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Practical cross-border insights into insurance and reinsurance law

Insurance & Reinsurance 2022

11th Edition

Contributing Editor:
Jon Turnbull
Clyde & Co LLP

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Business Interruption Insurance and the COVID-19 Pandemic: The Canadian Experience


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Introduction

There is no doubt that the COVID-19 pandemic has given rise to some of the most contentious legal issues of our time on a global scale. Justice Belobaba, for the Ontario Superior Court of Justice, began his determination regarding a class action carriage motion by stating, "[t]he impact of the Covid-19 pandemic on business operations in Canada has been devastating".[1] As the pandemic extends into its third calendar year, courts throughout the United States and across the Commonwealth have made remarkable strides in addressing coverage concerns for pandemic-driven business interruption losses. While many of these processes can be described as novel and expeditious, these terms sadly do not define the Canadian experience.

Last year, in our chapter titled "Whither Direct Physical Loss or Damage in Canada", we provided insight into how Canadian courts might interpret certain insuring agreements in relation to COVID-19 losses. Specifically, we looked to whether shutdowns in response to COVID-19 constituted "direct physical loss or damage", a phrase commonly employed as a threshold to cover in all-risks and other property policies. In Canada, this issue has only recently been addressed, and then only tangentially, by the Ontario Court of Appeal in its decision in *MDS Inc. v. Factory Mutual Insurance Company*.[2] Released after more than 16 months since the inception of the pandemic and not even in the context of a COVID-19 case, the Court overturned a troubling trial decision which appeared to open the way to the conclusion that the word "physical" had no substantive meaning. However, a variety of other coverage questions remain outstanding, and despite efforts to aggregate same, there appears to be no comprehensive end in immediate sight.

This chapter provides an overview of the current status of the Canadian legal processes grappling with the coverage issues arising out of the COVID-19 pandemic. It aims to provide a frank discussion about the difficulties faced by the Canadian judiciary in face of the urgent need for a resolution of the many outstanding coverage issues. As a part of that discussion, we compare the expedited processes which have taken place in both the UK and Australia to the omnibus class action of *Workman Optometry Professional Corporation et al. v. Certas Home and Auto Insurance Company et al.*, which highlights the traditional constraints of Canadian judicial processes which stand in the way of providing much-needed answers to insurers and policyholders alike.

An Update to *MDS*

In the landmark decision of *MDS*, the Ontario Court of Appeal refused to classify simple loss of use as constituting "resulting physical damage", thereby reversing the lower court's finding that, under an all-risks policy, the "physical damage" requirement for coverage might be met by a loss of use or economic loss.

This appeal considered the issue of whether the insurer, Factory Mutual Insurance Company ("FM"), was required to provide coverage under an all-risks property insurance policy (the "Policy") issued to the plaintiff, MDS Inc. ("MDS"), for losses arising from an unplanned shutdown of the Atomic Energy of Canada Limited ("AECL") Nuclear Research Universal ("NRU") reactor. The shutdown was caused by a leak in the NRU reactor. MDS purchased isotopes that were produced at the NRU reactor. As a result of the shutdown, MDS lost profits because it was unable to purchase said isotopes. Consequently, MDS submitted a claim for lost profits arising from the shutdown. FM Global denied coverage citing the corrosion exclusion.

The Policy provided business interruption coverage for losses resulting from physical damage, as well as Contingent Time Element coverage resulting from a supplier's business interruption. The Policy excluded coverage for losses caused by "corrosion" – a term which was not defined in the Policy. The Policy included an exception to the corrosion exclusion for resulting "physical damage not excluded by this Policy", but did not define resulting physical damage.

The question on appeal was, if the corrosion exclusion applied, whether the damage suffered constituted resulting physical damage. Despite being a purely *obiter* analysis because the corrosion exclusion was held not to apply, the trial judge had held that the loss of use in issue should be considered "physical damage" because the term "physical damage" was ambiguous. The court concluded that an all-risks policy is designed to provide broad coverage and, accordingly, the loss of use of insured property "would constitute resulting physical damage".

In allowing the appeal, the appellate court held that the trial judge erred in finding that the term "corrosion" was ambiguous and in deciding that losses other than physical damages were covered. Read in the context of the Policy as a whole, the meaning of the word "corrosion" was clear. The corrosion exclusion applied and MDS's losses were not covered under the Policy. Likewise, the term "physical damage" in the exception to the exclusion was clear. The court held that the plain meaning of physical damage did not include economic loss and a contextual analysis of the policy did not lead to a broader interpretation of "resulting physical damage". Additionally, the Court of Appeal held that case law has not extended the interpretation of "resulting physical damage" beyond physical repairs to include loss of use. Although the leak resulted in the shutdown, the shutdown itself was not resulting physical damage. Therefore, the Court of Appeal held that the exception did not apply to economic losses caused by the inability to use the equipment during the shutdown.

MDS has applied for leave to appeal to the Supreme Court of Canada. Because there is no automatic right of appeal to that Court in this case, MDS must convince the Court to grant leave on the basis that the appeal raises questions of public importance. MDS

has attempted to fulfil this test by effectively linking the matter to the pandemic in arguing that "[l]eave is sought because Canadians need to know what will and will not be covered by standard form "all-risk" insurance". This is reinforced by the fact that leave is not sought in relation to the applicability of the corrosion exclusion: instead MDS framed the "fundamental issues" as follows:

- whether a physical damage exclusion in a standard form "all-risk" policy should cover fortuitous and non-fortuitous harms; and
- whether the loss of an insured property's functionality or use constitutes resulting "physical damage" within the meaning of an "all-risk" policy.

MDS then submitted, very clearly, that "[t]he answer to these questions is relevant to issues affecting the Canadian public, including whether the shutdown of a business due to COVID-19 could constitute resulting "physical damage" within the meaning of an "all-risk" policy".

It is well-accepted by both policyholder and insurer counsel that the *MDS* decision is likely to influence the judicial approach to losses arising from the COVID-19 pandemic. Whether the result will be the same when such a question is eventually put to the courts in the COVID-19 context remains to be seen.

Responding to COVID-19 Challenges: The Canadian Experience

There is no doubt that the American judiciary has embraced the use of summary processes. Across the United States, we have seen hundreds of decisions related to whether coverage is afforded by pandemic-induced business interruption losses being handed down on a regular basis. As recently as December 9, 2021, the Seventh Circuit Court of Appeals released six decisions which concluded that commercial property policies did not provide coverage for loss of use which was unrelated to any physical alteration of property.[3] These decisions are simply the most recent in a long line of determinations, the earliest of which we have located being that of Judge Joyce Draganchuk in *Gavrilides Management Co. v. Michigan Ins. Co.*[4] in July 2020.

In Commonwealth jurisdictions, where processes are not generally as expedited as those available in the United States, alternative dispute resolution mechanisms have been adopted in light of the pressing need for closure on these issues for all stakeholders. In the UK, for example, the specific issue of whether business interruption wording provided coverage for losses related to COVID-19 has already been decided by the UK Supreme Court in its landmark decision of *FCA v. Arch Insurance (UK) Ltd. and Others*.[5] The Financial Markets Test Case Scheme allowed the Financial Conduct Authority to obtain a "timely, transparent and authoritative judgement" to "resolve contractual uncertainty in business interruption (BI) insurance cover".[6]

In Australia, two test cases were authorised to be taken by the Australian Financial Complaints Authority ("AFCA") in accordance with the AFCA's Complaint Resolution Scheme Rules. On October 8, 2021, Justice Jagot for the Federal Court of Australia decided *Swiss Re International Se v. LCA Marrickville Pty Ltd.*[7] The Court considered various business interruption claims from nine businesses and the issue of whether the business interruption policies could provide cover to policyholders for business losses due to the COVID-19 pandemic. The Court concluded, in all but one claim, that the business interruption policies did not require the insurers to provide coverage for business losses suffered as a result of COVID-19. An expedited appeal was heard before the Full Court of the Federal Court on November 8, 2021. As of the date of this chapter, this decision has not been released.

Canadian courts do not utilise summary processes in the way that American jurisdictions do, nor are there statutes which authorise "test cases" so as to streamline these disputes as in the UK and Australia. It is perhaps not surprising then that the Ontario Court of Appeal has recently commented about how the civil justice system in the province is dramatically overwhelmed, with a backlog of cases that has disrupted the administration of justice.[8] The Court noted that "no less than a cultural shift is required to preserve our civil justice system" and called on lower courts to adopt a creative and pragmatic approach to this extraordinary and unprecedented challenges to the judicial system to minimise delays and ensure expeditious access to justice.

Capitalising on the Court's commentary, Canadian counsel for various insurers in *Workman Optometry Professional Corporation et al. v. Certas Home and Auto Insurance Company et al.*,[9] the largest COVID-19 class action process addressing business interruption coverage issues, have sought to fashion an expedited process in an attempt to overcome institutional barriers to expedited resolution.

Workman Optometry – The Joint Adjudication Motion

Workman Optometry is a national class action comprised of businesses alleged to have suffered business interruption losses due to COVID-19. The class action initially named 16 insurers as defendants, including Canadian-based insurers, such as Economical Mutual Insurance Company and Co-operators General Insurance Company, as well as a number of Lloyd's Syndicates. The scope of the proceeding is sweeping, with the class defined as all natural and legal persons outside of the province of Quebec that:

(i) contracted with a Defendant for Business Interruption Insurance;
(ii) on or before August 31, 2021, made a claim under their Business Interruption Insurance policy for losses due to:
  (A) the actual or suspected infection of staff, agents, customers or other persons with the SARS CoV-2 virus or its variants at the insured premises or within such proximity as may be specified in the insured's Business Interruption Insurance policy;
  (B) the actual or suspected presence of the SARS CoV-2 virus or its variants on the insured premises; or
  (C) the order of a civil authority regarding the SARS CoV-2 virus or its variants; and
(iii) were denied insurance coverage for those losses by any of the Defendants.

The common questions, which were certified for disposition on August 20, 2021, were as follows:

(i) Can the presence of the SARS CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each Defendant's property insurance wordings?
(ii) Can an order of a civil authority in respect of business activities that was made due to the SARS CoV-2 virus or its variants cause physical loss or damage to property within the meaning of the business interruption provisions of each Defendant's property insurance wordings?
(iii) If the answer to either of the first two questions is "yes", are there any exclusions in any of the Defendants' property insurance wordings that would result in coverage for such loss or damage being excluded (with "physical loss or damage to property" including "physical loss" or "physical damage" or "direct physical loss" or "direct physical damage", or similar wording as may be used in the business interruption provisions of each Defendants' property insurance wordings (collectively, the "Common Issues"))?

While thousands of claims are wrapped into the *Workman Optometry* class action, which are cumulatively estimated to involve billions of dollars of possible cover, not all business interruption claims have been subsumed into that process. Accordingly, the problem remains that a number of other legal

proceedings also seek coverage under business interruption provisions in insurance policies issued by insurer defendants, which all may be decided on different factual records with the consequent risk of inconsistent findings.

For that reason, the insurer defendants brought a motion to compel parties to 81 "Overlapping Proceedings", meaning those proceedings which were said to be legally and factually similar to those in *Workman Optometry* (and, importantly, those proceedings where the insurer defendants have consented to the relief sought on the motion), to participate in a joint adjudication process to determine the Common Issues. This process which, at least on its face, might have been expected to avoid inconsistent findings and preserve judicial economy, was hotly contested as a novel exercise of the Ontario Superior Court of Justice's inherent jurisdiction to control its processes.

The motion to have the Overlapping Proceedings jointly adjudicated was heard on November 30 and December 1, 2021 by Justice McEwen, and the Court has yet to release its decision.

As argued by the moving party insurers, "joint adjudication contemplate[d] the use of a single record for the determination of the Common Questions across multiple proceedings" in multiple jurisdictions. It was not consolidation, which we would see the multiple actions amalgamated into a single court file, but would put all decisions before a justice for early and efficient determination of the subject question. Those insurers asserted that a common and uniform determination of the Common Questions on a national basis would resolve or materially advance the Overlapping Proceedings and avoid the risk of inconsistent findings. Such a determination required a coordinated adjudication process to ensure the Common Questions were decided on a common evidentiary record. The insurers argued that there was broad inherent and statutory discretion for the Ontario courts to order this novel form of joint adjudication, relying on section 138 of the *Courts of Justice Act* which cements the principle that "[a]s far as possible, multiplicity of legal proceedings shall be avoided".

In addition, the moving party insurers invoked the Ontario *Rules of Civil Procedure* which require the courts to construe the rules liberally to "secure the just, most expeditious and least expensive determination…".[10] Ontario's *Class Proceedings Act* also provides that the court with a powerful tool to "may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination...".[11] To uphold the administration of justice, those insurers submitted, the courts must use this discretion afforded to them to provide the most expeditious determination of every proceeding. Those insurers argued that the proposed joint adjudication would enhance access to justice and preserve scarce judicial resources as it recognises the significant challenges litigants and courts faced amid the COVID-19 pandemic. The joint adjudication process also took into consideration the extraordinary nature and shared circumstances of the Overlapping Proceedings.

A number of plaintiffs and other parties to litigation opposed the motion, arguing that the joint adjudication process would cause further delays, would be expensive, would not determine all the issues in the claims and would dilute the court's focus on issues which were individual to specific proceedings. If the motion was granted, it was claimed that some insurers would have some of the claims against them decided within the proposed joint adjudication process, and others that would proceed on an individual basis.

The opposing plaintiffs also relied on the right of plaintiffs to control their own litigation process, even where that right to control may also be to the detriment of the system as a whole. One of the more vocal opponents of the consolidating process was a national law firm. This is perhaps not surprising given, as noted by Justice Belobaba in a decision dated May 27, 2021, that a specific law firm had (at the time) served 17 individual statements of claim with the Ontario Superior Court of Justice against insurers with damages alleged to "range from $250,000 to over $3 million".[12]

Guidance in These Uncertain Times

Ultimately, the joint adjudication motion is an exceptional request for an exceptional remedy in response to exceptional circumstances. Whatever its specific difficulties, the joint adjudication motion shows the need for creativity in a more traditional Commonwealth jurisdiction in order to have urgent matters with significant ramifications determined in an expedited manner. To date, policyholders and insurers across Canada still do not have the clarity that those in comparative jurisdictions have been afforded.

Furthermore, a significant question has been raised with respect to whether the Supreme Court of Canada, due to the leave to appeal filed in *MDS*, will raise consider the "physical damage" issue in the context of COVID-19 before the class action ever gets determined. The authors anticipate significant difficulties in terms of overlapping determinations should the Supreme Court grant leave and make sweeping pronouncements on the issues as framed by *MDS*.

Certainly, there are many lessons to be learned from the COVID-19 pandemic. From the perspective of the administration of justice, one is that major reform is required in how courts operate in order fairly and effectively to serve the Canadian public. Echoing the sentiment of Justice Hourigan for the Court of Appeal in *Poitras*, "[t]here is no single province wide answer to problems we face in delivering timely civil justice… However, what must remain consistent across the province is that motion and trial judges have the discretion to respond to local conditions to ensure the timely delivery of justice".[13]

While the idea of judicial reform has been recognised repeatedly by Canadian courts, the sentiment will remain unfulfilled if courts are not able to respond to proposals to streamline processes. The fate of the joint adjudication motion in *Workman Optometry* can be expected to provide guidance as to future innovation by Canadian courts.

Endnotes

1. *Workman Optometry et al. v. Aviva Insurance et al.*, 2021 ONSC 142.
2. *MDS Inc. v. Factory Mutual Insurance Company*, 2021 ONCA 594.
3. *Bradley Hotel dba Quality Inn & Suites Bradley v. Aspen Specialty Ins.*, No. 21-1173 (7th Cir. Dec. 9, 2021); *Crescent Plaza Hotel Owner v. Zurich American Ins.*, No. 21-1316 (7th Cir. Dec. 9, 2021); *Mashallah et al. v. West Bend Mutual Ins.*, No. 21-1507 (7th Cir. Dec. 9, 2021); *Sandy Point Dental v. Cincinnati Ins.*, No. 21-1186 (7th Cir. Dec. 9, 2021); *TJBC Inc. v. Cincinnati Ins.*, No. 21-1203 (7th Cir. Dec. 9, 2021); and *Bend Hotel Development v. Cincinnati Ins.*, No. 21-1559 (7th Cir. Dec. 9, 2021).
4. *Gavrilides Management Co., LLC v. Michigan Ins. Co.*, Case No. 20-000258-CB, Order Granting Defendant's Motion for Summary Disposition (Ingham Cty Circuit Court, Mich., July 1, 2020).
5. [2021] UKSC 1.
6. "FCA Statement – Insuring SMEs: BI" (May 1, 2020), online: *FCA* <https://www.fca.org.uk/news/statements/insuring-smes-business-interruption>.
7. [2021] FCA 1206.
8. *Louis v. Poitras*, 2021 ONCA 49.
9. Court File No. CV-20-00643488-00CP.
10. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, rule 1.04(1).
11. *Class Proceedings Act*, 1992, S.O. 1992, c. 6, s. 12.
12. *Workman Optometry et al. v. Aviva Insurance et al.*, 2021 ONSC 3843 at para. 3.
13. *Louis v. Poitras*, 2021 ONCA 49.

Dominic Clarke practises principally in the area of insurance litigation encompassing both coverage and defence matters. A "go-to" counsel for insurers both nationally and internationally, Dominic's expertise is frequently sought out on large and complex coverage claims. He specialises in advising and representing insurers with respect to commercial general liability, directors' and officers' liability and commercial property policies. Dominic has significant experience in the defence of products liability and sexual abuse litigation. A force in the courtroom, he has appeared as counsel in the Ontario Superior Court of Justice and the Ontario Court of Appeal. A leading expert in insurance coverage and reinsurance matters, Dominic is a frequent lecturer to professional bodies, and is hailed as "very experienced, very agreeable and highly competent" by *Who's Who Legal*, with respondents drawing praise for his superb litigation practice, especially in coverage disputes. He has published numerous thought leadership pieces on insurance in his nearly three decades of practice.

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Anthony Gatensby's practice is devoted to all aspects of insurance coverage. Anthony's extensive experience has made him a resource for both domestic and international clients at the primary, excess, and reinsurance levels.

Anthony frequently provides practical legal advice and representation to both insurers and policyholders on all manner of first-party and third-party insurance coverage matters. He regularly provides advice on potential and existing claims, both before and during litigation. He is consulted on the re-writing of existing policies and the implementation of new wordings and policy forms. He appears routinely in applications and before appellate courts on novel issues of law. Regardless of the task, Anthony's solutions are pragmatic, cost-effective, and tailored to meet his client's needs.

Anthony maintains a deep and extensive knowledge of insurance law. By keeping himself on the forefront of the most challenging issues facing both the insurance industry and its consumers, he is continually consulting on particularly complex matters, including issues related to COVID-19.

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