Insurance & Reinsurance - Canada

Supreme Court Helps to Interpret Insurance Policies

Contributed by **Lang Michener LLP**

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A recent case demonstrated the importance of knowing and understanding insurance policies and ensuring that policies are appropriate to the insured's needs. In this case a claims-made policy was in dispute. Some of the claims made by the insured were found to have been preceded by valid notifications of these claims, which required the insurer to indemnify the insured. The court's ruling turned on the precise details of the insurance policy. The implications of this judgment illustrate the importance of knowing and understanding your insurance policy. As with many insurance cases, millions of dollars may be at stake.

Types of Insurance Policy

Two general types of insurance policy are available that provide coverage to insureds (eg, guaranteeing a defence and providing partial or full indemnification). Claims-made policies cover insureds according to when a claim is filed by a third party against the insured. If the claim is made during the policy period, the insurer is required to indemnify the insured, regardless of when the act giving rise to the claim occurred. Claims-made policies offer a degree of certainty to insurers: after the expiration of the policy, the insurer knows that no new liabilities may be incurred and it can calculate required reserves and future premiums with extra certainty.

In contrast, occurrence-based policies cover insureds according to when the act giving rise to the claim occurred. If the act occurred during the policy period, the insurer is required to indemnify the insured. Occurrence-based policies offer insurers a different sort of predictability: the insurer knows the term during which it is liable for coverage, giving it time to work with insureds on their business processes to try to mitigate risk as much as possible.

Other policies - such as those which blend elements of claims-made and occurrence-based policies - also exist. However, claims-made and occurrence-based policies are the two principal types of insurance policy.

Supreme Court Interprets Claims-Made Policy

The Supreme Court of Canada's recent ruling in *Jesuit Fathers of Upper Canada v Guardian Insurance Company of Canada* adds new context to the treatment of claims-made policies.

Background

From 1913 to 1958 the Jesuit Fathers of Upper Canada operated and administered a school in Spanish, Ontario. The school was operating under the federal policy to educate and assimilate Aboriginal children in Canada. The school closed in 1958.

As early as 1988 rumours and news articles suggested that improper activities - including harsh discipline and sexual abuse - took place at the school. In January 1994 a lawyer informed the Jesuits of a claim by her client, who alleged physical and sexual abuse, and offered to settle the claim. By the end of January 1994 the Jesuits knew of other general claims of abuse at the school.

Counsel for the Jesuits wrote to the Jesuits' insurer on March 18 1994, advising the insurer of the possibility that the Jesuits may, in the near future, face claims other than that of the January letter. After the conclusion of the term of the insurance policy, approximately 100 additional claims were made, making allegations similar to those outlined in the March letter, including claims of abuse resulting from the lack of proper supervision. Even though the claims themselves were made after the conclusion of the

Jesuits' insurance policy, the Jesuits sought indemnification against these claims as the general facts underlying the claims were made to the insurer during the policy period.

Insurance policy

The Jesuits had purchased a general liability insurance policy from two insurers, which provided insurance with respect to professional services offered by the Jesuits (eg, at the school) and expired on September 30 1994. The policy was a claims-made policy that differentiated between a 'claim' and a 'circumstance or occurrence'. This distinction was made in various sections of the policy.

Supreme Court decision

Prior case law has established that a claim requires a clear communicated intention by an alleged victim to hold the insured responsible for certain damages. The required communication, at minimum, is a clear intention by the third party to hold the insured responsible for the damages. This clear intention could include a demand for compensation or another form of reparation.

The Supreme Court found that with the exception of the January letter, the notification given to the Jesuits did not meet the standard of a claim, as these notifications did not include an intent to hold the insured responsible for specific damages. The Jesuits' general knowledge of events that may have given rise to potential claims did not, of itself, constitute a claim. As a result, there was no duty for the insurers to defend against any other claims against the Jesuits, as the duty to defend relates only to claims and complaints that might fall within the coverage of a policy. The Supreme Court held that while the general circumstances giving rise to the other claims were known to the Jesuits prior to the expiration of the policy and were communicated to the insurers, the specific claims were made only after the expiration of the policy. Since the policy covered claims and not circumstances, there was no coverage under the policy for these later claims.

The Supreme Court also noted that a provision known as a 'notice of circumstance clause' is available in some commercial contexts. The notice of circumstance clause permits an insured to report, during the policy period, circumstances that may give rise to future claims. Any claims based on circumstances brought to the attention of the insurer, but made after the expiry of the policy period, are deemed to be made during this period. As the policy did not include a notice of circumstance clause, even though it was commercially available upon the last renewal, the Supreme Court inferred and determined that the Jesuits did not desire this coverage to be included in the policy. In the Supreme Court's view, a refusal to take on additional coverage (eg, the notice of circumstance clause) is an implied rejection of the terms of this coverage and bars the insured from claiming these terms at a future date.

Comment

In the *Jesuit Case* the Supreme Court's final decision turned on the precise details of the insurance policy. Notification to the insurers required knowledge and receipt of a formal intention by the alleged victims to hold the insured responsible for damages. However, it was crucial for the insured that the notification given to the insurer was clear to a reasonable person and related directly to the ultimate claim.

With this case law in mind, insurance companies and insureds are advised to:

- discuss the offerings of insurance companies and clients' business needs to ensure that the most appropriate insurance is being used in each situation;
- ensure that all notifications are clear and appropriate and meet the standards set out in insurance policies;
- keep track of timelines in the policy (including policy expiry and notification dates) to verify that claims and notices are made within the prescribed limits; and
- consult with a lawyer when negotiating insurance contracts, making or reviewing notifications or claims, or if in doubt about legal rights.

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