Date: 19981215 Docket: C.A. 146439

NOVA SCOTIA COURT OF APPEAL
Cite as: Guardian Insurance Company of Canada v. Green, 1998 NSCA 202
Chipman, Flinn and Cromwell, JJ.A.

BETWEEN:

GUARDIAN INSURANCE COMPANY OF CANADA for the Appellant		D. Kevin Latimer
	Appellant	
- and -		
BENJAMIN GREEN		Clarence A. Beckett, Q.C. for the Respondent
	Respondent	
		Appeal Heard: September 17, 1998
		Judgment Delivered: December 15, 1998

THE COURT: Appeal dismissed per reasons for judgment of Flinn, J.A.; Chipman and Cromwell, JJ.A. concurring.

FLINN, J.A.:

Background:

On April 27, 1990, the respondent was involved in a motor vehicle accident. The owner and operator of the other motor vehicle involved (Mr. MacIsaac) was uninsured and unlicensed. The liability of Mr. MacIsaac for this accident is not disputed. The respondent claims to have suffered a severe soft tissue injury which has left him permanently disabled.

The appellant is the respondent's automobile insurer. Included in the respondent's automobile insurance policy is a Family Protection Endorsement, commonly referred to as "SEF (Standard Endorsement Form) 44". SEF 44 is optional insurance. Its purpose, in general terms, is to offer the insured, and certain members of his family, protection where personal injury results from the fault of the driver of another motor vehicle who has less insurance than the insured has; and where that other driver's insurance limits are insufficient to cover the personal injury damages.

The respondent (insured) alleges that his claim for damages for personal injuries exceeds the limits ($200,000.00) payable by Judgment Recovery (N.S.) Limited (Judgment Recovery), on behalf of the uninsured, Mr. MacIsaac. The insured's coverage under SEF 44 is $500,000.00.

The insured settled part of his personal injury claim with Judgment

Recovery, and now wishes to proceed with this action against his insurer, for the balance of his damages claim, under SEF 44.

The insurer's position is that under the SEF 44 endorsement, the insured is only indemnified for the amount that the insured is legally entitled to recover from Mr. MacIsaac. The insurer argues that since the insured settled with Judgment Recovery by way of consent judgment, the amount that the insured is legally entitled to recover from the uninsured, Mr. MacIsaac, has been finally determined; and, therefore, the insurer does not have to respond to the SEF 44 claim. Further, that the consent judgment compromises the insurer's rights of subrogation.

Prior to the trial of this action the parties agreed, on an interlocutory basis, to have the Court decide the issue as to whether the settlement with Judgment Recovery barred the insured from proceeding against his insurer under SEF 44. Following the hearing of this application, in the Supreme Court of Nova Scotia, Justice Anderson decided that the insured could proceed with this action under SEF 44, and was not barred because of the settlement with Judgment Recovery.

The insurer appeals that decision.

Insurance Policy Provisions:

Prior to reviewing the facts which give rise to this appeal, it would be helpful to set out certain of the relevant provisions of SEF 44. I have highlighted various portions of these provisions, which I will refer to throughout these reasons.

The basic insuring agreement is provided for in s. 2 as follows:

> **2. INSURING AGREEMENT**
>
> In consideration of the premium charged and subject to the provisions hereof, it is understood and agreed that the insurer shall indemnify each eligible claimant for the amount that such eligible claimant is legally entitled to recover from an inadequately insured motorist as compensatory damages in respect of bodily injury or death sustained by an insured person by accident arising out of the use or operation of an automobile.
>
> (Emphasis added)

The terms “eligible claimant” and “inadequately insured motorist” are defined in the Endorsement. It is not in dispute, here, that the insured is an eligible claimant, and that Mr MacIsaac is an inadequately insured motorist. The dispute, here, arises from the interpretation of the phrase “the amount that such eligible claimant is legally entitled to recover from an inadequately insured motorist”, and how that phrase is applied to the facts of this case. The words “legally entitled to recover” are not defined. The issue is whether the settlement with Judgment Recovery (and the consequent release and judgment) finally determined that amount, so as to foreclose any claim by the insured against his insurer under SEF 44.

The Endorsement sets out a process for determining the amount that an eligible claimant is legally entitled to recover under the Endorsement in section 5 of the Endorsement:

> **5. DETERMINATION OF THE AMOUNT AN ELIGIBLE CLAIMANT IS LEGALLY ENTITLED TO RECOVER**
>
> (a) The amount that an eligible claimant is legally entitled to recover shall be determined in accordance with the procedures set forth for determination of the issues of quantum and liability by the uninsured motorist coverage provisions of the policy. (emphasis added)
>
> (b) In determining the amount an eligible claimant is legally entitled to recover from the inadequately uninsured motorist, issues of quantum shall be decided in accordance with the law of the province governing the policy and issues of liability shall be decided in accordance with the law of the place where the accident occurred.
>
> (c) In determining any amounts an eligible claimant is legally entitled to recover, no amount shall be included with respect to pre-judgment interest accumulating prior to notice as required by this endorsement.
>
> (d) In determining any amounts an eligible claimant is legally entitled to recover, no amount shall be included with respect to punitive, exemplary, aggravated or other damages the award of which is based in whole or in part on the conduct of the inadequately insured motorist or person jointly liable therewith, to the extent that the said damages are not for the purpose of compensating the eligible claimant for actually incurred losses.
>
> (e) In determining any amounts an eligible claimant is legally entitled to recover from an inadequately insured motorist as defined in paragraph 1(e)(i), no amount shall be included with respect to costs.
>
> (f) No findings of a Court with respect to issues of quantum or liability are binding on the insurer unless the Insurer was provided with a reasonable opportunity to participate in those proceedings as a party.
>
> (emphasis added)

The uninsured motorist coverage provisions of the policy, referred to in Clause 5(a) of the Endorsement, provide that the determination is made by

agreement or by arbitration:

> (5) **Determination of legal liability and amount of damages**
>
> The determination as to whether the insured person shall be legally entitled to recover damages and if so entitled, the amount thereof, shall be made by agreement between the insured person and the Insurer.
>
> If any difference arises between the insured person and the Insurer as to whether the insured person is legally entitled to recover damages and, if so entitled, as to the amount thereof, these questions shall be submitted to arbitration of some person to be chosen by both parties, or if they cannot agree on one person, then by two persons, one to be chosen by the insured person and the other by the Insurer, and a third person to be appointed by the persons so chosen. The submission shall be subject to the provisions of **The Arbitration Act** and the award shall be binding upon the parties.
>
> (emphasis added)

The Endorsement also sets out what matters are taken into account in calculating the amount payable per eligible claimant:

> **4. AMOUNT PAYABLE PER ELIGIBLE CLAIMANT**
>
> (a) The amount payable under this endorsement to any eligible claimant shall be ascertained by determining the amount of damages the eligible claimant is legally entitled to recover from the inadequately insured motorist and deducting from the amount the aggregate of the amounts referred to in paragraph 4(b), but in no event shall the Insurer be obliged to pay any amount in excess of the limit of coverage as determined under paragraph 3 of this endorsement.
>
> (b) The amount payable under this endorsement to any eligible claimant is excess to any amount actually recovered by the eligible claimant from any source (other than money payable on death under a policy of insurance) and is excess to any amounts the eligible claimant is entitled to recover (whether such entitlement is pursued or not) from:
>
> .....
>
> (iii) the Régie de l'assurance automobile du Quebec;

(iv) an unsatisfied judgment fund or similar plan or which would have been payable by such fund or plan had this endorsement not been in effect;
(v) the uninsured motorist coverage of a motor vehicle liability policy;
(vi) any automobile accident benefits plan applicable in the jurisdiction which the accident occurred;
(vii) any policy of insurance providing disability benefits or loss of income benefits or medical expense or rehabilitation benefits;
(viii) any Worker's Compensation Act or similar law of the jurisdiction applicable to the injury or death sustained;
(ix) any Family Protection Coverage of a motor vehicle liability policy;

(emphasis added)

The Endorsement also sets out procedural matters which are required, as conditions precedent, to the liability of the insurer under the Endorsement in s. 6:

6. PROCEDURES

(a) The following requirements are conditions precedent to the liability of the Insurer to the eligible claimant under this endorsement:

(i) the eligible claimant shall promptly give written notice, with all available particulars, of any accident involving injury or death to an insured person and of any claim made on account of the accident;

(ii) the eligible claimant shall, if so required, provide details of any policies of insurance, other than life insurance, to which the eligible claimant may have recourse;

(iii) the eligible claimant and the insured person shall submit to examination under oath, and shall produce for examination at such reasonable place and time as is designated by the Insurer or its representative, all documents in their possession or control that relate to the matters in question, and they shall permit extracts and copies thereof to be made.

(b) Where an eligible claimant commences a legal action for damages for bodily injury or death against any other person owning or operating an automobile involved in the accident, a copy of the Writ of Summons or other initiating process shall be delivered or sent by registered mail immediately to the chief agency or head office of the Insurer in the province together with particulars of the insurance and loss.

> (c) Every action or proceeding against the Insurer for recovery under this endorsement shall be commenced within 12 months from the date upon which the eligible claimant or his legal representatives knew or ought to have known that the quantum of the claims with respect to an insured person exceeded the minimum limits for motor vehicle liability insurance in the jurisdiction in which the accident occurred. No action which is commenced within 2 years of the date of the accident shall be barred by this provision.
>
> (emphasis added)

Section 9 of the Endorsement provides for subrogation rights of the insurer:

> **9. SUBROGATION**
>
> Where a claim is made under this endorsement, the Insurer is subrogated to the rights of the eligible claimant by whom a claim is made, and may maintain an action in the name of that person against the inadequately insured motorist and the persons referred to in paragraph 4(b).

Facts:

I will note, firstly, that prior to the hearing of this matter in the trial court, both the insurer and the insured changed their respective counsel. Therefore, references in these reasons to the insured's (or insurer's) counsel will refer to matters prior to the change. References to the insured's (or insurer's) present counsel, or counsel on this appeal, will refer to matters subsequent to the change.

The evidence before the trial judge consisted of a detailed affidavit of the insured's counsel, which was supplemented by his *viva voce* testimony. As well, there was an affidavit from the insurer's counsel.

On August 14th, 1990, counsel for the insured commenced an action against Mr. MacIsaac, the uninsured driver. Judgment Recovery stepped in, in the name of the uninsured driver, and counsel for Judgment Recovery filed a defence on his behalf.

In 1991, counsel for Judgment Recovery examined, on discovery, the insured and his common-law wife (Mrs. Ryan) who was also injured in the accident. Following that, in 1991, Mrs. Ryan's claim arising out of this motor vehicle accident, was settled with Judgment Recovery for approximately $6,500.00.

There was a hiatus in events until such time as the insured's counsel received a clearer picture from the insured's doctor as to a more definitive prognosis with respect to the insured's injuries resulting from the automobile accident.

In September, 1992, counsel for the insured was advised by Dr. Robert Maher, a specialist in physical medicine and rehabilitation, that as a result of the injuries sustained in the motor vehicle accident, the insured was disabled from returning to his previous employment and that the insured would most likely require vocational training for sedentary or light occupations.

On October 7th, 1992, counsel for the insured wrote to the insurer.

Counsel advised the insurer of the insured's disability; that the insured's claim for damages would likely exceed the $200,000.00 limit of Judgment Recovery, and that the insured intended to pursue the insurer pursuant to the SEF 44 endorsement on the insured's policy. Counsel provided the insurer with copies of the pleadings in the proceeding which he had instituted against Mr. MacIsaac as well as copies of all medical reports which he had received to date outlining the insured's injuries.

In January, 1993, the insured's counsel received an actuarial report outlining a projection of loss of future income for the insured as a result of the disability arising out of his injuries.

On May 17th, 1993, counsel for the insured presented a detailed proposal for settlement to both counsel for Judgment Recovery and to counsel for the insurer, whereby part of the settlement would be paid by Judgment Recovery and part would be paid by the insurer. The insured's counsel provided both other counsel with a copy of an actuarial report which he had obtained, which assessed the insured's future wage loss at approximately $498,000.00. Counsel for the insured subsequently met, in Halifax, with counsel for the insurer and counsel for Judgment Recovery to review this proposal. It was agreed at that meeting that the insurer and Judgment Recovery would fund an assessment, (referred to as a 20 year observation period), to determine if the insured could do some other type of work. Apparently, the result of the

assessment was that the insured might never be able to complete the upgrading program, let alone be a suitable candidate for retraining.

On July 16th, 1993, counsel for the insured commenced an action against the insurer claiming, on behalf of the insured, Section B benefits as well as indemnification under SEF 44. The claim for Section B benefits is not at issue here. That matter will be dealt with in a separate proceeding. Counsel for the insured testified that he had given thought to joining the insurer in the action against Mr. MacIsaac. However, he decided against that procedure, upon reviewing the decision of **Leask Estate & Leask v. Crocetti & MacLeod** (1990), 95 N.S.R. (2d) 353, a decision of Chief Justice Glube (then of the trial court), which was affirmed by this Court (1990), 97 N.S.R. (2d) 221. The essence of the decision is that it would be inappropriate for an SEF insurer to be joined as a party in a proceeding such as this, by the insured against the underinsured driver of another motor vehicle.

Further negotiations did not resolve the matter. However, an agreement was reached between counsel for the insured, counsel for the insurer and counsel for Judgment Recovery that the insured would be made available for further discovery examination, and that such discovery evidence would be available in both actions. This discovery examination was held on January 24th, 1994. Three days prior, on January 21, 1994, the insurer filed a defence to the action.

On April 7th and 8th, 1994, counsel for the insured and counsel for Judgment Recovery entered into negotiations resulting in a settlement of Judgment Recovery's obligation on behalf of the uninsured, Mr. MacIsaac. Counsel for the insured deposed that the settlement was with the express agreement of Judgment Recovery, and conditional upon the understanding, that it would not prejudice the insured from continuing to pursue his insurer for benefits under Section B or the SEF 44 endorsement on the policy. The correspondence between counsel for the insured and counsel for the insurer confirms this agreement.

Under the terms of the settlement with Judgment Recovery the insured was paid $120,000.00. In his affidavit, counsel for the insured sets out the basis for this $120,000.00 amount:

> 15. That in reaching the settlement in the amount of $120,000.00, the Plaintiff took into account the statutory limits of $200,000.00 payable by Judgment Recovery, as well as the required deduction of any future Section B benefits payable by Guardian, as well as amounts paid out to a co-Plaintiff, Jeanette Ryan, also injured in the accident, and whose claim was previously settled on December 4, 1991, in the amount of $6,645.86. The present value of the Section B benefits was assessed by actuary Jessie Shaw-Gmiener as being approximately $68,000.00, representing the present value of $140.00 per week payable over the Plaintiff's remaining working life expectancy, and which, pursuant to the provisions of the *Motor Vehicle act*, any such amounts are deductible from the maximum amount payable by Judgment Recovery.

Counsel for Judgment Recovery advised counsel for the insured that the provisions of the **Motor Vehicle Act**, R.S.N.S. 1989, c. 293 required that a judgment be taken out, evidencing this settlement, and that a release be executed from the insured to Mr. MacIsaac. In correspondence, counsel for

Judgment Recovery suggested that he prepare a letter confirming that Judgment Recovery had no objections to the insured pursuing claims against his insurer for Section B benefits and for benefits under SEF 44 endorsement. A release was executed and an order for judgment taken out evidencing the terms of the settlement on May 31st, 1994.

In a letter dated May 30th, 1994, counsel for Judgment Recovery, writing to counsel for the insured, said the following:

> In accordance with our agreement, this is to confirm that Judgment Recovery (N.S.) Ltd. has no objection to Mr. Green pursuing his Section "B" Insurer, nor any objection to him pursuing his SEF 44 insurer in respect of damages over and above those which formed the settlement of this action.
>
> (emphasis added)

Counsel for Judgment Recovery agreed to provide, in the future, any documentation that would confirm the terms of the settlement, if such was needed.

Following the settlement with Judgment Recovery, counsel for the insured wrote to counsel for the insurer indicating that he wanted to bring the matter to an end and he made an offer to settle the claim. Included with this correspondence was an up-dated actuarial report outlining the lost of future earnings for the insured.

There was no formal response to this request. However, subsequently,

counsel for the insured had discussions with counsel for the insurer in his office in the latter part of May or early part of June, 1994. During that meeting counsel for the insured advised counsel for the insurer of his settlement with Judgment Recovery, and the amount of that settlement. Counsel for the insurer advised the insured that the request for settlement with the insurer would be considered. On May 12th, 1994, counsel for the insured wrote to counsel for the insurer requesting that he consent to amendments to certain paragraphs in his statement of claim to reflect the deductions that had been made by Judgment Recovery from their $200,000.00 limit.

Counsel for the insured, in his affidavit, and in his testimony, described in detail his futile attempts to resolve this matter with the insurer's counsel between May, 1994, and October, 1995. Counsel refers to the lack of response to his offer of settlement, despite repeated requests by counsel for the insured for some response with an indication of the insurer's position; failure to agree to amendments to the statement of claim until the 11th hour before a Chambers application seeking an order for such amendments; failure of counsel for the insurer to adequately respond to repeated requests of counsel for the insured for a meeting to discuss the matter, or to respond to his settlement proposal.

Not having received any response from the insurer's counsel, counsel for the insured, in the summer of 1995, filed a notice of intention to proceed with the action against the SEF insurer. On October 4th, 1995, he advised counsel

for the insurer that the offer to settle was withdrawn, and that he would be applying for a trial date.

In December 1995 counsel for the insured received a letter directly from the insurer indicating that it had asked the insurer's counsel to close his file and that counsel for the insured should deal directly with the insurer on this matter.

Counsel for the insured had a conference with the insurer's senior claims examiner at the insurer's office prior to a pre-trial conferences scheduled for January/February 1996. Counsel for the insured told the senior claims examiner that he could not wait any longer to get a response to his settlement proposal.

The insurer then retained its present counsel; and counsel for the insured, for the first time, became aware that the insurer would be taking the position that by settling with Judgment Recovery, the insured lost his right to claim against the insurer under SEF 44.

Counsel for the insured, with the consent of counsel for Judgment Recovery made an application to Justice MacLellan of the Supreme Court for an order to rectify the original judgment and release evidencing the settlement with Judgment Recovery.

On May 21st, 1996, Justice MacLellan signed an order which provides, inter alia, as follows:

> IT IS HEREBY ORDERED that the Release and Settlement of Claim executed on June 1, 1994, by Plaintiff, Benjamin A. Green, be hereby amended whereby the Release will release Defendant and Judgment Recovery (N.S.) Limited to the extent of the amount paid by or on behalf of the Defendant only and reserve the right of the Plaintiff, Benjamin A. Green to pursue his right of action against the Guardian Insurance Company of Canada and that the execution of the Release and Settlement of Claim not be bar to such claim including the claim being made in action number S.A.T. 01146 and that the Release Agreement be amended hereby.
>
> IT IS FURTHER ORDERED that the Order for Judgment dated the 19th day of May, 1994, granted by Mr. Justice Walter Goodfellow be and is hereby rectified and amended whereby the Plaintiff, Benjamin A. Green recover from the Defendant Angus D. MacIsaac the sum of One Hundred and Twenty Thousand Dollars ($120,000.00) and that the Plaintiff, Benjamin Green, reserve the right to pursue and maintain his action against the Guardian Insurance Company of Canada in respect of Section B benefits and SEF 44 endorsement in action number S.A.T. 01146 and such Order for Judgement shall not be a bar in such claim being advanced by the Plaintiff, Benjamin Green.
>
> (emphasis added)

The order was consented to by counsel for Judgment Recovery "on behalf of and in the name of the defendant [Mr. MacIsaac] pursuant to s. 218 of the **Motor Vehicle Act**". I note here that s. 218(5) of the **Motor Vehicle Act** provides as follows:

> **218.** (5) Where Judgment Recovery (N.S.) Ltd. files a defence pursuant to subsection (2) or intervenes in an action pursuant to subsection (4), it may, on behalf of and in the name of the defendant, whether or not the defendant is an infant, conduct the defence, consent to judgment in such amount as it considers proper, or do any other act that a defendant might do and all acts of Judgment Recovery (N.S.) Ltd. shall be deemed to be acts of the defendant, provided, however, that where the defendant is an infant no judgment by consent shall be entered without the approval of the court or a judge thereof.
>
> (emphasis added)

Notwithstanding the rectified order, the insurer, through its present counsel, reiterated its position that by entering judgment against Mr. MacIsaac, the insured had foreclosed his right to claim under SEF 44. As a result of the insurer's position, counsel for the insured decided to step aside, and the insured's present counsel was retained to carry the matter further.

The insured's present counsel and the insurer's present counsel agreed to have this issue of entitlement determined on an interlocutory basis, and the matter then proceeded before Justice Anderson.

Counsel for the insurer also filed an affidavit in this trial proceeding. In that affidavit he acknowledged receiving a settlement proposal from counsel for the insured in 1993 but that he had no participation in settlement negotiations between counsel for the insured and Judgment Recovery, and that at no time did he consent to the settlement reached with Judgment Recovery. He first learned of the settlement after the arrangements had been concluded. He deposes that at no time did he ever represent or agree that the insured's settlement with Judgment Recovery would not affect the insured's rights to pursue Guardian for SEF 44 benefits, and that prior to the transfer of the file from himself to the insurer's present counsel he had not seen the order for judgment and release evidencing the settlement between the insured and Judgment Recovery.

Decision of the Chambers Judge

In a short oral judgment rendered at the conclusion of the hearing, the Chambers judge decided that the insured should not be barred from seeking compensation from his insurer under SEF 44. He referred to the decision of the Ontario Court of Appeal in **Burns et al. v. Wellington Insurance Co. et al.** (1994), 16 O.R. (3d) 569, and decided that in these circumstances it would be unconscionable for the insured to be barred from seeking his remedies, against his insurer, under SEF 44.

Issues

The issues on this appeal may be stated, in two questions, as follows:

As a result of the terms of settlement between the insured and Judgment Recovery, (and the consequent release and judgment):

1. has the amount which the insured is legally entitled to recover from Mr. MacIsaac (as that is contemplated by the SEF endorsement in question) been finally determined, so as to foreclose any claim by the insured against his insurer for indemnity under SEF 44? and,
2. has the insured compromised the insurer's subrogation rights so as to forfeit recovery under the policy?

I have concluded that the answer to both of those questions is “No”. Within the meaning of this policy endorsement, the insured’s damages against Mr. MacIsaac have not been finally determined, and the insured’s claim for indemnity under SEF 44 has not been foreclosed; nor have the insurer’s subrogation rights been compromised. I will now set out, in detail, my reasons for coming to that conclusion.

Analysis

I will begin this analysis by referring to one particular submission which the insurer’s present counsel made during oral argument on the hearing of this appeal. He contends that the insured should have brought his proceeding against Mr. MacIsaac to trial, and had his damages fully assessed. The purpose of the SEF Endorsement, he argues, is to cover the shortfall of a judgment against the uninsured tort-feaser. Since the insured has taken his judgment against Mr. MacIsaac, he contends, the insured has lost his right to claim against the insurer.

The premise of counsel’s submission is incorrect. The insured has no obligation whatsoever, under the terms of the policy endorsement, to obtain a judgment against Mr. MacIsaac prior to making a claim against the SEF insurer. Further, the endorsement clearly provides in s. 5(f) that no findings of a Court with respect to issues of quantum or liability are binding on the insurer unless the

insurer was provided with a reasonable opportunity to participate in those proceedings as a party. Had the insured brought Mr. MacIsaac to trial, and established his full damages claim, the insurer could, simply, refuse to cover the shortfall; saying, that it was not bound by those proceedings because it was not a party thereto.

The policy endorsement specifically provides a process for determination of the amount that the insured is legally entitled to recover against Mr. MacIsaac. Section 5 of the Endorsement provides that such amount "shall be determined" both as to quantum and liability, as it is determined by the uninsured motorist provisions of the policy. Those uninsured motorist provisions, set out previously in these reasons, call for determination by agreement between the insurer and the insured, or by arbitration. There is no provision in the policy endorsement by which such amount is determined by any proceeding at the suit of the insured against the tortfeasor. There are only two references in the policy endorsement to a proceeding such as the insured's proceeding against Mr. MacIsaac. Firstly, s. 6 of the endorsement requires the insured to give notice of such proceedings to the insurer. That was done in this case. Secondly, is the reference, which I have already noted, that the insurer is not bound by those proceedings unless the insurer was provided with a reasonable opportunity to participate in those proceedings as a party (s. 5(e)).

Can such an amount be determined in this proceeding by the insured

against his insurer? The only reference in the policy endorsement to a proceeding by the insured against his insurer is that it must be commenced within 12 months of the insured's knowledge that he would be required to make a claim under the endorsement (s. 6(c)). In the matter before this Court, the insurer could have applied to stay this proceeding pending arbitration, which is called for in the endorsement. (see s. 7 **Arbitration Act**, R.S.N.S. 1989, c. 19). The insurer did not take that step; and does not, in fact, argue that the insured cannot maintain this action against the insurer. The insurer's position at this stage is, solely, that the insured has lost his right to SEF indemnity.

Therefore, while the endorsement does not provide that the insured's action against Mr. MacIsaac determines (for the purposes of the SEF 44 endorsement) the amount that the insured is legally entitled to recover against Mr. MacIsaac, there is nothing to prevent the insured from taking such proceedings. What, then, is the effect of the insured having taken that proceeding, and having settled part of his claim with Judgment Recovery?

Counsel have relied, essentially, on four cases to advance their respective positions here. Counsel for the insured on this appeal relies on **Burns et al v. Wellington Insurance Co. et al** (1994), 111 D.L.R. (4th) 260 (Ont. C.A.). Counsel for the insurer on this appeal relies on **Dahl v. Alberta (Administrator, Motor Vehicle Accident Claims Act) et al.** (1996), 1 W.W.R. 74 (Alta. C.A.);

Zukowski v. Royal Insurance (1998), A.J. No. 534 (Alta. Q.B.); and **Sommersall v. Friedman and Scottish & Yorke Insurance Ltd.** (1998), O.J. No. 2223 (Ont. Gen. Div.).

None of these four cases is directly on point. It is instructive, however, to review those cases - which I will do - noting the distinguishing features of each.

In **Burns**, the appellant had been seriously injured while a passenger on a motorcycle. He was rendered a quadriplegic, and it was common ground that his damage claim exceeded $1 million dollars. He sued the driver of the motorcycle, the driver's insurer, and his own father's insurer. The appellant's father's policy contained an under insured endorsement (SEF 42); and the tortfeasor's insurance was not sufficient to cover the damages. The appellant settled with the tortfeasor and his insurer. The settlement included the execution of a release, which not only provided that the tortfeasor was released from further claims, but that the appellant agreed to make no further claims against any person or corporation who might claim contribution or indemnity from the tortfeasor. The release had the effect of releasing the SEF insurer, although the trial judge found, as a fact, that such was not the intent of the parties to the release. There was no consent judgment here. The appellant made an application to amend his statement of claim in the action against the tortfeasor

to seek rectification of the release, so as to comply with the party's intention that the appellant's claim against the SEF insurer was not barred by the release. The SEF insurer was a party to the application and opposed it. The trial judge granted the rectification, however, decided that the release foreclosed the appellant's claim against his SEF insurer. In the Ontario Court of Appeal, Grange, J.A., writing for a unanimous Court, said the following at p. 263 [D.L.R.]:

> In my view, if the release is rectified to express the intention of the parties, that claim is not barred. The plaintiff's may sue Wausau [the SEF insurer] under their contract with all the consequences that may ensue including any subrogation rights that may lie.

After reviewing the evidence, which supported the trial judge's finding, that the intention of the parties was not to preclude further proceedings against the SEF insurer, Justice Grange said at p. 266 [D.L.R.]:

> .....both solicitors knew there was an ongoing claim against Wausau and expected it to continue. In other words, the release was not intended to be a release for more than a million dollars. Any claim for more than that amount was not intended to be covered by the release and was intended, if proved, to be paid by Wausau.

In the matter before this Court, **Burns** was relied upon by counsel for the insured to obtain the rectification order from Justice MacLellan.

In **Burns**, the Court was dealing with, only, a release from the insured to the tortfeasor; and whether that release should be rectified so as to permit further proceedings against the SEF insurer. In the matter before this Court, in addition to the rectified release, there is a rectified consent order for judgment by the insured against the tortfeasor, Mr. MacIsaac. The issue, here, is the

consequences of that rectified judgment and release.

In **Dahl**, the plaintiff, who suffered injuries at the hands of an unidentified driver, brought action, in Alberta, against the administrator of the **Motor Vehicle Accident Claims Act**, the unidentified driver and owner (referred to in the action as John Doe and Richard Rowe) and the plaintiff's SEF insurer. (Obviously, in Alberta, it is permissible for the SEF insurer to be a party to such a proceeding)

The administrator (who would perform substantially the same function as Judgment Recovery in Nova Scotia) made an offer of judgment to the plaintiff under Alberta **Rule** 169. That **Rule** provides as follows:

> **169(1)** At any time before the commencement of trial, a defendant may serve upon the plaintiff an offer of judgment specifying the terms upon which he is willing to settle a claim, or, where there is more than one, any of them.
>
> **(2)** On accepting the offer and filing the offer and acceptance in Court at any time before the commencement of trial, the plaintiff may apply to the Court for judgment in accordance with the offer and for costs, and may proceed with the action in respect of any claim not covered by the judgment or against any other defendant.
>
> **(3)** Where no acceptance has been filed, the defendant may, by serving notice of withdrawal upon the plaintiff, withdraw the offer at any time after 45 days from the service of the offer.

The offer was for the maximum liability under the **Statute** ($200,000.00). It contained a term as follows:

> The plaintiffs shall have leave, notwithstanding the granting to Heather Colleen Dahl of a judgment in accordance with this offer of judgment, to prosecute their claims to the extent they relate to damages in excess of

> the amounts herein awarded.

The plaintiff filed an acceptance of the offer, and pursuant to **Rule** 169(2), brought a motion for judgment for the amount offered, and under the terms described in the offer. Counsel for the plaintiff made it clear that he did not want to have the judgment issued unless it could be issued with the term attached.

The SEF insurer, a party to the proceedings, objected. It is not clear from the case report why the insurer objected. Presumably, it would be because the insurer would be bound by the judgment (both as to liability and quantum) having had an opportunity to take part in the proceedings. Therefore, the insurer might be prejudiced by the judgment. As the judgment of the Court of Appeal noted:

> The position of the insurer, Co-op, is determined under the Family Protection Endorsement S.E.F. 44, which includes the right to participate as a party and dispute issues of liability and quantum.

The Chambers judge refused to grant the order, on the terms requested, and the Court of Appeal agreed. Justice Picard said at p. 5:

> Once a plaintiff obtains a quantified judgment for her claim, that judgment extinguishes her claim for damages caused by the negligence, in this case the motor vehicle accident.

The Court of Appeal decided that the Chambers judge was correct in deciding that, under **Rule** 169(2), that the plaintiff cannot have both judgment against the administrator and leave to prosecute the claim for additional

damages against the unidentified driver or owner and the SEF insurer.

The Court in **Dahl** was not confronted, as this Court is on the hearing of this appeal, with circumstances where such a judgment has been granted. Justice McLellan has already granted judgment on the basis of an order consented to between the insured and Judgment Recovery on behalf of the uninsured Mr. MacIsaac. While the Court, in **Dahl**, expressed an opinion as to the consequences of granting judgment on the terms requested, what **Dahl** decided is that such a judgment is not permissible under Alberta **Rule** 169(2).

Counsel for the insurer on this appeal does not offer the **Dahl** case as authority that the rectification order of Justice McLellan was wrongly issued. In fact, counsel does not even challenge Justice McLellan's order. I note, here, that we do not have the same Rule in Nova Scotia as Alberta's **Rule** 169(2). I would think, however, without deciding the issue, that the Nova Scotia **Civil Procedure Rules** are broad enough to permit such a judgment to be entered.

In any event, counsel for the insurer relies on the *obiter dicta* in **Dahl** that the judgment, against Mr. MacIsaac, having been granted, is a bar to further recovery under the SEF 44 endorsement.

There is another important distinction between **Dahl** and the matter

before this Court. In **Dahl** the SEF insurer was a party to the proceeding, and, as a result, would have been bound by any judgment that was issued. In the matter before this Court the insurer was not a party, and is not prejudiced in any way by the rectification order.

Zukowski is a further Alberta case, decided in May of this year. Separate actions were commenced by the plaintiff against the uninsured tortfeasor and the plaintiff's SEF insurer. The plaintiff decided to settle with the administrator, on behalf of the uninsured tortfeasor. The plaintiff and the administrator consented to a judgment which provided as follows:

> 3. That the Plaintiff do recover judgment against the Defendant Michael W. Johnston for the sum of $100,000 all inclusive for general, special damages and judgment interest and costs;
>
> 4. The foregoing par. 1 is without prejudice to the right of the Plaintiff to pursue:
>
> (b) any claim which the Plaintiff may have by reason of any Under Insured Motorist Endorsement attached to and forming part of any policy of insurance which the Plaintiff may have had at the time of the said motor vehicle collision.
>
> (My emphasis)

The SEF insurer had been advised of the plaintiff's intent to resolve the matter with the administrator on the above terms and to obtain a consent judgment to that effect. The SEF insurer did not take any position, and did not appear when the matter was considered in Chambers.

Subsequently, the SEF insurer applied to the Court for an order that the issues between it and its insured had been determined by the consent order between the administrator and the insured. Justice Clarke agreed, essentially following the *obiter dicta* in **Dahl**.

He said at para. 10 (A.J.)

> I have concluded that the principle enunciated in the **Dahl** case, **supra**, governs this case. The effect of the Plaintiff recovering a judgment "... all inclusive for general. special damages and judgment interest and costs;" extinguishes her claim so that while the Consent Judgment purports to give the Plaintiff the right to pursue Royal for any claim which it might have by reason of any Under Insured Motorist Endorsement is a right that no longer has any content in that the Plaintiff no longer has any additional claim.

The terms of the judgment in **Zukowski** were "all inclusive for general, special damages and judgment interest and costs." In the matter before this Court, the rectified judgment, which incorporated the rectified release (releasing Mr. MacIsaac only to the extent of $120,000,00) reserved to the insured the right to pursue and maintain his action against the insurer in respect of the SEF 44 endorsement; and that the judgment "shall not be a bar in such claim being advanced" by the insured. Further, since the SEF insurer in **Zukowski** was given an opportunity to participate in the proceedings which resulted in the consent judgment, and declined, such SEF insurer would probably have been bound by that judgment. In the matter before this Court, the insurer is not bound by the judgment which the insured obtained against Mr. MacIsaac.

While these factors may suffice to distinguish **Zukowski** from the

matter before this Court, those distinctions may not be significant enough to dismiss the decision in **Zukowski** out of hand. The real concern that I have with the decision in **Zukowski** is that there is no analysis of the SEF 44 endorsement; nor is there any analysis as to how the wording of the SEF 44 endorsement should be interpreted, as I have done later in these reasons. The Court, in **Zukowski**, simply applied the *obiter dicta* in **Dahl**. There was no analysis of the SEF 44 endorsement in **Dahl**, because it was not necessary for the purpose of the decision in **Dahl**. **Dahl** decided, only, that a judgment, on the terms requested, could not be entered under the Alberta **Rules**. I am not saying that had such an analysis of the SEF 44 endorsement been done in **Zukowski**, the result would have been different. I am not even certain that the terms of the respective SEF 44 endorsements are identical. Therefore, while I do not ignore the decision in **Zukowski**, neither am I prepared to simply adopt its conclusion.

Further, in considering the decision in **Zukowski**, it is appropriate to note a further issue which was raised, tangentially, during the hearing of this appeal. It could be argued that the judgment against Mr. MacIsaac, although a judgment on its merits, was simply *res inter alios acta* - a transaction between others. As such, it cannot be relied upon by the insurer as determining, conclusively, the insured's legal entitlement to damages against the tortfeasor for the purpose of the SEF 44 endorsement. It does not appear that this issue was raised or considered in **Zukowski**. In any event, in view of the conclusion

which I have come to in this appeal, it is not necessary that I decide this issue.

Sommersall is a recent decision of the General Division of the Ontario Court, handed down in June of this year. In **Sommersall**, the plaintiffs were involved in a motor vehicle accident, and sustained injuries. In 1991 they brought action against the defendant who filed a defence. Later in 1991, counsel for the plaintiffs and counsel for the defendant entered into a "limits agreement". The terms of the agreement were:

1. The defendant would admit liability for the accident;

2. The plaintiffs would not make any claim against the defendant in excess of the defendant's policy limits of $200,000.00;

3. The defendant would (and did) make an advance payment of $50,000.00 to the plaintiffs.

In 1994 the plaintiffs' SEF insurer was added as a defendant, and it filed the defence.

In 1995 the plaintiffs brought a motion to set aside the limits agreement. That was later abandoned. The plaintiffs later withdrew any argument that the limits agreement was not a valid agreement.

The SEF insurer brought a motion, for the determination of a point of law prior to trial. The issue was whether the limits agreement, entered into

between the plaintiffs and the defendant - which limited the plaintiffs claim against the defendant to his policy limits - precluded the plaintiffs from advancing any claim against his SEF insurer.

All counsel agreed that the limits agreement was not the same type of agreement that was the subject of the decision of the Ontario Court of Appeal in **Burns v. Wellington (supra)**.

The plaintiffs argued that the words “legally entitled to recover” - as they appear in the SEF endorsement - and as they have been interpreted by the Ontario Court of Appeal mean that the insured must simply be able to establish that the tortfeasor is at fault, and the amount of damages caused by such fault. (**Johnson v. Wunderlich et al.** (1986), 57 O.R. (2d) 600 (Ont. C.A.) and **Chambo v. Musseau** (1993), 15 O.R. (2d) 305) Therefore, even if the limits agreement prevents the plaintiffs from recovering an amount against the defendant in excess of his policy limits, they can still establish that he was at fault and the amount of their damages, and therefore, are entitled to assert a claim under the SEF endorsement.

Justice Spiegal decided that by entering into the limits agreement, the plaintiffs have eliminated any excess over and above the policy limits of the tortfeasor; and the plaintiffs had, thereby, foreclosed any claim under the SEF

endorsement.

The trial judge decided that the interpretation of the words “legally entitled to recover”, by Morden, J.A. in the case of **Johnson**, and by Osborne, J.A. in the case of **Chambo** should be restricted to cases where the insured’s right to proceed against the tortfeasor is barred by virtue of a limitation period. It is my understanding that **Sommersall** is on appeal to the Ontario Court of Appeal.

There is a significant difference between **Sommersall** and the matter before this Court. For the same reason that the trial judge, in **Sommersall**, distinguished the limits agreement from the release which was the subject of the decision in **Burns**, the limits agreement is quite different from the rectified order and release which are the subject of this appeal. In **Sommersall** the plaintiffs agreed “not to make any claim against the defendant in excess of the defendant’s policy limits of $200,000.00". That was not the case here. The release which the insured signed, in favour of Mr. MacIsaac, was only to the extent of $120,000.00.

Counsel for the insured, on the hearing of this appeal, in addition to distinguishing **Sommersall** as I have done, invited the Court, during argument, to conclude that **Sommersall** was wrongly decided, because it involved too

narrow and strict an interpretation of the words “legally entitled to recover”. He submitted that this Court should apply the views expressed in **Johnson** and **Chambo**. In other words, all that the insured has to show, here, is that Mr. MacIsaac is at fault, and the amount of damages caused by that fault. In view of the conclusions which I have come to in these reasons, it is not necessary for me to consider that argument. Further, I am not satisfied that the full implications of applying the views

expressed in **Johnson** and **Chambo** “across the board” have been canvassed during argument. I would, therefore, leave that issue for another day. No doubt, the issue will be dealt with by the Ontario Court of Appeal in the hearing of the **Sommersall** appeal.

Conclusion:

There being no case authorities which are determinative of the issue, the resolution of this dispute must be decided on its own facts.

In interpreting the provisions of an SEF 44 endorsement, Justice Laskin said the following in **Chilton et al v. Co-operators General Ins. Co.** (1997), 143 D.L.R. (4th) 647 (Ont. C.A.) at p. 652:

> As a general rule, clauses in an insurance policy providing coverage are interpreted liberally or broadly in favour of the insured and those clauses excluding coverage are construed strictly against the insurer: *Madill v. Chu*, [1977] 2 S.C.R. 400, 71 D.L.R. (3d) 295. As Estey J. said in *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Ins. Co.*,

[1980] 1 S.C.R. 888 at 901, 112 D.L.R. (3d) 49:

> ... literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted.

I repeat, here, the basic insuring agreement set out in s. 2 of the SEF 44 endorsement:

> In consideration of the premium charged and subject to the provisions hereof, it is understood and agreed that the insurer shall indemnify each eligible claimant [the insured] for the amount that such eligible claimant [the insured] is legally entitled to recover from an inadequately insured motorist [Mr. MacIsaac] as compensatory damages in respect of bodily injury or death sustained by an insured person [the insured] by accident arising out of the use or operation of an automobile.
>
> (Emphasis added)

The position advanced by counsel for the insurer on this appeal is as follows: the insured has a judgment against Mr. MacIsaac for $120,000.00. That judgment establishes the amount that the insured is entitled to recover from Mr. MacIsaac. Therefore, since the amount that the insured is "legally entitled to recover" from Mr. MacIsaac (as those words are used in the SEF 44 endorsement) has been determined, the insured has no claim against the SEF insurer.

I reject that interpretation of the words "legally entitled to recover" as those words appear in the SEF endorsement, for two reasons:

1. it can hardly be said to be an interpretation that is liberal, and broad, in favour of the insured; and

2. the insurer's interpretation of the words "legally entitled to recover" produces a result, which is unrealistic.

I will demonstrate the latter point by reference to five factors which are at play in this case.

Firstly, nothing could be more clear, from the material before the Court, than that counsel for the insured and counsel for Judgment Recovery came to an agreement that the $120,000.00 payment was not intended to operate as a final determination of the insured's damages arising out of the accident with Mr. MacIsaac. It is also clear that the entry of the judgment, by Judgment Recovery, was only done to satisfy the paperwork requirements which the **Motor Vehicle Act** placed on Judgment Recovery. The rectified release document clearly releases Mr. MacIsaac only to the extent of the $120,000.00. In short, as between counsel for the insured and counsel for Judgment Recovery, the settlement with Judgment Recovery did not finally determine the insured's damages. Any doubt about this, is clarified by the letter from counsel for Judgment Recovery to counsel for the insured on May 30th, 1994, wherein he confirmed the agreement that Judgment Recovery had no objection to the insurer pursuing his SEF insurer in respect of damages over and above the $120,000.00 settlement.

Secondly, the uninsured driver (Mr. MacIsaac) has no complaint with the insured pursuing the SEF insurer, together with whatever subrogation rights flow from that. Judgment Recovery settled with the insured in the name of Mr. MacIsaac, and by virtue of s. 218(5) of the **Motor Vehicle Act**, the acts of Judgment Recovery are deemed to be the acts of Mr .MacIsaac.

Thirdly, the insurer has no complaint with respect to the settlement with Judgment Recovery. Under the terms of the SEF endorsement, the insurer is not bound by the settlement - either as to liability or quantum - because it was not a party to the action (Section 5(f)). It is still open to the insurer, at trial, to dispute both liability and quantum (although, here, the insurer does not dispute the liability of Mr. MacIsaac for the accident). In short, nothing in this settlement prejudices the insurer.

Fourthly, is the involvement of Judgment Recovery in this matter. The SEF 44 endorsement, by its very terms, contemplates the involvement of Judgment Recovery. Section 4 of the endorsement sets out what is taken into account in determining the amount that is <u>payable</u> to the insured. Section 4(b) of the endorsement provides that the amount payable is in excess of any amount actually recovered by the insured (or any amount that the insured is eligible to recover) from various sources including:

> (iv) an unsatisfied judgment fund or similar plan which would have been payable by such fund or plan had this endorsement not been in effect.

That provision clearly contemplates the insured having received a payment from Judgment Recovery, which is then deducted from the amount payable by the insurer. It is relevant, therefore, to explore how that payment from Judgment Recovery arises.

Judgment Recovery is a statutory corporation incorporated under the provisions of the **Judgment Recovery (N.S.) Act**, R.S.N.S. 1989, c. 289. Its members comprise all of the insurers that are licensed to issue motor vehicle liability insurance policies in the Province (s. 5). That would include the appellant. In proportion to each insurer's share of the total motor vehicle liability insurance premiums on policies written in the Province, those insurers fund the operations of Judgment Recovery (s. 15). Among Judgment Recovery's stated objects and powers is the following, set out in s. 3(e):

> **3.** The objects of the Company are and it has power to .....
>
> > (e) generally, ensure that victims of uninsured or otherwise financially irresponsible motorists are expeditiously indemnified to the extent and on such terms and conditions as may be prescribed from time to time in the *Motor Vehicle Act;*
> >
> > (emphasis added)

In settling this matter with the insured, "expeditiously", Judgment Recovery is required, under the provisions of the **Motor Vehicle Act**, to obtain a judgment against Mr. MacIsaac for the amount of the settlement.

If, as in this case, the SEF insurer expresses no interest, or initiative, in settling with the insured, a conflict arises. If, as counsel for the insurer on this appeal argues, such a judgment obtained by Judgment Recovery is a final determination of the insured's damages claim, then the insured's rights against Judgment Recovery - and Judgment Recovery's obligations to the insured - cannot be resolved, unless and until the insurer agrees. Considering the position advanced by the insurer on this appeal, one cannot assume that the consent of the insurer would be readily obtained.

Fifthly, we are dealing, here, with an insurance contract. In exchange for the payment of an additional premium, the insurer has contracted to indemnify the insured under certain conditions. As I have indicated previously, the purpose of this SEF 44 endorsement is to provide some monetary protection where the insured is the victim of a motorist who has less insurance than the insured has, and the insured's personal injury damages exceed the other motorist's insurance.

The SEF 44 endorsement sets up a fairly simple process for dealing with the insured's claim. There are obligations upon the insured, referred to in the endorsement as Conditions Precedent, by way of giving notice to the insurer with respect to the insured's claim, and with respect to the proceedings which the insured took against Mr. MacIsaac. The insured complied with those Conditions Precedent in this case, and the insurer does not suggest otherwise. The

endorsement provides that the amount the insured is legally entitled to recover from Mr. MacIsaac is determined one of two ways; by agreement, or by arbitration. It is not for me to speculate as to why the insurer did not adopt either of these courses here. As the record shows, there was no lack of effort by the insured's counsel, albeit unsuccessful, in attempting to get the insurer to deal with the insured's claim. In any event, the endorsement contemplates a fairly simple process. There is no requirement for the insured to bring proceedings against the uninsured Mr. MacIsaac.

When the SEF 44 endorsement is considered in light of all of these five factors which I have set out, it is readily apparent why the insurer's interpretation of the phrase "legally entitled to recover" is inappropriate. As long as the SEF insurer is not prejudiced by the settlement between Judgment Recovery and the insured, which it is not in this case, the interpretation of the words "legally entitled to recover" which counsel for the insurer on this appeal suggests, would produce a result which is unrealistic, and unfair. The insurer would be relieved of its contractual obligation under the policy, and, as a result, the insured would be denied his indemnity - all for no good reason.

Further, as I have noted, by virtue of s. 218(5) of the **Motor Vehicle Act**, the acts of Judgment Recovery, in settling with the insured, are deemed to be the acts of Mr. MacIsaac. For that reason, it cannot be said that the insurer's

rights of subrogation have been compromised by the insured's settlement with Judgment Recovery.

Taking into account the broad and liberal interpretation, in favour of the insured, which I must give to the SEF 44 endorsement, and considering all of the circumstances of this case which I have detailed in these reasons, in my opinion the amount which the insured is "legally entitled to recover" from Mr. MacIsaac (as those words are used in the SEF 44 endorsement) has not been finally determined by the insured's settlement with Judgment Recovery. If the insured, at trial, can prove that his damages exceed the payment to him by Judgment Recovery, then, to the extent of the insured's SEF 44 coverage, the insurer is obligated to indemnify him. It will be for the trial judge to decide whether the actual payment by Judgment Recovery to the insured ($120,000.00) or some other amount up to the maximum of Judgment Recovery's statutory limits ($200,000.00) is used to calculate the amount for which the insurer is required to indemnify the insured.

I wish to make it clear, that it is not my intention in these reasons to make a general pronouncement which would apply to all circumstances involving the rights of an SEF 44 insured to make a partial settlement of his damages claim with Judgment Recovery, or with any other third party insurer. I am dealing, only, with the circumstances of this case. There may be other circumstances where a different result would ensue. In that regard, I note from

my review of **Zukowski** that as a result of the decision of the Alberta Court in Appeal in **Dahl**, certain changes were made. Apparently, in April of this year, amendments were made to the Alberta **Motor Vehicle Accident Claims Act** to permit Alberta's counterpart of Judgment Recovery to consent to a partial judgment for its maximum liability under the **Act**, and for the Court to award a partial judgment under those circumstances. Perhaps the Superintendent of Insurance, in conjunction with the insurance industry, should look into this matter. It seems to me that the respective rights and obligations of the insured and the insurer, under an SEF 44 endorsement, should be able to co-exist with the respective rights and obligations of that same insured and Judgment Recovery under the **Motor Vehicle Act** (or, for that matter, with any other third party insurer), so that litigation such as this can be avoided.

I would dismiss the appeal. I would order that the appellant pay to the respondent, forthwith, its costs of this appeal which I would fix at $2,000.00 plus disbursements.

Flinn, J.A.

Concurred in:

Chipman, J.A.

Cromwell, J.A.

C.A. No. 146439

NOVA SCOTIA COURT OF APPEAL

BETWEEN:

GUARDIAN INSURANCE COMPANY OF CANADA	)	
Appellant	)	
- and -	)	REASONS FOR JUDGMENT BY:
BENJAMIN GREEN	)	
	)	FLINN, J.A.
Respondent	)	