February 29, 2016

I. INSURANCE ISSUES

Future CPP benefits fall under the definition of "any policy of insurance" and are therefore deductible from amounts payable by SEF 44 insurers

Portage LaPrairie Mutual Insurance Company v. Sabean, 2015 NSCA 53, per Scanlan, J.

I. FACTS AND ISSUES

The respondent was involved in a motor vehicle collision and commenced an action under the SEF 44 endorsement in his insurance policy for actual damages that exceeded the amount of payment by the tortfeasor in the settled claim. The parties disagreed as to whether the amount paid by the insurer should be reduced by deducting CPP disability benefits the respondent would receive, based on the meaning of the phrase "any policy of insurance" in the Endorsement.

The trial judge determined that the CPP disability benefits were not to be deducted. The insurer appealed.

II. HELD: Future CPP disability benefits are deductible from amounts payable by SEF 44 insurers

1. Is this term "any policy of insurance" ambiguous and therefore *contra proferentum* applies?

(a) The trial judge cited a New Brunswick Court of Appeal case that found CPP disability benefits are not deductible from SEF 44 due to ambiguity.

(b) The Court found that there is no ambiguity based on general principles of contract interpretation, including the plain, ordinary and proper meaning of the words, the law in Canada at the time the SEF 44 became available, and its history

(i) The purpose of the SEF 44 is an indemnity policy of "excess insurance", limiting an insurer's liability to actual loss.

(ii) At the time the SEF 44 became available, the SCC had established that benefits payable pursuant to the CPP were paid pursuant to "any contract of insurance" based on another act (***Pacific Railway v. Gill***)

(iii) After ***Gill,*** SEF 42 was drafted which made no attempt to prevent double recovery. The SEF 42 was later withdrawn by the insurance industry because of the expanded coverage this resulted in, and was replaced with the more restrictive SEF 44

(c) The Court held that there is no real difference between the phrase "any *contract* of insurance" as considered in ***Gill***, and the phrase "any *policy* of insurance" in this SEF 44.

(i) The Ontario Court of Appeal had relied on ***Gill*** to find that CPP disability benefits are money paid under a "valid policy of insurance"

(ii) In Nova Scotia, the definitions of "contract" and "policy" suggest that there is no real difference in these words ("policy" is defined as "the instrument evidencing a contract")

(d) Because CPP benefits were found previous to the SEF 44 to be "of the same nature as contracts of insurance"; the wording is clear in the SEF 44 that it is excess insurance, not allowing for double recovery; and there is no importance to the use of the word "policy" rather than "contract", there is no ambiguity in this clause.

(i) Therefore the trial judge erred in adopting the reasoning from the NBCA case

(e) The appeal was allowed and the matter was remitted to the trial judge to determine the value of the respondent's future CPP disability benefits that are to be deducted from the amount payable to him by the insurer.

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"Dependent Relative" in an SEF 44 policy requires proof of financial dependence

***Bilg v. Unifund Assurance Company*, 2015 ABQB 779**, per Pentelechuk, J.

I. FACTS AND ISSUES

The plaintiffs Gurchet Singh Bilg ("Gurchet"), Harkamal Singh Rasode ("Harkamal") and Sukhsimrit Singh ("Suksimrit") were injured in a motor vehicle accident and commenced an action against the drivers/owners of the other vehicle. In the tort action the plaintiff Mandeep Bilg ("Mandeep"), who was Gurchet's wife, sued for loss of consortium. Harkamal was Gurchet and Mandeep's brother-in-law. Suksimrit was Harkamal's brother.

The plaintiffs also commenced an action against State Farm, which had issued a policy to Harkamal for the vehicle involved in the accident. The policy contained an SEF 44 Endorsement with limits of $1,000,000.00. That action was ultimately dismissed when it was determined that the Endorsement was not triggered, as the policy limit of the tortfeasor's policy was also $1,000,000.00.

The plaintiffs then brought an action claiming indemnification from Unifund pursuant to an Ontario OPCF 44R Family Protection Endorsement, which was similar to the State Farm SEF 44. The Unifund policy had been issued to the plaintiff Mandeep for a different vehicle, with limits of $2,000,000.00.

Mandeep was residing in Ontario at the time of the accident. She and Gurchet had sold their home and she was in the process of moving to Alberta to join him. Gurchet was living in rented residence with Harkamal, Harkamal's wife, their daughter, Harkamal's parents and Suksimrit. No financial assistance was being provided by Mandeep or Gurchet to Harkamal and his family or Suksimrit before the accident. After the accident, Mandeep came to Alberta and she, Gurchet and their son moved into their own home.

The Unifund OPCF44R Endorsement provided coverage for "Eligible Claimants", defined as follows in s. 1.3:

> a) the insured person who sustains bodily injury; and
>
> b) any other person who, in the jurisdiction in which as accident occurs, is entitled to maintain an action against the inadequately insured motorist for damages because of bodily injury to or death of an insured person.

"Insured Person" was defined in the following terms in s. 1.6(a):

a) the named insured and his or her spouse and any dependent relative of the name [*sic*] insured and his or her spouse, while

i. an occupant of the described automobile, a newly acquired automobile or a temporary substitute automobile as defined in the Policy;

ii. an occupant of any other automobile except where the person leases the other automobile for a period in excess of 30 days or owns the other automobile unless family protection coverage is in force in respect of the other automobile; or

ii. not an occupant of an automobile who is struck by an automobile.

[Emphasis added by the Court.]

The plaintiffs Harkamal and Suksimrit were not the named insured or the named insured's spouse.

Unifund applied for summary dismissal of the claims of Harkamal and Suksimrit arguing that the Endorsement did not extend coverage to the two plaintiffs on the basis that they were not "Dependent Relatives" within the meaning of the Endorsement. The term "Dependent Relative" was defined in s. 1.2 of the Endorsement as:

(a) a person who is principally dependent for financial support upon the named insured or his or her spouse, and who is:

(i) under the age of 18 years;

(ii) 18 years or over and is mentally or physically incapacitated;

(iii) 18 years or over and in full time attendance at a school, college or university;

(b) a relative of the named insured or of his or her spouse, who is principally dependent on the named insured or his or her spouse for financial support

(c) a relative of the named insured or of his or her spouse who resides in the same dwelling premises as the named insured; and

(d) a relative of the named insured or of his or her spouse, while an occupant of the described automobile, a newly acquired automobile, or a temporary automobile, as defined in the policy.

BUT 1.3(c) and 1.3(d) apply only where the person injured or killed is not an insured person as defined in the family protection coverage of any other policy of insurance or does not own or lease for more than 30 days, an automobile which is licensed in any jurisdiction of Canada where family protection coverage is available.

Unifund argued that Harkamal and Suksimrit were not "principally dependent" on the named insured Mandeep or her spouse for financial support, nor were they residing in the same premises.

II. HELD: Application for summary dismissal granted; respondent plaintiffs not dependent relatives

1. The plaintiffs Harkamal and Suksimrit were held to be relatives of the insured, as they are connected by virtue of marriage. The term "relative" was not defined in the Endorsement. It was held that common law has dictated a broad and liberal approach to the definition, beyond just marriage, blood or adoption.

2. However, they were held not to be Dependent Relatives as per the Endorsement. The Court recognized four distinct scenarios involving Dependent Relatives outlined in the Endorsement, however only two that could possibly apply in this case.

(a) The first scenario is where the relative of the named insured or his/her spouse resides in the same dwelling premises as the insured. Section 1.3(c) refers to "a relative of the named insured or of his or her spouse who resides in the same dwelling premises as the named insured."

(i) Policy goes on to say that this only applies where the relative is not an insured person of any other policy of insurance or does not own an automobile licensed in any jurisdiction in Canada where family protection coverage available

(ii) The Court held that this subsection does not require an inquiry into financial dependence

(iii) In this case, one of the Respondent Plaintiffs would not fall under the category, as he was insured under the State Farm SEF 44

(iv) The named insured under the Unifund policy was living in Ontario at the time of the Accident, and was in the process of moving to Edmonton. The Court held that the words "residing with the named insured" suggested physically living in the same residence. There was no evidence to suggest the named insured Mandeep was even in the process of actually moving to the home the respondent plaintiffs were living in at the time of the accident, as evidenced by her leaving her 3 year old son in Ontario when she flew to Edmonton to attend to her injured husband. Therefore neither of the plaintiffs fell under this section.

(b) The second scenario is whether the claimants are principally dependent on the named insured or her spouse, per s. 1.3(b).

(i) The evidence showed that neither the named insured nor the spouse provided any financial assistance to the Respondent Plaintiffs, let alone them being principally dependent on them financially.

(ii) The Court rejected the respondents' argument that

"dependency" should be interpreted broadly so as to include social or culture dependency in circumstances where they lived as a family unit supporting each other culturally, financially and emotionally.

(iii) The Court held that the term "principally dependent for financial support" has been interpreted to mean more dependent on the named insured than any other source.

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A passenger who grabs the steering wheel is involved in the "use" or "operation" of the vehicle such that the loss is covered by the auto policy.

Felix v. Insurance Corporation of British Columbia, 2015 BCCA 394, per Bennett J., Saunders J. and Stromberg-Stein J.

I. FACTS AND ISSUES

The plaintiff ("Felix") was driving her car with her intoxicated boyfriend ("Hearne") in the passenger seat. Hearne repeatedly grabbed the steering wheel of the car while the car was in motion. The third time this occurred, Felix lost control of the vehicle. Hearne was killed and Felix sustained serious injuries. Felix sued Hearne's estate and obtained judgment against it in the sum of $791,950 plus costs. Felix had notified the no-fault insurer ICBC of this action, but ICBC chose not to participate. Felix then brought an action to recover its judgment from ICBC.

At trial, the court was asked to determine firstly whether Hearne was an "insured", and secondly whether his use of the vehicle caused Felix's injuries. The trial judge looked at sections 63 and 64 of the [Insurance (Vehicle)] Revised Regulation (1984), B.C. Reg. 447/83 [the "Regulations"], which read as follows:

> 63 In this Part, "insured" means …
>
> > (b) an individual who, with the consent of the owner or while a member of the owner's household, uses or operates the vehicle described in the owner's certificate,
>
> 64 Subject to section 67, the corporation shall indemnify an insured for liability imposed on the insured by law for injury or death of another or loss or damage to property of another that
>
> > (a) arises out of the use or operation by the insured of a vehicle described in an owner's certificate …

The trial judge found first that the definition of the word "use" in the context of sections 63 and 64 was broad enough to "cover the passive use of a vehicle by a passenger as a means of conveyance". However, the trial judge also felt bound to consider how these sections interact with section 66 of the Regulations. Section 66 specifically indemnifies a passenger "who, by operating any part of the vehicle while the vehicle is being operated by an insured, causes (a) injury or death to a person who is not an occupant of the

vehicle…".

The trial judge concluded that sections 63 and 64 could not be as broad as he initially thought since section 66 would in that case be rendered redundant.

Felix appealed this decision, arguing that the trial judge incorrectly applied the principles of statutory interpretation, overlooked the possibility that section 66 could be read harmoniously with sections 63 and 64, and incorrectly concluded that Hearne was not "using" the vehicle. Although ICBC approved of the trial court's ultimate decision, it took issue with the conclusion that (a) passive riding constituted "use" and (b) that Hearne's deliberate steering wheel grabbing was inseparable from his use of the vehicle as a passenger.

II. HELD: Appeal allowed; the use of the vehicle caused the Plaintiff's injuries

1. On appeal, the Court of Appeal for British Columbia (the "Court") allowed the appeal and found that the passenger was a "user" of the vehicle pursuant to Section 63(b), and the passenger's "use" of the vehicle caused the plaintiff's injuries.

2. The Court asked first whether it can be said that a passenger "uses" a car as that word is defined in the Insurance Act. Secondly, it considered whether there was "some nexus or causal relationship between Felix's injuries and the use of her vehicle by Hearne" (para 46).

3. In relation to the first question, the Court considered the history of the relevant legislative provisions. It noted that coverage originally extended to *every person* who *operates or drives* with consent, but that this was later narrowed in 1975 to *a licensed driver who operates or drives* with consent. The pre-cursor to section 66 was then added in 1983.

(a) In 1984, the legislature again amended the coverage provisions re-expanding them to include *an individual* who, with consent, *operates* the vehicle. In 2001 this was further expanded to include an individual who "*uses* or operates" the vehicle. The Court also considered the scheme of the *Act,* noting that the intention behind it was to ensure universal compulsory vehicle insurance.

4. The Court further added that determining the legal definition of the word "use" requires a context and fact specific inquiry. The Court referred to the Supreme Court of Canada's earlier analysis in ***Amos v. Insurance Corp. of British Columbia***, [1995] 3 S.C.R. 405 [*Amos*], where the Court found that the legislature's inclusion of the words "use and ownership", in addition to "operation" expanded the type of circumstances where coverage would apply.

(a) The first part of the two-part test from *Amos* requires that the "accident result from the ordinary and well-known activities to which automobiles are put" (para 37). The Court concluded on this point at para 41 that

…the concept of "use" when it refers to use of a motor vehicle is broadly defined. In my view, being a

> passenger in a motor vehicle is an "ordinary and well-known" use of a vehicle. I therefore agree with the trial judge that a passenger in a motor vehicle "uses" the motor vehicle when he or she is being transported from A to B. Use by a passenger may include other factual contexts, but it is only necessary to address facts presented in this case.

(b) The Court disagreed with the trial judge's conclusion that section 66 somehow negated this finding. Rather, the Court concluded that since section 66 was introduced before the legislature broadened the definition to "use and operation" the introduction of the word "use" in sections 63 and 64 was clearly intended to address situations outside of the scope of section 66.

(c) The second part of the *Amos* test requires that the court find a nexus or causal relationship between the injuries suffered and the "use, ownership or operation" of the vehicle. The Court adopted the reasoning formulated by the Supreme Court of Canada in ***Citadel General Assurance Co. v. Vytlingam***, 2007 SCC 46 (CanLII) and reworked it to apply in this situation, noting in para 48 that

> "[f]or coverage to exist, there must be an unbroken chain of causation linking the conduct of the user as a user of a motor vehicle to the injuries in respect of which the claim is made."

(d) The Court concluded, at para 50, that in this case,

> [w]hile a passenger, or user, in a moving automobile, Mr. Hearne grabbed the steering wheel causing the accident that led to Ms. Felix's injuries. It matters not for these purposes that he did not intend to take control of the car. He intentionally (and negligently) grabbed the wheel while he was "using" the vehicle. As a result, Ms. Felix suffered injury. There is, in my view, a clear unbroken chain of causation from his negligent act to her injuries. I would not disagree with the trial judge on this point.

5. The Court accordingly allowed the appeal and found that the ICBC was liable for indemnification of Hearne's Estate for the judgment obtained by Felix.

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II. LIABILITY ISSUES

A sports liability waiver provides an effective defence in a fitness facility accident where appropriately brought to the attention of a sophisticated Plaintiff

Urbanson v. Western Canadian Place, 2016 ABQB 32, per Master Prowse

I. FACTS AND ISSUES

The Plaintiff was injured while using a treadmill that malfunctioned. She sued HSG Health Systems Group Limited as the operator of the fitness centre where this took place, pleading in negligence and occupiers' liability. The Defendant HSG applied for summary dismissal of the case, based on a signed waiver it had obtained from the Plaintiff.

The form of waiver was contained on its own separate page under a bolded heading, in large font and capital letters reading: "**INFORMED CONSENT AND AGREEMENT AND RELEASE FORM**". Just below that heading, the Waiver provided as follows, in bold font: "**Please read carefully before signing**."

The waiver contained the following wording (In non-bolded font, the same size as the balance of the document other than the heading):

> I, for myself, my heirs, executors, and administrators, release and forever discharge ... HSG ...and each of their successors and assigns and each of their affiliates, directors, officers, employees, agents, member instructors and independent (collectively called the "Released Parties") from any claims, actions, costs, expenses and demands in respect of death, injury, loss or damage to my person or property (Including without limitation, under the Occupiers' Liability Act) wherever or however caused, including, without limitation, the negligence of one or more of the Released Parties, arising out of or in connection with the use or intended use of Western Canadian Place Fitness Centre.

[Emphasis added by the Court]

The final paragraph, just above the Plaintiff's signature, provided as follows:

> I declare that I have read, understood and agree to the contents of this INFORMED CONSENT AGREEMENT & RELEASE FORM in its entirety, and I have signed it voluntarily.

The Plaintiff could not positively swear that she had not read the form but acknowledged that she signed it. She could not recall the circumstances of its signature.

HSG's witness did not have any recollection of engaging in any discussion about the signing of the release. He testified to having followed a standard procedure for signing up a new member to the fitness club. His procedure was to give a tour of the club, to provide the perspective customer with a twelve-page bundle of documents, one page of which was the one-page waiver form and to ask the customer to read the material. He would indicate that he would answer any questions that the customer might have. He did not claim that his standard procedure included drawing attention to the form of waiver or to say anything about the form of waiver with a perspective new customer. The Court noted that "he appeared to allow the waiver form to speak for itself (unless a perspective customer chose to ask questions about it)."

Neither the HSG witness nor the Plaintiff could recall any discussion about the waiver form in question.

The Plaintiff had been a paralegal for fourteen years, with respect to tax, corporate, real estate, personal injury and oil and gas law.

II. HELD: For the Defence; Summary Judgment granted and case dismissed

1. The Court held that the case was capable of being resolved by way of summary proceedings because the record before the Court allowed an adjudication and disposition that could be fair to both parties for ***Whitecourt Power Limited Partnership v. Elliott Turbo Machinery Canada Inc.***, 2015 ABCA 252. Given that neither the Plaintiff nor the Defendant's representative had any recollection of what happened when the waiver was signed there was "no suggestion that a trial judge would have any better evidence before them in order to adjudicate the effectiveness of the release" (paragraph 27).

2. The Court held that the party asserting waiver bears the onus of establishing its effectiveness: ***Gallant v. Fanshawe College of Applied Arts & Technology***, 2009 Carswell Ont. 5734, at paragraph 25.

3. The Court summarized the law with respect to the obligation on a released party to bring the fact and contents of a liability waiver to the attention of the signing party:

> [10] The issue of whether HSG owed a common law duty to bring the waiver to the attention of the plaintiff in order for it to be effective was dealt with by McLachlin C.J.S.C. (as she then was) at para. 24 of ***Karroll v. Silver Star Mountain Resorts Ltd.***, 1988 Carswell BC 439, [1988] B.C.J. No. 2266:
>
> > It emerges from these authorities that there is no general requirement that a party tendering a document for signature take reasonable steps to apprise the party signing of onerous terms or to ensure that he reads and understands them. It is only where

> the circumstances are such that a reasonable person should have known that the party signing was not consenting to the terms in question, that such an obligation arises. For to stay silent in the face of such knowledge is, in effect, to misrepresent by omission.

4. In addition, in occupiers' liability cases, section 8(1) of the *Occupiers' Liability Act*, R.S.A. 2000 c. 0-4 was held to require the released party to take reasonable steps to bring the liability exclusion to the attention of the signing party.

5. The Court referred to a number of British Columbia cases that held liability waivers to be effective where they were on a separate piece of paper, signed by a relatively sophisticated party, clearly labeled as a release or waiver and where the signing party was given sufficient time to read the waiver: ***Karroll v. Silver Star Mountain Resorts Ltd***., 1988 Carswell BC 439 (B.C.S.C.); ***Arndt v. Ruskin Slo Pitch Assn.***, 2011 Carswell BC 2939; ***Mayer v. Big White Ski Resort Ltd***., Carswell BC 836 (BCSC); ***Loychuk v. Cougar Mountain Adventures Ltd.***, 2011 BCSC 193; ***Ocsko v. Cypress Bowl Recreations Ltd.***, 1992 CanLII 671 (BCCA); ***Clarke v. Action Driving School Ltd.***, 1996 Carswell BC 1004 (BCSC). The Court noted that a waiver has been held to be ineffective where the evidence established that the Plaintiff had not read it (***Crocker v. Sundance Northwest Resorts Ltd.*** [1988] 1 SCR 1186; or where the waiver clause was not on a separate page and printed in small font (***Parker v. Ingalls***, 2006 BCSC 942) or where the waiver clause was hidden within a larger document and the signing party was not given the opportunity to read it.

6. The Court held that the two issues that have to be considered in determining the validity of a waiver are:

> (a) Does the wording of the waiver encompass the Plaintiff's claim?; and
>
> (b) If so, do the circumstances surrounding the execution of the waiver prevent the Defendant released party from relying on it?

7. In this case, the Court held that: "[o]n its face, the wording of the waiver encompasses the claims asserted by Ms. Urbanson" (paragraph 9).

8. The Court found the Plaintiff to be a sophisticated party with insight into what she was signing:

> [17] The plaintiff has been a paralegal for fourteen years in the areas of tax, corporate, real estate, personal injury and oil and gas law. Common sense would indicate that more efforts need to be taken to communicate the import of a release to a less sophisticated person than to a sophisticated person. Given the plaintiff's work experience it is apparent that she would be considered a sophisticated person as her background would give her insight as to the importance of signing a release.

9. The Court held that the fitness facility was "one of moderate risk" where the risk of injury from using the treadmill could be foreseen, but which involved a lower inherent risk than other activities such as skydiving, ice diving, snowmobile racing or ice cave climbing. The Court held that "the more dangerous the activity the more effort should be taken to bring the nature in effect of the waiver to the attention of the participant" (paragraph 18).

10. The Court held that the Defendant health club had made the reasonable efforts required to bring the import of the waiver to the Plaintiff's attention:

> [23] There was nothing in the evidence to suggest that the plaintiff was pressured, rushed or otherwise prevented from reading the waiver.
>
> [24] Given the relative sophistication of the plaintiff and the formatting of the waiver, it is my view that HSG fulfilled its duty to make reasonable efforts to bring the import of the waiver to the attention of the plaintiff. Or, to use the language in the ***Karroll*** decision, supra, there were no circumstances to indicate to HSG that the plaintiff was not consenting to the terms in question.

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III. QUANTUM/DAMAGES ISSUES

Every day and reasonably safe playground activities will not expose a Defendant school district to occupier's liability.

Thompson (Litigation guardian of) v. Saanich (District), 2015 BCSC 1750, per Baird J.

I. FACTS AND ISSUES

The Plaintiff was an 11 year old girl enrolled at a day camp offered by the Defendant, the Corporation of the District of Saanich (the "District") at the Gordon Head Middle School in Victoria, B.C. During morning recess, the Plaintiff was in the playground playing a game called Grounders (a variation of tag played on playground equipment) with a number of children. While playing the game, the Plaintiff fell from a piece of playground equipment and struck her head.

The game was improvised and the children decided to play it; it was not organized by the District's employees. Thompson and the other children had played Grounders the previous day and on other previous occasions without incident. At the time of the incident, the program assistant supervising the playground knew the children were playing Grounders and did not intervene to stop them. Indeed, the assistant's evidence was that he had played the game as a child and considered it harmless.

Thompson sued the District in negligence under the *Occupiers Liability Act*, RSBC 1996, c 337 (the "OLA")

II. HELD: Action dismissed, District was entitled to costs if demanded; no fault on the District for this unfortunate accident.

1. The Plaintiff failed to establish that the District exposed the Plaintiff to an unreasonable risk of foreseeable harm.

(a) The District owed the Plaintiff a duty of care not to expose her to an unreasonable risk of foreseeable harm. The standard of care under the *OLA* is the same as common law, which is to be measured on an objective standard.

(b) The game, Grounders, fell within an everyday and reasonably safe range of playground activities for someone with the Plaintiff's age and experience.

(c) The Court took judicial notice of the fact that, in the overwhelming majority of cases, no mischief comes from such innocent pleasures as games involving pursuit and evasion commonly played by children.

(d) The risk of harm inherent in such games is sufficiently remote that to permit children to play them is not unreasonable.

2. The Plaintiff failed to establish that the District failed to adequately supervise the playground activities in which she was engaged

(e) The District's duty to the Plaintiff did not include the removal of every possible danger that might arise while she was in the care of its employees.

(i) The duty only required that the District (and its employees) protect the plaintiff from unreasonable risk of harm.

(f) A supervisor was close at hand, minding the children through recess and was doing so diligently and conscientiously.

(i) There was no evidence that any of the children behaved recklessly or aggressively or there was anything hazardous about their manner of interaction.

(ii) The Plaintiff simply moved backwards and lost her footing.

(g) While the District is vicariously liable for the negligent conduct of its employees, it is not strictly liable for any and all injuries sustained by children in its temporary care or control.

(i) The Court stated that "…the consequences of the plaintiff's misadventure cannot transform the District into a no-fault insurer…" (at para 22).

(h) Perfection is not the standard of care to be discharged by the District's employees.

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IV. PRACTICE ISSUES

Costs per Schedule C can be increased for inflation and subjected to a multiplier for complexity of the case

RVB Managements Ltd. v. Rocky Mountain House, 2015 ABCA 304, per Paperny, Watson, Slatter JJ.A.

I. FACTS AND ISSUES

This was a $25 million tort claim against a municipality. It culminated in a long, 27-day trial over two years. The Plaintiffs ended up getting nothing. They appealed and lost. The parties could not agree on costs. The trial judge made a costs award that 1) adjusted the costs for inflation and 2) used a column multiplier, since the amount at issue was several times the $1.5 million Column 5 number.

II. HELD: Inflation adjustments and column multipliers are permissible

1. *Inflation*

(a) The current amounts were enacted in 1998 and haven't been changed. Some trial judges have allowed indexing for inflation; some haven't. There has been no direct appellate ruling on the issue.

(b) The Plaintiffs made three arguments. First, they contended the fact the 2010 Rules didn't update the 1998 amounts means they implicitly "confirmed" them. The Court rejected that. They noted the Alberta Law Reform Institute specifically said that the amounts in Schedule C were "beyond the scope of the Rules of Court Project". The Court also observed that the *Interpretation Act* "displaces any assumption that the repeal and substitution of an enactment was intended to either confirm or change the prior law". In fact, at the time of the re-enactment in 2010, many judges were already adjusting for inflation. The "re-enactment should," the Court found, "be interpreted on the assumption that, where appropriate, that practice could continue."

(c) The Plaintiffs then cited a number of cases which had declined to adjust for inflation. The Court of Appeal noted some of these merely upheld, without discussion, costs awards which hadn't been adjusted. In other words, the Court of Appeal didn't interfere with the trial court's discretion, but didn't rule on the

merits of adjusting at all. (E.g. ***Chisholm v. Lindsay***, 2015 ABCA 179).

(d) Finally, the Plaintiffs argued inflation has to be proven in each case by expert evidence. The Court said the basic fact of inflation—that "the cost of living varies over time," was "sufficiently notorious that notice can be taken of it", but agreed that "the exact amount of inflation is something upon which evidence should ordinarily be presented." They noted the Bank of Canada inflation calculator says the average increase in cost of living since 1998 is 39%. "While more exact evidence would have been desirable, the award of 25% for inflation does not demonstrate any miscarriage of justice."

2. *Column Multipliers*

(a) This was a $25 million claim. The current Schedule C Column 5 maxes out at $1.5 million. The proposed amended column from the Rules of Court Committee is up to $2 million. The trial court here doubled the column since the claimed amount was 10x the column maximum.

(b) The Court of Appeal said this was permissible, since R. 10.31(3)(b) specifically authorizes the trial judge to award "a multiple, proportion or fraction of an amount set out in any column of the tariff". Rule 10.33 lists the criteria to be considered, and includes in R. 10.33(1)(b) "the amount claimed and the amount recovered". They noted it is common to award multiples for various reasons and essentially endorsed that practice.

III. COMMENTARY

1. It is a bit surprising the Court failed to mention the Rules of Court Committee, which found in January a "broad consensus that the Schedule needs to be updated to reflect inflation, and the Committee will be recommending approximately a 35% increase in the assessable amounts and the different columns."

2. In light of the Rules of Court memorandum and this Court of Appeal decision, it is likely inflation will be claimed and awarded much more often.

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V. SURETY AND BOND ISSUES

The relationship between trust and lien claims under Provincial builders' lien legislation

Stuart Olson Dominion Construction Ltd. v. Structal Heavy Steel, 2015 SCC 43, per Rothstein, J.

I. FACTS AND ISSUES

Stuart Olson Dominion Construction Ltd. ("Dominion") was the general contractor of a football stadium in Manitoba (the "Project"). The owner of the Project was BBB Stadium Inc. (the "Owner"). Dominion entered into a subcontract with Structal Heavy Steel ("Structal") to supply and install structural steel work for the Project.

Dominion began withholding payments to Structal and stated it was setting off against the unpaid amounts for back charges it claimed resulted from delays attributable to Structal. In September 2012, Structal filed a builder's lien against the Project Lands for approximately $15 Million, consisting of unpaid progress payments, unpaid statutory holdback, and a large delay claim of its own. The lien resulted in the Owner not making further payments to Dominion.

In October 2012, Dominion paid into Court a lien bond in the full amount of the lien. This bond provided that if Dominion did not satisfy any lien judgment against it, the surety of the lien bond would pay, up to an express maximum, the amount of the lien judgment. Structal approved the bond and vacated its lien, which Dominion expected would result in the Owner releasing to Dominion the progress payments being held back by the Owner as a result of the lien.

Structal continued to demand payment from Dominion, asserting that Dominion was required to comply with the trust provisions of the Manitoba's *Builders' Lien Act*, CCSM c. B-91 (the "*MBLA*") and was not entitled to any set off against the funds held in trust. The trust provisions in the *MBLA* impressed any funds received by Dominion from the Owner with a trust for the benefit of Dominion's subcontractors (one of whom was Structal) and expressly prevented Dominion from appropriating or converting the received funds for its own use until all of its subcontractors had been paid.

In addition to demanding payment from Dominion, Structal also put the Owner on notice that if it paid the funds (currently being held back by the Owner) to Dominion, the Owner would expose itself to a breach of trust claim to be made against it by Structal. Under the *MBLA,* an owner is also subject to its own express trust obligations. This notice by Structal resulted in the Owner not making any further payments to Dominion, despite the discharge of Structal's lien.

Dominion refused to make any payments to Structal, arguing that Structal was fully secured by the lien bond, that there was no breach of trust, and that Dominion had a set-off against the monies claimed by Structal.

Dominion applied to the Manitoba Court of Queen's Bench for a declaration that it had satisfied its *MBLA* trust obligations to Structal, which declaration would then allow it to receive payment from the Owner. In response, Structal filed a motion requiring full payment of its past-due invoices, without deduction or set-off, upon Dominion receiving the funds from the owner.

Dominion's position was that it should not have to pay amounts twice, once into Court (in the form of the lien bond, for which it was paying a premium to its surety) for the removal of the lien, and then again to secure its trust obligations.

The Manitoba Court of Queen's Bench held that the filing of the lien bond extinguished the trust obligations of Dominion pursuant to *MBLA* and stated that Dominion could do as it wished with the funds once received from the Owner. The Court of Appeal overturned this decision and concluded that under the *MBLA,* subcontractors have two separate and distinct rights beyond the common law right to sue for breach of contract: the right to the statutory trust and the right to file a lien claim against the property.

II. HELD: Appeal dismissed: the filing of the lien bond did not extinguish the statutory trust conditions

1. The Supreme Court of Canada upheld the decision of the Manitoba Court of Appeal and affirmed that the *MBLA* provides two separate, legislative remedies to those who provide services or materials to a construction project: construction liens (section 13) and statutory trusts (sections 4 and 9). A contractor or subcontractor can have both a lien claim and a trust claim and these different remedies serve different purposes.

(a) The purpose of a lien is to "creat[e] charges against the land in favour of those contractors, suppliers and workers who can prove their claims" (at para. 19 citing ***Provincial Drywall Supply Ltd. v. Gateway Construction Co.*** (1993), 85 Man. R. (2d) 116 (MBCA) at para 47). Liens create considerable impediments to liquidity since a lien creates an encumbrance on the land. To address the barrier created by a lien claim, the *MBLA* provides for vacating the lien if alternative security is posted, pending resolution of the validity of the lien claim. Accordingly, the *MBLA* provides that the land can be freed from the lien encumbrance while simultaneously protecting the lien claim.

(b) Alternatively, the purpose of the statutory trust is "to help assure that money payable by owners, contractors and subcontractors flows in a manner which is in accord with the contractual rights of those engaged in a building project and that it is not diverted out of the proper pipeline" (at para 40 citing ***Provincial Drywall Supply Ltd. v. Gateway Construction Co.***, supra at para 47).

> (c) Trust claims are not extinguished by filing of a lien bond, as a lien bond only provides security for a lien claim. If a lien is invalid, any claim against a lien bond is extinguished and the lien claimant would then be unable to access to the funds guaranteed by the bond. However, a contractor or subcontractor may still have a trust claim. The existence of the trust remedy is unaffected by the filing of a lien bond, which is consistent with the *MBLA*'s provision that the contractor is barred from diverting trust funds for its own use until all subcontractors have been paid.

2. Dominion argued that there was a risk of double compensation where the lien and trust claims were for the same work, services, or materials. In response, the Supreme Court articulated the distinction between payment and security:

> To the extent that the lien and trust claims are for the same work, services, or materials, payment under the trust will eliminate the equivalent amount payable to satisfy the lien claim. In the present case, Structal acknowledges that, had Dominion paid the trust monies into court, there could have been a reduction in the amount of the lien bond by an amount equivalent to the monies paid into court. Dominion chose to provide security by way of a lien bond rather than payment of funds into court. […] It is true that [Dominion] paid premiums for that bond which are not recoverable, but that is simply the cost of the security which it chose to provide. Structal will not receive double payment. (at para 48-49)

3. The Supreme Court also explained that had Dominion decided to pay cash into Court instead of a lien bond, it would have avoided the problem of having to "pay twice", once to vacate the lien and once to secure its trust obligations, as a payment of the trust funds into Court would have provided security for the lien and complied with the trust obligations in the *MBLA:*

> There may be circumstances where a contractor will choose to maintain double security where there are lien and trust claims for the same work, services, or materials, by acquiring a lien bond while still holding trust funds. However, a contractor can avoid double security by paying cash into court pursuant to s. 55(2) instead of depositing a lien bond. The *BLA* provides that any owner, contractor, or subcontractor with trust obligations "shall not appropriate or convert any part of the trust fund to or for his own use or to or for any use not authorized by the trust" until one of the listed steps has occurred (ss. 4(3), 4(4) and 5(3)). Payment of the trust funds into court to vacate a lien, for the amount of the lien claim implicated by the trust claim, does not constitute an appropriation or conversion of the trust funds. The contractor is doing exactly what the *Act* requires — ensuring the monies are held in trust for the beneficiary. These funds remain impressed with the trust; should

the lien claim fail while the trust claim is outstanding, the cash would continue to be trust funds when returned to the owner, contractor, or subcontractor. So long as the trust funds themselves are deposited with the court, the funds are secure and the trust has not been breached. (at para 46).

III. COMMENTARY

This decision is a reminder of the existence of trust claims under provincial builders' lien legislation and confirms that such trust claims are independent of one's lien rights and remedies. Lien rights and remedies are subject to strict timing requirements. A lien claimant must be sure it complies with these timing requirements or it loses its lien rights and remedies. Trust claims are not subject to any such strict timing requirements and could be advanced well after subcontractor has completed its work and left the a project site.

It is critical to note that this case arose from a dispute governed by the Manitoba *Builders' Lien Act*. Provincial lien legislation varies between the provinces in many important ways. There are some important differences between the Manitoba *Builders' Lien Act* and the Alberta *Builders' Lien Act*. For example, the trust provisions in the Alberta *Builders' Lien Act* are much weaker:

1. An Alberta owner is never subject to any trust obligations (Structal could not have convinced an Alberta owner that it would be exposed to a breach of trust claim by releasing funds to its contractor);

2. No trust obligations arise unless a certificate of substantial performance is issued (If no certificate of substantial performance issued, then there are no trust obligations);

3. Only payments received after the certificate of substantial performance is issued are held in trust (typically this would only be the hold back and value of work completed after the issuance of a certificate of substantial performance);

4. There is no express language stating what can or cannot be done with trust funds, only that funds are held in trust (thus there is uncertainty as to the extent of the trust obligations);

5. The restrictions on the use of trust funds does not prevent a contractor or subcontractor from paying other subcontractors or suppliers on a project to whom money is owed; and

6. There are no penalty provisions for a breach of trust, whereas in the Manitoba *Builders' Lien Act* a breach of trust is a summary offence which a penalty of a fine up to $50,000 or imprisonment up to two years.

A trust claim in Alberta does not result in an encumbrance to land and does not prevent the flow of contract funds as a lien does. While a claimant may have both a trust claim and a lien claim, it is the lien claim which will continue to take on the most importance in the eyes of those higher up the contractual chain, as the registration of a lien prevents an owner from making any further payments (s. 18).

A contractor who receives a holdback payment after

the certificate of substantial performance is issued will be subject to trust obligations. While those obligations prevent it from spending or using that money for other purposes, these funds do not have to be paid anywhere specific, can be used to pay other subcontractors or suppliers on the project or can be held pending the resolution of a claimant's lien and trust claim subject to any claims for set-off that may exist. Practically, as long as a contractor receiving trust funds can make a subcontractor with a trust claim whole, there is unlikely to be any loss to that subcontractor.

It will be interesting to see the extent that this decision results in more payments of cash into Court versus posting of lien bonds into Court in Alberta. Payments of cash into Court as security have their own disadvantages as they are potentially subject to claims of other parties like the Canada Revenue Agency like occurred in ***Japan Canada Oil Sands Ltd. v. Stoney Mountain Steel Corp.***, 2001 Carswell Alta 732, 93 Alta. L.R. (3d) 54, 290 A.R. 251.

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