EDITOR’S INTRODUCTION

Borden Ladner Gervais LLP is pleased to present this fifteenth edition of the Canadian Insurance Law Newsletter for the benefit of our clients and others interested in this constantly evolving area of law. Our objective is to keep you abreast of recent trends and developments of significance on a wide variety of insurance law related topics.

This fifteenth edition canvasses recent developments in the use of surveillance evidence, the potential liability of bank agents and employees in the context of group life and disability insurance for borrowers in Quebec and, in our feature article, developments across Canada in Canadian environmental class actions. This edition also contains case comments and articles on the requirement of causation in tort claims, the meaning of the standard form "intentional or criminal act" exclusion, and the first Canadian judicial consideration of a pollution exclusion in the directors’ and officers’ insurance context.

We invite your comments and suggestions with respect to questions, topics or concerns of special interest that you would like to see addressed in future editions.

Keith N. Batten,
Toronto Office,
(416) 367-6103,
E-mail: kbatten@blgcanada.com
SUMMARY OF RECENT DEVELOPMENTS IN CANADIAN ENVIRONMENTAL CLASS ACTIONS

Canadian businesses are vulnerable to actions in respect of sound, smell and dust emissions. These claims are increasingly being advanced across borders and as class actions. This article discusses Canadian environmental class action developments during the past six months, by way of a cross-country check up.

Western Canada: Balancing of Interests

Canadian National and Canadian Pacific railways have been sued in respect of coal dust settling on properties adjacent to railway lines running to Vancouver from coal-producing areas. Class certification was refused (Roberts v. Canadian Pacific Railway Company (2006)) by the British Columbia judge. The proposed class was found to be unmanageable as it covered every person within 500 metres of track running some 1,200 kilometres. In the judge’s opinion, the severity of interference with property use could not readily be extrapolated from one owner to another within the proposed class.

In the same vein, an Alberta judge declined to certify a lake water class action (Paron v. Alberta (2006)). Six cottage owners brought the action on behalf of 600 "similarly-situated" landowners. They claim that thermal pollution from an electrical generating plant affects the lake’s water level and interferes with the use and enjoyment of their properties. The complaints range from excessive weed growth to poor water quality, unstable winter ice to reduced well yield. An unpleasant odour plea is also advanced. Interestingly, the Alberta judge held that the merits of the claim are relevant in assessing the appropriateness of the proposed class definition:

Here, the nature of the action – Rylands v. Fletcher, riparian and littoral rights, and nuisance – are causes of action in which proof of individual loss is a component of the determination of liability. Class members cannot be identified without first determining who suffered harm, and that determination is integrally dependant upon the merits of the action.

The law of nuisance requires assessment of harm suffered by each individual in relation to his or her property, by comparison with the
threshold of a reasonable person occupying the premises. The Alberta judge noted the conflict between those who wanted a higher water level and those who wanted it lower, concluding that individual issues relating to proof of liability in nuisance and interference with riparian rights would "predominate". The judge noted:

Supply and demand continues to drive a vibrant marketplace around the lake and some variables unrelated to the allegations in this litigation affect property values, including variations in local jurisdictions surrounding the lake, the impact of railway lines, and the slopes of lakeshore properties. Proximity to industrial sites, including Trans Alta's, is also a factor that affects values.

Similarly, in Davey v. Canadian National Railway Co. (2006), a railway accident near Lake Wabamun in Alberta resulted in oil being spilled into the lake. The proposed class action claimed damage to lands within a five-kilometre radius of the lakeshore. The plaintiff eventually discontinued the action. Once again, the "vibrant real estate market in Alberta, and particularly the real estate market for lake properties," made it impractical to prove damage to the lands, notwithstanding the spill, according to materials filed with the court.

Moving eastward, the Saskatchewan Court of Appeal also refused to certify a class action, by organic grain farmers in Hoffman v. Monsanto (2007). They allege environmental safety issues and inability to market products as a result of cross-contamination with Monsanto’s genetically modified canola. The Court of Appeal held that the claim was not sufficiently plausible to merit a class action.

The one exception to judicial caution otherwise observed in western Canada regarding certification of environmental class actions is a trichloroethylene ("TCE") contamination claim in Windsor v. Canadian Pacific Railway Ltd. (2006). Groundwater in a Calgary suburb is alleged to have been contaminated with TCE. The railway defendant ("CP") owned a large repair facility near the affected properties. The plaintiffs allege that solvent originating in CP’s shops was used as a rolling stock degreaser. The claim focuses on noxious groundwater vapours. The class is defined by geographic and "temporal" boundaries. CP’s arguments that the proposed class is too broad (includes persons with no claim) and too narrow
(excludes persons with claims) were rejected by the Alberta judge. Regarding whether there is a sufficient evidentiary record to show that a significant number of the proposed class members actually suffered damage, the judge held that conflicting evidence regarding property values is a matter for resolution at trial, not at a certification motion. In crafting the class, the judge looked for a logical connection between the claim (reduction in property value) and the class definition. An appeal has been heard and is under reserve.

**Ontario: Lower Certification Threshold**

The Supreme Court of Canada recently refused to hear appeals from two certified Ontario environmental class actions: *Inco* (2007) and *City of Stratford* (2007).

The case against Inco relates to long-term release of nickel oxide into the Port Colborne environment. As pursued at the Ontario Court of Appeal (2006), the allegation is that house values dropped after an MOE announcement about higher than expected nickel levels in a soil sample. It appears that the announcement did not, in fact, occur. Notwithstanding that, the Court of Appeal still certified a class action with respect to decrease in property values. Had personal injury claims been advanced, the Court of Appeal’s reasoning suggests that individual issues would dwarf common issues, and the claims would not likely have been certified.

In *City of Stratford*, storm flooding resulted in residents’ complaints of ailments due to sewage exposure. The City had provided financial relief for some property damage prior to the class action being issued, about $1.2 million to 900 claimants. Despite this, the Ontario court certified the claim as a class action.

**Québec: Supreme Court of Canada to Review Two Claims**

Québec courts recently authorized two environmental class actions (*Couture* and *Krantz*) and granted judgment on the merits in two claims (*Ciment du Saint-Laurent* and *Domfer*).

*Regroupement des citoyens contre la pollution c. Alex Couture Inc.* (2007) is a bad odour case. The Québec Court of Appeal dismissed an appeal from a lower court ruling that had revised a proposed class definition to exclude casual visitors. Both courts stated that
common questions need not predominate, in authorizing the action to proceed on a class basis.

In *Krantz c. Québec* (2006), a Québec judge certified a noise class action relating to highway construction work. As in *Couture*, the class is limited to residents living at a certain time within a determined number of meters from the highway. The claim was authorized on behalf of the plaintiff’s Westmount neighbours. It is alleged that the provincial government and two construction companies broke noise and air pollution laws in demolishing and rebuilding an expressway. Compensation of $10,000 for each of 2,000 residents is demanded. This decision may be the first proposed class action in Canada involving residents suing government over excessive noise and dust created by road demolition and reconstruction work.

However, the most significant development this year arises from two Québec claims decided on their merits at the appellate level in late 2006. The Supreme Court of Canada has agreed to hear appeals, probably in early 2008, from these Québec decisions. The outcome of these two cases is likely to affect environmental class actions across Canada.

In *Comité d’environnement de Ville-Emard c. Domfer Poudres Métalliques Ltée.* (2006), the Québec Court of Appeal held Domfer liable for damages caused to neighbouring residents prior to installation of effective anti-pollution measures. Based on expert reports, the court ruled that dust, odours and noise emanating from the plant were brought to reasonable levels following the installation. As per *Saint-Laurent* discussed below, the Québec Court of Appeal tiered damages to claimants citing, inter alia, that claims must be presented with precision. Class members were awarded between $600 and $3,000 damages, depending upon their proximity to the site.

In *Ciment du Saint-Laurent Inc. c. Barrette et al.* (2006), residents neighbouring a local cement factory complained of cement dust damaging their properties, despite preventative measures by the factory. The Court of Appeal found that the factory had failed in its obligations under the Québec *Environment Quality Act*. The factory’s anti-pollution measures, though up-to-date, were found to have not been maintained properly. The court limited class membership to those who suffered damage directly linked to failure of the anti-pollution measures. On whether damages should be paid collectively or individually, the court accepted the lower court’s finding that collective indemnity would lead to over or under
indemnification. It favoured individual evaluation. The Court of Appeal awarded members between $170 and $2,000 based on their location in respect of the plant.

A notable exception to Quebec courts’ apparent willingness to authorise environmental class actions is Nadon c. Montréal (2007). A hay fever sufferer was refused authorisation to advance a claim on behalf of 180,000 persons. She alleged that the City of Montreal should have better controlled ragweed on city property.

Atlantic Canada: Nuisance Class Actions Advanced as Breach of Fiduciary Duty

Two significant cases are moving forward in Atlantic Canada.

Dobbie v. Canada (2006) is an “Agent Orange” action. The plaintiffs claim exposure to chemicals at the Canadian Forces Base at Gagetown, New Brunswick between 1965 and 1983. Novel breach of fiduciary allegations are being advanced, apparently seeking to avoid the individual enquiry involved in nuisance claims. A parallel case, Ward v. Canada (2006), is proceeding in Manitoba.

In MacQueen v. Nova Scotia and Ispat Sidbec Inc. (2007), the Sydney tar ponds are in issue, raising questions similar in nature to those under review in Inco in Ontario.

Underlying Insurance Coverage Issues

The British Columbia Court of Appeal in Lombard General Insurance Co. of Canada v. Cominco Ltd. (2007) held that an insurer is entitled to apply in British Columbia for declaratory relief that it has no obligation to indemnify or defend claims being advanced in the State of Washington under U.S. environmental protection legislation. Since the policy covered global risks, the Court of Appeal reasoned it was reasonable that B.C. law would apply to the coverage questions, not the law of the site of damage. The court held that the institution of a parallel proceeding did not necessarily mean inappropriate forum shopping.

In Boliden Ltd. v. Liberty Mutual Insurance Co. (2007), a mine operator in Spain discharged toxic waste into the environment causing catastrophic damage. An Ontario insured owned the Spanish mine. News of the disaster caused a dramatic fall in the insured’s share price. Shareholders claimed misrepresentations in a
prospectus issued at the time of an initial public offering. The insurer under a directors’ and officers’ policy refused to indemnify the insured’s legal fees to obtain a settlement, based on a pollution exclusion. An Ontario judge allowed the insured’s action for recovery of a large portion of the $3 million in legal fees incurred to settle the class action.

Future of Environmental Class Actions

Environmental class actions will increasingly have international facts, raising choice of law and jurisdiction questions to be addressed in resolving their merits and coverage issues. This cross-country check up reveals that class actions in relation to the environment have to date been more likely to succeed in the east than in the west. This may change. On May 3, 2007, the Supreme Court of Canada granted leave to appeal from two Québec Court of Appeal decisions partially allowing environmental class claims on their merits. These two significant cases will likely inform the environmental class action debate across Canada during the next few years.

Environmental claims are not always well-suited for a class action. Whether nuisance is “actionable” turns on a relationship between two neighbours. Personal injury claims, in particular, are usually not well suited for certification. Environmental class actions nevertheless pose serious risks for Canadian businesses. Risk management programs need to be in place to minimize the exposure. The defence of environmental class claims involves, amongst other things, a pro-active communications policy, a community-company integration program, and an individual complaints resolution strategy, all cumulatively designed to ward off advancement of the claim.

Barry L. Glaspell,
Toronto Office,
(416) 367-6104,
E-mail: bgaspell@blgcanada.com

Ed. Note: For a discussion of the insurance issues in the Boliden case referred to in this article, please see the full case comment by Mary Margaret Fox in this Newsletter.
Surveillance as an investigative tool is sometimes undertaken and there are both benefits and risks associated with the conduct of surveillance of which insurers should be aware.

A prudent insurer should undertake some degree of investigation at an early stage, and certainly well before the lapse of two years from the date of loss. In terms of capturing the fresh recollections of witnesses and participants, investigation in the early days will be most fruitful. However, surveillance may be conducted at any time, and in terms of putting to the test whether the plaintiff has suffered permanent injury, an argument may be made that surveillance taken closest to the date of trial is the most telling.

This article will highlight some relevant issues surrounding the use of surveillance evidence in litigation.

The Admissibility of Surveillance Evidence

In *Cam v. Hood* (B.C. - 2006), the plaintiff sought damages for soft tissue injuries sustained in three accidents. The defendants had the plaintiff’s activities observed and recorded by videotape over a three year period, and some 90 hours of surveillance included approximately 5 hours of the plaintiff playing volleyball. The defendants sought to put the video into evidence.

The plaintiff submitted that the videos should be declared inadmissible because their prejudicial value outweighed their probative value. She argued that the videos were unrepresentative, unfair and unreasonable, and had been obtained surreptitiously under circumstances that amounted to an unbridled invasion of privacy.

The defendants argued that the videos were relevant to the issue of what, if any, disability or loss of enjoyment the plaintiff had suffered as a result of her alleged injuries and that the videos should be considered probative as they provided evidence which tended to prove or disprove a fact in issue.
The court held that unlike criminal proceedings, the test in civil proceedings for the admissibility of evidence is not "whether the prejudicial value of the proffered evidence outweighs its probative value"; but whether the evidence is relevant and probative to a fact in issue. Where evidence is relevant and probative of a fact in issue, and shown to be accurate and fair in its depiction, it will be admissible.

According to the court, the manner in which the surveillance was undertaken was not reprehensible, meaning that it would not outrage the conscience of the community if all of the facts were known. There was no entry on to private property, and no disturbance of curtains or windows or the insertion of recording devices within private property. To the extent that the reasonable expectation of the plaintiff to privacy was infringed, she was free to explore a remedy under the B.C Privacy Act, but that statute did not include an exclusionary rule with respect to video or other evidence. The defendants had a legitimate right to investigate the abilities or disabilities of the plaintiff claiming compensation against them. The court held the surveillance video to be admissible.

Surveillance Evidence and the Implied Undertaking Rule

The recent decision in *Shred-Tech Corp. v. Viveen* (Ont. – December, 2006) will be of interest to parties using private investigators whose reports of surveillance are disclosed in the course of litigation. The defendants were former employees of the plaintiff who had been sued for, among other things, breach of duty in connection with setting up a competing business. The plaintiff retained private investigators in order to examine the defendants’ activities in establishing this competing business.

The private investigators’ reports were disclosed as the parties exchanged documents. The reports disclosed that the investigators obtained the telephone records of the defendants and while posing as a customer, surreptitiously collected video and audio recordings of the interior of the defendants’ premises. As a result of this disclosure, the defendants served an Amended Statement of Defence and Counterclaim which alleged invasion of privacy, trespass and breach of confidentiality. The plaintiff denied any involvement in the investigators’ methods of obtaining surveillance of the defendants. The defendant brought a motion
seeking an order relieving them of the deemed undertaking rule so that they could use the reports to pursue separate complaints with regulatory bodies against the investigators, the plaintiff and two of its corporate officers.

The deemed undertaking rule provides that all parties and their counsel are deemed to undertake not to use evidence or information for any purposes ulterior or collateral to the proceeding in which the evidence is obtained, unless the court is satisfied that the interests of justice outweigh any prejudice that would otherwise result to a party who disclosed the evidence. The court acknowledged that the purpose of the implied undertaking rule is to prevent improper use of evidence disclosed in litigation. There must be "special circumstances" present to allow relief from the application of this rule. The court allowed the application in regards to the private investigation firm and an individual private investigator, but ordered that the application was premature as against the plaintiff and its corporate officers. The court held that the defendants had provided evidence to suggest that the information was obtained in circumstances that did not support a finding of consent with respect to the telephone records.

It will be interesting to watch how this Ontario case will impact other jurisdictions where the use of surveillance evidence is challenged in the context of the implied undertaking rule.

**Surveillance Evidence - Is it a Reasonable Disbursement?**

In the recent Alberta Court of Queen’s Bench decision of *Lauzon v. Davey* (2007), the unsuccessful plaintiff in a medical malpractice action was ordered to pay costs and took issue with a number of items claimed by the defendants, including the costs of surveillance. The plaintiff argued against surveillance costs as the court found the plaintiff to be a "sincere person who generally believes the events unfolded as she described" and because there was no indication the court found the surveillance to be useful.

The court relied on earlier Alberta authority (*Kolecki v. McArthur* (1992) and *Kassam v. Draggish* (1991)) and came to the general conclusion that the costs of persons such as investigators can be claimed, in accordance with the well-established principle of costs that all reasonable and proper expenses should be allowed, noting the caveat that the costs of an
investigator may be disallowed if a lawyer could have performed the same task.

In the final analysis, the court in *Lauzon v. Davey* disallowed the surveillance costs on the basis that unlike the *Kolecki* and *Kassam* decisions, the surveillance in the case was of little or no benefit to the court. It may be taken from this that whether surveillance will be considered a reasonable disbursement rests in the discretion of the court, with a prime consideration being whether the evidence was considered beneficial or useful to the trier of fact.

**Summary**

When considering the use of surveillance, there are a number of important issues to keep in mind. In order to be admissible, surveillance evidence must be probative and relevant to a fact in issue. It must also be fair and accurate, and the evidence must not have been obtained in a reprehensible manner. It is critical to only retain investigators who are registered and supervised under relevant provincial legislation.

In regards to the use of surveillance evidence, the recent *Shred-Tech* case suggests that the court may be prepared to allow it to be used for purposes beyond the lawsuit for which it was produced.

Finally, at the end of a case successful parties and their counsel should keep in mind that the recovery of surveillance costs as a disbursement is wholly within the court’s discretion. Although there is conflicting case law as to whether it is a proper disbursement, it appears that the determination will be primarily based on whether the evidence was useful to the court.

While defendants have legitimate rights to investigate the abilities or disabilities of a plaintiff who is claiming compensation against them, there are a number of issues to keep in mind when retaining private investigators.

*Bruce Churchill-Smith,*
*Calgary Office,*
*(403) 232-9669*
*E-mail: bchurchillsmith@blgcanada.com*

*Jennifer Lepp,*
*Calgary Office,*
*(403) 232-9707,*
*E-mail: jlepp@blgcanada.com*
CASE COMMENT: BOLIDEN LIMITED v. LIBERTY MUTUAL INSURANCE COMPANY

The April, 2007 decision of our former partner, Mr. Justice (Frank) Newbould, appointed to the Ontario Superior Court in late 2006, is of interest for two reasons. The first reason is that it is, to our knowledge, the first decision in which a Canadian court has interpreted an "absolute pollution" exclusion in a directors’ and officers’ liability policy ("D&O policy") in the context of a claim for misrepresentation brought by a corporation’s shareholders seeking to recover damages representing the drop in share price caused, in substantial part, by a pollution incident. The second, and in our view the more significant reason from an insurance perspective, is that the decision considered and addressed the meaning of three different phrases often seen in various types of policy exclusions, ultimately holding that one of these (and in our experience the least used of the three until now) was broad enough to exclude the claimed loss.

Boliden Limited ("Boliden") was covered by a D&O policy issued by Liberty Mutual Insurance Company ("Liberty"). On April 25, 1998 a tailings pond dam in Spain, owned by a Boliden subsidiary, collapsed, contaminating approximately 10,000 acres of surrounding land with toxic waste. Production at the mine was immediately suspended. Boliden was required to establish a reserve of over $50,000,000 for remediation expenses and it was alleged that the total remediation costs could ultimately reach as high as $250,000,000. When news of the disaster was assimilated by the market, Boliden’s shares, 55% of which had been sold to the Canadian public pursuant to an IPO prospectus in June, 1997 at a price of $16.00 per share, dropped precipitously, reaching $5.35 by mid-November, 1998. Boliden’s shareholders instituted class actions in British Columbia and Ontario against Boliden, its directors and officers. The B.C. action was designated as the lead action (the "underlying litigation") and was restricted to statutory causes of action under various provinces’ securities legislation. The claim in the underlying litigation was that various statements in the prospectus regarding (i) the importance of environmental protection/pollution prevention; (ii)
Boliden’s status among the world’s zinc producers; and (iii) the estimated production of ore and primary metals from the particular mine, constituted misrepresentations, given the omission of a number of alleged material facts concerning (i) construction and maintenance of the tailings dam; (ii) stability problems with and structural defects of the tailings dam; (iii) seepage and leakage from the tailings pond and through the dam; (iv) the risk of a "natural disaster"; and (v) the environmental risks and effects arising from the toxicity of the materials in, or escaping from, the tailings pond.

The central issue concerning the D&O policy was whether the claim in the underlying action fell within an exclusion which provided that Liberty would "not be liable ... to make any payment for loss respecting a claim ... for or in respect of a pollution loss", defined to mean "a loss resulting from or attributable to or in any way involving, directly or indirectly, (1) the actual, alleged or threatened seepage, discharge, dispersal, release or escape of pollutants ..."

Boliden’s position was that the loss in share value resulted from or was attributable to or involved the alleged misrepresentations in the prospectus and not the failure of the dam. Boliden relied upon the decision of the Ontario Court of Appeal in Zurich v. 686234 Ontario Limited (2002), which held that even though a pollution exclusion clause in a CGL policy had, when read literally, covered the claim in question, it was not applicable where to give effect to it would effectively negate the coverage afforded by the policy and would be contrary to the reasonable expectations of the insured. Liberty’s position was that the loss claimed in the underlying litigation was caused by the discharge of pollutants and the expected cost of remedial work and that this loss resulted from, was attributable to or involved, directly or indirectly, the failure of the dam. Liberty relied upon the decision of the Ontario Court of Appeal in Mantini – Atkinson v. Co-operators (2005), which held that a phrase in an exclusion clause should not be given an unreasonable interpretation to narrow its effect. Both parties also relied upon various other cases – Canadian and American – interpreting differently worded pollution exclusions found in different types of policies.

Justice Newbould observed that none of the cases cited involved facts or language identical
to this case. He also noted that while the American courts’ approach has generally been to apply a "but for" test (i.e., but for the pollution there would not have been a claim) that approach has not been embraced by Canadian courts, which have adopted a test requiring there to be a continuous chain of causation between the act or event and the loss. He concluded that "In the end, this case requires the consideration of the meaning of the definition of "pollution loss" when applied to the claims of misrepresentation pleaded ..."

In this regard, he held:

- "resulting from" and "attributable to" – Both phrases lent themselves to two interpretations. The first was that the loss resulted from the failure to disclose facts, constituting a misrepresentation. The second was that the loss resulted from the discharge of pollutants since otherwise there would have been no litigation. The latter approach required a "but for" analysis, however, which was inconsistent with the Canadian approach. In any event, the possibility of two interpretations meant that these phrases were ambiguous and were required to be interpreted in favour of Boliden.

- "in any way involving, directly or indirectly." – The word "involving" had "less of a cause and effect meaning, particularly when used with the word "indirectly". The words "in any way involving" meant "in any way tied to or concerned with". While those allegations in the underlying litigation pertaining to construction defects, lack of stability and structural defects did not fall within the definition of "pollution loss", those allegations of actual seepage and leakage and pertaining to the risk of natural disaster and other environmental risks and effects did. The amounts claimed for these allegations could be said to directly or indirectly involve, be tied to or concerned with the actual and alleged seepage of pollutants:

It would be fanciful to suggest that the drop in share price did not involve the discharge of pollutants,
which no doubt was what was in the minds of the B.C. Court of Appeal when it stated that the failure of the tailings dam was the "catalyst" or "triggering event" for the litigation.

The pollution exclusion therefore applied to some, but not all, of the claims asserted in the underlying action.

This holding led to a further ruling on the applicability of the allocation clause in the Liberty policy, which is not discussed here since we understand that this aspect of the decision has been appealed.

While Justice Newbould’s analysis in relation to the pure "pollution" aspect of the claim is interesting, it is in our view unlikely to be significant in the D&O context since most D&O policies in the marketplace now provide a "carve out" from the absolute pollution exclusion to afford coverage (usually limited and often capped in dollar value) for shareholder/derivative claims similar to those asserted in the underlying litigation. His analysis, however, of the "connecting" language in the exclusion has potential significance for similarly worded exclusions in many types of policies and will therefore be of interest to all insurers and not only to claims representatives but also to underwriters.

Mary Margaret Fox,
Toronto Office,
(416) 367-6195,
E-mail: mmfox@blgcanada.com
Many borrowers now choose to take advantage of group life and disability insurance plans to guarantee the payment of their debt, particularly in the context of mortgage loans. The legal position of each of the parties in these plans has led to a steady flow of court decisions. In Roy v. Desjardins, Sécurité financière, compagnie d’assurance-vie (2006), the Quebec Court of Appeal had recent occasion to revisit the respective roles of the insurer (the issuer of the policy), the lender (the policyholder) and the borrower (the participant) and to consider under what conditions the insurer can be bound as a result of mistakes and representations by the lender’s employee who dealt with the borrower.

The circumstances of the dispute in Roy are not unusual. Mr. Roy was granted a loan by the Caisse Populaire Desjardins. Mr. Cloutier, the senior employee of the Caisse who negotiated the loan, invited Mr. Roy to participate in a group insurance plan with Desjardins Sécurité Financière, to guarantee the payment of his debt in the event of his death or disability. Mr. Roy accepted this proposal. The enrolment form was filled out entirely by Mr. Cloutier. A key section of the enrolment form which focused on the applicant’s health and insurability was left blank. Mr. Roy then signed the form, shook hands with Mr. Cloutier, and left the Caisse. Mr. Roy thought he was covered.

It is a frequent feature of the management of such group insurance plans that, unless the client’s answers on the enrolment form trigger an immediate assessment of the risk, the form is not sent to the insurer until and unless the risk materializes. In this case, the enrolment form was kept at the Caisse. Mr. Roy dutifully made his monthly mortgage payments, including the premium for insurance, until he became incapacitated and sought coverage under the group disability insurance plan. At that point, the insurer received the partially blank form, sought and obtained further information on Mr. Roy’s health condition at the time of the application, and denied coverage.

The fact that the insurer does not assess the application at the time the client obtains the
loan is bound to create some difficulties. Indeed, a few judges have expressed discomfort with the idea that insurers are then in a position to assess the risk after it has materialized. Conversely, dishonest borrowers may remain silent about their condition at the time of the application and later claim to have relied on coverage for which they paid without any opposition for months or years. Good faith borrowers, for their part, may have relied on the negligent or mistaken representations of the lender’s employees, and truly believed that they were covered.

There are two possible solutions to this conundrum. Under the first solution, the lender’s employee who discussed the insurance plan with the borrower is treated as the mandatary or agent of the insurer, and the insurer is bound by all representations that this person made to the borrower who was in good faith. Under the second solution, the lender’s employee is not treated as the mandatary of the insurer, the borrower is not covered, but the borrower can nonetheless seek compensation from the lender for the fault of its employee that resulted in a denial of coverage.

The difference between the two solutions is not immaterial, as is illustrated by the decision in this case.

In Roy, the Superior Court came to the conclusion that the senior employee of the Caisse, Mr. Cloutier, did not have the authority to bind the insurer to coverage that would not have been accepted if the form had been filled out properly. Turning to the tort liability of the lender, the court found that since Mr. Roy would not have been able to obtain insurance coverage elsewhere at the time of his application, Mr. Cloutier’s negligence had caused no injury, and Mr. Roy was without remedy.

On appeal, the Quebec Court of Appeal overturned this decision. It found that under the circumstances, Cloutier could be treated as mandatary of the insurer, and that Roy was justified in relying on Cloutier’s representations that he was covered. The issue of whether Cloutier acted with actual or apparent authority was not clearly decided (Article 2163 of the Quebec Civil Code). The court did find that Cloutier was no longer acting as an employee of the Caisse at that moment, and could not engage the Caisse’s liability. In light of Mr.
Roy’s good faith, the Court of Appeal disregarded the blank sections on the form and Roy’s health condition at the time of the application, and gave effect to the contract.

It is doubtful whether the lender, as policyholder, could ever have broad powers as a true mandatary of the insurer in dealing with borrowers who participate in group insurance plans. On the other hand, there is now a string of appellate decisions such as this one which allow for the possibility of the lender acting under an ostensible or apparent mandate, in making binding representations to the client. The analysis is highly fact specific.

Similar difficulties obviously arise in common law provinces. A similar range of solutions exist, from a claim in tort or contract against the intermediary, to a claim in contract against the insurer resting on the apparent authority of the intermediary. From a comparative perspective, it is interesting to note that the indicia of apparent mandate in Quebec are analogous to those listed in similar circumstances in common law provinces:

- the lender is providing a service; it holds application forms bearing the name of the insurer;
- an employee of the lender assists clients in completing the application for insurance; the lender collects the premium and manages the plan; and the employee of the lender is designated, acts and talks as an authorized representative for the insurer. All of these signs emanate from the insurer and sustain the borrower’s reasonable belief that the representative can bind the insurer.

The Supreme Court of Canada recently declined to grant leave to appeal from this decision of the Quebec Court of Appeal.

Daniel Jutras,
Montreal Office,
(514) 954-3186,
E-mail: djutras@blgcanada.com
To succeed in a negligence action, the plaintiff must prove all elements of the tort, including foreseeability and causation. These two elements, often thought to have been judicially relaxed, are alive and well according to the February, 2007 unanimous decision of the Supreme Court of Canada in *Resurfice Corp. v. Hanke*.

Ralph Hanke ("Hanke") was the operator of an ice resurfacing machine, manufactured by Resurfice Corp. By mistake, a water hose was inserted into the gasoline tank rather than the water tank. When the tank overfilled, gasoline vapours escaped and were ignited by an overhead heater. Hanke was severely burned in the resulting explosion and fire. Hanke sued the manufacturer and distributor of the machine, alleging that the design of the machine was defective in that the water tank and the gasoline tank were similar in appearance and placed close together, thus creating an unreasonable risk of confusing the two. He further alleged a failure to warn users with respect to distinguishing the water tank from the gasoline tank.

The Courts Below

The trial judge found that Hanke either placed the hose in the gasoline tank (clearly labelled "Gasoline Only") or he turned on the water when he knew or ought to have known that the hose was in the gasoline tank and not the water tank. Importantly, the trial judge found that "Hanke knew precisely which was the water tank and which was the gasoline tank on the machine that day" and that there was no confusion between the two tanks. In the result, the trial judge stated "[T]he simple answer, in my view, is this: the accident was caused by operator error and had nothing to do with the design or manufacture of the machine". There was no fault with the design. It was not reasonably foreseeable that an operator would introduce water into the gasoline tank and therefore there was no duty to warn.

The Alberta Court of Appeal disagreed and ordered a new trial. While the court was critical of the trial judge's analysis in many respects, the two main issues were foreseeability and causation. Specifically, the court ruled that the trial judge failed to consider policy factors in determining foreseeability and, regarding causation, the trial judge erred in applying a "but
for" test instead of a "material contribution" test. These were the primary issues explored on appeal to the Supreme Court of Canada.

The issue of foreseeability can be dealt with briefly. The Court of Appeal explicitly stated what many defendants believe often takes place: that the court must consider policy matters such as the seriousness of the injury and relative financial position of the litigants. In a soft rebuke, the Supreme Court of Canada clearly stated that such considerations are irrelevant to foreseeability.

The Issue Of Causation

On the issue of causation, the Alberta Court of Appeal cited both of the earlier Supreme Court of Canada decisions in *Athey v. Leonati* (1996) and *Walker Estate v. York Finch General Hospital* (2001) in support of its conclusion that the circumstances rendered the "but for" test unworkable, and instead called for the application of the "material contribution" test. The Chief Justice, writing for the Supreme Court, noted that the Court of Appeal’s suggestion that the material contribution test must be used whenever there is more than one potential cause would effectively eliminate the "but for" test. In recognition of the difficulty that some judges have had in articulating the proper test for causation in negligence cases, the Supreme Court of Canada set out some general principles:

1. As a fundamental rule, the primary test for causation requires the plaintiff to discharge its burden of showing that "but for" the negligent act or omission of each defendant, the injury would not have occurred. This requirement achieves the desired result that there be a substantial connection between the injury and the defendant’s conduct.

2. In special circumstances, as an exception to the basic "but for" test, a "material contribution" test is applied. Resort to the "material contribution" test is made only if two requirements are established:
   (a) "it must be impossible for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the "but for" test. The impossibility must be due to factors that are outside of the plaintiff’s control; for example, current limits on scientific knowledge"; and,
   (b) "it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered
that form of injury. In other words, the plaintiff’s injury must fall within the ambit of the risk created by the defendant’s breach”.

In emphasizing the limited applicability of the “material contribution” test, the Supreme Court of Canada stated that “in those exceptional cases where these two requirements are satisfied, liability may be imposed, even though the “but for” test is not satisfied, because it would offend basic notions of fairness and justice to deny liability by applying a “but for” approach”.

The clear and concise reasoning of the Supreme Court in Resurfice will greatly assist in reminding the trier of fact that, absent exceptional circumstances, the plaintiff must prove on a balance of probability that the injury or loss would not have occurred “but for” the defendant’s negligence. Further, where the evidence falls short of meeting the “but for” test, the plaintiff must establish that the two requirements for the “material contribution” test exist. Of these two requirements, the greater hurdle would appear to be the obligation on the plaintiff to establish that it would be impossible for the plaintiff to prove that the defendant’s negligence caused the plaintiff’s injury using the “but for” test. Importantly, the impossibility must be due to factors outside of the plaintiff’s control. In product liability cases, the issue of spoliation could take centre stage in defeating a claim on the issue of causation. While the Supreme Court has certainly clarified the test to be applied, it is of course the application of that test which matters to the litigants of any particular case. For example, there has already been judicial interpretation of what evidence or absence of evidence there needs to be in order for a plaintiff to establish the “impossibility” requirement. This will likely be one of the battle grounds in the war on causation.

The Supreme Court also took the opportunity in Resurfice to emphasize another topical issue: the extensive use of experts when expert evidence may not be required. The trial judge in Resurfice heard extensive expert evidence on the design of the machine but placed no reliance on the expert evidence, concluding that the accident was caused simply by operator error. The Supreme Court confirmed that “a trial judge is not obliged to consider the opinions of expert witnesses if he can arrive at the necessary conclusions on issues of fact and responsibility without doing so”.

Robert L. Love,
Toronto Office,
(416) 367-6132,
E-mail: rlove@blgcanada.com
In *Eichmanis v. Wawanesa Mutual Insurance Company* (February, 2007), the Ontario Court of Appeal recently considered the “criminal act” component of the standard form intentional or criminal act exclusion commonly found in Canadian homeowner’s policies and provided clear guidance as to the scope and operation of the exclusion.

The standard form intentional or criminal act exclusion considered in the *Eichmanis* case, provided in part as follows:

> You are not insured for claims made or actions brought against you for:  
> bodily injury or property damage  
> caused by any intentional or criminal act or failure to act by:  
> any person insured by this policy …

It has been held in a number of leading cases, including that of the Supreme Court of Canada in *Lloyd’s v. Scalera* (2000), that for the “intentional act” component of the exclusion to apply it is required that the insured possess the intent not only to do the act, but also, in doing the act, the intent to injure. This interpretation of the “intentional act” exclusion was adopted by the court in *Eichmanis*. The operation of the “criminal act” component of the exclusion has not been so clearly settled, however, with some courts, but not others, requiring not only a “criminal act” but also an intent to injure, as with the “intentional act” component.

In *Eichmanis*, the insured minor was convicted of the *Criminal Code* offence of “criminal negligence causing bodily harm” as a result of the negligent discharge of a shotgun. The insurer moved for a declaration of no coverage based on the policy exclusion. The motions judge at first instance found that both the “intentional act” and “criminal act” components of the exclusion required a finding of intent to cause loss or damage and rejected the insurer’s argument that the “criminal act” component did not require an intent to injure or to cause the loss or damage complained of.

On appeal, the insurer did not challenge the motion judge’s finding on the application of the “intentional act” exclusion, but argued that intent to injure is not a requirement of the “criminal act” component of the exclusion. The Court of Appeal agreed with the insurer’s argument and dismissed the claim for coverage. In doing so, the key findings of the Court of
Appeal can be summarized as follow:

1. The language of the exclusion is disjunctive, it applies to injury "caused by any intentional or criminal act".
2. The exclusion is clear and unambiguous – the word "intentional" does not modify the word "criminal". Where the act or omission that causes the loss is criminal in nature, the exclusion applies without proof of intention to cause the injury or damage. The motion judge’s interpretation of "criminal act" as applying only to criminal acts intended to cause injury rendered the phrase "criminal act" superfluous because the requirement of an intent to injure was already caught by the "intentional act" component of the exclusion. An insurance contract is not to be interpreted so as to render its terms meaningless.
3. In Canada, the phrase "criminal act" means any breach of the Criminal Code. A criminal conviction is not required by the exclusion, but if there is a conviction, it is prima facie proof of the fact.
4. Section 118 of the Ontario Insurance Act, which states that a contravention of any criminal law does not by itself render unenforceable a claim for insurance coverage unless the act is committed with intent to bring about loss or damage, is not applicable where the policy of insurance at issue expressly provides otherwise. It is noteworthy that the decision in Eichmanis eliminated coverage not only for the perpetrator of the criminal act but also for other insureds who were sued as a result of the commission of the criminal act, in this case, negligence claims for inadequate supervision against the minor perpetrator’s uncle and aunt with whom he resided at the time. Although this issue was not examined in any detail by either the motion’s judge or the Court of Appeal, it was undoubtedly correct based on a number of recent decisions that have reviewed the "any person insured by this policy" language used in the exclusion. Whether such a result will follow in other cases will depend on the particular wording of the policy under consideration.

The insured in Eichmanis has commenced an application for leave to appeal to the Supreme Court of Canada. A decision on that leave application is not expected prior to the end of August, 2007. If leave is granted, a decision on the appeal will likely take at least another year. At this time, however, the decision of the Court of Appeal in Eichmanis represents the current state of the law on the "criminal act" exclusion in Ontario.

Keith N. Batten,
Toronto Office,
(416) 367-6103,
E-mail: kbatten@blgcanada.com
SUMMER 2007

INSURANCE LAW GROUP LEADERS:

Calgary
Bruce Churchill-Smith
(403) 232-9669

Montréal
Jeremy Bolger
(514) 954-3119

Ottawa
Bryan Carroll
(613) 787-3506

Toronto
Robert L. Love
(416) 367-6132

Vancouver
Vince Orchard
(604) 640-4126

EDITOR - KEITH N. BATTEN
TORONTO OFFICE

This newsletter is prepared as a service for our clients and other insurance professionals. It is not intended to be a complete statement of the law or an opinion on any subject. Although we endeavour to ensure its accuracy, no one should act upon it without a thorough examination of the law after the facts of a specific situation are considered. No part of this publication may be reproduced without prior permission of Borden Ladner Gervais LLP.

This newsletter has been sent to you courtesy of Borden Ladner Gervais LLP. We respect your privacy, and wish to point out that our privacy policy relative to newsletters may be found at http://www.blgcanada.com/utility/privacy.asp. If you have received this newsletter in error, or if you do not wish to receive further newsletters, you may ask to have your contact information removed from our mailing lists by phoning 1-877-BLG-LAW1 or by emailing subscriptions@blgcanada.com

© Copyright 2007 Borden Ladner Gervais LLP