

# LITIGATION NOTES

Legal Decisions and Developments in Canada

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## Woman Struck by Stationary Object

*The Ontario Court of Appeal holds that the “uninsured or unidentified automobile” coverage in Ontario’s standard automobile insurance policy should provide coverage for injuries sustained as a result of walking into a pole protruding from a parked truck.*

One day, Ms. Lewis walked out of a variety store and struck her head on a steel pole protruding from a truck parked the wrong way on the street in front of the store. The pole struck her above her right eye near her temple. She fell to the ground, unconscious and suffered a serious head injury which left her cognitively impaired.

The truck could not be identified and Ms. Lewis therefore sued her own insurance company, Economical Mutual Insurance Company (“Economical”). Economical denied coverage on the basis that Ms. Lewis had not been “struck by” or “hit by” the unidentified vehicle. A motions judge agreed and granted summary judgment in favour of Economical. Ms. Lewis appealed to the Ontario Court of Appeal.

Section 265 of the Ontario *Insurance Act* requires every automobile insurance policy to provide coverage to persons who are injured in an accident involving an unidentified or uninsured automobile. A person is entitled to recover amounts that they would have been “legally entitled” to recover from the owner or driver of the unidentified automobile. In the case of the person who is not the occupant of an automobile there is coverage if that person is “struck by” an unidentified automobile.

Under the compulsory form of automobile policy prescribed by regulation under the Ontario *Insurance Act*, insurance is available to a pedestrian who is “hit by” an unidentified automobile. In addition, Ms. Lewis had purchased a family protection endorsement, which also provided coverage to a person who is not an occupant of an automobile but is “struck by” an automobile.

The Court of Appeal found that the motions

judge had correctly identified that “unidentified and uninsured motorist” coverage is remedial and must therefore be interpreted broadly and liberally. However, the Court considered that the motions judge had interpreted the legislative provisions too restrictively in concluding that Ms. Lewis had not been hit or struck by the automobile. The Court of Appeal held that the words “struck by” or “hit by” must be interpreted in the context of the dominant purpose of the insurance coverage, which is to compensate victims injured as a result of an accident involving an unidentified automobile. Economical had already acknowledged that Ms. Lewis had been injured in an accident with an unidentified automobile by paying her statutory accident benefits which are available where “an incident in which the use or operation of an automobile directly causes an impairment”.

The Court further held that the words “struck by” or “hit by” generally connote simply “coming into contact with” and do not specifically ascribe movement to either object involved. “Accordingly, we do not normally differentiate between ‘Ms. Lewis was struck by the pole’; ‘Ms. Lewis struck her head on a pole’; and ‘the pole struck Ms. Lewis above her right eye’”.

The Court also concluded that the interpretation relied upon by Economical was inappropriate “because its application brings about an unrealistic result that was not contemplated in the ‘atmosphere in which the insurance was contracted’”. The Court could not see any distinction between an accident where a person is struck by a pole on a very, very slow moving truck as opposed to being struck by a pole on a stationary truck.

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The Court went on to consider case law which has extended coverage to persons who were not in any literal sense struck or hit by an automobile. In one case a cyclist had to take sudden evasive action to avoid colliding with a car that almost struck him and then left the scene. The cyclist suffered injuries and claimed under his unidentified automobile coverage. The Court held that this was tantamount to having been struck by the vehicle. In another case, a woman suffered shock and physical and psychological damage as a result of a car colliding into the wall of her house. Again, although the vehicle did not actually strike the woman herself, the Court concluded that her “injuries arguably resulted from the proximate, sensory invasion, the notional equivalent of being struck”. In another case a car mounted the curb and struck a street sign, bending it over and causing it to strike a pedestrian. The Court in that case held that the pedestrian had been struck by the automobile stating:

“The words “struck by the described automobile”, if taken to mean only that there must be direct physical contact between the automobile and the person of the claimant, could make the possibility of recovery depend upon minute differences in the circumstances,

*(Continued on page 4)*

# Copyright Infringement Case Allowed to Proceed

*The Society of Composers, Authors and Music Publishers of Canada (“SOCAN”) brought an action against Maple Leaf Sports & Entertainment “MLSE”, claiming licence fees in respect of performances at Toronto’s Air Canada Centre. A motion for summary judgment brought by MLSE was dismissed.*

The Society of Composers, Authors and Music Publishers of Canada (“SOCAN”) is a collective society under section 67 of the *Copyright Act*, (the “Act”). It administers the performance rights of virtually all copyright protected musical works in Canada. SOCAN also has agreements with other performing rights organizations in other countries. When a performance takes place in Canada, SOCAN licences the performances, collects royalties/fees and pays out the royalties to the members whose works have been performed.

Maple Leaf Sports & Entertainment (“MLSE”) owns and operates the Air Canada Centre in Toronto, which is used for various sporting events, concerts and other entertainment.

SOCAN brought an action in the Federal Court of Canada against MLSE for failure to pay royalties for more than 40 concerts. SOCAN alleged that they were the owners of the works performed at the concerts and that MLSE allowed the performances without obtaining a licence from SOCAN and without paying the applicable fees. SOCAN claimed a declaration of failure to report and pay and of infringement, and an order for payment of royalties plus interest, damages, statutory damages and ancillary relief.

MLSE denied that SOCAN held the rights claimed, denied knowledge of the works performed and denied that they were responsible for payments, asserting that any liability rested with the concert promoters. MLSE claimed that they merely rent or lease the space for the concerts and that they are therefore not responsible to obtain the licence or pay royalties as they do not authorize the performance of specific works. MLSE brought a motion for summary judgment to have the action dismissed.

The Court reviewed the general principles that apply to summary judgment applications in the Federal Court of Canada, as outlined in *Granville Shipping Co. v. Pegasus Lines Ltd.*:

1. the purpose of the provisions is to allow the Court to summarily dispense with cases which ought not proceed to trial because there is no genuine issue to be tried;
2. the test is not whether a party cannot possibly succeed at trial, but whether the case is so doubtful that it does not deserve consideration by the trier of fact at a future trial;
3. each case should be interpreted in reference to its own contextual framework;
4. provincial practice rules (especially Rule 20 of the

Ontario Rules of Civil Procedure, can aid in interpretation;

5. the Federal Court may determine questions of fact and law on the motion for summary judgment if this can be done on the material before the Court (this is broader than Rule 20 of the Ontario Rules of Civil Procedure);
6. on the whole of the evidence, summary judgment cannot be granted if the necessary facts cannot be found or if it would be unjust to do so;
7. in the case of a serious issue with respect to credibility, the case should go to trial because the parties should be cross-examined before the trial judge. The mere existence of apparent conflict in the evidence does not preclude summary judgment; the court should take a “hard look” at the merits and decide if there are issues of credibility to be resolved.

The Court determined that there were three central issues to the litigation:

1. Insofar as it related to concerts held before December 16, 2002, was the action barred by any limitation period?
2. Could SOCAN show the requisite elements for copyright infringement, including but not limited to ownership, performance of the works at issue, absence of consent of the owner and applicability of its tariffs to the concerts?
3. Had MLSE authorized or allowed infringing performances in such manner as to render it liable for royalties?

An important factor parties must consider in a summary judgment motion is making sure they put their “best foot forward”. This requires putting forth the best evidence to satisfy the test on a summary judgment, without turning a summary judgment motion into a trial. MLSE claimed that SOCAN did not put their “best foot forward” because they relied on hearsay evidence, consisting of grainy Youtube.com videos and Wikipedia entries in relation to what works were played. SOCAN attributed this to its inability to have meaningful discovery of MLSE’s evidence.

Rule 81 of the *Federal Court Rules* requires evidence in affidavit form, but Rule 55 gives the court flexibility to allow hearsay on a principled basis. The Court in this case held that to preclude evidence that may be admissible at a trial would be contrary to the intent of the summary judgment rules, especially where SOCAN’s case was dependent on hearsay, because neither party had direct personal experience on what happened at the concerts. It will be the responsibility of SOCAN to persuade the trial judge that the hearsay evidence is reliable and necessary. Determining who had the obligation to maintain

evidence of performances will have an impact on this decision by the trial judge.

A central point of this litigation was the scheme of SOCAN’s mandate and the rights and obligations which flow from the interpretation. SOCAN argued that the responsibility of reporting and record-keeping falls to those who may be liable for obtaining a license and reporting royalties – in this case MLSE. MLSE argued that SOCAN had the obligation to prove all the elements of the case and that they were not responsible for any of the reporting or record-keeping.

Section 27(5) of the Act provides that it is an infringement of copyright “...for any person, for profit, to permit a theatre or other place of entertainment to be used for the performance in public of a work or other subject-matter without the consent of the owner of the copyright unless that person was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.”

Section 41(1) of the Act provides that a court may not award a remedy in relation to an infringement unless “(a) in the case where the plaintiff knew, or could reasonably have been expected to know, of the infringement at the time it occurred, the proceedings for infringement are commenced within three years after the infringement occurred; or (b) in the case where the plaintiff did not know, and could not reasonably have been expected to know, of the infringement at the time it occurred, the proceedings for infringement are commenced within three years after the time when the plaintiff first knew, or could reasonably have been expected to know, of the infringement.” MLSE’s knowledge, expectation or reasonable belief was therefore crucial to its limitation defence. MLSE’s obligation to report as well as SOCAN’s obligation to monitor performance were also key issues. The resolution of those issues was at least in part fact driven and dependant on the quality of the evidence and the credibility of the respective positions. Assessing the credibility of witnesses must be left to the trial judge.

The motion for summary judgment was dismissed with costs to the Plaintiff.

*Society of Composers, Authors and Music Publishers of Canada v. Maple Leaf Sports and Entertainment*, 2010 FC 731 (CanLII)

# State Immunity Act Considered

*The Ontario Superior Court of Justice rules that a libel action against Guyana's Minister of Agriculture and a state-owned sugar producer is not barred by the State Immunity Act.*

Demerara Sugar has been produced since the 1800's in Guyana, although sugar calling itself Demerara is now produced in other countries including Mauritius, Barbados, India and Malawi.

Guyana's largest sugar producer is Guyana Sugar Corporation Inc. ("Guysuco"), a company wholly owned by the government of Guyana. Guysuco is Guyana's largest employer and its largest foreign exchange earner. Its revenue accounts for between 11% and 13% of Guyana's GDP.

Prior to 2003 Guysuco marketed its sugar in unlabelled 50 kg bags primarily within the Caribbean region. In April of 2003, it launched its own brand of sugar for the retail trade, which it called "Demerara Gold".

Lionel Bedessee came to Canada from Guyana in 1971. Under the name Bedessee Imports Ltd., he began selling foods from the Caribbean, which were relatively scarce in Canada at the time. In 1977 he started a retail store on Queen Street West in Toronto and ultimately expanded to a 46,000 square foot warehouse and manufacturing facility. In 1985, he incorporated Bedessee Imports Inc. which carries on business out of a warehouse in Brooklyn, New York and a wholesale outlet in Florida. Since at least 1984 the Bedessee companies (collectively "Bedessee") have been selling a sugar product known as Demerara Gold and another known as Guyanese Pride. Both contain sugar originating from Mauritius and not from Guyana.

In October of 2003 Guysuco wrote to Bedessee inviting it to submit an application for distributorship of Guysuco's Demerara Gold.

Bedessee declined, advising that Demerara Gold was a trademark of Bedessee and that Guysuco would be unable to market its product under that name in Canada or the United States. Both parties immediately applied to register the trademark and each opposed the other's application. Guysuco ultimately abandoned its application.

In 2009, Guysuco embarked on an aggressive marketing campaign aimed in particular at Guyanese expatriates in North America. Mr. Robert Persaud, Guyana's Minister of Agriculture, made a number of statements suggesting that Guyanese in North America were being duped into purchasing sugar made in Mauritius which was being passed off as Guyanese sugar. These statements indicated that Bedessee "has a reputation of dishonest marketing in branding and packaging its products to deceive the West Indians residing in North America". Bedessee commenced a libel action against Guysuco and Mr. Persaud in Ontario.

The Defendants moved to dismiss or permanently stay the action, relying on the *State Immunity Act* ("Act"), which provides that a foreign state is immune from the jurisdiction of any court in Canada. The Plaintiffs relied on exceptions in the Act and in particular that contained in section 5 which provides that a foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state and section 6 which provides that there is no immunity in respect of damage to or loss of property that occurs in Canada.

Justice Strathy reviewed the common law

antecedents of the *State Immunity Act*, as summarized by Lord Wilberforce in the House of Lords case of *I Congreso Del Partido*:

"Historically, nation states enjoyed an absolute immunity from adjudication by foreign courts. Under international law, it was accepted that sovereign states should not be 'embarrassed' by subjection to the control of a foreign judiciary. Over time, however, as governments increasingly entered into the commercial arena, the doctrine of absolute immunity was viewed as an unfair shield for commercial traders operating under the umbrella of state ownership or control. The common law responded by developing a new theory of restrictive immunity. Under this approach, courts extended immunity only to acts *jure imperii* [public acts], and not to acts *jure gestionis* [private acts]."

In order for the exception to apply it is necessary to investigate the fundamental nature of the activities entered into by the foreign power. If they are essentially commercial in nature then the exception will apply."

In this case Justice Strathy found that the public statements made by Minister Persaud were "directly related to the commercial activity carried on by Guysuco. The statements were directed at activities undertaken by a commercial competitor and had to do with the protection of Guysuco's brand – a plainly commercial activity". The motion to stay or dismiss the action was dismissed.

*Bedessee Imports Ltd. v. Guyana Sugar Corporation, Inc.*, 2010 ONSC 3388 (CanLII)

# Toxic Mould Claim Excluded From Coverage

*The Manitoba Court of Appeal finds that policy exclusions apply and no coverage is available for a toxic mould claim.*

Minox Equities Limited ("Minox") is the owner of a housing complex in Winnipeg, Manitoba, built in 1977. Although certified compliant with all relevant by-laws and specifications at the time of construction, there were reports of water leaking into some apartments within 2 years of completion. Between 1979 and 2000, Minox took various measures to remedy a variety of problems arising from water ingress in the buildings. However, in March of 2000 the Residential Tenancies Branch of the Manitoba government received a complaint of a health hazard in one of the units, caused by water leakage,

mildew and rot. Minox retained a firm of consulting engineers, who identified a major area of mould growth, some of which was toxigenic. A report prepared for Minox in March of 2000 stated that it was likely that the mould was due to the concentrated failure of the building envelope and that more significant mould growth may be detected inside the walls.

In June of 2001 Minox learned that tenants in another unit had become ill and investigations of that unit identified further toxigenic mould growth. Minox advised its insurer,

Sovereign General Insurance Company ("Sovereign") by way of a call to its insurance broker of a potential claim due to mould damage in July of 2001. On November 13, 2002 Minox submitted a proof of loss to Sovereign in the amount of \$8,585.68, relating to remediation efforts in one of the units.

Further investigation revealed that significant mould abatement was required in all of the

*(Continued on page 4)*

## Stationary Object (continued)

(Continued from page 1)

entirely unpredictable, such as, for example, whether the claimant had been able to interpose between himself and the automobile some article he was carrying, such as a suitcase, a box of tools or unusually thick clothing. In such cases, the force of the impact is transmitted directly to the person of the injured party, regardless of the fact that he has

not been ‘struck by’ the automobile and that there is no direct physical contact between himself and it”.

The Court therefore concluded that there should be coverage. On the argument that this would open the floodgates to injury claims by persons who walk into unidentified parked cars, the Court pointed out that this was a case about coverage, not liability or

negligence. If the owner or driver of a parked car were not negligent, the claimant would have no “legal entitlement” to damages and therefore would not be able to recover under the uninsured or unidentified motorist coverage.

*Lewis v. Economical Insurance Group*, 2010 ONCA 528 (CanLII)

## Toxic Mould (continued)

(Continued from page 3)

buildings in the complex and in December of 2002 Minox submitted a second proof of loss with an estimated cost for remediation of \$646,000, including tenant relocation and professional and consulting fees.

Sovereign denied coverage with respect to both proofs of loss, and Minox sued. At trial, the trial judge allowed Minox’s claim and awarded damages in the sum of \$545,969.88. Sovereign had argued that the build-up of humidity causing the mould growth was not the result of a risk or peril, that exclusions against latent defect or improper design applied and that exclusions against seepage of water or dampness of atmosphere also applied. The trial judge dismissed all of Sovereign’s arguments and Sovereign appealed to the Manitoba Court of Appeal.

On appeal the case turned primarily on the

applicability of the seepage exclusion. The trial judge had been of the view that although one of the excluded events allowed the ingress of moisture into the units, he could not find that the occurrence of mould inevitably followed. “In addition to the moisture, spores, a source of food, and the appropriate acidity of the water were factors that needed to be present in the right combination to produce mould. Whether or not the mould would or would not be toxigenic was a further uncertainty. I am unable to conclude that the excessive moisture was either a direct or indirect cause triggering the occurrence of mould”.

The Court of Appeal held that the trial judge committed an error of law in interpreting the exclusion clauses in a way that required that the damage had to have been inevitably caused by seepage, rain or humidity. This interpretation meant that Sovereign must not

only prove that the seepage, rain or humidity caused the loss or damage but must also prove that these events would always cause that loss or damage.

The exclusion used the phrase “directly or indirectly” and this phrase “generally connotes that both the direct and consequential losses of an event are captured. Thus, as long as the evidence in the present case indicates that mould was a direct or consequential result of the seepage, rain and humidity, then the exclusion clauses would apply, absent other issues. In this case, the evidence, as so found by the trial judge, is clear that the seepage, rain and humidity present in the complex led to the moisture and humidity conditions which were so conducive to mould growth”.

The appeal was allowed.

*Minox Equities Ltd. et al. v. Sovereign General*, 2010 MBCA 63 (CanLII)

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