NOVA SCOTIA COURT OF APPEAL

Citation: ***Royal & SunAlliance Insurance Company of Canada v. Meridian Construction Inc.***, 2012 NSCA 84

Date: 20120823
Docket: CA 349660
Registry: Halifax

Between:

Royal & SunAlliance Insurance Company of Canada

Appellant

v.

Meridian Construction Inc. and Tribeca Mechanical Limited

Respondents

Judges:	Hamilton, Fichaud and Bryson, JJ.A.
Appeal Heard:	June 7, 2012, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs payable by the appellant to each of the respondents in the amount of $3,000.
Counsel:	Murray J. Ritch, Q.C. and Wayne J. Francis, for the appellant J. Scott Barnett, for the respondent, Meridian Construction Inc. Clarence Beckett, Q.C., for the respondent, Tribeca Mechanical Limited

Reasons for judgment:

[1] Shannex Healthcare Management Inc. ("Shannex") was developing a retirement facility in Truro, Nova Scotia. Shannex retained Meridian Construction Inc. ("Meridian") as general contractor. Tribeca Mechanical Limited ("Tribeca") was the plumbing subcontractor. Exodus Limited ("Exodus") supplied piping to the project.

[2] Shannex alleges that on June 26, 2002 a leak was detected in a 4-inch domestic cold water line in the mechanical penthouse at the nursing home. Shannex further alleges that Tribeca and/or Exodus, with Meridian's concurrence, attempted to make temporary repairs on June 27, 2002. Shannex further alleges that the pipe ruptured on June 30, 2002 causing extensive damage to the nursing home.

[3] The appellant, Royal & SunAlliance ("Royal") issued a Builders' Risk/Wrap Up Liability Composite Policy (Wrap Up Policy) that named Shannex as the insured and Meridian and Tribeca as additional insureds.

[4] The Wrap Up Policy was initially to expire on May 1, 2002 but was extended to June 15, 2002. Royal issued a property policy to Shannex effective June 16, 2002. Pursuant to the property insurance policy, Royal paid Shannex $699,745.78, arising from damage caused by the pipe rupture.

[5] In 2005, Royal brought a subrogated action against Meridian, Tribeca and Exodus. Defences were originally filed on Meridian's behalf by its commercial general liability insurer, Aviva Canada, and on Tribeca's behalf by its commercial general liability insurer, Dominion of Canada (hereinafter the "CGL policies").

[6] In 2009, Meridian and Tribeca asked Royal to provide a defence for them to the Shannex action. Royal refused and Meridian and Tribeca brought an application for an order that Royal should:

(a) defend Meridian and Tribeca in the subrogated Shannex action;

(b) appoint independent counsel to conduct such defences;

(c) indemnify Meridian and Tribeca for all defence costs and expenses incurred to date with respect to the Shannex action.

[7] In response to the application of Meridian and Tribeca, Royal filed a "notice of contest/notice of application" seeking a declaration that the loss in the Shannex action was not covered under Royal's Wrap Up Policy. Meridian and Tribeca argued that Royal's application should be stayed until liability was determined in the Shannex action. The applications were heard by Justice Hood who identified the issues before her as:

1. duty to defend;

2. declaration re coverage;

3. stay of Royal's application.

After inviting and receiving supplementary submissions from counsel, Justice Hood determined that a dispute resolution clause in the Royal Wrap Up Policy obliged her to restrict herself to the "duty to defend issue". She held that Royal owed a duty to Meridian and Tribeca from the time Royal denied coverage to Meridian and Tribeca in October 2009 (2011 NSSC 177).

[8] In her written decision, Justice Hood did not address who should have conduct of the defences. Counsel could not agree on the wording of the order and there was a further hearing to decide the defence conduct and costs indemnity issues. Justice Hood issued a supplementary oral decision in which she determined that "Meridian and Tribeca . . . be at liberty to retain and instruct independent counsel of their own choosing." She further ordered that Royal should indemnify Meridian and Tribeca for all costs and expenses incurred on their behalf (regardless of whether these costs had been paid by Dominion and Aviva).

[9] Royal has appealed alleging that Justice Hood erred in law:

1. by determining that there was a possibility of insurance coverage under s. 1(a)(i) of Royal's Wrap Up Policy;

2. by failing to consider the effect of other insurance policies held by Meridian and Tribeca at the date of loss;

3. by declaring that Meridian and Tribeca were at liberty to retain and instruct legal counsel of their own choosing and have Royal pay the cost;

4. by indemnifying Meridian and Tribeca for all legal costs incurred on their behalf since October 2009.

Standard of Review

[10] The parties divide on this issue. Royal says that determination of the "duty to defend" is a question of law reviewable on a correctness standard, citing Justice's Fichaud's decision and *Trisura Guarantee Insurance Company v. Belmont Financial Group Inc.*, 2008 NSCA 87 at para. 23.

[11] Tribeca and Meridian argue that the standard of review for the first issue (interpretation of 1.1(a)(i) of the Wrap Up Policy) is correctness. They submit that the other issues involve mixed questions of fact and law and the exercise of discretion, warranting a "palpable and overriding" standard of review.

[12] The standard of review is correctness for error of law and palpable and overriding error for issues of fact or mixed fact and law with no extractable error or law: *Housen v. Nikolaisen*, 2002 SCC 33.

Issue No. 1 - Coverage under Clause 1(a)(i):

[13] Justice Hood began her analysis of the duty to defend with the following observation:

> [11] This issue was complicated by the fact that the party making the subrogated claim, the property insurer, is also the insurer who provided the Builders' Risk Policy [i.e. the Wrap Up Policy] which included Meridian and Tribeca as insureds, as set out in the definition quoted above. Also, counsel on this application are the same counsel as plaintiff's counsel in the subrogated claim.

Justice Hood then noted that, according to the pleadings, Shannex was alleging breach of contract and negligence by Meridian and Tribeca regarding installation of a faulty pipe, negligence with respect to the June 2002 repair to the pipe, and negligent supervision by Meridian. Justice Hood summarized:

> [15] The allegations are broad, as would be expected, and encompass both the original installation of the pipe and the repairs to it.

[14] After reviewing appropriate jurisprudence and the relevant terms of the Wrap Up Policy, Justice Hood described her task:

> [23] I must consider both the above provisions from the insurance policy and the statement of claim to determine if there is a duty to defend based upon the potential for coverage. The question for me is whether there is a "mere possibility" that a claim within the policy might succeed. The parties do not disagree that this is the test nor that this is a low threshold.

[15] The parties do not dispute Justice Hood's identification of the applicable law.

[16] The insuring agreement under Royal's Wrap Up Policy provided:

> 1. Insuring Agreement
>
> (a) The Insurer will pay:
>
> (i) those sums that the Insured becomes legally obligated to pay as compensatory damages because of 'bodily injury' or 'property damage' arising out of the Insured's operations in connection with the project shown on the 'Coverage Summary'. No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverage A, B and D. This insurance

> applies only to 'bodily injury' and 'property damage' which occurs during the Policy Period. The 'bodily injury' or 'property damage' must be caused by an 'occurrence' The "occurrence" must take place in the 'coverage territory.'
>
> (ii) with respect to 'Products-completed operations hazard' those sums that the Insured becomes legally obligated to pay as compensatory damages because of 'bodily injury' or 'property damage' occurring at the project site' and arising out of the 'Insured's work' but only after such work has been completed or abandoned, this insurance will continue in force for the number of months shown on the 'Coverage Summary' under Completed Operations Hazard Extension from the end of the Policy Period or from the date of final acceptance or the substantial completion of the project shown on the 'Coverage Summary' as certified by the architect, whichever date shall occur first.

[17] When determining the possibility of coverage under Clause 1(a)(i) of the Royal policy, Justice Hood reasoned:

> [30] ...In this context, I must consider what part 1(a)(i) of the Wrap Up Liability provisions provide. They provide for payment for "property damage" "arising out of" "the Insured's operations" "in connection with the project." It specifically provides that the property damage must occur "during the Policy Period" and must be caused by an "occurrence."

[18] After careful analysis of the policy provisions, Justice Hood concluded:

> [44] ...In my view, the nature of the claim is either that the original installation was faulty or the subsequent repair. The pleadings do not exclude the former as a potential source of the claim against Tribeca and/or Meridian. Meridian and Tribeca do not need to prove there is coverage. I am not to decide this issue definitively; that is for the trial judge in the Shannex action. I am not to decide if the claim against Meridian and Tribeca has merit. If it is clear that there is no coverage, there is no duty to defend; otherwise, if there is a potential for coverage, a mere possibility, there is a duty to defend. The trial judge could conclude that the "property damage" occurred at the time the pipe was installed. Therefore, there is a "mere possibility" that there would be coverage within 1(a)(i). A claim within the policy might succeed. Accordingly, I conclude that there is a duty to defend.

[19] Justice Hood went on to consider whether, in the alternative, there may be coverage under Clause 1(a)(ii).

[20] Again, after careful consideration of the relevant policy provisions, Justice Hood found:

> [52] The trial judge in the Shannex action will determine what caused the damage and when the damage occurred. The trial judge could conclude that the damage occurred after the project had been completed, although the pipe needed repair on June 26. The trial judge could conclude that there was no negligence in the repair. The effect of that conclusion would be that the work was not outside the completed-products operations hazard. If that were the case, there is a "mere possibility" that a claim within the policy could succeed, if the trial judge accepts the position of Meridian and Tribeca.
>
> [53] I therefore conclude there is a duty to defend triggered by 1(a)(ii).

[21] During oral submissions, Royal's position changed from that advanced in its factum:

> 33. Therefore, there are only two possible outcomes at trial on this issue; a) the "property damage" occurred after the Policy Period ended, or b) the "property damage occurred during the Policy Period. In outcome a) there is no coverage. Outcome b) would seem to provide coverage, but RSA cannot sue its own insured to recover for that loss. As a result, Meridian and Tribeca can never become "legally obligated" to pay for these damages under Section 1(a)(i). As there is no possibility of coverage, there is no duty to defend.

[22] In its factum, Royal did not address Justice Hood's alternative finding that coverage might be available under Clause 1(a)(ii) of Royal's Wrap Up Policy and therefore this also triggered a duty to defend. However, during argument, Royal conceded that it owed the respondents a defence with respect to some of the allegations of the Shannex statement of claim. In particular, the allegations of supplying a faulty pipe, the negligent installation of that pipe, and the negligent supervision of this work all triggered a duty to defend. But Royal argued that this only engaged the coverage provided under Clause 1(a)(ii) of the Policy. Royal submitted that the court had an "obligation" to "allocate" the duty to defend by

assessing the Wrap Up Policy against the allegations in the statement of claim. The Court invited and received supplementary submissions on this point.

[23] Counsel for Meridian and Tribeca objected to Royal's advancing an alternative argument for the first time at the oral hearing on appeal. Royal's position throughout had been that there was no duty to defend. Its novel suggestion that such a duty applied to some allegations but not others was not put before Justice Hood. The affidavits filed by the parties and the arguments submitted by them to Justice Hood were not directed to this argument.

[24] The difficulty of allocating defence costs as suggested by Royal in this case is illustrated by the main authority upon which Royal relies – *Hanis v. Teevan*, 2008 ONCA 678. Significantly, the court in that case had the advantage of a concluded trial decision on the merits. In *Hanis*, the Ontario Court of Appeal distinguished between contractual (insurer and insured) and equitable (between insurers) allocation of defence costs. The latter is not contractual but depends upon a general rule of indemnity that an insured may not recover more than its loss, *Castellain v. Preston* (1883) 11 Q.B.D. 380 (C.A.); *State Farm Mutual Automobile Insurance Co. v. Prudential Assurance Co. Ltd.,* (1985) 54 O.R. (2d) 621. In *Hanis*, the Ontario Court of Appeal eschewed American authority on the equitable allocation of defence costs between an insurer and insured and favoured the British approach of interpreting the policy (*New Zealand Forest Products Ltd. v. New Zealand Insurance Co. Ltd.*, [1997] 3 N.Z.L.R 1 (P.C.) and see: *Coronation Insurance Co. v. Clearly Canadian Beverage Corp.* (1999), 168 D.L.R. (4th) 366 (B.C.C.A) at para. 41).

[25] It seems clear from the case law that insurers and insureds have negotiated defence cost arrangements in "mixed claims" on their own initiative or at the encouragement of the courts. Where negotiations fail, it is generally preferable to allocate defence costs following a decision on the merits because it is often impossible to allocate these costs prior to determination of liability in the main action, (see for example, *Lombard General Insurance Co. of Canada v. 328354 B.C. Ltd.*, 2012 BCSC 431 at para. 69 and following; *Continental Insurance Co. v. Dia Met Minerals Ltd.*, [1996] B.C.J. No. 1293 (C.A.) at para. 18; *P.C.S. Investments Ltd. (c.o.b. Property Claims Service) v. Dominion of Canada General Insurance Co.*, [1996] A.J. No. 33 (C.A.). But in this case, the argument is moot because the success of Royal's allocation argument assumes that Justice Hood

erred in concluding that there was a possibility of coverage under Clause 1(a)(i) of the Wrap Up Policy. Since she did not err in her interpretation of the policy with respect to either Clause 1(a)(i) or (ii), there are no potential defence costs to allocate, at least at this preliminary stage, in the absence of trial findings in the Shannex action.

[26] Royal's misunderstanding with respect to coverage under clause 1(a)(i) is expressed in para. 29 of its factum:

> 29. The Shannex allegations, if proven, could not possibly establish coverage under the RSA Liability Policy. Even though the allegations relate to some events that occurred before the Policy Period ended, ***all of the actual "property damage" alleged occurred after the Policy Period ended.*** ... [Emphasis added]

With respect, this simple assertion ignores the language of Royal's own policy which Justice Hood carefully considered. Interpretation of the policy language is a question of law, reviewable on a correctness standard: *Belmont*, *supra*, para. 31. Justice Hood correctly noted that the property damage coverage in Clause 1(a)(i) of the Wrap Up Policy must be caused by an "occurrence". The policy defines property damage to include not only physical injury to tangible property but resulting loss of use of that property and loss of use of tangible property that is not physically injured. "Occurrence" is defined as an accident, including continuous or repeated exposure to substantially the same harmful conditions. Property damage that results in a loss of use of tangible property that is not physically injured is "deemed to occur at the time of the occurrence that caused it". Justice Hood rightly observed that the allegations in the Shannex action encompassed both the original installation of the pipe and repairs to it. Therefore, the "occurrence" of property damage could have arisen from the original installation or the subsequent faulty repair. This means that there is a possibility of coverage under Clause 1(a)(i) as well as Clause 1(a)(ii) and the obligation to defend is triggered under either clause. Justice Hood did not err in so finding.

Issue 2 - Other Insurance:

[27] Royal alleges that Justice Hood should have considered the Meridian and Tribeca CGL policies but failed to do so. Royal cites the "other insurance" clause in its Wrap Up policy:

> 10. Other Insurance
>
> If other valid and collectible insurance whatsoever is available to an Insured for any loss that is covered under this Policy, the insurer under this Policy shall be liable for only the excess, if any, of any loss over the applicable limit of the other insurance whatsoever covering such loss.
>
> The Insurer under this Policy shall never be a contributor to any loss that is less or equal to the applicable limit of the other insurance covering such loss. [Emphasis in original]

[28] Royal submits that this clause provided a complete defence to the Meridian/Tribeca application because their CGL policies were primary to Royal's. At the hearing before Justice Hood, Royal argued that it was not trying to convert the application into one "of contribution amongst insurers", but that the "reality of situation" required taking the CGL policies into account.

[29] Counsel for Tribeca made clear that he was only retained to defend Tribeca against the Shannex action. He was not retained by Dominion as coverage counsel under its CGL policy. He was not in a position to argue coverage issues under that policy.

[30] Meridian argues that there are evidentiary and procedural issues that remain to be addressed. Meridian objects that insurers against whom an equitable claim may be made should be parties before the Court. Meridian also says that there are unknowns such as the extent of Royal's subrogated claim and whether it is limited to Shannex's insured loss. Royal did not apply in this proceeding for equitable allocation of defence costs against Dominion and Aviva directly. They are not formally parties before the Court. Royal did not seek an adjournment before Justice Hood for the purpose of bringing such an application.

[31] Notwithstanding Royal's plea that it was not trying to convert the application into one of contribution amongst insurers, that would have been the practical effect of what it was urging upon Justice Hood. Royal's submission that its Wrap Up Policy is excess coverage, assumes that the CGL insurers bear the responsibility of primary coverage. This is an outcome which the CGL insurers are entitled to argue, after receiving appropriate and formal notice. In the result,

Justice Hood did not err in declining to address this issue. However, that does not dispose of the question of contribution amongst insurers.

[32] Where there is more than one policy of insurance covering the same risk, insurers are entitled to seek equitable contribution from one another with respect to the loss (*Family Insurance Corp. v. Lombard Canada Ltd.*, 2002 SCC 48, at paras. 14 and 15; *Broadhurst & Ball and Allport v. American Home Assurance Co.* (1990), 1 O.R. (3d) 225 (C.A.); leave to appeal refused [1991] S.C.C.A. No. 55).

[33] In its factum, Tribeca concedes:

> 39. It was open to Meridian and Tribeca to select the RSA composite policy under which to claim indemnification by way of a defence in the Shannex action, and they did so in the application against RSA. Furthermore, the CGL policies carried by Meridian and Tribeca were not properly before the court on that application and the CGL insurers were not named or represented in the application. It is still open to RSA to commence proper proceedings against the CGL insurers for equitable contribution on defence costs.

[34] To be clear on this point, a finding that Royal owes Tribeca and Meridian defences in the Shannex action does not resolve any possible equitable contribution amongst the insurers themselves. The issues of contribution amongst the insurers have not been determined in this proceeding because, as the respondents have argued, Dominion and Aviva are not parties. Those issues remain for determination in a proceeding in which Royal, Aviva and Dominion are all parties.

Issue 3 - Choice of Counsel:

[35] Royal objects that Justice Hood erred by authorizing Meridian and Tribeca to retain and instruct counsel at Royal's expense. Royal submits that if it has a duty to defend, it should be permitted to select and instruct counsel in the normal course and in accordance with its policy.

[36] Royal also makes a preliminary objection that the ability of Meridian and Tribeca to choose and instruct counsel was not properly before Justice Hood.

[37] The relief requested by Meridian and Tribeca was for the "appointment of independent counsel" because Royal could not "properly and in good faith discharge its defence duties". Meridian and Tribeca did not simply request "separate" counsel. They asked for "independent" counsel. It is hard to imagine how "independent" counsel could be appointed if he or she were appointed and instructed by Royal. While arguably the sought-for relief should have added the words "as selected by Meridian and Tribeca", the thrust of that relief is fairly set out in the Meridian/Tribeca application. Moreover, when the parties could not agree on the form of order, this issue was argued before Justice Hood. Royal had ample opportunity to advance its position at that time.

[38] Royal cites the leading Canadian authority on an insurer's right to appoint counsel: *Brockton (Municipality) v. Frank Cowan Co.* (2002), 57 O.R. (3d) 447, 154 O.A.C. 125 (C.A.). In *Brockton* the Ontario Court of Appeal explains that the contractual right of the insurer to control the defence arises from the potential obligation to indemnify the insured. It is a standard contractual obligation in most policies of insurance affording third party liability coverage. However, the right of the insurer to control the defence is not absolute. The Court of Appeal in *Brockton* summarized the conflicting principles:

> **43** I agree with the approach taken in *Zurich* and *Foremost*. The issue is the degree of divergence of interest that must exist before the insurer can be required to surrender control of the defence and pay for counsel retained by the insured. The balance is between the insured's right to a full and fair defence of the civil action against it and the insurer's right to control that defence because of its potential ultimate obligation to indemnify. In my view, that balance is appropriately struck by requiring that there be, in the circumstances of the particular case, a reasonable apprehension of conflict of interest on the part of counsel appointed by the insurer before the insured is entitled to independent counsel at the insurer's expense. The question is whether counsel's mandate from the insurer can reasonably be said to conflict with his mandate to defend the insured in the civil action. Until that point is reached, the insured's right to a defence and the insurer's right to control that defence can satisfactorily co-exist.

[39] Courts have long recognized the unique situation of an insurer and insureds and have tolerated at least potential conflicts of interest. The insurer's contractual right to appoint and instruct counsel usually overrides potential conflicts. In *Mara (Guardian ad litem of) v. Blake* (1996), 74 B.C.A.C. 296 (C.A.), the British Columbia Court of Appeal put it this way:

10 The real question, however, is whether this conflict, if indeed it is one, is such as to override the insurer's right to appoint and instruct counsel as it deems best, and to disqualify counsel of its choice from acting. No case has been cited to us, and we have not located in our research, any case that suggests counsel should be disqualified. Indeed, the courts have on many occasions recognized the unique nature of the insured-insurer relationship, in which the insurer, although bound to deal with the insured in good faith, is ultimately entitled as a matter of contract to decide upon what course is to be taken in the conduct of an action, notwithstanding that the insured may vigorously object. As observed by Greene, M.R. in *Groom v. Crocker* [1938] 2 All E.R. 395 (C.A.):

> These provisions [of the insurance policy in question] do not in terms refer to the position of solicitors, but they clearly entitled the insurers to nominate a solicitor to act in the conduct of the proceedings to which they relate. The duty of the solicitor so nominated to the insured for whom he is to act cannot, of course, be the same as that which arises in the ordinary case of solicitor and client, where the client is entitled to require the solicitor to act according to his own instructions. The whole object and usefulness of these provisions would be defeated if the insured were to be entitled to interfere with the conduct of the proceedings in that way. The insured, in my opinion, is not entitled to complain of anything done by the solicitor upon the instructions, express or implied, of the insurers, provided it falls within the class of things which the insurers are, as between themselves and the insured, entitled to do under the terms of the policy when properly construed. [at 400].

. . .

12 In British Columbia, the authority of the insurer under a policy of motor vehicle insurance is ensconced in the Regulations to the Insurance (Motor Vehicle) Act, ss. 74 and 74.1 . . .

Each defendant in this case has, therefore, granted to the insurer the exclusive right to control and conduct the defence to the action against him. Subject to the duty of good faith, the insurer alone is entitled to appoint and instruct counsel, to settle within the limits of the policy notwithstanding that the insured may object, or to defend the claim notwithstanding that the insured may wish to settle. Essentially, by taking up the policy of insurance, the insured has agreed that, subject to "good faith" remedies, his interest (at least in non-financial terms) and his wishes will be subordinated to those of the insurer in return for the latter's obligation to indemnify him for damages arising from the final award or

> settlement made against him. This reality would appear to have been accepted by the defendants in this case, none of whom have objected to I.C.B.C.'s appointment of one counsel to defend the four actions.

However, *Mara* is clearly distinguishable because Royal does not admit it has any obligation to indemnify or defend Meridian and Tribeca.

[40] In this case, Royal has three insureds (Shannex, Meridian and Tribeca) under two separate policies, (the Wrap Up Policy and the Property policy issued to Shannex) with liability issues arising between Shannex on the one hand and Meridian/Tribeca on the other.

[41] It is one thing if the interests of an insurer with respect to an accident are the same as that of its insured because their interests in defending the claim are identical. But in this case, Royal advances a subrogated claim on behalf of Shannex and has taken a position with respect to how the accident occurred in order to a deny Meridian/Tribeca a defence – let alone indemnification – under the Royal Wrap Up Policy. Royal's interests are more than potentially opposed to those of Meridian and Tribeca – they are actually in conflict.

[42] Royal has indemnified Shannex and has taken subrogated proceedings against Meridian and Tribeca while denying that it has a duty to defend or indemnify either. Royal has a direct financial interest in recovering what it paid Shannex. It would be wrong to permit Royal to instruct counsel whose conduct could potentially compromise any potential coverage of Meridian and Tribeca under the Wrap Up Policy.

[43] In *Appin Realty Corp. v. Economical Mutual Insurance Co.*, 2008 ONCA 95 (leave to appeal refused, [2008] S.C.C.A. No. 145), the Ontario Court of Appeal noted:

> **11** The motion judge referred to the principle that an insurer's right to control the defence of the action is not absolute: *Brockton (Municipality) v. Frank Cowan Co.* (2002), 57 O.R. (3d) 447 (C.A.). He rejected the proposed safeguards as impractical and ineffective. In view of the insurer's initial refusal to defend the plaintiff's action - which prompted Appin's application to compel the insurer to defend - and in view of the ongoing coverage dispute, the motion judge concluded that a reasonable person would still perceive a conflict despite the proposed safeguards.

The Court of Appeal characterized this as an exercise of discretion with which they would not interfere. The Alberta Court of Appeal has also upheld the appointment of independent counsel at the insurer's expense in cases of actual conflict with an insured: *P.C.S. Investments*, above at para. 25.

[44] Justice Hood did not err in granting the order sought. Royal could not maintain both the subrogated Shannex action against Meridian and Tribeca and then purport to defend Meridian and Tribeca at the same time. Given Royal's position on coverage and the duty to defend, Meridian and Tribeca were properly concerned that Royal could influence the subrogated action in such a way as to minimize its potential coverage exposure, to the detriment of Meridian and Tribeca.

Issue 4 - Indemnification for Meridian and Tribeca's Defence Costs:

[45] Justice Hood awarded reimbursement of Meridian and Tribeca's defence costs as of the date that Royal refused to provide defences.

[46] Royal argues that defence costs should not have been granted in this case because the expenses of Meridian and Tribeca's defences to date have been borne by their CGL Insurers, not by Meridian and Tribeca directly. Royal cites no authority for this proposition. On this point, Justice Hood said:

> ...[It] is not something the court should concern itself with or will concern itself with in this case.

[47] In effect, Royal asks to be made the beneficiary of a third party contract between Meridian and Tribeca and their CGL Insurers. The parties seeking reimbursement of defence costs are not Aviva and Dominion but rather Meridian and Tribeca. It is they who have a contract of insurance with Royal. What they do with any defence costs recovered is their business. Royal's position here really anticipates the outcome of an application for equitable contribution amongst all interested insurers, something not before Justice Hood.

CONCLUSION:

[48] The appeal should be dismissed but Justice Hood's order is without prejudice to any subsequent order that may allocate defence costs amongst relevant insurers. Royal shall pay costs of $3,000 inclusive of disbursements to each of Meridian and Tribeca.

Bryson, J.A.

Concurred in:

Hamilton, J.A.

Fichaud, J.A.