Doctrine of Nullification of Coverage

The appellants in this case owned an in-ground swimming pool which was insured through a property insurance policy (the “Policy”) issued by the respondent, The Personal Insurance Company (“The Personal”). Exclusion 18 of the Policy excluded loss or damage to outdoor swimming pools. Exclusion 11 of the Policy provided that there was no insurance for “settling, expansion, contraction, moving, bulging, buckling or cracking of any insured property, except resulting damage to building glass”.

However, the appellants had purchased Endorsement 33B which amended the Policy and insured the swimming pool “against all risks of direct physical loss or damage, including damage caused by freezing or the weight of ice, snow or wet snow…”

The appellant’s swimming pool was damaged as a result of hydrostatic uplift pressure. This pressure was due to a build-up of ground water which caused the pool to lift out of the ground and as a result, to crack. The Personal denied coverage on the basis of Exclusion 11 and were upheld in first instance. An appeal to the Ontario Court of Appeal was allowed on the basis of the doctrine of nullification of coverage. This doctrine provides that an insurance policy should not be interpreted in a manner which would largely, if not completely, nullify the purpose for which the insurance was sold. The doctrine has at times been viewed as no more than a particular application of the contra proferentem rule, which provides that an ambiguity in an insurance contract should be construed against the insurer. However, the better view now seems to be that even where a policy provision is clear and unambiguous, it will not be applied where: (1) it is inconsistent with the main purpose of the insurance coverage and where the result would be to virtually nullify the coverage provided by the policy; and (2) where to apply it would be contrary to the reasonable expectations of the ordinary person as to the coverage purchased.

The appellants also made a persuasive argument to the effect that the common exclusions in the Policy should not apply to Endorsement 33B. That Endorsement provided that all the other terms and conditions of the Policy would remain unchanged including certain of the common exclusions which were enumerated, but not including Exclusion 11. The appellants argued that if all of the common exclusions were intended to have been incorporated into Endorsement 33B, then the enumeration of these four exclusions was redundant. The Court felt that this was a fairly compelling argument but that in any event the case could be resolved on the basis of the doctrine of nullification of coverage.

The Court stated the principle that if a court “…is able to determine on an objective basis that the insurer’s interpretation would render nugatory coverage for the most obvious risks for which the endorsement is issued, a tactical burden shifts to the insurer. It will be for the insurer to show that the effect of its interpretation would not virtually nullify the coverage and would not be contrary to the reasonable expectations of the ordinary person as to the coverage purchased. This is a reasonable approach given that the insurer is in an ideal position to show that, contrary to what appears to be the case, the endorsement does in fact provide coverage. For example, the insurer would have access to its records and the experience in the industry and would be able to show the claims that had been paid for loss or damage not falling within the exclusion”.

In this case Exclusion 11 excluded coverage for “settling, expansion, contraction, moving, bulging, buckling or cracking of any insured property…” The Court found it difficult to conceive of any damage or loss to an in-ground swimming pool but would not come within that exclusion. Clearly the most common causes of loss or damage for a homeowner’s policy, such as theft or fire have no application to an in-ground swimming pool but would not come within that exclusion. Clearly the most common causes of loss or damage for a homeowner’s policy, such as theft or fire have no application to an in-ground swimming pool. When counsel for the insurer was pressed for an example that would not come within Exclusion 11, he was unable to do so. The Court concluded that there was coverage under the Policy.

Cabell v. The Personal Insurance Company, 2011 ONCA 105 (CanLII)
Group Defamation

The Supreme Court of Canada defines the circumstances in which individual members of a group can sue for damages resulting from defamatory comments made about the group.

The Supreme Court of Canada recently considered whether discriminatory comments made about a group of individuals can form the basis for an action in damages for defamation. In November of 1998 Andre Arthur, a "shock jock" host on radio station CKVL in Montreal, Quebec made the following comments about the taxi industry in Montreal:

"[TRANSLATION] Why is it that there are so many incompetent people and that the language of work is Creole or Arabic in a city that’s French and English? …I’m not very good at speaking "nigger"…Taxis have really become the Third World of public transportation in Montreal. …My suspicion is that the exams, well, they can be bought. You can’t have such incompetent people driving taxis, people who know so little about the city, and think that they took actual exams. …Taxi drivers in Montreal are really arrogant, especially the Arabs. They’re often rude, you can’t be sure at all that they’re competent and their cars don’t look well maintained."

Mr. Bou Malhab, a taxi driver whose mother tongue is Arabic, applied to Quebec Superior Court for authorization to institute a class action against Mr. Arthur and the radio station. The application for authorization was initially dismissed on the basis that the size of the group was such that it would be impossible to prove a causal connection between Mr. Arthur’s comments and injury sustained by each member of the group personally. This decision was reversed by the Quebec Court of Appeal which allowed the class action to proceed.

When the action was heard on the merits, the Quebec Superior Court found that Mr. Arthur’s comments were defamatory and wrongful. Although the evidence was to the effect that only about 20 of the drivers concerned had listened to the radio show and that it was therefore impossible to demonstrate that each member of the group had sustained a personal injury, the Court ordered the respondents to pay $220,000 to the Taxi Drivers’ Professional Association.

This decision was appealed to the Quebec Court of Appeal where it was reversed. The Court found that three situations are possible where defamatory comments are made about a group: (1) The group is large and the comments become lost in the crowd; (2) Certain members of the group are named or can easily be identified; or (3) The group is small enough for the members to be personally affected. There is right to compensation in the latter two cases only.

In this case, the Court of Appeal found that the ordinary person would not have believed Mr. Arthur’s comments and would have thought that the offensive accusations had been diluted by the size of the group concerned, leaving intact the personal reputation and dignity of the drivers. This decision was appealed to the Supreme Court of Canada.

The Supreme Court began by reviewing the Quebec law of defamation, where “…an attack on a person’s reputation can involve allegations of fact or merely offensive and insulting comments. In Quebec Civil Law, it does not matter whether the assertions are made in writing, orally or through images or gestures or whether they attack another person’s reputation directly or by intimidation or innuendo”. The concept of defamation “requires that the right to the protection of reputation be reconciled with the right to freedom of expression, since that which belongs to the former is generally taken away from the latter”. Freedom of expression is guaranteed by the Canadian Charter of Rights and Freedoms and is “one of the pillars of modern democracy, in that it allows individuals to become emancipated, creative and informed, encourages the circulation of new ideas, allows for criticism of government action and favours the emergence of truth”. The right to the safeguard of reputation is guaranteed by Quebec’s Charter of Human Rights and Freedoms and the Civil Code of Quebec. In addition, since good reputation is related to dignity it is also tied to rights protected by the Canadian Charter.

There is no specific form of action for punishing defamation in Quebec law. Defamation actions come under the general system of civil liability, which requires that the plaintiff demonstrate a fault committed by the perpetrator, an injury suffered by the victim and a causal connection between the two. In this case, fault and causal connection were not in issue and the Court confined its analysis to the determination of injury, dependent on the purely subjective emotions or feelings of the person who has allegedly been defamed. If comments could be shown to be injurious simply by referring to one’s feeling of personal upset, humiliation, mortification, vexation, indignation or sadness or to the fact that one’s sensibilities or feelings have been offended, hurt or even trampled on, little would be left of freedom of opinion and expression. The very concept of defamation would also become entirely dependent on the particular emotions of each individual.”

The Court then went on to outline the requirements for making a case for defamation in circumstances where comments have been made about a group of people. Under Quebec law the plaintiff must first establish that a personal injury has been sustained. Except in specific cases identified by legislation, a group without juridical personality does not have the necessary capacity to be a party to an action. Second, a right to the protection of reputation must be demonstrated and a group without juridical personality does not have the right to the safeguarding of its reputation. Third, the injury is compensable only if it is personal to the plaintiff. The purpose of compensation is to put the victim back in the situation he or she was in prior to the injury. Consequently, an individual will not be entitled to compensation solely because he or she is a member of a group about which offensive comments have been made. At the same time, however, “…the victim does not have to be expressly named or designated to be able to bring an action in defamation. The attack does not have to be specific or particularized. The person who made the impugned comments cannot avoid liability by hiding behind the fact that he or she used general terms applying to a group. Attacks on a group may in fact personally affect some or all of the group’s members. While the injury must be personal, it does not have to be unique, that is, different from the injury sustained by the other members of the group. The reputation of more than one person may be tarnished by the same wrongful comments…”

In order for the members of a group to make out a case for defamation, they must prove that an ordinary person would have believed that each of them personally sustained dam-

(Continued on page 3)
Group Defamation (continued)

Vandalism Includes Wanton Disregard

The Supreme Court of British Columbia finds that moisture damage resulting from a “grow-op” carried on by tenants may not have been deliberate but was wanton disregard, such that the homeowner’s vandalism coverage should respond.

Ms. Hanlon owns a pleasant home in the Town of Salmon Arm, British Columbia. She had the unfortunate experience of leasing it to tenants who used the house to cultivate marijuana. When she recovered possession of her home there was significant damage as a result of the grow operation. Faucets had been replaced with outdoor hose bibs and holes had been punched in the walls to allow irrigation hoses to pass through them. Wallpaper was lifting and carpet was stained due to excessive humidity.

Ms. Hanlon reported the problems to her insurance company, ING Insurance Company of Canada (ING). ING appointed an adjuster who advised Ms. Hanlon that the claim had been processed as vandalism by her tenants but that damages resulting from poor tenant maintenance or caused by condensation, mould or mildew were not covered. The cost of repairing the physical damages such as the holes in the walls and destroyed plumbing was estimated at $5,836.57. However, the moisture damage was assessed at $15,277.24 plus an additional $10,000.00 if testing detected mould.

The ING policy (“Policy”) was a specified perils policy, which provided insurance against “direct loss or damage caused by ... vandalism or malicious acts”. There was no mould or mildew exclusion, so the issue was whether the damage resulting from excessive heat and moisture was caused by vandalism.

ING took the position that the heat and moisture damage was caused by poor tenant maintenance and/or wear and tear, which were not covered under the Policy. ING said that in order for an action to amount to vandalism, there must be a wrongful intention accompanying the act of destruction. In this case there was clearly an intention to cut through the walls but no wrongful intention to cause the moisture damage. The Court began by setting out the well-settled principles to be applied in construing insurance policies:

1. The court must search for an interpretation from the whole of the contract that promotes the parties' true intent at the time of entering into the contract; (2) Where words are capable of two or more meanings, the meaning that is more reasonable in promoting the intention of the parties will be selected; (3) Ambiguities will be construed against the insurer, often by use of the contra proferentem rule; (4) An interpretation that will result in either a windfall to the insurer or an unanticipated recovery to the insured is to be avoided; (5) Coverage provisions should be construed broadly and exclusion clauses narrowly; (6) The desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

The Court disagreed with ING’s argument, citing case law which has established that vandalism need not necessarily be deliberate. It is sufficient that it be “wanton”, which implies a reckless disregard for the rights of others. In this case the tenants, in turning a rental home into a greenhouse and conducting a grow operation, were clearly wanton in that they showed a reckless disregard for the owner’s rights. It was “...inapt to characterize the damage from such acts as mere wear and tear or poor tenant maintenance”.

ING also argued that the damage was not directly caused by vandalism because there was a chain of events leading up to the damage. The chain began with the excessive use of water and high temperatures to irrigate and create the optimum environment for the marijuana and ended with damage to the home. Again, the Court disagreed. The cases cited by ING dealt with exclusions and the application of exceptions within the exclusions. Furthermore, the exclusions in issue in those cases related to the interpretation of phrases such as “unless directly caused by a peril not otherwise excluded herein”.

In this case, it was not an exclusion which was at issue but an insuring agreement, which must be construed broadly. Furthermore, the word “direct” was used in the insuring agreement as an adjective to describe the damage or loss and not as an adverb to describe or modify the verb “caused”. The Court concluded that it could see nothing in the wording of the Policy to introduce any restriction of the application of the ordinary meaning of the word “caused”. ING could have written a policy that used “directly caused” language or could have excluded coverage for mould, however caused. It did neither, and on the facts of this case the moisture damage was covered under the insuring agreement relating to vandalism.

Bou Malhab v. Diffusion Métromédia CMR Inc., 2011 SCC 9 (CanLII)

Hanlon v. ING Insurance Company of Canada, 2011 BCSC 73 (CanLII)
Right to Instruct Counsel

The fact that a claim exceeded the available coverage under an insurance policy did not create a conflict of interest. Where the insurer had not raised coverage concerns or issued a reservation of rights, there was no reason for the insured to retain independent counsel at the insurer’s expense.

137328 Canada Inc. carries on business as a supplier and installer of security systems in Cornwall, Ontario. It operates under the name Alliance Security Systems (“Alliance”).

In October of 2003 Alliance entered into a contract with Richelieu Hosiery International Inc. (“Richelieu”) to provide monitoring services for a period of 5 years. In May of 2008 as a result of excessive snow load, the roof of Richelieu’s premises collapsed, causing damage in an amount alleged to be in excess of $7 million.

Alliance had a commercial general liability policy (the “Policy”) issued by Economical Mutual Insurance Company (“Economical”). The Policy provided that Economical would defend any action commenced against the insured alleging property damage and Economical accordingly appointed defence counsel to defend the action on behalf of the insured. Meanwhile a claims specialist with Economical advised the insured that the damages claimed exceeded the limits of the Policy, which was $2 million. As a result, Alliance retained its own independent counsel who advised Economical that he considered that there was a conflict of interest between Alliance and Economical and that his independent representation of Alliance should be funded by Economical.

Economical denied that there was a conflict of interest. It had not expressed any concerns with respect to coverage, nor had it issued a reservation of rights on behalf of the insurer. Nevertheless, counsel for Alliance instructed the counsel appointed by Economical not to take any further steps in the action and proceeded to issue his own Statement of Defence and Crossclaim. He then issued a Third Party Claim against Economical claiming indemnity for all claims made against Alliance in the main action as well as its legal costs of defending the main action.

Alliance argued that the insurance contract was silent as to whether the insurer or the insured has the right to choose and instruct defence counsel and that the principle of contra proferentem should apply and that the insured should have the right to appoint and instruct counsel. The Court disagreed, saying that the doctrine of contra proferentem applies when a contract is ambiguous and has been drafted by the opposing party but in this case the policy was not ambiguous.

There have been a number of cases that have held that where an insurance policy provides that the insurer has a duty to defend, this implies a corresponding right to control the defence. This right is not absolute and if a particular case creates a reasonable apprehension of conflict of interest, if counsel were to act for both the insurer and the insured, the insurer must surrender control of the defence to an insured who wishes to retain its own counsel and must pay for such counsel. However, even where there is a reservation of rights that is based on coverage disputes which have nothing to do with the issues being litigated in the underlying action, there is no conflict of interest. In this case Economical had not reserved its rights and had undertaken to provide a defence to Alliance. There was no reasonable apprehension of conflict of interest on the part of counsel appointed by Economical. Alliance was ordered to discontinue its third party claim against Economical and to surrender the defence of the action to Economical’s appointed counsel.

137328 Canada Inc. v. Economical Mutual Insurance Company, 2100 ONSC 1085 (CanLII)