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INSURE UPDATES APRIL 2020

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Announcement:

We are pleased to announce that Eric Dolden, Lorne Folick, Steve Wallace, Brian Rhodes and Michael Libby were peer-reviewed and recognized by Lexpert as some of Canada's leading practitioners of commercial insurance litigation!

Markham (City) v AIG Insurance Co of Can: A Marked Departure from Precedent?

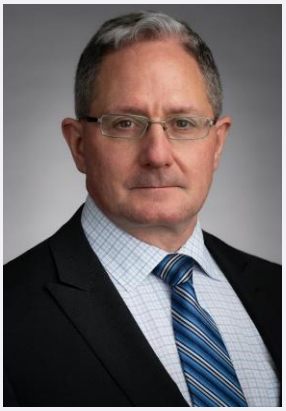
By Mark Barrett, DWF Toronto, Email: mbarrett@dolden.com

Recent reasons for decision of the Ontario Court of Appeal in *Markham (City) v AIG Insurance Co of Can*[1] address coverage for an Additional Insured pursuant to a Certificate of Insurance. The decision has created a stir in some quarters, with some calling the decision a marked departure from the Court of Appeal's earlier reasons in *Carneiro v Durham (Regional Municipality)*.[2] But is it?

In *Carneiro*, Durham had contracted Miller Maintenance to plow Durham's roads in the winter. The contract required Miller to include Durham as an Additional Insured under Miller's liability policy. Miller's policy with Zurich did so. An action was advanced against Durham and Miller relating to an accident on an icy road. Zurich claimed it had no duty to defend Durham because some allegations of negligence in the pleading were unrelated to Miller's winter maintenance work. The Court found Zurich was obligated to fund 100 per cent of Durham's defence, noting as follows:

> *The true nature of the claim was clearly expressed in the statement of claim – the deceased lost control of his car because it skidded on ice and snow on the roadway. That pleading, coupled with the allegation*

[1] 2020 ONCA 239
[2] 2015 ONCA 909.



> *that Durham and Miller failed to keep the road clear of ice and snow, relates directly to Miller's obligations under the contract. It engages Zurich's obligation to defend Durham, subject to any qualification in the policy.*

In *Markham*, the City of Markham ("the City") rented a hockey rink to a local hockey club. A young spectator was injured when a hockey puck flew into his face during a game. He sued both the City and Hockey Canada, of which the local hockey club was a member, for damages.

The City was insured by Lloyd's Underwriters ("Lloyd's") under a CGL policy. The City was also an Additional Insured to Hockey Canada's CGL policy with AIG Insurance Co of Canada ("AIG"). AIG accepted that it was required to participate in the City's defence but argued that Lloyd's had a concurrent duty to defend and to pay an equitable share of the City's defence costs. An application judge found that AIG was required to defend the entire action and pay 100 percent of the defence costs, subject to indemnification of costs, if any, from Lloyd's upon final resolution of the action.

The Court of Appeal allowed the appeal and held that both AIG and Lloyd's owed a duty to defend the City, and both had to share the City's defence costs equally, subject to a right to seek a reallocation at the conclusion of the action.

The Court first examined the allegations of negligence advanced in the pleading, noting that such allegations were all advanced against "*the City, Hockey Canada, or both*." In general, the allegations against both parties were that they failed to put in place adequate safety systems for spectators, failed to place signs or warnings of danger, and like kinds of allegations.

The Court then went on to consider the terms of each policy of insurance. Both policies provided standard CGL coverage for liability imposed by law because of "bodily injury," as defined.

The Lloyd's policy contained an Other Insurance clause that provided that the "*Insurer shall not be liable if at the time of any accident or occurrence covered by the Policy, there is any other insurance which would have attached if this insurance had not been effected, except that this insurance shall apply only as excess and in no event as contributing insurance ….*"

The Other Insurance clause in the AIG policy was a current standard CGL Other Insurance clause providing that the "*insurance afforded by this Policy is primary insurance*."

The Certificate of Insurance issued to the City confirmed that the City was added as an additional insured to the AIG policy, "*but only with respect to the operations of the named insured* [*i.e.*, Hockey Canada]." An endorsement to the AIG policy provided that the City was included "*as Additional Insured but only in respect of liability arising out of the Named Insured's operations*."

In its analysis, the Court of Appeal noted that the AIG policy only covered the City for "*liability in respect of [Hockey Canada's] operations*". All other

occurrences that caused bodily injury were not covered by the AIG policy but were covered by the Lloyd's policy.

Therefore, the Court found that the Other Insurance clause in the Lloyd's policy would apply to the extent, but only to the extent, that claims would also be covered by the AIG policy, and Lloyd's would be an excess insurer with respect only to those claims.

Because on the pleading some claims may not be covered by the AIG policy and may be covered *only* by the Lloyd's policy, Lloyd's had a duty to defend the City against the claims not covered by the AIG policy. In the result, both AIG and Lloyd's had a duty to defend, and it was equitable that each pay 50 percent, subject to a right of re-allocation at the conclusion of trial.

So is this really a marked departure from *Carneiro*? Not really.

The Court of Appeal based its decision squarely on the pleadings of negligence that were made equally against both defendants. Logically, based on the pleadings, the possible results at trial could be that any liability of the City arises solely out of its own operations, or solely out of Hockey Canada's operations, or some combination of both. But the coverage available to the City under AIG's policy was limited to "*liability arising out of the operations of*" Hockey Canada.

It naturally follows that, to the extent that one result at trial could be that any liability of the City arises solely out of its own operations and would be covered only under the Lloyd's policy, Lloyd's was not excess in that respect and had a duty to participate in the City's defence.

The pleadings in *Carneiro* were quite different. There, the Court found that the "*true nature of the claim was clearly expressed in the statement of claim – the deceased lost control of his car because it skidded on ice and snow on the roadway.*" There was no basis for finding on those pleadings that the Zurich policy would not have to respond to the entirety of any liability faced by the Region. All of the alleged potential liability was in respect of the very "operations" that Miller had contracted to perform for Durham.

Finally, *Carneiro* is silent upon, and never overruled, prior case law that found only a partial duty to defend an Additional Insured.[3] In that regard, it should never have been regarded as setting out a principle of general application with respect to the scope of the duty to defend an Additional Insured, which is almost invariably limited to "*liability arising out of the operations of the Named Insured.*"

[3] Such as *Atlific Hotels and Resorts Ltd.* v. *Aviva Insurance Company of Canada*, 2009 CanLII 24634 (ON SC), or *Papapetrou* v *1054422 Ontario Limited*, 2012 ONCA 506.

Take away

As ever, it is solely the specific pleadings under consideration and the terms and conditions of the specific policy of insurance that govern a liability insurer's duty to defend. Neither *Carneiro* nor *Markham* deviates from this rule. Wherever an insurer's liability to an Additional Insured is limited to the "liability arising out of the operations of the Named Insured," as usually is the case, the pleading must be examined with care to determine if there is any potential for a finding of liability against the Additional Insured that will not be based upon the operations of the Named Insured. If there is, then the Additional Insured's own insurer may also have to participate in the defence of the Additional Insured.

Unsigned Waivers: Reasonable Steps Required to Bring Waiver to Participants' Attention

By Dan Richardson, DWF Vancouver, Email: drichardson@dolden.com

In recent years, courts across Canada have been increasingly willing to enforce waivers of liability. However, the British Columbia Court of Appeal recently bucked the trend. In *Apps v Grouse Mountain Resorts Ltd*,[4] the Court of Appeal reversed the Supreme Court's dismissal of the claim of a plaintiff injured in a snowboarding accident, on the basis that the ski resort had not properly brought the waiver's terms to the plaintiff's attention.

The plaintiff attended Grouse Mountain to go snowboarding. He purchased his ticket from a ticket booth at the base of the mountain. An exclusion of liability notice was printed on a sign above the ticket booth, and on the back of the ticket the plaintiff received after payment (together, the "waiver"). The waiver included an "own negligence" clause, which excluded liability for any injuries caused by Grouse Mountain's own negligence. The plaintiff did not read the waiver, and he was not required to sign a waiver form.

Tragically, the plaintiff was rendered a quadriplegic as a result of an accident that occurred when he attempted an "XL jump" run at Grouse Mountain's Terrain Park.

In defence of the plaintiff's action for damages, Grouse Mountain relied on the waiver, and signs posted at the entrance to the terrain park, at the top of the mountain.

Trial Decision and Appeal

At a summary trial, the court dismissed the plaintiff's claim on the basis of the waiver and the warning signs posted at the terrain park. The key issue on appeal was whether Grouse Mountain had done all that was reasonable to bring the terms of the waiver to the plaintiff's attention.

[4] 2020 BCCA 78.

The Court of Appeal noted that the more onerous a waiver term (such as Grouse Mountain's "own negligence" clause), the more rigorous will be the requirement for what constitutes reasonable notice.

In considering whether the plaintiff had reasonable notice of the terms of the waiver, the trial judge relied, in part, on the signs posted at the terrain park, which were "clear and easy to read". On appeal, the court found that the trial judge erred in taking into account the warning signs at the terrain park, which the plaintiff could only have seen after purchasing his ticket. When these warning signs were taken out of the equation, the court was left with the trial judge's findings that the "own negligence" clause of the waiver was "*buried in a difficult-to-read section, among colons and semicolons, with no attempt to highlight it or emphasize it in any way, in a notice posted where it would be unreasonable to expect anyone to stop and read it.*"

The Court of Appeal concluded that Grouse Mountain had not done what was necessary to bring the own negligence clause of the waiver to the plaintiff's attention. In reaching its conclusion, the court contrasted the waiver with Grouse Mountain's season pass contract form, which includes a yellow box outlined in red indicating that it is a waiver, and also includes an "own negligence" clause set out in another marked box, in capital letters.

At the time of the accident, the plaintiff worked as a ski/snowboard technician at another ski resort, Whistler Mountain. He had signed a season's pass agreement at Whistler, which included a waiver with an "own negligence" clause. In addition, as part of his job, the plaintiff witnessed the signatures of customers who rented equipment and signed waivers. However, the plaintiff denied that he had ever read the waivers at Whistler.

The Court of Appeal accepted that a plaintiff's circumstances can be taken into account in waiver cases, particularly when considering knowledge of risk. However, the Court of Appeal disagreed with the trial judge's conclusion that the plaintiff had sufficient notice of Grouse Mountain's "own negligence" clause because of his experience as a ski/snowboard technician at Whistler. The Court of Appeal concluded that what the plaintiff did not read in the agreements at Whistler could not - as a matter of contract law - fix him with knowledge of what he did not read at Grouse Mountain.

Take Away

This case emphasises the distinction between signed and non-signed waivers. In the case of a signed waiver, the participant is presumed to know the terms of the waiver. As such, parties seeking to rely on waivers should obtain a signed form whenever possible.

If securing a signed waiver is not practical, a non-signed waiver remains an effective risk management tool, provided a party takes reasonable steps to bring it to participants' attention. In particular:

1. The language of waivers should be clear and easy to read.

2. Own negligence clauses should be highlighted and emphasized, *e.g.*, by using large capital letters, red text, marked boxes, etc.
3. Timing is crucial; waivers must be brought to a participant's attention before payment.
4. Participants must be given sufficient time to stop and read a waiver sign.

British Columbia and Ontario Courts Unite: Broad Waiver Need Not Specifcally Name All Causes of Action

By Cayleigh Shiff, DWF Vancouver, Email: cshiff@dolden.com

In *Nelson v British Columbia (Environment)*,[5] the British Columbia Supreme Court upheld a waiver of liability in favour of the defendant where the language was broad and did not specifically name the causes of action the plaintiff claimed.

The plaintiff sued the Province of British Columbia (the "Province") for damages arising out of a landslide and resulting debris flood (the "Flood") that was allegedly caused by the failure of a culvert located on provincial land. The plaintiff claimed that the Province was liable to him for damages under the provincial *Water Act*, and/or common law nuisance and negligence. The plaintiff's property, located on Lower Arrow Lake in the Kootenay region, was a part of an "off the grid" community that produced their own electricity and sustained their own water supply. The plaintiff's water supply and production of electricity was affected by the Flood.

In 2011, the plaintiff subdivided his land into three parcels. As part of the process, when the plaintiff subdivided his property, he signed a covenant containing an exclusion of liability clause (the "Waiver") in favour of the Province. Specifically, the covenant waived the plaintiff's right to bring an action against the Province with respect to loss caused by "flooding, erosion or some other similar cause", but did not specifically exclude negligence, nuisance, or actions pursuant to the *Water Act*.

The Province's primary defence to the plaintiff's action was that the Waiver should operate to nullify the plaintiff's claims. The plaintiff, however, argued that the Waiver did not include negligence, nuisance, or actions pursuant to the *Water Act*. He further argued that it only applied to *natural* flooding and that the Flood was caused by a failure of the manmade culver and fell outside the scope of the Waiver.

The Province argued that the Waiver encompassed all claims relating to flood or erosion, and that parties need not specifically list all types of claims in order to adequately protect against them. The Province relied on case law to support the proposition that if a waiver is worded broadly enough to exclude liability generally, there is no need to name each specific tort or cause of action.

[5] 2020 BCSC 479.

Ultimately, the court found the language of the Waiver clear and unambiguous in protecting the Province from all manner of causes of action relating to the flood or erosion. The court rejected the plaintiff's interpretation of the Waiver that it excluded negligence, nuisance, and *Water Act* claims. Instead, it preferred the approach taken by the Ontario Court of Appeal and Ontario Superior Court of Justice recent cases, which ruled that a broad exclusion of liability clause can effectively encompass all claims. [6]

Take Away

As with any contractual term, drafters must pay close attention to the language that shapes scope of the claims they wish to guard against in a waiver, release, or other exclusion of liability clause. Previously, courts were unclear about whether waivers needed to include specific causes of action in order to broadly shield the protected party from all future claims, making the drafters' jobs all the more difficult. Recently, the court in *Nelson* has clarified that properly drafted language can broadly bar all claims without specifically naming each cause of action. However, drafters must not become complacent and should continue to use direct, unambiguous language, even when drafting broad exclusions of liability clauses.

Consistency in policy wordings is vital: a caution on unlimited coverage

By Jonathan Weisman, DWF Vancouver, Email: jweisman@dolden.com

Consistency in policy wordings is important. But consistency between wordings and declarations is equally important – especially regarding policy limits. That is the biggest lesson in the British Columbia Supreme Court's ruling in *Surespan Structures Ltd v Lloyd's Underwriters*[7] - a case that touches on many essential issues: the significant of declaration pages, the allocation of limits to multiple insureds' competing claims, and the insured's entitlement to pre-judgment financing costs.

The defendant issued a project-specific professional liability policy ("Policy") for the construction of two health care facilities. The plaintiff was selected to design, supply, and install precast concrete components of the facilities' parkades. Defects were discovered in some of these components, and the plaintiff was called upon to investigate and remediate the work, incurring some $9,900,000, plus financing costs, in doing so.

The plaintiff sought to recover its costs of remediation under Policy. The policy wordings set out four coverages:

1. To pay damages arising from claims against the insured;
2. To pay the Insured's costs of remedying defects if the costs were incurred before substantial completion (called "Mitigation of Loss");

[6] *Antorisa Investments Ltd. v. 172965 Canada Ltd. (2006),* 82 OR (3d) 437 at para 40 (Ont SCJ); *Biancaniello v DMCT LLP*, 2017 ONCA 386.
[7] 2020 BCSC 27.

3. To pay defence costs; and
4. To pay certain supplementary amounts.

The Policy's declarations specified that:

> "*Insurance is provided only for those coverages for which a specific limit of insurance is shown – on terms and conditions contained in the forms indicated*."

The declaration page specified a $10,000,000 limit for "*Professional Liability (Claims Made)*". It did not detail the separate coverages as the wordings did.

The defendant initially denied the plaintiff was an insured, but the plaintiff successfully obtained an order declaring both it and its design subcontractor to be insureds and setting out deadlines for both the proof of loss and the defendant's response to same. Meanwhile, another design subcontractor gave notice of claims under the Policy. This claim was resolved for an insurer payment of roughly $1,400,000, allocated as $900,000 paid to settle a claim against the insured subcontractor and $500,000 for Mitigation of Loss.

With respect to the plaintiff's claim, the defendant maintained three key objections:

1. That the policy limit of $10,000,000 applied;
2. That the payments to the other design subcontractor eroded the limit;
3. That the defendant's own claim expenses eroded the limit; and
4. That there was no coverage for the plaintiff's financing costs.

The case turned on two factors: (1) an inconsistency in the wording of the coverage obligations; and (2) whether the declarations' language was enough to impose limits on coverage.

The Court concluded that the $10,000,000 limit did not apply to the Mitigation of Loss coverage. The three other coverages' wording expressly stipulated that they were subject to available policy limits – Mitigation of Loss did not. That absence was, the Court concluded, consistent with the different nature of the Mitigation of Loss coverage. It insured the first-party risk of defects remedied during construction, and could be triggered absent a claim against the insured. For that reason, the policy's Limits of Liability Clause, which applied the specified limits to "CLAIMS made against the INSURED" was not enough to salvage the omission of limits from the coverage grant.

The defendant submitted that these deficiencies in the policy language were counteracted by the limits wordings in the declarations. As a general rule, the Court observed that declaration pages are subordinate to policy wordings, absent specific language to the contrary. The phrase "*on terms and conditions contained in the forms indicated*" agreed with this general rule. The policy wording clearly provided Mitigation of Loss coverage, and so the absence of a coverage-specific policy limit could not remove it. The reference to "Claims" reinforced the Court's view that the policy limits applied only to the other, claims-based coverages.

The unique wording of the Mitigation of Loss coverage grant, combined with the absence of language addressing that grant in the declarations page, was fatal to the defendant's position – Mitigation of Loss coverage was not subject to policy limits.

In the alternative, the Court made findings worth noting on the other issues:

1. Claims could erode limits once they crystallized.
2. Some of the defendant's claims would have been deductible from limits, and for purposes of competing insureds' claims, would be deductible as individually incurred.
3. While financing charges were not compensable, they could be awarded as compensatory damages for a breach of the duty of good faith. Given that timelines for adjusting the loss had previously been established by court order, the Court concluded that compensatory damages equal to the plaintiff's financing costs from that court-ordered deadline to date was appropriate.

Take away

Consistency in wordings is vital. Remember that coverage grants will be interpreted broadly. If only some grants of coverage reference policy limits or exclusions, the rest will prove more generous than underwriters expect.

Importantly, declarations pages cannot be relied on to limit coverage unless their language clearly meshes with and overrides the policy wording. Aligning declarations language with policy wordings is critical – generic terms like "claims" are not enough if they are not consistently used in both the declarations and wordings.

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