RIMSCANADA™

Additional Insureds

Rights And Obligations

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Issues To Be Discussed

- Privity of Contract
- Who Qualifies as an Insured?
- Additional Insured v Additional Named Insured
- Scope of Coverage
- Subrogation

Issues To Be Discussed

- Certificates of Insurance
- Rights and Obligations
- Conclusion

Common Perceptions

- Additional insureds are covered for vicarious liability only
- Additional named insureds have full access to the policy
- Additional named insureds are liable for unpaid premiums and deductibles
- Without privity of contract, there is no coverage

Privity of Contract

- Under contract law
  - "an 'elementary' principle, as it has been called times without number, that only a person who is a party to a contract can sue upon it" – Lord Haldane – Dunlop Pneumatic Tyre Co. v Selfridge a Co. Ltd.
    - House of Lords – 1915

Privity of Contract

- Preferred Accident Ins. Co. of New York v Vandepitte
  - An action on a contract by a non contracting party can be supported only if the contract was entered into by a contracting party acting as trustee or agent of the non-contracting party (1932 S.C.C.)

Privity – Vandepitte to Fraser River

- Preferred Accident v Vandepitte
  - S.C.C. 1932
- Commonwealth Construction v Imperial Oil
  - S.C.C. 1978
- Greenwood Shopping Plaza Ltd, v Beatie
  - S.C.C. 1980

Privity – Vandepitte to Fraser River

- London Drugs Ltd v Kuehne & Nagel International Ltd.
  - S.C.C. 1992
- Fraser River Pile & Dredge Ltd v Can Dive
  - S.C.C. 1999

Preferred Accident

- Per Duff, J, in rejecting coverage for an additional insured, an additional insured by statute, under an automobile insurance policy:

Preferred Accident

– “It would, I repeat, be a monstrous injustice to impose upon the insurance company, by statute, a liability to the daughter or to persons injured by the act of the daughter, which the daughter could not enforce directly, or indirectly, in the absence of some such enactment, and a construction leading to that result ought not to be accepted unless the language employed is so clear as to leave no reasonable way of escape.”

Preferred Accident

- Per Duff, J, on who could enforce an insurance policy:
  - "It may be that a trust would arise in consequence of a written direction by the insured under this clause; but until there is such a direction, at all events, it seems clear that the named insured is entirely master of the situation, and under no enforceable obligation to require the company to indemnify any one of the classes of persons described"

Consequences of Vandepitte Ruling

- Additional insureds have no privity of contract
- Additional insureds cannot enforce the policy in their own right unless they can prove that the named insured entered into the contract as their agent or trustee.

Consequences of Vandepitte Ruling

- This led, in the insurance context, to the development of:
  - Agency clauses
  - Trustee clauses

Consequences of Vandepitte Ruling

- Being specifically named in a contract as a beneficiary, was, historically not sufficient to establish a right of action under that contract. As such:
  - An additional named insured would not necessarily be able to enforce the contract.

Third Party Beneficiaries

- Tweddle v Atkinson (1861) 1 B. & S. 393 (Cited in Preferred Accident)
  - "Some of the old decisions appear to support the proposition that a stranger to the consideration of a contract may maintain an action upon it, if it stands in such a near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. The strongest of these cases is that cited in

Third Party Beneficiaries

- Bourne v Mason (1695), in which it was held that the daughter of a physician might maintain assumpsit upon a promise to her father to give her a sum of money if he performed a certain cure. But there is no modern case in which the proposition has been supported. On the contrary, it is now established that no stranger to the consideration can take advantage of a contract, although made for his benefit

Agency, Trust, Additional Named Insured

- From the moment it was decided, Preferred Accident was considered legally correct but unreasonable.

Agency, Trust, Additional Named Insured

- Possible solutions:
  - Judicial solution – over rule it (considered but rejected)
  - Legislative intervention (followed with respect to automobile insurance)
  - Aggressively use Agency and Trust provisions
  - Appeal to concept of express intent – additional named insured – possibly a futile gesture.

Commonwealth Construction

- The next major development involving the rights of additional insureds is the Imperial Oil case.
- Imperial Oil Ltd v Commonwealth Construction Co. [1978] SCC
  - Name of the Insured
    - Imperial Oil Limited and its Subsidiary Companies and any Subsidiaries thereof and any of their Contractors and Subcontractors

Commonwealth Construction

- Per Insurer, in a subrogated action:
  - Contractors and subcontractors were insureds only for the work they actually performed. Notwithstanding the subrogation waiver, the insurer could subrogate.

Commonwealth Construction

- The court rejected this argument on three grounds
  - First, Agnew-Surpass Shoe Stores v Cummer-Young Investments Ltd. [1976] SCC
    - "When a building in construction is insured for the joint benefit of the owner and contractor, certainly the later is not expected to be held liable for loss caused by the negligence of his workmen"

Commonwealth Construction

- The court noted:
  - “Although this statement may be said to be an obiter, because made in a landlord-tenant case, it does, in my view, express correctly the principle.”
- Second item was the judicial history of subrogation in both the United Kingdom and the United States

Commonwealth Construction

- Third item was the Trustee Clause contained in the Policy. Though the court did not consider it necessary, it did not hurt. Accordingly:
  - "While these conditions may have been inserted to avoid the pitfalls that were the lot of the unnamed insured in Vandepitte vs. Preferred Accident Insurance Corp. Of New York [1933] A.C. 70.], a precaution that in my view was not needed, they without doubt cover additional ground."

Greenwood Shopping Plaza Ltd.

- In 1980, in Greenwood Shopping Plaza Ltd. v Beattie, the Supreme Court of Canada allowed subrogation against the employees of a tenant for fire damage to the shopping plaza. Though there was a waiver of subrogation in favour of the tenant, the court ruled that this waiver did not extend to the tenant's employees as they were not parties to that contract.

Greenwood Shopping Plaza Ltd.

- No reference was made to either the Imperial Oil or the Agnew-Surpass judgments.
- With the exception of being cited for support by the trial judge in Fraser River Pile & Dredge Ltd. v Can-Dive Services Ltd. the Greenwood case has been largely ignored.

London Drugs v Keuhne & Nagel

- In London Drugs Ltd. v Keuhne and Nagel International Ltd. [1993] SCC, the court, in a non-insurance case, accepted a principled exception to privity. The limitation of liability contained in the contract of storage was extended to apply to the warehouseman's employees within specific boundaries.

London Drugs v Keuhne & Nagel

- The employees must be performing duties on behalf of the customer at the time the customer's property is damaged .The court was not willing to relax the scope of "privity" beyond this. The court did not address what it had already decided in prior rulings involving insurance.

London Drugs v Keuhne & Nagel

- The trial judge in Fraser River focused on this lack of reference to the prior insurance cases to conclude that London Drugs supported the insurance company's position that the doctrine of "privity" was alive and well in the insurance context.

Fraser River Case

- Fraser River Pile & Dredge (S.C.C. 1999) involved a subrogation claim by the insurers of a barge that sank due to the negligence of the lessee.
- Can-Dive, the lessee, was by definition, an additional insured on Fraser River's marine policy:

Fraser River Case

- Fraser River's policy granted additional insured status to anyone renting barges from it. Can-Dive was not aware of coverage until discoveries
- The barge sank due to Can-Dive's negligence
- The insurer tried to subrogate
- The only issue before the Supreme Court of Canada was the additional insured's right to invoke the subrogation waiver.

Fraser River Case

- The S.C.C. agreed with Can-Dive. In doing so, the court created a new principled exception to the doctrine of privity:
  - Insurance
- Per Iacobucci, J, in overturning Vandepitte:

Fraser River Case

– "… I nonetheless wish to add that there are also sound policy reasons for relaxing the doctrine in these circumstances. In this respect, it is time to put to rest the unreasonable application of the doctrine of privity to contracts of insurance established by the Privy Council in Vandepitte, supra, a decision characterized since its inception by both legislatures and the judiciary as out of touch with commercial reality."

Who Qualifies as an Additional Insured?

- In IBC 2100 for Corporations
  - Executive officers, directors and shareholder (in their capacity as such)
  - Employees, voluntary employees
  - Real estate managers

Who Qualifies as an Additional Insured?

- In broad manuscript wordings
  - Each of the above
  - Any party required to be added as an additional insured in a contract, but only to the extent so required
- Added by endorsement
  - Any party specifically added by endorsement but only to the extent so added

What About Liability Contractually Assumed?

- IBC 2100 does cover liability of others assumed under an “insured Contract”
- Defense costs are covered only if required by the contract
- Defense costs form part of compensatory damages and are not in excess of policy limits

What About Liability Contractually Assumed?

- Insured Contract Includes:
  - A contract for a lease of premises
  - An easement of license agreement re railway crossings
  - Any other easement agreements
  - A sidetrack agreement
  - An ordinance or bylaw to indemnify a municipality, except for work for a municipality
  - An elevator maintenance agreement

What About Liability Contractually Assumed?

- That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "compensatory damages" because of "bodily injury" or "property damage" to a third person or organization, provided the "bodily injury" or "property damage" is caused in whole or in part, by you or by those acting on your behalf. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement

What About Liability Contractually Assumed?

- Note: the coverage provided to an additional insured is arguably broader than that provided for contractually assumed liability. Contractual liability addresses liability assumed under an indemnity agreement. At law indemnity agreements are interpreted against the party relying on the agreement. An insurance policy is interpreted in favor of the insured.

Status Of Additional Insureds

- Per S.C.C. a waiver of subrogation in an insurance policy can be enforced by a party to whom the waiver is stated to apply.
- The Vandepitte restriction on the rights of additional insured is no longer good law.
- By inference, the benefits conferred by additional insured status is also enforceable.

Status Of Additional Insureds

- There is a limit:
  - The parties to the contract must have intended to confer the benefit
  - The activities performed by the party seeking protection must be the activities contemplated by the contract.
- In practice, courts have enforced the rights of additional insureds with little question.

Status Of Additional Insureds

- Since 1972 there are over 200 decisions reported in Quicklaw. The privity argument was invoked in no more than five cases.

Additional Insured v Additional Named Insured

- The case law suggests that there is no difference
- The insurance industry in Canada – IBC – does not recognize a difference and would like to avoid the term “additional named insured” because it is simply not used in any of the standard insurance policies.

Additional Insured v Additional Named Insured

- Assuming, for a moment that a difference in status were recognized, could there be any rational reason for granting broader coverage to a party named as an additional named insured as opposed to a party named as an unnamed insured or named as an additional insured? Absent a definition in the policy to the contrary, or evidence of established usage in the insurance industry, evidence that does not exist, an insured is an insured.

Additional Ins. Coverage Upheld

- Mercer v Paradise (Town) [1991] N.J. 126
- Consumers' Gas Co. v Fletcher Heating Inc. [1991] O.J. No. 821
- Kelowna (City) v Royal Insurance Co. of Canada [1992] B.C.J. No. 147
- McGeough v Stay 'N Save Motor Inns Inc. [1993] B.C.J. No. 1221

Additional Ins. Coverage Upheld

- Cowichan Valley School District No. 79 v Lloyds Underwriters [2003]B.C.J. No. 1964
- Lombard General Insurance Co. v CGU Insurance Co. of Canada [2003] O.J. No. 3385 (affirmed [2005] O.J. No. 2269.
- Lacombe v Don Philips Heating Ltd. [2005] O.J. No. 3932

Additional Ins. Coverage Upheld

- RioCan Real Estate Investment Trust v Lombard General Insurance Co. [2008] O.J. No. 1449

Coverage Upheld

- SREIT (Park West Centre) Ltd. v ING Insurance Company [2008] N.S.J. No. 247
- Liu (Litigation Guardian of) v Chu [2009] B.C.J. No. 1138
- Penticton (City) v AXA Pacific Insurance Co. [2009] B.C.J. 2021

Coverage Upheld

- Saanich (District) v Aviva Insurance Company of Canada [2010] B.C.J. No. 1863
- Cadillac Fairview Corporation v Oakridge Landscape Contractors and Lombard Canada [2010] ONSC 4535
- Williams (Guardian ad litem of) v B.C. Conference of the Mennonite Brethren Churches [2010] BCSC 791

Mercer v Paradise (Town)

- In this case, Delcan - a consultant on a municipal water services project was added as an additional insured to a liability policy issued to the general contractor. A Certificate of Insurance was provided.

Mercer v Paradise (Town)

- Following a claim by Mercer for loss of his well due to blasting on the sewer project, the insurer denied coverage to Delcan on the basis that Delcan was covered for vicarious liability only and not for claims alleging Delcan's independent negligence

Mercer v Paradise (Town)

- The Policy wording did not limit Delcan's coverage to vicarious liability, consequently, the court ruled in favor of coverage.

Consumers' Gas

- A home owner claimed against Consumer's Gas and its contractor, Fletcher Heating for fire damage allegedly caused by improper service work.
- Fletcher was required to indemnify Consumers' for liability arising out of Fletcher's work and was required to add Consumers' as an additional named insured to Fletcher's CGL policy.

Consumers' Gas

- Fletcher refused to indemnify and its insurer refused to defend.
- The Pleadings against Consumer's alleged:
  - Consumer's failed to properly train or supervise its agents or employees

Consumers' Gas

- Consumers' allowed the Defendant Fletcher Heating to attend the Plaintiff's residence to service the furnace when it knew or ought to have known that the Defendant Fletcher Heating was incompetent…

- The court pointed out that there were no allegations against Consumers' that were not related to Fletcher's performance of the work and as such, Consumers' was owed a defense.

Kelowna (City) v Royal Insurance

- Kelowna was an additional named insured with respect to land occupied by the Kelowna Motorcycle Club but only as owner of the land so occupied.
- The clubs CGL policy excluded coverage for "… liability of the Insured to any participant in any event conducted, sponsored or otherwise arranged by the Insured.

Kelowna (City) v Royal Insurance

- Royal denied coverage to the City for a claim brought by a participant based on the “participant’s exclusion” and on basis that at the time of the accident the land was not occupied by the motorcycle club but rather by the race promoter.

Kelowna (City) v Royal Insurance

- The court noted the policy contained a severability clause. As the City was not running the event, the participants exclusion did not apply to the City.
- The court rejected the insurer's arguments relating to occupancy.
- Royal was required to defend the City as an additional insured.

McGeough v Stay ‘N Save

- Stay ‘N Save Motor Inns permitted O’Donals restaurant to use 40 parking spots on its property. A patron of O’Donals was injured when she slipped on ice in the parking lot. She claimed against Stay ‘N Save who claimed against O’Donals’ CGL policy.

McGeough v Stay ‘N Save

- Say ‘N Save was added as an additional insured under the O’Donals policy for liability arising out of the operations of O’Donals.
- The court ruled that the accident arose out of O’Donals’ use of the parking spots and as such arose out out of its operations.
- Stay ‘N Save was covered for the claim.

Cowichan Valley School District

- School District allowed a local hockey club the use of baseball fields for a fund raising baseball tournament.
- School District was added as an additional insured "…but only with respect to liability arising out of the operations of the named insured…"

Cowichan Valley School District

- A player was injured when he stepped into a low spot along the base line while running the bases.
- The insurer denied coverage for the ensuing suit based on the cause of the injury being the defect in the field, and as such did not arise out of the operations of the named insured.

Cowichan Valley School District

- The court disagreed. The injury was intimately connected to the purpose for which the field was intended to be used by the hockey club. As such, the injury arose out of the operations of the named insured.

Lombard General Insurance

- This case arose out of a fire in a high-rise apartment in Toronto that resulted in several fatalities. The action was against both the building owner and the property manager. The insurer acknowledged that the property manager was an additional insured on the landlord's CGL and umbrella policies.

Lombard General Insurance

- The issue before the court was the order in which the policies were required to respond. i.e. did the property manager's CGL policy respond before the landlord's umbrella policy?

Lombard General Insurance

- The court ruled, and it was upheld on appeal, that all primary insurance available to the property manager must be exhausted before the umbrella policy could be called upon.
- The court ruled the order of payment was
  - First, the landlord's CGL
  - Second, the property manager's CGL
  - Third, the landlord's umbrella policy

RioCan Real Estate Trust

- This case is involves the coverage available to a property owner as additional insured under a snow removal contractor's policy. The court rejected the logic of an earlier court ruling in a similar case that held that the landlord's liability under the Occupier's Liability Act was a separate liability, Accordingly:

RioCan Real Estate Trust

– “I am of the view that in most situations where there is a duty to defend some, or only one, of the claims made against an Insured and that claim embodies the true nature of the claim, a duty to defend the entire claim arises. This is so even where the pleadings include claims that may be outside the policy coverage.”

RioCan Real Estate Trust

- The critical part of this ruling is that the duty to defend the entire claim arises only when the covered claim:
  - "embodies the true nature of the claim."

SREIT (Park West Centre) Ltd.

- SREIT is another snow clearing and ice removal case. The injured party alleged that he slipped on ice and alleged that the owner failed to make the premises safe from the risks inherent in ice and snow and also claimed under the Occupier's Liability Act.

SREIT (Park West Centre) Ltd.

- The snow removal contractor's insurer refused to defend SREIT, the additional insured, on the grounds that the ice originated from a faulty gutter that allowed water to drip down onto the side walk. This fact, as well as the Occupier's Liability Act pleading, allegedly dealt with separate negligence and were outside the scope of the additional insured coverage.

SREIT (Park West Centre) Ltd.

- Per the Court:
  - "Even if it could be said that the Amended Statement of Claim contains allegations that are both within and some that are outside the coverage, the claims are, in my opinion, so intertwined that there is no rational or practical basis for distinguishing costs related to the covered and arguably non covered claims."

SREIT (Park West Centre) Ltd.

- On appeal, ING, the contractor's liability insurer, argued that the court had failed to give effect to the limitation to the additional insured status, i.e. coverage was in fact limited to vicarious liability. This argument was rejected by the Court of Appeal. Accordingly:

SREIT (Park West Centre) Ltd.

- "As the passages which follow make clear, Justice Beveridge was satisfied that despite the rain gutter allegations in the amended pleadings, the true nature or substance of the action being a slip and fall on an unsalted sidewalk, had not changed."

Liu (Litigation Guardian) v Chu

- Manulife, as landlord, was an additional insured on a tenants policy. Due to the tenants negligence, Liu was injured when struck by a delivery cart on the common elements of the mall.

Liu (Litigation Guardian) v Chu

- The tenant's insurer refused to defend Manulife, alleging that the pleadings included allegations re the statutory liability of Manulife, a liability allegedly not covered by the tenant's insurance.
- In rejecting this argument, the court noted:

Liu (Litigation Guardian) v Chu

- "Sovereign's position that Manulife's liability arises from its duties as an occupier under the Act may be convincing at first glance. However, it disregards the nexus between the plaintiff's claim and the coverage that Sovereign agreed to provide Maxim's. It would be without dispute that the act of Maxim's employee in effecting a delivery of goods to its premises in Metrotown on a cart would fall within the scope of the policy."

Cadillac Fairview Corporation

- Cadillac Fairview was provided with a Certificate of Insurance stating that it was added as an additional insured on a policy purchased by its snow removal contractor.
- Following a slip and fall, pleadings were issued alleging improper snow removal and failure to maintain the pavement.

Cadillac Fairview Corporation

- In ruling that the insurer was obliged to defend Cadillac, the court observed:

Cadillac Fairview Corporation

- "If, through negligence, ice was allowed to build up, that would be a contributing cause of the plaintiff's loss, whether the underlying pavement was properly maintained or not. I cannot think of a circumstance on this pleading in which Cadillac Fairview could reasonably be found liable for negligent maintenance of the pavement without the build up of ice as a contributing cause of the loss. The true nature of the claim is negligence in the removal of ice."

Penticton (City) v Axa

- A contractor working for the City relocated a Stop Sign, making it obscure. It was not replaced when the work was completed.
- Following an accident, the city was sued for failing to replace the stop sign and failing to properly supervise the contractor

Penticton (City) v Axa

- The court ruled that there was sufficient nexus between the acts of the contractor and the accident for the City to claim as an additional insured under the contractor's CGL policy

Saanich (District) v Aviva

- In this case, an individual attending a dog grooming course at a local recreational centre was injured when stuck by a lacrosse ball. The pleadings alleged that the lacrosse group was negligent and that the City was negligent in not providing for the safety of invitees.

Saanich (District) v Aviva

- The City was an additional insured on a liability policy purchased by the lacrosse league.
- Aviva denied coverage to the City on the grounds that failing to provide for the safety of invitees was a separate liability and did not arise out of the operations of the lacrosse league. The court disagreed:

Saanich (District) v Aviva

- "Particulars of the negligence alleged with respect to Saanich are not identical to those concerning the Lacrosse Defendants, but they are inextricably linked. In many of the cases cited to me, the particulars of negligence were identical. However, this is not a necessary prerequisite to establish the duty to defend where the policy contemplates coverage so long as the potential liability arises out of the activities of the named insured."

Williams (Guardian ad litem of)

- During a performance by a Christian rock group at a church the floor collapsed causing severe injuries to members of the audience. A condition of the use of the church building was that the promoter was to place insurance for the performance and that the church be added as an insured under the promoters CGL policy.

Williams (Guardian ad litem of)

- The issues before the court was whether or not the church and others had been added as additional insureds and what was the extent of the coverage provided if coverage was found to exist.

Williams (Guardian ad litem of)

- The court ruled that on the facts of the case, the broker had, at a minimum, the implied authority to add additional insureds to the promoter's policy, and that the Certificate of Insurance issued by the broker was sufficient to provide additional insured status.

Williams (Guardian ad litem of)

- Was the collapse of the floor, caused by a preexisting design error, a risk covered by the promoter's CGL policy?
- The additional insured language did not limit coverage to "liability arising out of the operations of the named insured."

Williams (Guardian ad litem of)

- The court ruled that the allegations were sufficient to require the insurer to defend. As to the argument that the broker had unnecessarily broadened coverage by not limiting the scope of coverage to “arising out of” the operations of the promoter, the court dismissed this argument.

Williams (Guardian ad litem of)

- According to the court:
  - “However, even if the authority had included such a requirement I find that the application should be dismissed because interpretation of the named insured operations limitation dictates that even if the wording had been included on the certificate, Lloyd’s/Temple would still be required to defend the claim.”

Williams (Guardian ad litem of)

- "As Southin J.A. stated in Monenco, '[s]uffice it to say that if this project had not existed, there would have been no claim. Ergo the claim arises out of it.' Had the promoter not put on the concert, then no injuries would have occurred. Thus the potential liability arises out of the operations of the insured, Unite, and there would be no restrictions upon the coverage potentially available to the conference and the other additional insureds even if the wording had been included in the certificates."

Additional Ins. Coverage Denied

- TransAlta Utilities Corp. v High Tree Services [1994] A.J. No. 351
- Canadian National Railway v O'Hanlon Paving Ltd. [1999] ABQB 762
- Kocherkewych v Greyhound Canada Transportation Corp. [2003] B.C.J.C. No. 534

Additional Ins. Coverage Denied

- Waterloo (City) v Economical Mutual Insurance Co. [2006] O.J. No. 5252
- D'Cruz v P.P. Landscaping Ltd. [2007] O.J. No. 2704
- Ontario (Minister of Transportation) v Canadian Surety Co. [2008] O.J. No. 4670
- Cadillac Fairview Corporation v Olympia Sanitation Products Inc. [2010] ONSC 4309

Additional Ins. Coverage Denied

- Kinear v Canadian Recreation Excellence (Vernon) Corp. [2010] B.C.J. No. 2675
- Dominion of Canada General Insurance Co. v ING Insurance Co. of Canada [2011] O.J. No. 3080

TransAlta Utilities Corp.

- The issue was the scope of coverage provided to “additional insured” parties for their own negligence. The cause of the loss claimed against was trespass. The court ruled, reversed on appeal, that under the facts of this case, there was coverage.
- The contract required High Tree Services to procure insurance to cover its own liability plus that of TransAlta for liability:

TransAlta Utilities Corp.

– "…arising out of or in consequence of or directly or indirectly attributable to the operations and work required to be performed by the Contractor, …on behalf of the Power Company, whether such injuries to person or damage to property is due or claimed to be due to the negligence of the Contractor, … or the Power Company…"

TransAlta Utilities Corp.

- According to the court:
  - There is an absolute liability imposed upon High Tree by cl. 9(a) to indemnify TransAlts from and against all loss, solicitor and client costs, charges, damages, expenses, claims and demands arising from any damage to property as a result of the operations and work performed by High Tree on behalf of TransAlts whether such damage is caused by the negligence of High Tree or of TransAlta.

TransAlta Utilities Corp.

- One of the exceptions to this indemnity excluded liability for:
  - damage to property of occupiers of lands on which the power company has a right of way for damage that is normal and reasonable in the context of the contractor performing its work

TransAlta Utilities Corp.

- A certificate of insurance had been issued stating that coverage was provided in accordance with the requirements of the contract..
- The trial court held that the exception did not, based on a technicality, apply.
- This was reversed on appeal.

TransAlta Utilities Corp.

- On appeal, the Alberta Court of Appeal ruled that the insurer was not obligated to defend TransAlta for two reasons" Accordingly"
  - First, the nature of the incident fell squarely within the exceptions to the indemnity, i.e.
    - damage to property of occupiers of lands on which the power company has a right of way…

TransAlta Utilities Corp.

– Second, trespass could not be considered an occurrence and as such was not covered by the insuring agreement. (Note – trespass coverage is included as a standard coverage in IBC 2100)

Canadian National Railway

- O'Hanlon Paving contracted with CN. The Work was described in the contract as:
  - Rental of Snow Removal Equipment…
  - "This Contract covers the supply of all labour, material and equipment required to carry out the following work:
    - Snow clearing and hauling"

Canadian National Railway

- CN was added as an additional insured, as follows:
  - …CN is an additional insured “with respect to Rental of Snow Removal Equipment, Edmonton Terminals”.
- An accident happened when a truck owned by a O’Hanlan subcontractor was damaged:

Canadian National Railway

– “While under the direction of a CN supervisor, Cramer’s truck became stuck as it was attempting to cross several tracks. A short time later, the truck was struck by a locomotive and as a result, suffered extensive damage.”

Canadian National Railway

- The court ruled that the accident did not arise out of the renting of snow clearing equipment and rejected CN's claim for coverage as an additional insured under O'Hanlan's policy.

Kocherkewych V Greyhound

- Bus driver placed luggage directly behind passenger on station platform. The passenger fell backwards over luggage and was injured.
- Greyhound was an additional insured on a liability policy issued to operator of bus depot.

Kocherkewych V Greyhound

– Policy defined insured as:

- Each person, firm, corporation or government body for whom the Insured has contracted to provide insurance is an Insured but only with respect to liability which arises out of the operations of the Insured, and only to the extent required by such contract.

Kocherkewych V Greyhound

- Court ruled that the contract did not require the Insured to insure against the negligence of Greyhound's employees. As the injury arose out of the negligence of Greyhound's employee, Greyhound was not insured.

Waterloo (City) v Economical

- K-W Octoberfest Company organized the Octoberfest festivities in Waterloo. The City permit required K-W Octoberfest to purchase liability insurance and to name the City of Waterloo as an additional insured. This was done, as follows:
  - "[City is]…added as additional insured but only insofar as their legal liability arises vicariously out of the negligent operations of the Named Insured."

Waterloo (City) v Economical

- A spectator sued after it was struck by a train while watching the Octoberfest parade. The allegations were against the City for having scheduled the parade at the same time trains were passing through and that it permitted K-W Octoberfest to operate a parade without reasonable or adequate steps to protect crowds.

Waterloo (City) v Economical

- The court ruled that the allegations against the City were for liability resulting from its own negligence. As the coverage provided by Economical was limited to the City's vicarious liability arising our of K-W Octoberfest's activities, there was no coverage

D’Cruz v B.P. Landscaping

- Arlene D’Cruz sued for injuries sustained when she allegedly slipped on ice on premises owned by Peel Housing. The allegations against Peel Housing included negligence with respect to winter maintenance and liability under the Occupier’s Liability Act
- B.P. Landscaping sued Peel for indemnity for any liability to D’Cruz

D'Cruz v B.P. Landscaping

- Peel was added as an additional insured:
  - "…but only with respect to their interest in the operation of the named insured."
- The court ruled that in defending B.P. Landscaping, the insurer was defending the main action and had no obligation to defend Peel because the action against Peel include allegations that were outside of the operations of B.P. i.e.

D’Cruz v B.P. Landscaping

- Liability under the Occupier’s Liability Act and, arguably, specifying a work schedule for B.P. that was inadequate for proper snow and ice removal.

- Based on subsequent Ontario rulings this case is suspect.

Ontario v Canadian Surety

- Huron Construction contracted with the Ontario Ministry of Transportation to pave a section of highway. The contract required Huron to place liability insurance naming Her Majesty the Queen as an additional insured…

Ontario v Canadian Surety

- "…and shall protect the Ministry against all claims for all damage or injury including death to any person or persons and for property of the Ministry and of any other pubic or private property resulting from or arising out of any act or omission on the part of the contractor…"

- The Certificate that was issued did not limit liability to the Huron's operations.

Ontario v Canadian Surety

- The Certificate read as follows:
  - This will confirm that
    - Huron Construction Limited and Huron Gravel and Her Majesty the Queen in Right of Ontario as represented by the Minister of Transportation and Communications has insurance in the Canadian Surety Company

Ontario v Canadian Surety

- Due to problems with the paving or the shoulder of the highway a truck driver lost control of his truck and was rendered a paraplegic
- At trial, Huron was found liable, but the Ministry was required to indemnify Huron for one half of the judgment

Ontario v Canadian Surety

  - "…as a result of M.T.O.'s independent negligence in failing to act upon information it obtained from an inspection conducted two days before the accident"

- The lawyer representing both the Ministry and its insurer, Kansa, did not seek coverage under the additional insured endorsement, believing that coverage did not apply in the circumstances.

Ontario v Canadian Surety

- Following the judgment, Kansa filed suit claiming indemnity against both Huron's insurer and against the lawyer that had represented it and the Ministry.

Ontario v Canadian Surety

- The court ruled that there was no coverage for the additional insured under the circumstance, and that the term “arising out of” in the policy did not grant coverage broad enough to include M.T.O.’s own independent negligence.
- In rejecting coverage, the court reasoned as follows:

Ontario v Canadian Surety

- “M.T.O’s inspection is alleged to have arisen out of Huron’s operations. The existence of such nexus or causal connection can also be seen as the foundation for coverage extending only to claims for liability arising from an act or omission of Huron. The fact that Lane J. found independent liability of M.T.O. which led to a duty to indemnify Huron that liability does not create a causal nexus which would trigger an indemnity obligation simply because it arose out of Huron’s operations. M.T.O. owed a duty to the public to inspect and had its own duty to inspect. These duties are independent of Huron’s acts.”

Ontario v Canadian Surety

- The court also articulated a public policy argument against coverage

Ontario v Canadian Surety

- “I must also be alive to the commercial reality of the relationship in determining the intent and expectation of the parties. Notably, the issuance of the Certificate was relegated to Rowlands Insurance Agency. No separate application was required. No additional premium was ever sought, or paid. It does not make any commercial sense whatsoever for such extensive coverage to be offered in such circumstances relating to wide-sweeping risks beyond liability coverage if M.T.O. were to be liable for some act of Huron”

Ontario v Canadian Surety

- The Ontario Court of Appeal affirmed and added the following:
  - “Based on the specific wording of the certificate and the CSC Policy, we are of the opinion that any coverage afforded thereunder to the MTO was limited, at least, to claims based on the MTO’s vicarious liability for the acts or omissions of Huron and its representatives. However, the liability findings made against the MTO in the accident litigation do not engage vicarious liability on the part of the MTO. On the contrary, they involve acts or omissions of the MTO’s own personnel.”

Ontario v Canadian Surety

- This ruling could be considered to be out of step with several other rulings. Nonetheless, it does exist and it could cause problems.

Cadillac Fairview v Olympia

- Plaintiff slipped and fell in shopping mall and alleged that:
  - Something on the floor caused her to slip
  - The area where she slipped was improperly designed
  - The area was in a state of disrepair
  - No signs were posted to warn of danger

Cadillac Fairview v Olympia

  - Floor was improperly maintained
  - Cadillac had instituted an inadequate cleaning regime
- The Indemnity provision in contract required Olympia to indemnify Cadillac for liability arising out of its operations. There were no allegations that injury arose out of the operations of Olympia

Kinnear v Canadian

- While attending a local hockey game Kinnear was injured when he fell while crossing rocks that bordered the parking lot. The pleadings included:

Kinnear v Canadian

- "…that the defendants … were negligent and in breach of their duties imposed by the Occupiers Liability Act. Specifically, he alleges a failure to design, build and maintain safe access to the site from 34th Street; failure to warn against the danger of pedestrians crossing the boulder zone; and failure to check, maintain and repair the overhead lighting in the area of the boulder zone."

Kinnear v Canadian

- The policy issued to the Vipers hockey team covered the arena owners as additional insureds for liability arising out of the operations of the Vipers. None of the allegations in the pleadings were directed at the operation of the Vipers. As such, no coverage was provided to the additional insureds.

Dominion of Canada v ING

- Named Insured operated a banquet hall in space rented from building owner.
- Building owner was added as an additional insured on policy covering banquet hall
  - "but only with respect to liability arising out of the ownership, maintenance or use of that part of the premises designated in the Declaration Page(s) leases to the Named Insured"

Dominion of Canada v ING

- TP slipped on ice while negotiating curb in front of the banquet hall
- Under the terms of the lease it was the Landlord's responsibility to maintain the area where the accident occurred, and the parking lot did not form part of the demised premises.

Dominion of Canada v ING

- The Ontario Superior Court of Justice ruled that the owner was not an additional insured with respect to the accident that occurred.
- The claim for the slip and fall was settled for $160,500.

Some Coverage Applied

- Atlific Hotels and Resorts Ltd. v Aviva Insurance Co. of Canada [2009] O.J. No. 2005

Atlific Hotels and Resorts Ltd.

- Deerhurst Resort was an additional insured on its snow removal contractor's policy, but only with respect to the contractor's snow removal activities.
- The claims against Deerhurst allege:
  - Negligence in the removal of snow and ice
  - Negligence on the part of Deerhurst in the operation and management of the hotel
  - Occupiers liability Act

Atlific Hotels and Resorts Ltd.

- Aviva refused to defend Atlific
- Atlific cited RioCan as authority that Aviva was required to defend both the covered and not covered pleadings.
- The court correctly rejected this argument:
  - "Thus in RioCan, the court determined that"
    - 'the true nature of the claim is that the defendant was negligent in failing to maintain an ice free parking lot'

Atlific Hotels and Resorts Ltd.

- Here, there were allegations against Deerhurst that went beyond the scope of the work of the snow removal contractor.
- Aviva was ordered to defend Atlific for the snow removal part of the claim.

Atlific Hotels and Resorts Ltd.

- This case contrasts with D'Cruz where the court ruled that because there were allegations both within and outside of the coverage, the insurer had no obligation to defend any part of the claim.

Additional Insured and Subrogation

- Lancombe v Don Phillips Heating
- Concominium Corp. 9813678 v Statesman Corp. [2007] A.J. No 695

Lacombe v Don Phillips

- This case involves the cost of remediation following a significant spill of oil at the Lacombe home.
- Don Philips was a contractor to Francis Fuels and had added Francis Fuels as an additional named insured on its CGL policy. This was confirmed by a Certificate of Insurance issued by Aviva.

Lacombe v Don Phillips

- The Aviva policy specified that Francis Fuels was an additional named insured:
  - "solely with regard to the liability arising out of the operations of the named insured"
- Aviva, was also the home owner's insurer for Lacombe, and in this capacity, subrogated against Francis Fuels.

Lacombe v Don Phillips

- Francis Fuels argued that Aviva could not subrogate in this instance because an insurer cannot subrogate against its own insured, even if it qualifies as an insured under different policies issued by that insurer. The court agreed.

Lacombe v Don Phillips

- The court also ruled that the facts established that the damage did “arise” out of the operations of Don Phillips, i.e. defective work by a Don Phillips’ employee, and noted that the term “arising out of” meant in part:

Lacombe v Don Phillips

  - "flowing from," "incident to," or "having connection with". Consequently, "So long as Francis' liability has any connection to the actions of Phillips, coverage will be available

- This ruling appears to interpret the term "arising out of" more broadly that did the courts in the Ontario Ministry of Transportation case.

Condominium Corp v Statesman

- Statesman Corp. was developing four condominiums. At the time of the fire, two of the condominiums were completed. During construction of the third, a fire occurred due to the negligence of a contractor. The ensuing damage to the completed condominiums and to neighbouring stuctures was $22,000,000

Condominium Corp v Statesman

- The insurer for the two condominiums corporations brought an action against Statesman to recover the money it had paid to repair the damaged structures.
- At the time of the fire, Statesman Corp. owned two parking spots and some other property covered by the policy insuring the damaged buildings.

Condominium Corp v Statesman

- The insurance on the condominiums covered directors, owners, unit holders and manager. Statesman was all of these.

Condominium Corp v Statesman

- At trial, the court allowed subrogation based on the limited extent to which Statesman was an insured and based on the fact that the loss resulted from Statesman's construction operations and not his ownership of insured property. The Court of Appeal disagreed:

Condominium Corp v Statesman

- "It is also suggested that it is unfair that an insured be protected from suits by its insurer, if that insured only paid a small fraction of the premiums for the policy. I respectfully disagree with that argument. This policy expressly waives subrogation against each of many insured. A bargain is a bargain, even if cheaply bought."

Condominium Corp v Statesman

- The court also raised the argument of public policy in rejecting subrogation in this case. Accordingly:

Condominium Corp v Statesman

- “But there is a bigger drawback to letting insurers sometimes sue their insured. For every new subrogated suit against an insured which succeeded, there would be a penumbra of dozens, even hundreds, of other doubtful cases. Those would yield unsuccessful subrogated suits, threats of suits, complex investigation by adjusters and experts, and lengthy negotiations. Even cases without any actual fault or special circumstances would at least involve lengthy investigation to assure the insurer that neither existed”

Action On Policy Not Enforceable

- Fenrich v Wawanesa Mutual Insurance Co. [2005] A.J. No. 788

Fenrich v Wawanesa

- Fenrich is a homeowner's policy case. Following damage to the Fenrich residence, Wawanesa settled the claim for damage to the dwelling as well as the contents claim of the owner of the dwelling.
- The owner's adult son was not willing to settle for the amount offered for his contents and sued Wawanesa.

Fenrich v Wawanesa

- Wawanesa acknowledged that the son was an insured under the policy, but argued that based on the policy language, only the named insured could sue. The court agreed. Accordingly:

Fenrich v Wawanesa

– The provisions in the policy limiting the right to sue to those named in the Declaration (in this case Fenrich's parents) demonstrates that the parties did not intend to extend the benefits of suing to a third party such as Fenrich, even though he is entitled to coverage because he falls under the definition of "Insured". Thus the first requirement of Fraser River, supra, is not met."

Fenrich v Wawanesa

- Based on this case, an insurer's rights of subrogation against design professionals in builder's risks policies may be supported.

Certificates of Insurance

- Mercer v Paradise (Town) [1991] N.J. No. 126
- Williams (Litigation guardian of) v B.C. Conference of the Mennonite Church Brethren [2010] I.L.R. 1-5005
- Ontario (Minister of Transportation) v Canadian Surety Co. [2008] O.J. 4670

Certificates of Insurance

- Certificates of Insurance routinely contain the following disclaimer:
  - This Certificate is issued for information purposes only and confer no rights on the holder
- The Certificate then purports to add parties as additional insureds; and

Certificates of Insurance

- Promises to endeavor to provide prior notice of cancellation, with no liability for failing to do so.
- So, what is a certificate of insurance worth?

Are Disclaimers Effective?

- In Mercer v Paradise (Town) the insured status of Delcan was evidenced by a Certificate of insurance that contained the traditional disclaimer. No one challenged Delcan's status. According to the court:
  - "To their credit, in this proceeding the third parties agree in argument that the effect of the certificate, with its reference to Delcan, is that Delcan was added as an unnamed insured under the general liability policy."

Certificates and Disclaimer's

- In Williams, though not mentioned in the reported case, the certificate did contain the traditional disclaimer. The disclaimer was not argued largely because it was believed that the use of certificates is so prevalent in commercial transactions that to argue against additional insured status based on the disclaimer would be futile and would probably only annoy the judge.

Certificates & Disclaimer's

- Also, based on practice, the court ruled that including an additional insured on a certificate of insurance, in this case, was equal to issuing an endorsement to the policy. This conclusion was based in part on the stated practice of the insurer, but was presented in very general terms.

Certificates

- The court in Ontario v Canadian Surety made the following observation about certificates of insurance:
  - “The Certificate is nothing more than evidence of coverage but cannot and does not create a separate and different policy or impose new duties on the insurer to indemnify any party not covered by the original contract of insurance. The Certificate is not the policy, but only evidence of the fact that a policy has been issued.”

Certificates

- Do the Williams and Paradise (Town) cases, as well as a whole bunch of cases where the issue of disclaimers was simply not addressed, thus allowing certificates to be treated as granting coverage, mean that the “weasel words” that are included in the vast majority of certificates, have become unenforceable as a result of the practice in the industry?

Certificates

- Maybe, but the Ontario courts seem undecided.
- In my opinion, certificates must be approached with extreme caution.

Rights and Obligations – First Named v Additional Insured

- Under standard CGL policies:
  - Only the First Named Insured is responsible for paying the premium
  - Only the First Named insured can cancel or change the policy
  - Only the First Named Insured receives notice of cancellation unless the policy is amended to provide notice to the additional insured

Rights and Obligations – First Named v Additional Insured

- The First Named Insured is responsible for deductibles
- No one receives preferential treatment in payment of claims
- Additional insureds must comply with the notice requirements in the policy

Conclusions

- Additional insured can, absent language in the policy to the contrary, enforce their rights to coverage.
- Insurers have no right of subrogation against their insureds, even additional insureds, but if the right of subrogation is specifically retained, such as against design professionals for their professional activities, we do not know.

Conclusions

- Additional insured status, granted by a certificate of insurance, has been ruled enforceable but its scope is unclear.
- Be careful. The specific question as to the enforceability of a certificate of insurance has not been fully answered.

Conclusions

- The scope of coverage granted an additional insured is determined by the language defining the grant of coverage; i.e.
  - If vicarious liability is all that is intended to be provided, spell it out.
  - If broader coverage is required, spell it out.
  - Allowing the courts to anticipate the intent leads to unfortunate results.

Conclusions

- The term “arising out of” has been interpreted as meaning much more than vicarious liability, but in the Ministry of Transportation case, a restrictive interpretation was used.
- If specific coverage is required for an additional insured, spell out the coverage and request an endorsement to the policy.

Conclusions

- Certificates of insurance may be valuable, but the best coverage you can rely on is the coverage you have purchased yourself.