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THE S.C.C. RULES THAT AN INSURER IS UNDER NO DUTY TO DEFEND PURSUANT TO A CLAIMS-MADE POLICY WHERE A POTENTIAL CLAIM IS DISCOVERED BUT NO CLAIM IS ACTUALLY ASSERTED DURING THE POLICY PERIOD



The Supreme Court of Canada's decision in *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada* deals with an insurer's duty to defend pursuant to a claims-made policy in circumstances where one or more claims are officially made after the policy period, but the potential for and details of other claims are brought to the insurer's attention during the policy period.

FACTS & BACKGROUND

The Jesuit Fathers of Upper Canada (the "Jesuits"), operated an Indian residential school from 1913 until 1958. In 1988, the Jesuits obtained a general liability policy which included errors and omissions insurance in relation to professional services rendered by them.

By January of 1994, the Jesuits had become aware of allegations that former students had been abused at the school. On January 27, 1994, a lawyer representing one former student wrote to the Jesuits, advising them that her client was making a claim against the Jesuits for abuse he suffered while attending the school.

On March 18, 1994, counsel for the Jesuits wrote to their insurer regarding the former student's claim, and indicated that the Jesuits could, based on their own investigation, face many similar claims in the near future. In his letter, the lawyer specifically identified nine other possible victims, the alleged offenders, the dates and locations of the acts of abuse, and the nature of the possible claims that became known during the investigation.

After receiving information about the former student's claim and the other potential claims, the insurer refused to renew the policy beyond September 30, 1994.

Approximately 100 further claims were made in relation to similar allegations of abuse after the policy expired. The Jesuits' insurer refused to defend these additional claims as they were only "first made" after the expiry of the policy and were therefore not covered by the policy.

The trial judge found that the Jesuits' insurer had a duty to defend them with respect to the claim that was actively made and the nine potential claims of which they were made aware during the term

of the policy, but not with respect to any subsequent claims. The Ontario Court of Appeal dismissed the Jesuits' appeal from the court below.

THE RULING

The Supreme Court of Canada dismissed the Jesuits' appeal, holding that their insurer had no duty to defend them in relation to the claims made after the expiration of the policy period. The Court also noted that the trial judge erred in concluding that the nine potential claims of which the Jesuits were made aware during the policy period were "claims made" within the policy.

While the policy did not define the term "claim", the Court held that the term "claims first made" in the scope of the insuring clause means that a claim must be actively made, as opposed to merely being discovered, during the policy period. This definition is consistent with the common law definition of the term "claim" which requires a third party communication to the insured of an intention to hold the insured accountable for damages. This intention may be conveyed directly by the claimant or through the claimant's representative, provided that the representative is acting with the claimant's knowledge and approval and the claimant's intentions are accurately conveyed.

The Court held that, with the exception of the one student who had actively made a claim during the policy period, an intention to hold the Jesuits responsible for damages was not communicated by any of the other former students or their representatives during the policy period. As a result, the Jesuits' insurer did not have a duty to defend the actions flowing from those claims.

IMPLICATIONS TO THE INDUSTRY

The decision in *Jesuit Fathers* impacts all insurers who provide claims-made policies that do not contain a definition of "claim". Now, an insurer can be confident in its decision to deny coverage where the insured has not received a communication within the policy period directly from a claimant or the claimant's representative that the claimant holds the insured accountable for damages. Insurers would also be well advised to examine their policy definitions of "claim" and compare those definitions to the common-law definition of claim adopted by the Court.

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