Getting It Right Before the Loss: Indemnity, Additional Insured, and Waiver of Subrogation Issues

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INTRODUCTION

The contract is the very foundation of almost all business relationships. Whether one is buying or selling a subsidiary, entering into a lease, or selling a product or service, a contract is involved. Too often, however, contractual risk transfer is overlooked. Precedent clauses are often inserted into business agreements with little consideration of how they will operate in the event of a loss. Once the loss has occurred, it is usually too late to change the agreement and to re-allocate the risk.

This paper discusses the law and will provide practical suggestions for dealing with indemnity clauses, additional insureds, and waiver of subrogation and tort immunity issues.

This paper will consider the following issues:

- Interpretation of indemnity clauses
- Insurance coverage for indemnitees
- Tort immunity flowing from contractual insurance clauses
- Review of recent insurance and indemnity cases
- Dealing with coverage under more than one policy
- Can the court consider the scope of the indemnity agreement when interpreting the insurance contract?

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[2] The content in this article is provided for general information purposes only and does not constitute legal or other professional advice or an opinion of any kind.

- Common pitfalls in dealing with insurance and indemnity agreements;
- Recent Ontario cases;
- Dealing with coverage under more than one policy; and
- Can the court consider the scope of the indemnity when interpreting the insurance contract?

THE INDEMNITY AGREEMENT

In business contracts, it is common for one party to agree indemnify another party. The agreement to indemnify may or may not be accompanied by a further agreement to provide insurance for the other party. The indemnity is generally limited in scope, for example to occurrences in a certain location or arising out of the specified operations. As an example, a snow removal contractor may agree to indemnify the owner of a parking lot for personal injury claims "arising out of" that contractor's work on the parking lot.

There are two parts to an agreement to indemnify and insure:

- First, the indemnifying party agrees that it will be liable to account for the other party's liability to a third party in tort; and
- Second, the indemnifying party agrees to secure insurance to cover that liability.

The exact scope of the obligations, of course, are defined by the language of the agreement. As discussed below, it is very important to realize that these two obligations are independent of each other.

An example of an insurance and indemnity clause is as follows. This clause was taken from a service agreement:

> Indemnification
>
> The Service Provider will, both during and following the term of this Agreement, indemnify and save harmless the [Indemnified Party] from all costs, losses, damages, judgments, claims, demands, suits, actions, complaints or other proceedings in any manner based upon, occasioned by or attributable to anything done or omitted to be done by the Service Provider, its directors, officers, employees, agents, subcontractors or volunteers in connection with services provided, purported to be provided or required to be provided by the Service Provider pursuant to this Agreement.
>
> Insurance

> The Service Provider will obtain and maintain in full force and effect during the term of this Agreement, general liability insurance (the "Liability Insurance Policy") acceptable to the [Indemnified Party] in an amount of not less than five million dollars ($5,000,000.00) per occurrence in respect of the services provided pursuant to this agreement. Without limiting the generality of the foregoing, the Liability Insurance Policy shall:
>
> (a) be placed with a reputable insurer which is licensed to carry on business in Ontario and which is acceptable to the [Indemnified Party];
>
> (b) include as an additional insured [the Indemnified Party] and its representatives and employees;
>
> (c) include bodily injury, property damage, and personal liability coverage;
>
> (d) contain a separation of insureds and cross-liability clause;
>
> (e) provide that it will not be cancelled or materially altered without at least sixty (60) days prior written notice to the [Indemnified Party] delivered to the persons and addresses listed ... below.
>
> Within 10 days of the execution of this Agreement, the Service Provider is required to provide the [Indemnified Party] with a certificate of insurance confirming that the Liability Insurance Policy is in force. Within 30 days of the execution of this Agreement, the Service Provider is required to provide the [Indemnified Party] with a copy of the Liability Insurance Policy.

For ease of reference, this paper will refer to the party agreeing to provide the indemnity and insurance as the "indemnitor" and the party receiving the indemnity and insurance the "indemnitee".

INTERPRETATION OF INDEMNITY CLAUSES

General Rules of Contract Interpretation

An indemnity is a contractual term. As such, the general rules of contractual interpretation will apply. Professor Fridman, in *Law of Contract in Canada*, 5th ed. (Toronto: Carswell, 2006) at 454-462, summarizes these rules as follows:

> **The canons of construction for written documents**
>
> (i) Where there is no ambiguity in a written contract it must be given its literal meaning.
>
> (ii) Words must be given their plain, ordinary meaning, at least unless to do so would result in absurdity.
>
> (iii) The contract should be construed as a whole, giving effect to everything in it if at all possible.

(iv) In cases of doubt, as a last resort, language should always be construed against the grantor or the promisor under the contract; *verba fortius accipiuntur contra proferentem.*

(v) The *ejustem generis* rule.

However, special rules also apply to indemnity clauses. They are akin to an exclusion in an insurance policy, as they essentially limit and shift liability from one party to another. For this reason, indemnity clauses, like insurance exclusions, are construed narrowly against the party seeking to rely on the clause. Fridman states, at page 518:

> Once [an exclusion clause] is included in the contract ... it now seems clear that the courts regard it with critical, even, it might be said, a jaundiced eye. They will approach the interpretation of such a clause strictly, applying the ordinary rules of construction.

The leading Canadian case on indemnity clauses is *Canada Steamship Lines Ltd. v. R.,* [1952] 2 D.L.R. 786 (Privy Council). In that case, the Crown leased property to another party. The Crown's employees were negligent, and burned down a building on the leased premises. Pursuant to the lease, the lessee undertook to indemnify the Crown for any losses. Even though the Crown's employees were negligent, the Crown still sought to rely on the indemnity clause. The clause at issue stated:

> 17. That the lessee shall at all times indemnify and save harmless the lessor [the Crown] from and against all claims and demands, loss, costs, damages, actions, suits or other proceedings by whomsoever made, brought or prosecuted, in any manner based upon, occasioned by or attributable to the execution of these presents, or any action taken or thing done or maintained by virtue hereof, or the exercise of any manner of rights arising hereunder.

The Court set out a three-part test for interpreting indemnity clauses:

> (1) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called "the *proferens*") from the consequences of the negligence of his own servants, effect must be given to that provision. Any doubts which existed whether this was the law in the province of Quebec were removed by the decision of the Supreme Court of Canada in *Glengoil SS. Co. v. Pilkington* (1897) 28 S.C.R. 146.
>
> (2) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the *proferens*. If a doubt arises at this point, it must be resolved against the *proferens* in accordance with article 1019 of the *Civil Code* of Lower Canada: "In cases of doubt, the contract is interpreted against him who has stipulated and in favour of him who has contracted the obligation."
>
> (3) If the words used are wide enough for the above purpose, the court must then consider whether "the head of damage may be based on some ground other than that of negligence," to quote again Lord Greene in the *Alderslade* case, *supra*. The "other ground" must not be so fanciful or remote that the *proferens* cannot be supposed to have desired protection against it; but subject to this qualification, which is no doubt to be implied from Lord Greene's words, the existence of a possible head of damage other than that of negligence is fatal to the *proferens* even if the words used are *prima facie* wide enough to cover negligence on the part of his servants.

The court held that the wording was not clear enough, and refused to enforce the indemnity clause in favour of the Crown.

Strict Construction of Indemnity Clauses

Indemnity clauses are to be strictly construed. In *Falcon Lumber Ltd. v. Canada Wood Specialty Co.* (1978), 23 O.R. (2d) 345 (Ont. H.C.) and in *Braun Estate v. Zenair Ltd.*, [1998] O.J. No. 4841 (Ont. C.A.), the courts commented:

> The legal authorities lay down a number of general rules to be applied in the construction of exempting clauses. First, the clause must be strictly construed and the burden is on the party relying upon the exemption to prove that the particular loss caused to the other party was clearly within the scope of the exemption clause. Secondly, if there is an ambiguity in the meaning of the exemption clause, and it is capable of more than one reasonable construction, then the rule of *contra proferentum* will apply and the exemption clause will be construed against the maker. Thirdly, the defendant will not generally be exempt from liability for the negligence of its servants unless express words are used or unless the only possible head of damage for which the defendant may be liable on the contract lies in negligence.

This principle is demonstrated in the recent case of *Kinnear v. Canadian Recreation Excellence (Vernon) Corp.*, 2010 CarswellBC 3645 (S.C.). The plaintiff had left a hockey game and was in the parking lot when the overhead lighting went out. The plaintiff tripped and fell, and sued the owner and the operator of the arena facility. The owner and the operator then sued the hockey club and sought to rely on an indemnity clause which provided as follows:

> The [Vipers hockey club] shall indemnify and save harmless [NORD (the owner) and CRE (the operator)]...from and against all claims and demands whatsoever (including all legal costs incurred by and any of them in defending any such claims or demand) ***arising directly or indirectly out of or occurring during the use of the Facility by the [Vipers]*** or any one authorized by the [Vipers] to use the Facility. The [Vipers] will be under no obligation to indemnify and save harmless [NORD and CRE] against or in respect of any damages or judgment rendered against [NORD and CRE] resulting from or arising out of any negligence or fault on the part of [NORD or CRE] with respect to the maintenance or condition of the Facility to the extent that the damage, loss for (sic) injury was caused or occasioned by the negligence of [NORD or CRE].

The owner and the operator argued that the loss arose out of the use of the facility by the hockey club. The plaintiff had been attending the hockey game, and would not have fallen but for the attendance to watch the game.

The court rejected this argument and held that the hockey club had no obligation to indemnify the owner or the operator:

> The plaintiff's claim in this case is based on allegations of negligence with regard to the maintenance and condition of the facility. There is no allegation, by the plaintiff or by the defendants, of negligence of any kind against the Vipers. Pursuant to the Facilities Agreement, the club had no rights or obligations with regard to the design, maintenance, repair or condition of anything outside of the building itself.
>
> In view of the whole of the agreement, I cannot conclude that it could have been within the

> contemplation of the parties that the Vipers would indemnify NORD or CRE for the consequences arising from NORD or CRE's negligence in an area completely outside the realm of the Vipers' responsibility or control.
>
> ***As the court said in Sinclaire v. South Trail Shell (1987), 2002 ABQB 378 (Alta. Q.B.), such a "shifting of responsibility should...require much clearer language..."***
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> With regard to the third step referred to above, clearly there could be an obligation on the part of the Vipers to indemnify NORD or CRE from claims other than those arising from NORD's or CRE's own negligence, including those suggested by the third parties' counsel, errant pucks, negligence of staff employed by the Vipers, and claims for injuries occurring within the areas of the Vipers' control and responsibility.
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> I conclude that clause 26 does not oblige the Vipers or the owner of the Vipers to indemnify the defendants NORD or CRE for any claim which is based solely on the allegations of NORD's or CRE's own negligence, which this claim is.

Indemnity For One's Own Negligence

There is frequently an issue of whether an indemnitee may be indemnified for his or her own negligence. For example, assume that a contractor working on a building agrees to indemnify the building owner for any damage to the building. Assume as well that the building owner burns down the building, and then seeks to have the innocent contractor pay for the loss caused by the owner's own negligence.

Such a scenario is not as far-fetched as it may seem. Recall the *Canada Steamship Lines Ltd. v. R.,* [1952] 2 D.L.R. 786 (Privy Council) case, which had very similar circumstances. The court in that case noted that it is *possible* for one to be indemnified for its own negligence, but there was no indemnity on the facts of that particular case.

The contract will require very clear language in order for indemnity of one's own negligence to be permitted. The Supreme Court of Canada commented in *Fenn v. Peterborough (City)*, [1981] 2 S.C.R. 613 (S.C.C.) that the law was clear that "if one is to be protected against or indemnified for one's own negligence, there would have to be an indemnity clause spelling out this obligation on the other party in the clearest terms".

Indemnity for one's own negligence was considered in *Beatty v. Waterloo (Regional Municipality)***,** 2011 CarswellOnt 4484 (S.C.J.). In this case, a motor vehicle accident took place near a residential housing project. The plaintiff alleged that the grading contractor, Nellis, was negligent and caused the action. The plaintiff also sued the municipality.

The municipality sought to rely on an indemnity clause in the contract with Nellis, which provided:

> The said Contractor shall indemnify and save harmless the Owner, his agents or such Municipality as aforesaid, from any claims or actions for loss or damages whatsoever that may result from <u>any of the Contractor's operations</u>.

The court construed the language strictly and held it was not clear enough to include the municipality's own negligence:

> The wording of the clause in this case requires Nellis to indemnify the municipality for claims or actions for loss or damages resulting from *its — that is Nellis' - operations*. That wording does not provide the necessary clear and unambiguous language required to hold Nellis responsible for the negligence of the municipality. In fact, it makes no mention at all of the negligence of the municipality.
>
> As I have found that Nellis was not negligent, there is no basis upon which to apply the indemnification provision nor can it be relied upon by the Municipal Defendants as a basis for liability in negligence.
>
> However, the clause is not limited to indemnification for claims in negligence, but provides for indemnification for "any claims or actions for loss or damages." As such, if Nellis were to be found liable on the ground of nuisance, the indemnification clause may apply.
>
> As such, there is a genuine issue for trial as to the application of the indemnity clause if Nellis is found liable for nuisance.

Does the Indemnity Clause Require the Indemnitor to Defend the Indemnitee?

Assume that there is no insurance, and that the indemnitee is forced to rely only on the indemnity clause. Does the indemnitor have to pay ongoing defence costs as they are incurred (similar to a duty to defend in an insurance policy), or does the indemnitor only have to reimburse the loss at the end of the day?

This issue was considered in *Stewart Title Guarantee Co. v. Zeppieri* (2009), 70 C.C.L.I. (4th) 247 (S.C.J.). In that case, a title insurer agreed to "indemnify and save harmless" Ontario real estate lawyers from certain types of claims. This obligation was found in a business contract, and not in an insurance policy.

Stewart Title tried to argue that it was only required to reimburse the legal fees of the lawyers at the end of the litigation. Such an argument may have succeeded if the clause had been limited to only an "indemnity". However, this particular clause stated that Stewart Title would both "indemnify" and "save harmless".

It is a principle of contract interpretation that different words are intended to have different meanings. "Save harmless" must, therefore, have a different meaning than "indemnify". The court held that the "save harmless" wording required Stewart Title to defend and pay defence costs on an ongoing basis. The court commented:

> The 2005 Indemnity Agreement does not contain the standard duty to defend language ordinarily seen in liability insurance policies: see, for example, *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801 (S.C.C.), at para. 8; Barbara Billingsley, *General Principles of Canadian Insurance Law*, p. 233. Instead, in the 2005 Indemnity Agreement Stewart Title agreed with the LSUC that for a real estate transaction where it issued a title insurance policy, it would "indemnify and save harmless" the lawyer and his firm who acted for the transferee, chargee and/or the title

> insurer "from and against any claims arising under the title insurance policy(ies), except for the member's gross negligence or wilful misconduct".
>
> This language imposes two obligations on Stewart Title with respect to a member of the LSUC — to "indemnify" that member, and to "save harmless" that member from claims arising under a title insurance policy. The contractual obligation to save harmless, in my view, is broader than that of indemnification. I accept the respondents' submission that the obligation to "save harmless" means that a LSUC member should never have to put his hand in his pocket in respect of a claim covered by the terms of the 2005 Indemnity Agreement. Accordingly, the 2005 Indemnity Agreement requires Stewart Title to pay for the member's on-going costs of defending a claim that falls within the coverage of agreement. This interpretation not only is consistent with the plain meaning of the phrase "indemnify and save harmless", it also is consistent with the case law, the business sense underpinning the 2005 Indemnity Agreement, and the reasonable expectations of the parties.

Some contracts use even broader language to ensure that there is an ongoing defence obligation: to “indemnify, save harmless, and defend”.

Problems with Contractual Indemnities

One of the most significant problems with contractual indemnities is the fact that they are worthless if the indemnitor does not have sufficient assets to pay for the indemnity. If the indemnitor has no assets, or becomes bankrupt, then the indemnity is meaningless. It is for this reason that most business contracts contain both an indemnity, as well as a requirement that the indemnitor obtain insurance coverage for the indemnitee. The insurance provides an alternative source of recovery for the indemnitee.

INSURANCE COVERAGE FOR INDEMNITEES

The scope of coverage for indemnities under CGL policies can vary greatly, depending on how the indemnitee is covered under the policy.

Coverage as an Indemnitee

The current form of the standard IBC CGL policy provides coverage for indemnitees in certain circumstances. The Supplementary Payments provision provides:

> 2. If we defend an insured against an “action” and an indemnitee of the insured is also named as a party to the “action”, we will defend that indemnitee if all of the following conditions are met:
>
> a. The “action” against the indemnitee seeks “compensatory damages” for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an “insured contract”.

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defence of, that indemnitee, has also been assumed by the insured in the same "insured contract";

d. The allegations in the "action" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee";

e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "action" and agree that we can assign the same counsel to defend the insured and the indemnitee; and

f. The indemnitee [agrees to cooperate with the insurer, *etc.*].

Upon reviewing these terms, it becomes immediately apparent that coverage is severely restricted under this clause. There will often be a conflict of interest between the indemnitor and the indemnitee. Where that happens, there is no coverage under this part of the policy. Further, it is necessary that the indemnitor (i.e., the insured) has also assumed the defence of the indemnitee under the business contract. If the indemnitor/insured refuses to do so, then there will again be no coverage under this part of the policy.

Coverage as an Additional Insured

Benefits of Additional Insured Coverage

It is much more preferable to have coverage as an additional insured, as there are usually fewer restrictions on coverage. For example, coverage is not dependant on the insured assuming the defence of the additional insured under the indemnity clause in the business contract. As well, the insurer cannot refuse to defend on the basis of conflict of interest; instead, the insurer is required to retain two separate lawyers in the event of conflict.

Problems with Additional Insured Coverage – No Endorsemenet

That being said, additional insured status comes with its own potential problems and pitfalls. One of the most common problems arises out of the use of the standard ACORD certificate of insurance, and the failure of insurers to issue additional insured endorsements.

The certificate itself will usually state that the party at issue has been added as an additional insured, "but only with respect to liability arising out of the operations of the Named Insured". Many people rely on the certificate as evidence of being an additional insured.

However, many certificates contain a number of disclaimers, including the following:

> "This certificate is issued as a matter of information only and confers no rights upon the certificate holder other than those provided in the policy. This certificate does not amend, extend or alter the coverage afforded by the policies listed herein."

Insurers often take the position that a certificate alone is insufficient to create additional insured coverage, and that an endorsement is necessary. Where no endorsement was ever issued, this creates huge problems for the additional insured.

Some courts have held that an insurer is bound by the certificate of insurance alone, where the broker appeared to have the insurer's authority to issue the certificate naming a party as an additional insured, even if there was no endorsement added to the policy. This issue was considered in the recent case of *Williams (Litigation Guardian of) v. B.C. Conference of the Mennonite Brethren Churches* (2010), 86 C.C.L.I. (4th) 107.

In *Williams v. Mennonite Brethren*, several people were injured when the floor of a church collapsed and they were plunged into the church's basement. The collapse occurred during a rock concert that was being held at the church. The promoter of the rock bands that were playing had liability insurance, which had been issued by a broker. The broker issued certificates of insurance to the owner of the church and to the bands. However, the insurer had not endorsed the promoter's policy to add the church and the bands as additional insureds. Justice Dillon concluded that the certificates were valid and provided coverage, even though there was no endorsement. The practice between the broker and insurer indicated that the certificates were equivalent to endorsements adding additional insureds.

There was no express agreement between the insurer and the broker for the broker to add additional insureds to the promoter's policy. However, evidence showed that the insurer was not concerned about the broker issuing certificates of insurance under a promoter policy to add additional insureds, provided that the insurer had prior information about the additional insureds. The promoter sent a list of venues to the broker annually, with the request for coverage. A representative of the insurer testified that brokers were not required to seek the insurer's approval before issuing certificates on a promoter's policy, and the representative was told not to acknowledge acceptance of the certificates due to volume. The history of the transactions between the broker and insurer indicated the issuance of certificates was routine in the case of the promoter in this case. The certificates themselves contained the term "issued", which Justice Dillon felt was significant.

Justice Dillon found that the conduct of the insured gave "implied authority" (also known as "apparent authority") to the broker to issue the certificate. Even if the insurer never received copies of the certificates, the broker still had the implied authority to add additional insureds. Therefore, the insurance policy covered the church and the bands.

However, of note in that case, the insurer agreed that *the issuance of a certificate authorized by the insurer was, alone, sufficient to add the church and bands as additional insureds to the promoter's policy*. This rendered inoperative the standard

form language of the certificate that stated that the certificate was a matter of information only and conferred no rights on the insured.

This argument will obviously not work in every case, as it is very fact-specific. The more prudent course of action is to ensure that endorsements are used, or to obtain written confirmation from the insurer that certificates will be accepted as evidence of additional insured status.

Effect of Failure to Obtain Additional Insured Coverage

As noted above, there is usual a dual obligation to indemnify *and* to obtain insurance. What happens if the indemnitor gave an indemnity, but failed to name the indemnitee as an additional insured under the insurance policy. Does this relieve the indemnitor from its obligations under the indemnity clause in the business agreement?

The answer is "no". Even if the indemnitor fails to obtain insurance, it is still obligated to comply with its contractual indemnity. The recent case of *Papapetrou v. 1054422 Ontario Ltd.*, 2011 ONSC 4731 provides an example.

In that case, the plaintiff fell on stairs of premises owned by Cora Group Ltd. She sued Cora and the snow removal contractor (1054422 Ontario Ltd.). The snow removal contractor agreed to obtain $2 million of CGL coverage and to name Cora Group as an additional insured. In addition, the contractor agreed to indemnify Cora Group:

> The Contractor assumes sole responsibility for all persons engaged or employed in respect of the Work and shall take all reasonable and necessary precautions to protect persons and property from injury or damage. The Owner shall not be responsible in any way for any injury to or the death of the Contractor's employee', agents or subcontractors or to any other person or for any loss of, or damage to, any property in any way resulting from any act or omission of the Contractor or the employees, agents or sub-contractors of the Contractor, including loss of business or profits. The Contractor shall indemnify and save harmless the Owner, their directors, employees, agents and representatives against all claims, losses, liabilities, demands, suits and expenses from whatever source, nature and kind in any manner based upon, incidental to or arising out of the performance or non-performance of the contract by the Contractor or any of its employees, agents and representatives.

Even though the snow removal contractor failed to obtain the promised insurance, the court held that the contractor was required to defend and indemnify Cora Group under the terms of the indemnity clause. The judge commented:

> As a result, based on the contract, and the context of the pleadings framing the action, the snow removal contractor is obligated to defend and indemnify the property owners. This remains the case despite the fact that the contractor failed to name the property owner as an insured contrary to the contract between the parties. They should not escape responsibility to defend/indemnify merely because they failed to meet their contractual responsibility.

The failure to obtain insurance coverage is a breach of the business contract between

the indemnitor and the indemnitee: *Scarborotown Chrysler Dodge Jeep Ltd. v. Shark Investment Group Inc.*, 2007 CarswellOnt 4085, aff'd 2009 ONCA 414. The measure of damages is usually the cost of defending and settling the case, which would have been covered under the insurance policy. The indemnitor therefore becomes liable for those amounts.

It is important to realize that the obligations under the business contract and the insurance policy are independent of each other.

As noted above, however, the indemnitor may not have sufficient assets to pay.

TORT IMMUNITY FLOWING FROM CONTRACTUAL INSURANCE CLAUSES

Where the business contract contains a covenant to obtain insurance, the indemnitee may be obtaining tort immunity. In other words, the indemnitor (or its insurer in a subrogated claim) may be prevented from suing the indemnitee for losses in tort.

A "trilogy" of Supreme Court of Canada cases has established this principle: *Cummer-Yonge Investments Ltd. v. Agnew-Surpass Shoe Stores Ltd.* (1975), [1976] 2 S.C.R. 221 (S.C.C.); *Pyrotech Products Ltd. v. Ross Southward Tire Ltd.* (1975), [1976] 2 S.C.R. 35 (S.C.C.); and *Smith v. T. Eaton Co.* (1977), [1978] 2 S.C.R. 749 (S.C.C.). These cases "are generally recognized as standing for the proposition that, in the context of a commercial lease, a covenant to insure by a landlord should flow to the benefit of a tenant unless that result would be inconsistent with something in the lease itself": *North Newton Warehouses Ltd. v. Alliance Woodcraft Manufacturing Inc.*, 2005 BCCA 309, 44 B.C.L.R. (4th) 227 (B.C. C.A.), at para. 33.

The *Cummer-Yonge* and *T. Eaton* cases stand for the proposition that the landlord cannot sue the tenant where the landlord covenanted to insure the building. The *Ross* case held that the tenant is immune where it covenanted to pay for part or all of the insurance premiums.

The Ontario Court of Appeal explained the law in *Tony & Jim's Holdings Ltd. v. Silva* (1999), 43 O.R. (3d) 633:

> It is well established that the risk of loss by fire passed to the landlord under the provision of the lease respecting payment of insurance rates by the tenant. This is so even in the absence of an express covenant to insure: *Pyrotech Products Ltd. v. Ross Southward Tire Ltd.* (1975), [1976] 2 S.C.R. 35 (S.C.C.). The risk passed to the landlord despite the tenant's general covenant to repair, which, in the absence of the landlord's obligation to insure, would obligate the tenant to repair damage caused by its own negligence: *Cummer-Yonge Investments Ltd. v. Agnew-Surpass Shoe Stores Ltd.* (1975), [1976] 2 S.C.R. 221 (S.C.C.). As stated by this court in *Madison Developments Ltd. v. Plan Electric Co.* (1997), 36 O.R. (3d) 80 (Ont. C.A.) at 84:
>
> > The rationale for this conclusion is that the covenant to insure is a contractual benefit accorded to the tenant, which, on its face, covers fires with or without negligence by any

> person. There would be no benefit to the tenant from the covenant if it did not apply to a fire caused by the tenant's negligence.
>
> It is equally clear that the insurer can be in no better position than the landlords on their subrogated claim.

Since the trilogy, the same principles have been extended to construction contracts: *Madison Developments Ltd. v. Plan Electric Co.* (1997), 36 O.R. (3d) 80 (Ont. C.A.). In that case, the defendants were subcontractors on the plaintiff owner's and contractor's building project. The contract between the contractor and subcontractor obligated the former to obtain fire insurance. The builder's risk policy named the owner and contractor as insureds but also insured property owned by others. A construction shed was destroyed by fire. The insurer brought an action in the name of the owner and contractor. At trial, the subcontractor and its employees were found negligent and liable for damages. The court determined that the insurer had subrogation rights. The subcontractor and its employees appealed, and the Court of Appeal set aside the judgment. The contract obligating the contractor to obtain fire insurance protected the subcontractor from a subrogated claim. The undertaking to secure insurance was a contractual benefit to the subcontractor and operated as an assumption by the contractor of the risks associated with fire.

A similar result occurred in *Active Fire Protection 2000 Ltd. v. B.W.K. Construction Co.* (2005), 25 C.C.L.I. (4th) 103 (C.A.). In that case, BWK Construction Co. was a general contractor for the construction of a municipal community centre. BWK hired a subcontractor, Active Fire Protection, to install a fire sprinkler. BWK was obligated to obtain "all-risk" property insurance as required by general contract with town and fire insurance as stipulated in subcontract. Based on that understanding, Active Fire agreed to assume certain risk under the subcontract. The indemnity clause provided:

> Article XII. The subcontractor hereby assumes entire liability for any and all damage or injury or any kind or nature whatever to all persons, whether employees or otherwise, and to all property resulting from the performance of the work provided in this Agreement, and agrees to indemnify [the appellant] from and against any and all loss, expense including attorney's fees in connection with the performance of the work herein provided for, or resulting from the use by the Subcontractor, his employees, of any materials, tools, implements, scaffolding, ways, hoists, elevators, works or machinery or other property of [the appellant] whether same arise under common law or Worker's Compensation Law (in effect) locally or otherwise. If such claim for demand is made against [the appellant], any payment due or thereafter to become due the subcontractor shall be withheld to cover such loss and expense, including attorney's fees.
>
> Until the completion and final acceptance of the work the subcontractor shall maintain, at his own expense, the following: "WORKER'S COMPENSATION INSURANCE" in accordance with the laws of the Province in which the Work is situated: "PUBLIC LIABILITY INSURANCE" and "PROPERTY DAMAGE" of sufficient coverages to protect and indemnify owners, [the appellant] and others from all claims that may arise.

The project was damaged by a flood, which was caused by Active Fire’s negligence. BWK withheld payment to Active Fire, and Active Fire sued. BWK then counterclaimed for the flooding damages.

Active Fire successfully argued that BWK had no cause of action against it for the flood. Had BWK obtained proper insurance, then the insurer would have paid and BWK would have been an insured under the policy. Article XII, the indemnity given by Active Fire, had to be interpreted in this context. In other words, the indemnity was not intended to cover risks which should have been covered under the insurance that was to have been provided by BWK. The Ontario Court of Appeal held that BWK could not be better off by having failed to meet its contractual obligation to provide insurance, and commented:

> In this case, both in the Main Contract and in the Subcontract, the appellant [BWK] contractually undertook to obtain insurance for the entire construction project that it admits would have responded to the losses in issue. In breach of its contractual obligations, the appellant failed to obtain such insurance coverage. But, its commitments to obtain the requisite insurance (all-risks property insurance under the Main Contract and fire insurance under the Subcontract) operated as a voluntary assumption by the appellant of the risk of loss or damage caused by the perils to be insured against. As a matter of contract, it assumed the risks.
>
> When the appellant's commitment to obtain all-risks property insurance was incorporated as a term of the Subcontract, it became a specific contractual covenant in favour of the respondent [Active Fire]. In addition, the appellant gave a separate and distinct covenant under the Subcontract in favour of the respondent to obtain fire insurance. As this court indicated in *Madison*, there would be no benefit to the respondent from these contractual covenants by the appellant unless they applied to insured perils caused by the respondent's own negligence. Thus, the appellant's failure to obtain the specified insurance was a breach of both the Main Contract, entitling the Town of Whitby to relief against the appellant, and the Subcontract, in contravention of its obligations to the respondent.
>
> As in *Madison*, this was a large construction project. The parties to the Main Contract expressly envisaged that subcontractors would be involved in carrying out the work on the project. For this reason, the Town extracted a commitment by the appellant to protect the Town's interests under the Main Contract by incorporating the general conditions of the Main Contract into any subcontract. The respondent's obligations under Article XII of the Subcontract must be understood in this context.
>
> The respondent agreed to assume the liability described in Article XII in the face of the appellant's obligations to obtain all-risks property and fire insurance. In assuming that liability, the respondent was entitled to expect performance by the appellant of those contractual obligations, to its benefit and to the benefit of the owner of the project, the Town of Whitby. Were it otherwise, the respondent's assumption of such liability may well have been differently expressed or reduced.

The Court held that, by failing to obtain the promised insurance, BWK was not permitted to sue Active Fire for the flood loss. Active Fire was therefore granted summary judgment on its fees for the unpaid work on the project.

RECENT INSURANCE AND INDEMNITY CASES

There have been numerous Ontario cases determining the extent of insurance coverage for additional insureds in the last several years. Certain cases interpret the extent of the coverage broadly, while others interpret the extent of the coverage narrowly.

LaCombe v. Don Phillips Heating Ltd., 2005 CarswellOnt 4386 (S.C.J.) is one of the cases that interpreted "arising out of" the operations of the named insured very broadly. In *LaCombe,* the court considered a situation in which a company hired to replace an oil furnace hired a subcontractor to install the furnace. An insurance certificate was sent to the subcontractor which stated the following:

> This is to certify that the Assured set forth below is insured by insurance companies as noted below, which insurance is described as follows: [description of policy]

There was no indication in the certificate of insurance that the additional insured provision in the policy actually limited the subcontractor's coverage by providing coverage "solely with regard to liability arising out of the operations of the contractor".

The subcontractor argued that because of the broad certificate of insurance and the fact that the full policy wordings were never provided to the subcontractor, the insurer ought to be estopped from arguing that coverage was "solely with regard to liability arising out of the operations of the contractor". The court held that the argument was not available, as there was no evidence of detrimental reliance on the part of the subcontractor.

Therefore, that issue was not resolved.

The court ultimately found for the subcontractor despite the narrower wording of the insurance policy. It interpreted the words "arising out of" in the insurance policy very broadly:

> Second, the term "arising out of" has a broader significance than "caused by". In Amos v. Insurance Corp. of British Columbia, [1995] 3 S.C.R. 405, at para. 21, the Supreme Court of Canada held that the words "arising out of have been said to mean "originating from," "having its origin in," "growing out of," "flowing from," "incident to," or "having connection with." So long as Francis' liability has any connection to the actions of Phillips, coverage will be available.

Despite the fact that it was arguably the subcontractor's own negligence, there was some connection to the actions of Phillips and the court therefore determined that it was covered.

In *Harris v. Memorial Boys' & Girls' Club Inc.,* [2008] O.J. No. 2750 (S.C.J.), the coverage was also interpreted broadly. The City of London attempted to recover its share of a settlement paid to a plaintiff who was injured by a horizontal bungee amusement at a ribfest in one of its parks. Both the operator of the bungee amusement and the Memorial Boys' & Girls' Club (the event organizers) were contractually obligated to add the City as an additional insured on their liability policies. The organizers provided the certificate and added the City as an additional insured "but only with respect to their interest in the operations of the named insured." The operator provided the City with a certificate but did not actually obtain the insurance. The insurer was not a party to the proceeding. The operator was noted in default but presumably did not have insurance or assets.

Justice Rady found that the plaintiff's injury was causally connected to the activities being carried out by the organizer and by the operator. The injury of the plaintiff was "closely connected" to the activity that the organizer's insurer had agreed to insure. The plaintiff would not have been injured but for the decision of the organizer to put on the ribfest. Based on the foregoing, Justice Rady concluded that there was a right to indemnity. However, Justice Rady distinguished the cases which were determined after trial where there was a finding of an independent cause of action against the party seeking indemnity.

Riocan Real Estate Investment Trust v. Lombard General Insurance Co. (2008), 91 O.R. (3d) 63 (Ont. S.C.) is a slip and fall case in which the contractor agreed to add *Riocan* as an additional insured for losses suffered in connection with the snow removal operations at its properties. There were several underlying actions to the duty to defend application. The statement of claim made some allegations that were arguably independent allegations against *Riocan* (for example, failing to have a system of inspection). However, the judge found as follows:

> Notwithstanding the multiple theories pleaded by the plaintiffs, the fundamental issue raised in each of the actions is that the plaintiffs' slip-and-fall on the ice covered parking lot occurred because of the failure of the owner to keep the parking lot free of ice. The true nature of the claim is that the defendant was negligent in failing to maintain an ice-free parking lot and as a result the plaintiffs fell and sustained injuries. It will be up to the trial judge to determine firstly if there were conditions in the parking lot which caused the plaintiffs to fall and if so whether these conditions arose because of the work performed or not performed by the contractor or whether the landowner bears some or all of the responsibility under the Occupiers' Liability Act. It is also possible that the trial decision will not cleanly apportion the fault as between the contractor and RioCan. In any event, it is impossible at this stage to determine where fault may lie for the plaintiffs' injuries.

The judge therefore held as follows:

> I am of the view that in most situations where there is a duty on an insurer 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. Conflict issues can be addressed in a number of ways. Counsel did not request me to deal with this issue.

The judge held that there was coverage for the additional insured and that the insurer had a duty to defend the entire claim.

In *Waterloo (City) v. Economical Mutual Insurance* Co., [2006] O.J. No. 5252, the insurer's duties were considered to be narrower. The Ontario Superior Court considered whether Economical had a duty to defend a personal injury action brought against the applicant, the City of Waterloo. The plaintiff in the underlying action was injured by a train passing nearby while watching the Kitchener-Waterloo annual Oktoberfest parade. The parade was conducted by a corporation called K-W Oktoberfest Inc.

The City of Waterloo had been added as an additional insured on K-W Oktoberfest's

insurance policy with Economical. The Certificate of Insurance indicated that the City was added as an additional insured to the policy, "but only insofar as their legal liability arises *vicariously* out of the negligent operations of the Named Insured". Justice Flynn noted that the Certificate stated on its face that it was only issued as a matter of information and conferred no rights on the holder. The policy itself did not mention the words vicarious liability. The additional insured endorsement stated:

> This insurance applies to those stated on the declarations as "additional insureds", but only with respect to liability arising out of the operations of the named insured.

Justice Flynn noted that by the very terms of the certificate itself, the certificate was subordinate to the terms, conditions and exclusions of the policy. The policy language was considered paramount.

In determining that there was no duty to defend, Justice Flynn stated as follows:

> In my view this is a common, clear and unambiguous limitation of coverage. The words "arising out of have been interpreted in the cases to include such meanings as "originating from", "growing out or, "flowing from", "incident to", or "having connection with".
>
> These words define the pertinent liability for which coverage is provided. The pleadings on their face do not allege facts in support of liability "flowing from" or "incident to" the operations of K-W Oktoberfest Inc. And the plaintiffs have not sued K-W Oktoberfest Inc.
>
> The K-W Oktoberfest parade was merely the site or occasion of the Hepditches unfortunate accident with the train.

All of the allegations of negligence against the City stand alone and are neither expressly or by necessary inference derivative of or arising out of the operations of K-W Oktoberfest Inc.

Tinkess v. N.M. Davis Corp., [2007] O.J. No. 1026 (S.C.J.) also interpreted the words "arising out of" narrowly. That case involved a slip and fall in which the party to whom snow removal was subcontracted had been added on the policy of the parking lot operator. The court considered an indemnity and insurance agreement in which the snow removal subcontractor agreed to indemnify the parking lot operator for liability in any "manner arising out of, any of [the subcontractor's] acts or failures to act ". The judge held that the subcontractor was only liable for its own liability and that there was no indemnity or insurance obligation with respect to the parking lot operator's independent negligence. Justice Belobaba held that since there was no indemnity or insurance obligation under the business contract, there was no need to consider whether the parking lot operator had even been added to the snow removal subcontractor's insurance policy. There was some indication that the parking lot operator had not actually been added, despite the fact that there was a certificate of insurance.

D'Cruz v. B.P. Landscaping Ltd., 2007 CarswellOnt 4385 (S.C.J) involved a slip and fall on an icy patch located on property owned by Peel Housing, one of the

defendants. Peel Housing had a contract with B.P. Landscaping Ltd. according to which B.P. Landscaping agreed to indemnify Peel Housing and to name Peel Housing as an additional insured on B.P. Landscaping's insurance policy. B.P. Landscaping was insured by Citadel.

The contract between Peel Housing and B.P. Landscaping provided that B.P. Landscaping would provide general liability insurance coverage, "with coverage including the activities and operations conducted by the vendor and those for whom the vendor is responsible for in law". Peel Housing was to be named as an additional insured.

The Certificate of Insurance stated:

> The Regional Municipality of Peel and/or Peel Housing Corporation — 0/A Peel Living have been added as additional insureds, but only with respect to their interest in the operation of the named insured.

In an unusual decision, the judge held that the allegations that were relevant to B.P. Landscaping's involvement were already being defended by Citadel, incidental to its defence of B.P. Landscaping. She further held that there were separate and distinct claims of liability made against Peel Housing that were unrelated to the allegations against B.P. Landscaping, such as duties arising from its status as an occupier of the property on which the incident occurred. She stated that those allegations were no doubt covered by Peel Housing's own policy of insurance. It is questionable as to whether this decision was correctly decided.

Atlific Hotels & Resorts Ltd. V. Aviva Insurance Co. of Canada, 2009 CarswellOnt 2697 (Ont. S.C.) provided narrow coverage, and distinguished the *RioCan* case discussed above. In *Atlific,* the Court considered an agreement in which a resort was named as an additional insured under the Aviva policy of a snow removal contractor, but only with respect to liability arising out of the contractor's operations. There were allegations in the statement of claim of negligence on the part of all defendants relating to snow and ice removal, negligence on the part of the resort in the operation and management of the hotel, and occupier's liability.

The court held that Aviva did not have to defend the entire action. Rather, it had to defend only the snow and ice removal claims (the first of the three categories of allegations outlined above). *Riocan* was distinguished because in that case, the court was able to find that a claim potentially within coverage captures "the true nature of the overall claim." In *Atlific,* there were three categories of negligence and the two that were unrelated to snow and ice removal could stand on their own.

The writers prefer the *Riocan* decision to the decision of *Atlific* Hotels. Given the decision in *Hanis v. Teevan,* [2008] O.J. No. 3909 (C.A.), the writers have difficulty in seeing how the duty to defend could be split so early in the proceedings. Presumably, in defending the snow and ice removal claims, there would be substantial overlap in the defence of the other claims.

DEALING WITH COVERAGE UNDER MORE THAN ONE POLICY

A party that is an additional insured under one policy often has its own insurance that covers the same loss. Both policies may respond to the loss, and questions will arise as to how defence and indemnity costs should be divided amongst the overlapping insurance policies.

Overlapping Coverage

The Supreme Court considered this issue in *Family Insurance Ltd. v. Lombard Canada Inc.,* [2002] 2 S.C.R. 695. The court noted that two policies (or more) contribute to a loss if the following conditions are met:

1 All the policies concerned must comprise the same subject-matter.

2 All the policies must be effected against the same peril.

3 All the policies must be effected by or on behalf of the same assured.

4 All the policies must be in force at the time of the loss.

5 All the policies must be legal contracts of insurance.

6 No policy must contain any stipulation by which it is excluded from contribution.

In that case Lesley Young was sued by a plaintiff who had been injured in a fall from a horse. Young was covered by two policies – a homeowner's liability policy issued by Family Insurance, and a commercial general liability ("CGL") policy issued by Lombard to members of the Horse Council of B.C.

At issue was which insurer had to pay the defence costs. Both policies applied to the loss. Each insurer argued that its policy was excess and that the other policy was primary. The B.C. Court of Appeal went outside of the policy wordings and considered the surrounding circumstances (such as the premium payable, the type of policy, the insurers' presumed intent, *etc*.). All of these surrounding circumstances led the court to hold that the Family policy was primary, and the Lombard policy was excess.

However, the Supreme Court reversed. It held that each insurer had to pay 50%. The Supreme Court noted that it is necessary to determine the intentions of each insurer *vis-a-vis* the insured. If it is a contest between two insurers, then the court cannot go outside of the policy to consider surrounding circumstances. If it is a contest between the insured and the insurers, then the court may consider surrounding

circumstances to resolve ambiguity.

Primary or Excess Insurance?

The first question is whether one of the policies is excess to another. This can be determined through the insuring agreements (i.e. one policy says it will apply once primary insurance is exhausted) or through the "other insurance" clauses of the contract.

In the situation we are considering, there will likely be two policies that are primary according to their insuring agreements. The question is, therefore, whether the "other insurance" provisions of the contract change that and make one excess to the other.

An "Other Insurance" clause is a condition in a liability insurance policy which stipulates what happens when there is other insurance *at the same level.* In other words, "Other Insurance" clauses are used when there are two primary policies, or two excess polices.

Basically, there are three types of "Other Insurance" clause:

- *Primary or pro rata clause.* This type of clause typically states that if there is other primary insurance, then the policy contributes with the other primary policy on a *pro rata* basis.

- *Excess clause.* An excess clause states that, if there is other valid and collectible insurance, the policy is excess.

- *Escape clause.* An escape clause states that, if there is other valid and collectible insurance, the policy does not apply whatsoever.

The general rule is that the courts will give effect to the "Other Insurance" clauses if they can be reconciled: *Family Insurance Ltd. v. Lombard Canada Inc.* For example, if one policy states that it is primary, and the other states that it is excess, then there is no problem — the court will hold that the first policy is primary and the second policy is excess.

How the policies will interact will depend on the interpretation of the "Other Insurance" clauses. For example:

- If both policies are primary, they will contribute to defence costs. The method of sharing will depend on the policy language.

- If both are excess, and there is no primary insurance, then the excess clauses cancel each other out. Both become primary, and they will usually share equally. (See *Family Insurance Ltd. v. Lombard Canada Inc.).*

- If one is primary, and one has an escape clause, then only the primary policy will apply.

In the *Family Insurance* case, both insurers had to contribute equally, as the two excess clauses cancelled each other out.

CAN THE COURT CONSIDER THE SCOPE OF THE INDEMNITY AGREEMENT WHEN INTERPRETING THE INSURANCE CONTRACT?

Insurers often try to restrict the scope of coverage provided to additional insureds based on the indemnity clause in the contract. Whether the insurer is entitled to do so depends on the terms of the business contract and of the insurance policy. However, some general rules can be stated:

- As a starting point, the scope of coverage for an additional insured should be found *only* in the terms of the insurance policy, unless the insurance policy states otherwise. For example, the terms of the additional insured endorsement will usually limit liability to "liability arising out of the operations of the Named Insured", or sometimes to liability arising out of a specified contract.

- In some rare cases, the insurance policy will state that coverage under the policy is limited *only* to the coverage provided under the contractual indemnity between the indemnitor and the indemnitee: see *e.g. Kocherkewych v. Greyhound Canada Transportation Corp.* (1996), 35 C.C.L.I. (4th) 221 (B.C.S.C.).[3]

- In the absence of such provisions in the insurance policy, the terms of the indemnity should not be considered. In must be recalled that the insurer is not a party to the business contract between the indemnitor and indemnitee, so the business contract should not be considered as part of the insurance coverage analysis in most cases. Rather, the business contract is properly understood as extrinsic evidence. Any attempts to use the language in the business contract to interpret the insurance policy must be made in the context of the rules on introducing extrinsic evidence.

Justice Winkler, as he then was, provided an extensive analysis of introducing extrinsic evidence in a non-insurance context in *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of),* [2008] O.J. 2637 (Ont. S.C.), affirmed (1999), 178 D.L.R. (4th) 634 (Ont. C.A.). Justice Winkler summarized the parole evidence rule as follows at paragraphs 403-405:

[3] In that case, the insurance policy covered indemnitees of the 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*".

> Where the agreement has been reduced to writing, the parol evidence rule operates to prohibit the introduction of extrinsic evidence to vary the written contract. This rule of interpretation is enunciated in G.H.L. Fridman, The Law of Contract in Canada, 3rd ed. (Toronto: Carswell, 1994) at pp. 455-456:
>
> The fundamental rule is that if the language of the written contract is clear and unambiguous, then no extrinsic parol evidence may be admitted to alter, vary, or interpret in any way the words used in the writing.
>
> . . .
>
> This is consistent with the principle that where a document purports on its face to be the final and conclusive expression of the parties' agreement, the document will be taken to be a reliable record of the parties' latest agreement, and evidence of the negotiations leading up to it will not be admissible. See: S.M. Waddams, The Law of Contracts (3rd ed.) (Toronto: Canada Law Book, 1993) at 210. . . .
>
> In short, the general rule is that where the contract is not ambiguous, external evidence is not admissible.

There is some wiggle room, as extrinsic evidence can be introduced to attempt to show the "factual matrix" in which the policy was made. A court is not restricted to simply reviewing the terms of the policy without any consideration of the commercial context in which it is made. According to *Leigh Instruments,* the court "may admit evidence of the surrounding circumstances, including evidence of the commercial purpose of the contract, the genesis of the transaction, the background, the context, and the market in which the parties were operating." The subjective intention of the parties is not admissible; the evidence is admitted to show what "reasonable persons in the position of the parties" would have intended in that context.

The "factual matrix" can unearth a "latent ambiguity" in the contract. A contract that is clear on its face may be ambiguous in light of its commercial context. Further evidence can then be admitted to ascertain, objectively, the intention of the parties.

The Ontario Court of Appeal recently upheld the parole evidence rule in an insurance coverage context. In *Lombard Canada Ltd. v. Zurich Insurance* Co., [2010] O.J. No. 1645 (Ont. C.A.), the court determined that the motion judge had erred by using a fleet report which did not form part of an insurance policy in interpreting that insurance policy. In that case, Choice Rental leased a car from Tracmount. The car was involved in an accident and the driver and Tracmount were sued. Choice Rental was insured by Zurich, but failed to list the particular car on its reports to Zurich. Zurich refused to defend. Lombard had issued a contingent lessor's liability insurance policy to Tracmount, in case a lessee (such as Choice Rentals) failed to procure insurance as required. Lombard brought an application for a declaration that Zurich had an obligation to cover the vehicle.

The applications judge found that Zurich had no such obligation. In so finding, she relied on four documents: the policy; the fleet endorsement; Tracmount's certificate as additional insured; and a monthly fleet report provided by Choice to Zurich.

The Court of Appeal held that the applications judge ought only to have considered the policy and the fleet endorsement that formed a part of that policy. Tracmount's certificate was not a part of the policy between Choice and its insurer. The monthly fleet report was certainly not part of the policy. According to the Court of Appeal, the policy and fleet endorsement were determinative.

CONCLUSION

Indemnity and insurance clauses are seldom given any consideration when business agreements are drafted. They are typically boiler-plate clauses contained within precedents. The agreements are often drafted by corporate lawyers who have no real idea of what the clauses mean and how they interact.

Risk managers must be aware of the different types of indemnity and insurance clauses, and how they interact. Being attentive to such issues can avoid much unnecessary, and expensive, litigation.