

## LITIGATION NOTES

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## Use of Expert Denied Again

The Quebec Superior Court recently rejected an expert's report produced in support of the plaintiff's case, in litigation between a manufacturer of roofing shingles and two of its customers.

IKO Industries Ltd. ("IKO") is a manufacturer of roofing materials and Everest Supply Inc. ("Everest") and Produits Pour Toitures Fransyl Ltée ("Fransyl") are two of IKO's distributors in the Province of Quebec.

IKO's distributors were entitled to certain volume discounts and year-end rebates based on the quantity of product purchased from IKO. For the period of July 1, 2004 to June 30, 2005 Everest and Fransyl disputed the calculation of the year-end rebates. They furthermore alleged that they had been unable to meet their sales targets by reason of an allocation system imposed by IKO with respect to certain of its products. As a result they withheld payment of amounts owing to IKO and IKO sued them. They counterclaimed for the rebates to which they felt they were entitled.

IKO retained the accounting firm of PricewaterhouseCoopers LLP ("PWC") to prepare an expert's report for the purpose of quantifying the year-end purchase rebate entitlements of Everest and Fransyl and to determine whether they would have met their purchase targets if they had

purchased all of the product allocated to them.

The defendants opposed the production of this expert's report on the basis that it would not add anything to the judge's understanding of the case. The Quebec Superior Court considered the caselaw with respect to the admissibility of experts' reports, beginning with the 1994 decision of the Supreme Court of Canada in *R. Mohan*. That case established that there are four conditions which must be met for an expert's report to be admissible: (1) the evidence must be relevant; (2) the evidence must be necessary to assist the trier of fact; (3) there must be no exclusionary rule otherwise prohibiting the receipt of the evidence; and (4) the evidence is given by a properly qualified expert.

The defendants alleged that the second of these criteria was not met in this case and the Court agreed. Expert evidence is only admissible where it is necessary to assist the Court to understand the facts and to appreciate the evidence. Expert evidence is generally only necessary where the case turns on technical or scientific questions of some complexity. Where the facts are straightforward and the judge is as capable as the expert of understanding them and arriving at the proper conclusion, expert evidence will not be admissible.

In this case, the facts were not particularly complicated.

Essentially, the dispute turned on the entitlement of the defendants to rebates based on their interpretation of their contract with IKO. Contractual interpretation is within the competence of the trial judge and no specialized accounting knowledge was required for the purpose of calculating the amount of the applicable rebate. PWC's report was not admitted.

A similar result was reached in a case decided last year by the Ontario Superior Court of Justice. *Dulong v. Merrill Lynch Canada Inc.* was an action brought by an investor to recover stock market losses allegedly sustained by reason of the negligence of his investment advisors.

The plaintiff sought to introduce expert testimony from a Mr. Malcolmson, a securities lawyer who had worked for the Ontario Securities Commission ("OSC") and in that capacity had become familiar with the policies, rules and regulations of the OSC and of the Investment Dealers Association. He had subsequently worked for the Toronto Dominion Bank and assisted in the development of the Bank's retail brokerage arm. However he had never worked as retail stock broker and was not qualified to testify about the standards and practices of the retail

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## Use of Expert (continued)

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brokerage industry in Ontario. Judges do not require an expert to interpret policies, rules or regulations which they are perfectly capable of reading for themselves. Consequently Mr. Malcolmson's evidence was not admitted.

Whether a case is being decided by a judge alone or a judge with a jury, ex-

pert evidence must be used judiciously. As Justice Sopinka of the Supreme Court of Canada said in *R. v. Mohan*:

"There is a danger that expert evidence will be misused and will distort the fact-finding process. Dressed up in scientific language which the jury does not easily understand and submitted through a witness of impressive antecedents, this evidence is apt to be accepted by the

jury as being virtually infallible and as having more weight than it deserves."

*IKO Industries v. Produits pour toitures Fransyl Ltée*, 2007 QCCS 33 (CanLII)

## Breach of Warranty Leads to Coverage Denial

Mr. and Mrs. McIntosh wanted to retire. They owned a house in Windsor, Ontario and a cottage in the Muskoka Lakes region. They were avid boaters and decided that they would supplement their income in retirement by purchasing and chartering a high-speed powerboat for use in "poker runs" and other excursions. They sold their house in Windsor, liquidated their RRSP's and took out a bank loan to purchase a 32 foot Advantage Victory powerboat for \$220,000.

Mr. McIntosh approached a Mr. Macauley at the insurance brokerage of Ogilvy & Ogilvy in order to obtain insurance for the boat. He told Mr. Macauley of his plans to charter the boat and Mr. Macauley told him that commercial insurance would be very expensive and that until such time as he actually obtained paying customers for the boat he should insure it for personal use only. Consequently, Mr. McIntosh completed a pleasure craft application which was forwarded by Macauley to Royal & Sun Alliance Insurance Company of Canada ("Royal"), who were not informed about McIntosh's plan to start a business using the boat.

On August 20, 2002 Ogilvy & Ogilvy sent Mr. McIntosh a copy of the insurance policy stating in the covering letter that they were attempting to obtain a commercial quote as requested but that in the interim coverage was for private pleasure use only. The policy as issued contained a warranty stating that the vessel would be used solely for

private pleasure purposes and would not be chartered or leased or used for any commercial purpose. Mr. McIntosh acknowledged receiving the policy and stated that his understanding was that as long as he did not take any paying customers on the boat he would have insurance coverage.

During the summer of 2002, Mr. McIntosh made an attempt to obtain commercial coverage on the boat and Mr. Macauley contacted Royal on his behalf. However, Royal indicated that they were not interested in taking on the risk of insuring the boat for commercial use. Mr. McIntosh acknowledged that Mr. Macauley had informed him that he had been unable to obtain a quote for commercial coverage and that he understood that his boat was only insured for personal use.

In the summer of 2002, Mr. McIntosh took steps to get his business up and running. He opened a bank account in the name of Offshore Performance Tours and put a decal with that name on the deck of the boat. He had business cards printed up and took the boat to three poker runs, although he claimed that he did not receive any paying customers that summer.

In July of 2003 the policy came up for renewal and again contained the warranty for private pleasure purposes. In the summer of 2003 Mr. McIntosh set up a website for Offshore Performance Tours and placed advertisements in boating magazines. He had flyers printed up offering that for \$375 plus

GST, an individual could participate in a poker run, receive lunch, dinner, a team shirt and a video of the event, among other things. Despite these efforts, Mr. McIntosh claimed that he did not obtain a single paying customer throughout the summer of 2003. A photograph of his boat appeared in "Poker Runs America", an on-line magazine relating to performance boating. The boat was shown participating in a poker run which took place on September 12 and 13, 2003, but Mr. McIntosh claimed that the five people shown onboard were all family and friends and none were paying customers.

On the Thanksgiving weekend of October 2003, the boat was stolen. It was found a few days later and it had been completely stripped. The theft was reported to the Ontario Provincial Police and investigated by Constable Poulton. A claim was made under the Royal insurance policy, but coverage was denied on the basis that there had been a breach of the absolute warranty against commercial use of the boat.

Mr. McIntosh sued both Royal and Ogilvy & Ogilvy on the basis that he had been led to believe that so long as he did not take paying commercial customers on the boat, he would have valid insurance coverage. However, the Court did not believe his assertions to the effect that he had not had paying customers on the boat. For one thing, the Court believed the evidence of Constable Poulton, a disinterested witness, who testified to the effect that Mr. McIntosh

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## Breach of Warranty (continued)

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had told him that the boat had been chartered for poker runs in the summer of 2003. Perhaps more compelling was the activity in the bank account of Offshore Performance Tours. This bank account was in the same branch of the Canadian Imperial Bank of Commerce (“CIBC”) in Windsor, in which Mr. McIntosh had his personal account. Monies were periodically deposited in the account of Offshore Performance Tours but Mr. McIntosh claimed that these did not represent revenues from operations. He claimed that they were monies that he deposited in the account in order to cover expenses related to marketing and promotion. However,

he was unable to explain why, instead of simply transferring funds from his personal account at the CIBC to the account of Offshore Performance Tours in the same branch, he chose to withdraw large sums of cash and deposit them in an automatic teller machine in another town where the boat was located. Furthermore, he was unable to explain away a deposit for \$401.25, which is equivalent to \$375 + GST, and corresponds to the daily charter rate for one person on his boat. Nor could he explain away another deposit for \$3,210.00, which corresponds to the daily charter rate for 8 people.

With respect to Ogilvy & Ogilvy, the Court found that the advice given by Mr. Macauley to Mr. McIntosh had been wrong, in that it was incorrect for him to have asserted that Mr. McIntosh would

have coverage under his pleasure policy, so long as he did not take paying customers on the boat. In fact, the activities of promotion and marketing undertaken by Mr. McIntosh probably would have constituted commercial activities and been in breach of the warranty. However, having found that Mr. McIntosh did in fact take paying customers on his boat, he would have been in breach of his warranty in any event and there was no causal link between Mr. Macauley’s bad advice and the denial of coverage.

*McIntosh v. Royal & Sunalliance Insurance Company of Canada*, 2007 FC 23 (CanLII)

## Province Has No Duty to Protect the Public From West Nile

George Eliopoulos was bitten by a mosquito in 2002 and became infected with West Nile Virus. He was treated in hospital and released, but died the following year from complications after a fall. His estate and family sued the Ontario government, alleging that the Ontario government had been negligent in not preventing the West Nile outbreak in 2002. The government brought a motion to strike the claim as disclosing no reasonable cause of action, and this motion was dismissed by both the motions judge and the Divisional Court. The Court of Appeal granted the government’s motion and dismissed the claim.

The central issue was whether Ontario owed Mr. Eliopoulos a private law duty of care, such that they could be liable to Mr. Eliopoulos in negligence. The claimants alleged that Ontario had failed to:

(i) take steps to deal with West Nile Virus as an emergency; (ii) take adequate measures to reduce the mosquito population in Ontario; (iii) coordinate with other governments and organizations; and (iv) provide

accurate information to the public about the threat of West Nile Virus.

The Court set out the test for finding a private law duty of care: (i) was the harm that occurred (Mr. Eliopoulos’ death) the reasonably foreseeable consequence of the respondent’s act (the government’s actions regarding West Nile virus)?; and (ii) are there any policy reasons why liability should not be recognized?

The Court first examined the government’s statutory powers under the *Health Protection and Promotion Act*. It concluded that these powers did not create a private law duty of care to Mr. Eliopoulos, as the powers were discretionary powers to be exercised in the general public interest.

The Court next examined the government’s West Nile Virus Plan, a document entitled *West Nile Virus: Surveillance and Prevention in Ontario, 2001*. It found that this plan did not trigger a private duty of care, as it was not a policy decision to be implemented at an operational level and any duties created by the plan resided not with the government but with local authorities or boards of health: The Plan represented an attempt by the Ministry to encourage and coordinate appropriate measures to reduce the risk of West Nile Virus by providing information

to local authorities and the public.

The Court found that this fell well short of the sort of policy decision aimed at a particular risk that would trigger a private law duty of care “to implement such policy at the operational level in a non-negligent manner”. It concluded that the government did not owe a private law duty of care to the claimants. It also found that, had the claimants established such a duty of care, policy considerations would negate the imposition of a duty, as to impose this burden would interfere with “sound decision-making in the realm of public health”: In deciding how to protect its citizens from risks of this kind that do not arise from Ontario’s actions and that pose an undifferentiated threat to the entire public, Ontario must weigh and balance the many competing claims for the scarce resources available to promote and protect the health of its citizens.

*Eliopoulos v. Ontario*, (2007) 82 O.R. (3d) 321 (C.A.)



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## **Expert Retained by Plaintiff Does Not Owe Duty of Care to Defendant**

In a recent decision out of the Ontario Superior Court of Justice, the Court granted a motion brought by a third party seeking to strike out the third-party claim initiated by the defendant. The plaintiff had retained the third party to conduct an environmental assessment of its property. The third party's report concluded that there was contamination to the plaintiff's property by gasoline migrating from the defendant's property. The plaintiff sued the defendant, who in turn, sued the environmental assessment company for breach of an implied contractual duty, breach of a duty of care, negligent misrepresentation and tort of abuse of process. The motions judge struck out each claim on the basis that there was no cause of action.

The court contrasted this situation with the relationship between an insured and

a fire investigator hired by an insurer. The insured is bound by the insurance contract to co-operate with a fire investigation and the investigator would know that the insured could be adversely affected by a careless investigation.

In this case, the Court held that there was no particular vulnerability by virtue of any relationship between the defendant and the third party, nor was there any relationship due to any contractual obligation. There was no "heightened expectation" of the defendant regarding the third party's conduct.

Even if there was a *prima facie* duty of care, the court rightly noted that it should be negated for policy reasons. Any recognition of such a proposed duty of care would "distort the legal relationships in that it

would set up an incoherent scheme of liability, where, rather than focus on the obligation or the possible liability of the Defendant with respect to damages caused to the Plaintiff, there would be a further issue, a distorting one, where the Defendant would focus any alleged liability on the party who prepared the report for the Plaintiff." The motions judge also noted that the third party is entitled to witness immunity, and being implicated as a third party would discourage it from testifying in the main action, which would be adverse to the proper functioning of justice.

*Vie Holdings Inc. v. Imperial Oil Limited*, 2007 CanLII 242