and multi-peril policies. In the meantime, the task of resolving disputes arising [page437] from this disjunction between insurance law and practice falls to the courts. Brown and Menezes lament: "Surely there can be little which is less productive, or more wasteful, than litigation about such technicalities": C. Brown and J. Menezes, *Insurance Law in Canada* (2nd ed. 1991), at p. 16. I whole-heartedly agree.

¶ 6 The comprehensive policy at issue on this appeal cannot be shoehorned into the Part 5 fire insurance section without contrived reconstruction and anomalous consequences. It simply does not fit. Consequently, it cannot be said that the Legislature intended the Fire Insurance provisions to govern. It follows that comprehensive policies are governed by Part 2, which is of general application. Accordingly, we conclude that the limitation period of one year from filing proof of loss applies, and that the appellant's claim is not statute-barred.

II. Analysis

¶ 7 The result in this case depends on whether KP Pacific's policy falls within Part 5 of the *Insurance Act*, governing fire insurance, or within Part 2, the general part. If the policy falls within Part 5, the appellant is out of time. If not, it may pursue its claim. Which Part applies depends on how one reads the Act. To attempt to understand the Act's provisions, one must trace its history.

¶ 8 In 1925 British Columbia consolidated a number of laws into the *Insurance Act*. The Act defined fire insurance simply as "insurance against loss of or damage to property in the Province, or in transit therefrom or thereto, caused by fire, lightning, or explosion, [including] sprinkler-leakage insurance": *Insurance Act*, S.B.C. 1925, c. 20, s. 2. In 1935 the definition was amended to add the qualification that the fire insurance must not be "incidental to some other class of insurance defined by or under this Act": *Insurance Act Amendment Act, 1935*, S.B.C. 1935, c. 38, s. 2. Fire insurance was seen as a [page438] discrete class of insurance, dealing exclusively or primarily with loss due to fire. The Fire Insurance Part of the Act accordingly seemed to be confined to strict fire insurance policies.

¶ 9 In 1938 the Act was amended to include the possibility that the Fire Insurance Part of the Act could apply to fire insurance policies that also included other risks. This provision, still found in s. 119 of the Act, provides that "[t]his Part applies to insurers carrying on the business of fire insurance and to contracts of fire insurance, whether or not a contract includes insurance against other risks as well as the risks included in the expression 'fire insurance as defined by this Act'": *Insurance Act Amendment Act, 1938*, S.B.C. 1938, c. 24, s. 3 (emphasis added). No other province adopted this particular language. Why British Columbia made this change is unclear. Perhaps it was designed to reflect the fact that fire insurance policies also might cover incidental risks, such as water damage from fire. It seems unlikely that the reason for the amendment was to respond to the multi-peril policy, which was not yet prevalent.

¶ 10 In 1957, in concert with other provinces, the Legislature amended the Act to exclude certain contracts of insurance from the Fire Insurance Part, Part 5, namely contracts of theft insurance (now s. 119(a)), loss of profits insurance (now s. 119(b)), and policies "[w]here the peril of fire is an incidental peril to the coverage provided" (now s. 119(c)): *Insurance Act Amendment Act, 1957*, S.B.C. 1957, c. 31, s. 7. Updated by further exclusions, the present s. 119 reads as follows:

[page439]

> This Part applies to insurers carrying on the business of fire insurance and to contracts of fire insurance, whether or not a contract includes insurance against other risks as

well as the risks included in the expression "fire insurance" as defined by this Act, except

(a) contracts of insurance falling within the classes of aircraft, automobile, boiler and machinery, inland transportation, marine, plate glass, sprinkler leakage and theft insurance,
(b) if the subject matter of the contract of insurance is rents, charges or loss of profits,
(c) if the peril of fire is an incidental peril to the coverage provided, or
(d) if the subject matter of the insurance is property that is insured by an insurer or a group of insurers primarily as a nuclear risk under a policy covering against loss of or damage to the property resulting from nuclear reaction or nuclear radiation and from other perils.

¶ 11 Section 119 maintains a classification approach to the applicability of Part 5. Fire insurance is defined by reference to the regulations, now Regulation 337: *Insurance Classes Regulation*, B.C. Reg. 337/90, s. 2. The 1938 clause introduces the idea that the Part may apply where the policy insures other risks, suggesting that an all-risks policy might fall within this Part. However, the exceptions that follow in s. 119(a) all refer to classes of insurance or incidents of those classes as defined in Regulation 337. The result is a section that defines the contents of Part 5 on the basis of a definition of fire insurance as a narrow discrete class, tantalizingly amplifies it to include other risks, and then ratchets it back by a series of class-based exclusions.

¶ 12 How, if at all, does an all-risks policy penetrate the tangled historical thicket that guards entry to Part 5? It does not enter through the initial definition of fire insurance in Regulation 337, which [page440] says that "'fire insurance' means insurance against loss of or damage to the property insured caused by fire, lightning, smoke or explosion due to ignition, and includes sprinkler leakage insurance". The only point of entry for an all-risks policy is the 1938 clause, not found in any other province's legislation, that says Part 5 applies "whether or not a contract includes insurance against other risks as well as the risks included in" the definition of fire insurance. As noted above, it seems unlikely this phrase was intended to embrace modern multi-peril policies. However, even if the phrase is thus extended, it fits ill with s. 119's class-based structure, as becomes apparent when we come to the specific exclusions. The question is simple to put but difficult to answer: If the 1938 phrase brings modern multi-peril policies into Part 5, how much of them is then taken out by the exceptions?

¶ 13 Much ink has been spilled on the interpretation of these exceptions and what precisely they remove from Part 5. Sadly, little certainty has emerged. The debate reveals different levels of uncertainty. The first uncertainty is whether one element of a policy falling within an exclusion removes the entire policy from Part 5, or only removes the excluded element. Different courts have answered the question differently. Before us, all parties agreed that an approach that chops the policy up, with some elements in Part 5 and other elements outside, is unworkable. This leaves, however, the anomaly that a minor excluded element can propel an entire policy out of Part 5.

¶ 14 The second level of uncertainty relates to how one interprets the exclusions in s. 119. One approach is to read them as referring to the nature of the loss or peril that actually occurs. Thus, if the event that [page441] triggers the claim is theft, an all-risks policy is removed from Part 5 by the operation of s. 119(a), which excludes theft insurance. This approach seems unworkable, since what rules govern a policy depends on one's *ex post* characterization of the triggering event . Another approach is to hold that if the non-fire aspects of the coverage are merely incidental, the policy stays within Part 5; if they are more dominant, the policy is removed from Part 5 and comes under Part 2. This approach requires ranking the perils covered in an all-risks policy to determine which are primary and

which are incidental. This, in turn, has spawned a third view: that in a multi-peril policy, all risks covered are incidental to the coverage provided, with the result that all multi-peril policies are propelled out of Part 5 and into Part 2: *Dressew, supra*. Yet, detractors point out that this seems to change the common meaning of the word "incidental", which connotes a primary-secondary distinction, and that if there is no hierarchy of perils, they should all be considered co-equal, rather than "incidental" under s. 119(c).

¶ 15 Still other problems emerge when we try to force comprehensive policies into s. 119. Some losses covered by comprehensive policies, such as business losses, may be difficult to assess within the limitation period of one year from the date of the precipitating event, in this case fire. Further confusion arises from the fact that some of the enumerated exclusions seem to be internally inconsistent with the general grant. For example, fire insurance is defined in the regulations as including the risk of sprinkler leakage. Yet, s. 119(a) specifically excludes sprinkler leakage insurance from the Fire Insurance Part. How this can be so remains a mystery.

¶ 16 None of the proposed solutions for deciding whether or not a given multi-peril policy comes [page442] under Part 5 sits comfortably with the language of s. 119, taken in its entirety. One is driven to conclude that s. 119, despite its alterations, is based on the paradigm of discrete categories of insurance policies and is incapable of coherently addressing the modern multi-peril policy. It may have made good sense in the 1930s, when insurance was offered in discrete packages, each containing its own special type of coverage. It makes much less sense now.

¶ 17 The exclusions in s. 119 refer not to perils but to types of policies, as defined by current Regulation 337. Each of the items in s. 119(a) refers to a type of insurance defined in the Regulation. They are labeled variously, some by the class of property they cover (aircraft, automobile, boiler and machinery, plate glass); others by the activity involved (inland transportation, marine); still others by the peril (sprinkler leakage, theft). They share only this: they designate a category of insurance. Thus, s. 119 (a) excludes from Part 5 policies of insurance that are not, by custom and statutory definition, fire insurance. Sections 119(b) and 119(d) likewise remove from Part 5 subject classes of insurance policies. Section 119(c) acts as a residual clause; it excludes policies not specified in (a), (b), and now (d), where fire insurance is minor or incidental in relation to the main subject of the policy. Viewed thus, all the parts of s. 119 work together.

¶ 18 If we still lived in a world where people took out different policies for each of these risks, s. 119 would still function reasonably well. The problem is that our world is quite different. Section 119 is being asked to apply to an animal it was never designed to tame -- the modern multi-peril policy. Section 119 is built on the premise of discrete policies for discrete subject matters, with limited overlap. It deals with overlap and intersection by enumerated exclusions, and by the logic of what is primary and what is incidental. It may still make good sense for certain [page443] multiple subject-matter policies, where these are fairly limited in scope, and where the subject matters can be readily identified and ranked. But when applied to broader multi-risk policies, it fails.

¶ 19 I conclude that s. 119 can be applied to comprehensive policies only at the costs of contrived reinterpretation and anomalous consequences. Whatever interpretation one seeks to put on Part 5's terms, however one struggles to apply it to this policy, one ends by acknowledging inconsistency. I cannot conclude either from the language of s. 119 or its history that the Legislature intended a multi-risk policy such as this one to fall within Part 5 with all the attendant consequences, including a shortened limitation period. It follows that this policy, like any other policy that does not fit into a specific category, is governed by Part 2, the section of general application.

¶ 20 We come to this conclusion fully aware that the general provisions of Part 2 may not represent

an ideal solution for multi-risk comprehensive policies. Professor Rendall has observed that "[i]t may well be thought that Pt. 2 is a more primitive regulatory code than Pt. 6 [now Part 5], less adequate as a scheme of regulation": J. A. Rendall, "Case Comment: *Dressew Supply Ltd. v. Laurentian Pacific Insurance Co.*: A Revisitation" (1995), 28 C.C.L.I. (2d) 220, at p. 235. On the other hand, in *Churchland v. Gore Mutual Insurance Co.* (2001), 92 B.C.L.R. (3d) 1, 2001 BCCA 470, Finch J.A. commented that Part 5, on balance, is "unfavourable to insureds" (para. 61). To repeat, it is our hope that legislators will rectify the situation by amending the *Insurance Act* to provide specifically for comprehensive policies. In an insurance era dominated by comprehensive policies, it is imperative that Canada's Insurance Acts specifically and unambiguously address how these statutes are to operate and the rules by which comprehensive policies are to be governed.

[page444]

¶ 21 This leaves the insurer's alternative argument that even if Part 2 applies, the fact that the contract of insurance specifies a limitation period of one year from loss ousts the longer limitation period in Part 2. I cannot accept this argument. The issue is governed by s. 3(a) of the Act, which provides:

> This Part has effect, despite any law or contract to the contrary, except that
>
> (a) if any section or statutory condition contained in Part 3, 4, 5, 6 or 7 is applicable and deals with a subject matter that is the same as or similar to any subject matter dealt with by this Part, this Part does not apply ... .

This provision does not permit the insurer to substitute harsher terms than those provided in Part 2. The plain language of the section indicates the Legislature's intent that the provisions in Part 2 operate as a floor of protection beneath which insurance contracts cannot descend. If a contract falls within one of the enumerated Parts, then that Part is engaged and provides a different floor. Otherwise, the insured is guaranteed, at a minimum, the statutory protections contained in Part 2. The insurer's attempt to argue that the shorter limitation period is more advantageous to the insured because it is more certain verges on the disingenuous.

III. Conclusion

¶ 22 I would allow the appeal and direct that the claim proceed to trial. The appellant shall have its costs throughout.

Solicitors:

Solicitors for the appellant: Armstrong & Company, Vancouver.

Solicitors for the respondents: Guild, Yule & Company, Vancouver.

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COVERAGE AND THE MISSING POLICY
presented by
Christopher McKibbin

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COVERAGE AND THE MISSING POLICY

Determining coverage in the absence of a policy

Christopher McKibbin[1]

This paper reviews two distinct situations in which a missing insurance policy can complicate coverage analysis. In the first situation, a policy will have been agreed upon and issued, but it has been physically lost over time, and no copy can be found. In the second, more complicated situation, coverage for a risk has been bound but a loss occurs before final policy wording has been agreed upon and the policy has been issued.

I. Policy Issued but Lost

Certain types of insurance litigation are particularly prone to this problem. For example, actions involving construction defects, environmental contamination or vicarious liability for physical or sexual abuse may result in policies from the 1960s or 1970s being called upon to respond. However, due to changes in corporate structure, poor record-keeping practices or other reasons, it may not be possible to physically locate a copy of the policy. Assuming that a copy of the responding policy cannot be found in the records of the insured, the underwriter or the broker, the court is confronted with the challenge of determining coverage in the absence of specific policy wording.

Several Canadian courts have dealt with this challenge, most notably in the area of churches' vicarious liability for sexual misconduct of priests. The 1980s and 1990s saw a significant number of these cases, involving allegations of misconduct going back as far as the 1950s and 1960s. In such circumstances, it would not be uncommon for an insured's liability policy to have been lost over time, nor would it be unusual for copies of such policies in the possession of insurers or brokers to have been lost or destroyed.

---

[1] Associate, Cozen O'Connor, Toronto, Ontario.

As in every case, the onus lies with the insured to demonstrate coverage. In the absence of a copy of the policy, the insured must demonstrate:

(a) that there was a legal contract of insurance in existence at the relevant time;

(b) what the relevant terms of the policy were, insofar as they can be ascertained or demonstrated; and

(c) that the specific loss or liability would have fallen within coverage under the terms of the policy.

Each of these must be demonstrated by the insured on a balance of probabilities. In the absence of policy documentation, these would seem to be insurmountable hurdles. However, the courts have taken a common-sense approach and have shown a certain willingness to "bridge the gaps" where the historical record is inadequate.

A leading Ontario case that demonstrates this approach is the decision of the Superior Court of Justice in *E.M. v. Reed*.[2] The plaintiff alleged that, commencing in 1964, he had been sexually abused by a Roman Catholic priest and brought an action against both the priest and the diocese. The diocese brought third-party proceedings against several or its liability insurers. One of these insurers, Great American, was called on to respond for the policy year 1963-1964. However, only fragments of the manuscript policy could be found and the "jacket," the printed portion which ordinarily would have contained many of the standard terms and conditions that formed part of policies at this time, had been lost. Nothing in the material before the Court conclusively demonstrated that there either was or was not a duty to defend.

The insured diocese asserted that, as a matter of contract law, the policy should be "rectified" to include a duty to defend, based on the strong likelihood that the parties would have intended that there had been a duty to defend in the original policy. Wilkins J. rejected this contention, and held that ascertaining the terms of the policy was an evidentiary matter, as opposed to a question of contractual interpretation:[3]

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[2] (2000), 24 C.C.L.I. (3d) 229 (S.C.J.), aff'd (2003) 49 C.C.L.I. (3d) 57 (Ont. C.A.), leave to appeal ref'd [2003] S.C.C.A. No. 334.

[3] *Ibid.* at para. 64.

> *I do not think this rectification is necessary because I am satisfied on the evidence tendered before me that pages of the policy were missing and that the jacket which had disappeared would have contained standard form clauses such as a duty to defend provision. This is not a case of attempting to reconstruct the intentions of the parties or dealing with a contract which requires rectification in order to make sense. This is a straight forward instance in which the historical evidence points conclusively to the presence of a jacket with the policy and shows that, on the balance of probabilities, the jacket would have contained a duty to defend clause. This conclusion does not lead to the creation of new terms or the rewriting of the contract. Rather, it is the archaeological discovery of the presence of such a term in the contract at a level of proof sufficiently high to allow me to find as a fact that the duty to defend clause was present as part of the total contractual agreement between the parties.*

Wilkins J.'s approach was essentially to utilize common sense to bridge the gaps caused by the missing fragments, even where, as here, the policy was manuscript in nature.

However, one could easily envision circumstances in which it might be more difficult to demonstrate, by "archeological discovery," the existence or scope of a particular policy provision. For example, in *Navy League of Canada v. Citadel General Assurance Co.*,[4] the Court considered whether the insured could establish the terms of a manuscript liability policy that had been shown as having been issued in 1970, but which had subsequently gone missing. The Court held that the insured could do so in two ways:[5]

> *(a) Is there evidence which establishes a generic or customary approach among insurers respecting bodily injury coverage? and*
>
> *(b) If not, is there sufficient evidence of the policy wording of Great American to establish the probable provisions in the policy?*

In *Navy League*, the Court held that the insured had failed to demonstrate either of these. First, the insured was unable to demonstrate that there was any generic or customary bodily injury coverage in use at the time the policy was in place. Crucial issues, such as whether the

[4] (2003), 66 O.R. (3d) 460 (S.C.J.).
[5] *Ibid.* at para. 12.

coverage was occurrence-based or claims made and whether the bodily injury coverage extended to psychological injury, could not be resolved by recourse to customary practice in 1970.

The insured also failed to demonstrate to the Court's satisfaction what the probable provisions of its policy were. The insured, which was a non-profit organization that had a children's training program, had proffered copies of manuscript policies of two Roman Catholic dioceses in an attempt to demonstrate that its bodily injury liability coverage was similar to theirs. However, these were also manuscript policies, and the Court held that these manuscript policies could not be utilized to infer the scope of the bodily injury coverage afforded by the insured's manuscript policy. As a result, the insured's motion failed.

The above cases involve situations where the court is called upon to ascertain the terms of manuscript policies. Where no policy can be found, but the evidence demonstrates that the insured's coverage was under a standard form of policy, the court will likely rely on a blank or file copy of the standard form policy, subject to any evidence with respect to special endorsements. For example, in *Catholic Children's Aid Society of Hamilton-Wentworth v. Dominion of Canada General Insurance Co.*,[6] the Court found that the insured Society had maintained standard form liability coverage for all years between 1948 and 1997, and that the relevant terms of coverage had remained unchanged during that time. Based on this evidence, the Court was prepared to find that there were policies with these terms during the years 1966-1969, even though no such policies could be found.

II. No Policy Finally Issued at time of Loss

A more complicated problem arises where coverage for a risk has been bound, but no final policy wording has been agreed or issued prior to a loss. Especially with large, complex or specialized risks, several insurers will be bound to a risk well before final policy documentation is fully agreed and issued. As a broker finds underwriters to subscribe to substantial programs of insurance, the broker will often be required to negotiate terms with each individual underwriter.

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[6] (1998), 7 C.C.L.I. (3d) 11 (Gen. Div.). A similar approach has been taken in Alberta: see *Synod of the Diocese of Edmonton v. Lombard General Insurance Co. of Canada*, [2004] A.J. No. 1287 (Q.B.).

The dealings between the broker and the underwriters will often involve much back-and-forth negotiations on specific terms and, by the time a program of insurance is fully subscribed, the broker will have a considerable task in sorting out the correspondence, emails and notes to ascertain what the terms of the insurance program actually are.

Coverage analysis in such circumstances can be even more difficult than where a policy has simply been lost; litigants and courts do not even have recourse to an incomplete historical record from which to attempt to find the "right" answer.

This is illustrated by the insurance issues surrounding the terrorist attacks against the Word Trade Center on September 11, 2001. The attacks on the Twin Towers represented the largest single property loss in history, at least until Hurricane Katrina in August 2005. The World Trade Center had been purchased by a group headed by Larry Silverstein in July 2001. At the time of the attacks, over twenty individual insurance companies had signed binders which obligated them to provide property damage insurance, but, with minor exceptions, they had not agreed and issued formal insurance policies.

From an insurance perspective, a key issue was whether or not the terrorist attacks comprised one occurrence or two – the issue decided in *SR International Business Insurance Co. v. World Trade Center Properties LLC* (the *Swiss Re* case).[7] The insurers contended that the attacks had resulted from the same cause or series of causes, i.e. the terrorists' conspiracy, and that the loss of the two buildings should be treated as one occurrence. The Silverstein parties contended that each of the two buildings had been hit by a different plane at a different time, and that each loss was a separate occurrence.

With no final policy wording in place, three insurers brought motions for partial summary judgment before the U.S. District Court for a determination of whether the loss constituted one occurrence or two. The Court recognized that traditional, formalist contract analysis is not wholly applicable in respect of the binding of major risks:

[7] 222 F. Supp. 2d 385 (S.D.N.Y. 2002).

> *Although the existence of open terms generally suggests that binding agreement has not been reached, that is not necessarily so. For the parties can bind themselves to a concededly incomplete agreement in the sense that they accept a mutual commitment to negotiate together in good faith in an effort to reach final agreement within the scope that has been settled in the preliminary agreement.*

However, the Court held that, under New York law, when a binder is signed, the contract of insurance is closed and the binder becomes, in effect, the same as a regular insurance policy. The task before the Court was to determine what the terms of the binder were, even if these terms were not the terms that might have, eventually, been finally agreed upon by the underwriters and the broker. Each of the three moving insurers contended that, whatever terms might have eventually been agreed upon, they had each agreed to a specific form of property coverage drafted by the broker, known as the "WilProp" form. Under the provisions of the WilProp form,[8] the terrorist attacks would unambiguously constitute only one occurrence.

Thus, even though there was no "final" policy wording in place, the District Court construed the binders as complete policies in themselves, meaning that the parties were compelled to abide by the inchoate "terms" as they existed at the time of the binder, irrespective of their intent to not be bound by such terms in the final policy wording.

Some practical suggestions for avoiding these kinds of problems include:

(a) Documenting the intentions of the insured and the underwriters, to the extent possible, in the binder itself. In the case of a renewal, this would include any intention to continue with or to depart from the previous policy's terms.

(b) Noting whether any standard form wording is to be used and, if so, what form. Where a form is to be utilized subject to specific amendments, these should be noted in the binder.

(c) Follow up and ensure that the final policy wording is finalized and agreed on as soon as possible after the binder has been put in place.

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[8] The relevant policy provision read: "'Occurrence' shall mean all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur."

The use of binders and slips to effect short-term coverage pending delivery of final policy wording is not going to disappear. However, in light of the decision of the District Court in the World Trade Centre case, it is important that brokers, insureds and underwriters take all reasonable steps to clearly reduce their intentions to writing, even as part of the binder or slip. The failure to do so invites a stranger to the transaction to "fill in the blanks," based on whatever can be discerned from the state of negotiations at the time the loss occurs.

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