IN THE SUPREME COURT OF NOVA SCOTIA

Cite as: LaPierre v. General Accident Assurance Company of Canada, 2007 NSSC 9

Date: 20070111
Docket: S.K. 193310
Registry: Kentville

Between:

Gaetan Joseph LaPierre

Plaintiff

v.

The General Accident Assurance Company of Canada, and D. Foster Insurance Services Limited

Defendants

Judge: The Honourable Justice Gregory M. Warner

Heard: December 11, 2006, in Kentville, Nova Scotia

Counsel: Mark S. Raftus, and Raymond F.Wagner, counsel for the plaintiff, Gaetan LaPierre

John Kulik, counsel for the defendant, The General Accident Assurance Company of Canada

By the Court:

A. INTRODUCTION

[1] On July 13, 1998, Gaetan LaPierre, a member of the Canadian Armed Forces, was being transported with other military personnel in a mini-bus (owned by Erroll Griffith, driven by Leonard King, and contracted by Roraina Airways) from a hotel in Georgetown, Guyana, to the airport. The mini-bus collided head on with an oncoming pickup truck while attempting to pass a tractor trailer. LaPierre was injured.

[2] At that time LaPierre's vehicles situate at Greenwood, Nova Scotia, were insured by General Accident ("insurer") through an independent insurance broker, under the standard Nova Scotia automobile policy - SPF No. 1 ("Policy") with a Family Protection Endorsement -SEF No. 44 ("Endorsement").

[3] Based on advice from a Guyana lawyer, to the effect that the normal maximum third party liability coverage for taxis in Guyana was the equivalent of $3,000.00 Canadian dollars, LaPierre did not sue in Guyana, but claimed against his insurer pursuant to the Endorsement in his Policy. In October, 1999, after the

insurer denied liability, based on the territory limitation in the Policy, LaPierre sued his insurer for payment pursuant to the Endorsement, and, in the alternative, his insurance broker for negligence.

[4] A trial was set down to determine liability only. Shortly before trial the action against the broker was dismissed by consent. As a result, the trial became a hearing on agreed facts, affidavits, and oral argument.

B. ISSUES

[5] First Issue: Does the territorial limit in the Policy apply to the Endorsement?

[6] Second Issue: Has the plaintiff established that the minibus was under-insured?

C. FIRST ISSUE Does the territorial limit in the Policy apply to the Endorsement?

Policy and Endorsement

[7] Clause 1 of the part 6 of the Policy ("GENERAL PROVISIONS, DEFINITIONS AND EXCLUSIONS") reads:

> 1. TERRITORY
>
> This policy applies only while the automobile is being operated, used, stored or parked within Canada, the United States of America or upon a vessel plying between ports of those countries.

[8] If this territorial limit applies to the SEF No. 44 - Family Protection Endorsement, the insurer is not liable to the plaintiff. The plaintiff submits that the proper interpretation of the Policy (including the Endorsement) is ambiguous and that the doctrine of *contra proferentem* applies against the insurer. The insurer says there is no ambiguity.

[9] Subsection 108(1) of the **Insurance Act of Nova Scotia** ("Act") provides that no insurer shall use a form of policy or endorsement in respect of auto insurance other than on a form approved by the Superintendent. Subsection 108(6) authorizes the Superintendent to approve a form of policy for general use containing agreements and provisions in conformity with the Act. Subsection

108(7) says that the approved form of policy shall be published in the Royal Gazette, but that approved endorsement forms need not be so published.

[10] The Policy in this case is the standard automobile policy (owner's form) - SPF No. 1, published in the Royal Gazette on June 26, 1996 at pages 2530 - 2554 inclusive. The Endorsement in this case is the standard SEF No.44 - Family Protection Endorsement, approved by the Superintendent.

[11] The Policy consists of seven parts (although un-numbered in SPF # 1, for ease of reference, I assign numbers to each part) as follows:

Part 1: a one sentence general insuring agreement (page 2531);

Part 2: Section "A", which describes third party liability cover (pages 2531- 2532);

Part 3: Section "B", which describes no fault accident benefits (pages 2532 - 2539);

Part 4: Section "C", which describes cover for loss or damage to the insured's vehicle (pages 2540 - 2542);

Part 5: Section "D", which describes uninsured and unidentified auto coverage (pages 2542 - 2547);

Part 6: "General Provisions, Definitions And Exclusions", which describes provisions, definitions and exclusions applicable to the Policy as a whole; and

Part 7: "Statutory Conditions", which contains conditions mandated by the legislation.

[12] The Endorsement contains eleven numbered sections and one supplement. The sections relevant to this analysis are section 1 (definitions), section 2 (insuring agreement), section 8 (Quebec exclusion), and section 11 (miscellaneous). In the Endorsement,

(a) The Insuring Agreement (Section 2) states in clear and simple language that the insurer shall indemnify each <u>eligible claimant</u> for the amount that he or she is legally entitled to recover from an <u>inadequately insured motorist</u> as compensatory damages in respect of injury or death sustained by <u>an insured person</u> by accident arising out of the use or operation of an <u>automobile</u> (underlined words are defined);

(b) Automobile is defined in Section 1 as "a vehicle with respect to which motor vehicle liability insurance would be required if it were subject to the law of the province governing the policy";

(c) Section 8 states that the Endorsement does not apply to an accident occurring in the Province of Quebec;

(d) Section 11 states in part: "This endorsement is attached to and forms part of the Policy . . . Except as otherwise provided in this endorsement, all limits, terms, conditions, provisions, definitions and exclusions of the policy shall have full force and effect"; and

(e) In Section 1, the term "policy" means the policy to which the endorsement is attached.

[13] The only defined term in Part 6 of the Policy that is relevant to the territorial limit clause, is "the automobile". Clause 5 of Part 6 of the Policy defines "the automobile" as follows:

> In this policy except where stated to the contrary the words "the automobile" mean:
>
> **Under sections A (Third Party Liability), B (Accident Benefits), C (Loss of or Damage to Insured Automobile), D (Uninsured Automobile)**

(a) The Described Automobile . . .[defined]

(b) A Newly Acquired Automobile . . .[defined]

And under sections A (Third Party Liability), B (Accident Benefits), D (Uninsured Automobile) only

[Subsections (c), (d), (e) and (f) define four other types of automobile, none are relevant to the issues in the case at bar.]

Rules of Interpretation

[14] The general principles for interpreting insurance contracts have been summarized by this Court in **Lunenburg Industrial Foundry v. Commercial Union Assurance,** 2005 NSSC 23, at paragraph 17 - 29. These principles apply to automobile insurance policies.

[15] The Supreme Court wrote, in **Brissette v. Westbury Life Insurance Co**. [1992] 3 S.C.R. 87:

> 4 In interpreting an insurance contract the rules of construction relating to contracts are to be applied as follows:

(1) The court must search for an interpretation from the whole of the contract which promotes the true intent of the parties at the time of entry into the contract.

(2) Where words are capable of two or more meanings, the meaning that is more reasonable in promoting the intention of the parties will be selected.

(3) Ambiguities will be construed against the insurer.

(4) An interpretation which will result in either a windfall to the insurer or an unanticipated recovery to the insured is to be avoided. See **Consolidated-Bathurst Export Ltd. V. Mutual Boiler & Machinery Insurance Co.** [1980] 1 S.C.R. 888.

[16] While adopting the **Brissette** principles, McLachlin, J. (as she then was), in **Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co** [1993] 1 S.C.R. 252 wrote at paragraph 37:

37 . . . In each case the courts must examine the provisions of the particular policy at issue (and the surrounding circumstances) to determine if the events in question fall within the terms of coverage of that particular policy. This is not to say that there are no principles governing this type of analysis. Far from it. In each case, the courts must interpret the provisions of the policy at issue in light of general principles of interpretation of insurance policies, including, but not limited to:

(1) the contra proferentum rule;

(2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and

(3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

[17] Since the Supreme Court made clear the prominence of the doctrine of *contra proferentum* in **Consolidated Bathurst Export Ltd v. Mutual Boiler & Machinery Insurance Co**. [1980] 1 S.C.R. 888 (at paragraph 25), the most common argument between insurers and claimants has been whether an ambiguity exists. At paragraph 26 the Court wrote:

> 26. . . apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, 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. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

[18] What constitutes an ambiguity was answered by the Supreme Court in **Bell Express Vu Ltd. Patrnership v. Rex,** 2002 SCC 42 at paragraph 29. The answer

was given in the context of statutory interpretation; it applies equally to contract interpretation.

> 29 What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte, supra*, at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminister Bank Ltd. V. Zang* (1965), [1966] A.C. 182 (U.K. H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *Canadian Oxzy Chemicals Ltd. V. Canada (Attorney General),* [1999] 1 S.C.R. 743 (S.C.C.), at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, *each equally in accordance with the intentions of the statute*, that the courts need to resort external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".

Analysis

Grammatical and Ordinary Meaning

[19] Section 11 of the Endorsement states that the Endorsement forms part of the Policy, and "except as otherwise provided in this endorsement, all limits, terms, conditions, provisions, definitions and exclusions of the policy shall have full force and effect."

[20] The territorial limit clause states that the Policy applies only while the automobile is operated in Canada, the United States or a vessel plying between their ports.

[21] On its face, the territorial limit excludes insurance coverage under the Policy - which expressly includes the Endorsement - while the automobile is in Guyana.

[22] The plaintiff argues that “the automobile” in which the plaintiff was riding was not an automobile as defined in Clause 5 of Part 6 of the Policy. While that is correct, it does not affect the applicability of the territorial limit to the Endorsement for two reasons.

[23] First, the definition of “the automobile” in Clause 5 of Part 6 of the Policy expressly states that, except where stated to the contrary, it applies: in respect of the first two definitions, to Sections A, B, C, and D of the Policy; and, in respect of the last four definitions, to Sections A, B, and D only. Said differently, the definition of “the automobile” in clause 5 of Part 6 of the Policy does not apply to any part of the Policy except Sections A to D, and therefore does not apply to the Endorsement.

[24] Secondly, the Endorsement has its own definition of “automobile”. In the Endorsement, “automobile” simply means a vehicle with respect to which motor vehicle liability insurance would be required if it were subject to the laws of the Province of Nova Scotia. Replacing the definition in clause 5 of the policy with the definition in the Endorsement does not create an ambiguity as to whether the territorial limit applies to the Endorsement. The “ except where stated to the contrary” clause mandates the substitution. The mini-bus, in which the plaintiff was a passenger in Guyana at the time of the accident, meets the definition of an automobile set out in the Endorsement.

[25] Applying a grammatical and ordinary meaning to the territorial limit clause, the Policy applies only while the automobile (as defined in the Endorsement) is being operated, used, stored or parked within Canada, the United States of America, or upon a vessel plying between ports of those countries, and not in Guyana.

Meaning In The Context Of The Policy As A Whole

[26] The territorial limit is contained in Part 6 of the Policy, called “General Provisions, Definitions and Exclusions”.

[27] Like Part 7 of the Policy (“Statutory Provisions”) it is plain and obvious that Part 6 applies to the Policy as a whole. Nothing in the territorial limit clause expressly says that it does not apply to the Policy as a whole, nor is there anything in Part 6 of the Policy that states that the general provisions, definitions and exclusions do not apply to the Policy as a whole.

[28] The territorial limit clause is not found in any of the four “Sections” (A, B, C or D), which Sections provide specific types of insurance coverage that are different from the coverage set out in the Endorsement.

[29] All four “Sections” of the Policy contain additional limits, terms, conditions, provisions, definitions and exclusions that apply to, or are particular to, the insurance coverage in that Section. It is noteworthy that in Sections A (Royal Gazette page 2531), C (Royal Gazette page 2541) and D (Royal Gazette page 2547, clause 8), the reader of the Policy is directed in bold print to the words: “See also General Provisions, Definitions, Exclusions and Statutory Conditions of this

Policy". These three clauses (in bold print) within the Sections setting out specific coverage reinforce the obvious intention that Part 6 and Part 7 of the Policy apply to the Policy as a whole.

[30] The reference in Section 11 of the Endorsement to the fact that the Endorsement forms part of the Policy - the terms, conditions, limits and exclusions of which shall have full force and effect except as otherwise provided in the Endorsement, and the placement of the territorial limit in Part 6 of the Policy removes any doubt that the territorial limitation in the Policy applies to the Endorsement.

Impact of the Insurance Act

[31] The only reference to territorial limits in the Act is in Section 117. It specifies that Section A (third party liability coverage) applies to ownership or use of an insured vehicle within Canada, the United States of America or upon vessels plying between their ports.

[32] The plaintiff argues that because the Act only mandates a territorial limit in respect of third party liability coverage, that there is no basis to construe clause 1 in Part 6 of the Policy as applying to any more than Section A of the Policy. Said differently, the absence of any reference in the Act to territorial limits applying to situations of inadequately insured motorists means that there is no basis for the territorial limits to apply in those circumstances, or, alternatively, that such should at least give rise to an ambiguity as to whether the territorial limit applies to the coverage contained in the Endorsement.

[33] This argument appears to be based on the analysis of two decisions referred to the Court by the plaintiff: **Sutherland v. Pilot Insurance Co.,** 2006 CarswellOnt 4090 (OSCJ) and **Shulakewych v. Alberta Motor Association Insurance Co**., an arbitration decision of the Honourable James H. Laycraft, Q.C., dated December 21, 1999.

[34] The Court in **Sutherland** wrote at paragraphs 23 and 24:

> 23 Although "underinsured", is a concept recognized for many years and through many amendments of the *Insurance Act* and its regulations, it has not been made explicitly subject to the *Insurance Act* or OAP 1 [SPF 1] from whence the territorial limitations arise.

> 24 The absence of clear and express language as to the extent and scope of the limitation as it impacts upon a claimant in circumstances of underinsurance addressed by OPCF 44R. [SEF 44], has left the question in a state of ambiguity. As such, the issue is to be resolved in favour of the insured.

[35] A review of paragraph 3 of that decision appears to show that in Ontario, the statutorily-mandated territorial limit which first related to third party liability coverage was extended by an amendment to the Act in 2002 to cover uninsured or unidentified motorists. The argument in that case appears to have been whether the legislation authorized a territorial limit. The insurer argued that an under-insured motorist was by logic subsumed within the principles relating to uninsured motorists (see paragraphs 5 and 20 of the decision). The Court rejected this argument. The insurer's argument in this case is not the same. To the extent that the insured relies on this argument, I find that the provisions of the Nova Scotia Act (particularly section 108), which authorize policies and endorsements approved by the Superintendent "in conformity with this Part [of the Act]", do not prevent a policy or endorsement from containing a term or provision not expressly set out in the Act. To conclude otherwise would make the creation of a policy or endorsement (other than a certificate or cover sheet) redundant. The Act and Regulations stipulate the minimum requirements for, and in instances such as auto

policies approval of the form of, policies, but legislation has not removed the ability of insurers to offer coverage that is beyond the requirements of legislation such as, in this case, contained in the Endorsement.

[36] In **Shulakewych**, the plaintiff was a passenger in a vehicle in Ukraine which, in a passing manoeuvre collided with another vehicle, resulting in serious injury to the plaintiff. The plaintiff claimed benefits under Section B and the SEF 44 Endorsement of her husband's auto policy. The arbitrator noted that the Alberta Insurance Act originally mandated the territorial limit to third party liability cover (like Section 117 of the Nova Scotia Act); in 1972, the Alberta Act was amended to require Section B or "Accident Benefits" coverage. He noted that, unlike the Sections A and B cover, the SEF 44 Endorsement cover has no statutory basis but is a matter of contract between the insured and the insurer. He found that the standard auto policy and endorsement (a) is not easily readable (that is ambiguous) and (b) should be construed against the insurer as a last resort (per the *contra proferentum* doctrine) except where the language in the policy comes word for word from the Act or Regulations. Because Section B cover is statute-based, and SEF 44 Endorsement coverage is not, *contra proferentum* may result in different interpretations of policy coverage. In that case, the insurer argued that because: (a)

the statutorily mandated territorial limit applied to liability policies, and (b) Section B insurance coverage was statutorily mandated for all motor vehicle liability policies, the statutorily mandated territorial limit respecting liability policies applied to Section B coverage, and consequently, the Section B claim of the plaintiff insured was excluded.

[37] With respect to the SEF 44 Endorsement coverage, the arbitrator decided that because: (a) the endorsement itself was clear and contained no territorial limit, and (b) in the "General Provisions" part of the policy, the territorial limit clause was stated to apply only in respect of "the automobile" which term was defined in Clause 5 of the "General Provisions", which definition clearly did not include the vehicle in which the insured was a passenger while in the Ukraine, and (c) nothing in Clause 1 or in the endorsement was a statement to the contrary that the specific meaning assigned to the words "the automobile" [in what is our Clause 5] is not to apply, then the territorial limit does not apply to the coverage contained in the endorsement. Relying on two Ontario Court of Appeal decisions to the effect that coverage required by statute could only be limited by statute, the arbitrator rejected the insurer's argument.

[38] I have trouble with the arbitrator's analysis in this regard for two reasons. First, I do not accept, as a principle of statutory interpretation that, because the Act mandates that third party liability (Section A) coverage shall be subject to a territorial limit,

(a) the SEF 44 Endorsement coverage cannot include a territorial limit, or

(b) no matter how clear or express the language creating the territorial limit is, its inclusion in the Policy is unauthorized and contrary to law, or at least gives rise to an ambiguity as to whether it applies.

[39] Second, I disagree with the arbitrator's analysis of the meaning of the words "the automobile" in the territorial limit clause. The definition of "the automobile" contained in Clause 5 of the "General Provisions" part of the Policy, clearly would not include the vehicle in which the insured was a passenger in the Ukraine. However, the six definitions of "automobile" contained in Clause 5 <u>expressly</u> state that they apply only to coverage under Section A, B, C and D of the Policy, or to coverage under Sections A, B and D of the Policy. The arbitrator's statement that "nothing in Clause 1 or in the Endorsement is a statement to the contrary . . .", ignores the fact that: (a) in Clause 5 the six definitions are specifically stated to be in respect of cover under Section A, B, C and D of the Policy, and (b) at the

beginning of Clause 5 appear the words "in this Policy except where stated to the contrary". These two facts expressly provide for a definition of "the automobile" that may be different from that which, in Clause 5, is restricted to cover under Sections A to D of the policy. As previously noted, section 11 of the Endorsement states that the Endorsement forms part of the Policy; because the Endorsement does contain a definition of "automobile" (that is different from and broader than that contained in Clause 5 of the "General Provisions" part of the Policy) it is clear and unambiguous that this definition is to be used when reading the word "automobile" in the territorial limit clause.

Sensible Commercial Result and Unanticipated Recovery

[40] Many courts and text writers recognize that the presumed intentions of the parties to insurance contracts is to avoid unrealistic results and to promote "sensible commercial" results. See, for example, Insurance Law in Canada by Craig Brown and Julio Menezes (Carswell: Looseleaf), **Consolidated Bathurst** at paragraph 26, and **Brissette** (the fourth rule of construction).

[41] Courts will construe ambiguities in an insurance contract against the insurer. While Cory, J.A., (as he then was), in **Wigle v. Allstate Insurance Co., of Canada**, 1984 CarswellOnt 26 (OCA), discussed a policy of interpretation applied by American courts and known as "reasonable expectations doctrine", and noted that the doctrine appeared to give effect to the reasonable expectations of policy-holders in cases which did not involve ambiguous provisions, even he limited himself to situations where an ambiguity existed. (See paragraph 46).

[42] The Ontario Court of Appeal, in **Chilton v. Co-operators General Insurance,** 1997 CarswellOnt 360, again limited the doctrine of reasonable expectations of cover to situations where an ambiguity exists. At paragraph 26, the court wrote that the rule favouring the insured where ambiguity arose only favoured the insured where there were two reasonable but differing interpretations of the policy, and the court should not strain to create an ambiguity where none exists.

[43] It is acknowledged that, if the insured had been in his own vehicle while injured in Guyana (or if he had been in any of the six types of vehicles defined in Clause 5 of the "General Provisions" part of the Policy), the territorial limit would

have excluded recovery under the Endorsement. It is incongruous that the territorial limit, which clearly applies to the entire Policy, and which is not specifically excluded by the Endorsement, would create a significantly greater benefit to the insured than if he was using one of the vehicles for which his primary premium is paid to the insurer.

[44] The Endorsement is expressly declared to form part of the Policy, and nothing in the Endorsement or in the territorial limit clause expressly states, or by reasonable inference suggests, that the "General Provisions", or territorial limit, does not apply to the Endorsement. It would be a surprising and unanticipated result if the territorial limit were held to apply to all of the Policy except the Endorsement. It is not logical that in these circumstances the Endorsement, an addendum to the policy's primary cover, could afford unlimited territorial coverage. The characterization by courts of SEF 44 coverage as "last ditch" or "safety net" coverage, as noted by Saunders J.A. at paragraphs 55 and 56 in **MacIsaac v. Deveaux**, 2004 NSCA 87, supports this conclusion.

[45] In **Shulakewych**, the arbitrator appears to have recognized this point but does not answer it. At page 14 he writes:

> It would appear therefore that had Mrs. Shulakewych been riding in her husband's car when she was injured in Ukraine, she would not be entitled to the coverage provided by the Family Endorsement though I leave that conclusion to the person who must ultimately decide such a case.

[46] In **Sutherland**, the court does not appear to have dealt directly with this, but may have indirectly when, at paragraph 19, the court stated that the law applicable to interpretation of insurance contracts requires that the court interpret the words of the endorsement liberally, construe any ambiguity against the insurer, and: "in determining coverage, the court should protect the reasonable expectations of its insureds even though such expectations are contrary to the expressed intention of the insurer. **Chilton v. Co-operators General Insurance Co.** (1997), 32 O.R. (3d) 161, [1997] O.J. No. 579 (Ont. C.A.)." With respect, in **Chilton**, the Court of Appeal did not suggest that, absent ambiguity, an insured's reasonable expectation is to be upheld even if contrary to the expressed intention of the insurer. It held that, although harsh in its result to the insured, the unambiguous wording of the disputed words in that case would not mislead an insured, and did not give rise to an ambiguity about coverage. It denied coverage.

[47] The Supreme Court in **Reid Crowthers** expressed the rule in a more balanced manner - as a desirability, where the policy is ambiguous, of giving effect to the reasonable expectation of the <u>parties.</u>

<u>Plaintiff's Cases</u>

[48] The plaintiff relied upon **Sutherland** and **Shulakewych**.

[49] In addition to my earlier observations, I had difficulty with the attempt in **Sutherland** to distinguish **Pickford and Black Ltd. v. Canadian General Insurance Co.,** [1977] 1 S.C.R. 261. In **Pickford**, a public liability policy provided coverage for bodily injury and death. Exclusion number 1 of the Policy excluded claims for accidents occurring outside Canada and the United States. An Endorsement extended coverage to property damage. The issue was whether the exclusion applied to the Endorsement. The Supreme Court of Canada held that the endorsement was expressly stated to be subject to all the statements, limitations, exclusions and provisions of the policy, and consequently was subject to the territorial limit in the exclusion. In **Sutherland**, the court distinguished the **Pickford** reasoning because the words "subject to" (used in the **Pickford** policy)

are more effective than "except as otherwise provided in this change form" (used in **Sutherland**) in extending the territorial limit in the General Provisions to the endorsement. The court held that the words "subject to" fixed the policy as the dominant document, whereas "except as otherwise provided in this change form" anticipates the change form to depart from the policy. This distinction is artificial and of no logical consequence to a reasonable interpretation of the respective clauses.

Insurer's Cases

[50] The insurer asked the Court to adopt the reasoning in **Radu v. Heartford Fire Insurance Co** [1997] O.J. 6356 (OSCJ) and **Ortiz v. Dominion of Canada General Insurance**, 2001 CarswellOnt 7 (OCA).

[51] The wording of the territorial limit in **Radu** differs from this case. It reads:

> WHERE YOU ARE COVERED
>
> This policy covers you and other insured persons for incidents occurring in Canada or the United States of America or on a vessel travelling between ports in these countries.

[52] In **Radu** the court found that the clause was written in simple and unambiguous language: "the territorial limit means exactly what it says. The insured is entitled to the benefits so long as the incident leading to the entitlement of benefits occurred in Canada or the United States of America or on a vessel travelling between ports in those countries."

[53] **Radu** was distinguished in **Shulakewych** on the basis that the words "incidents occurring" is much wider than the words in our territorial limit clause. That arbitrator failed to note that the finding in **Radu** that the clause (Clause 11 in our Endorsement) clearly makes the endorsement part of the policy and, except as otherwise provided in the endorsement, all limits in the policy part of the endorsement.

[54] In **Ortiz**, the insured was in an accident in Guatemala involving an uninsured driver. Uninsured coverage was mandated by the Ontario Act (as is Section D coverage in Nova Scotia by Section 139(2) of the Act). Like Nova Scotia, the Ontario Act did not impose territorial limits except in respect of third party liability (Section A) coverage. The insured argued that it was not open to the

Superintendent to approve a form of policy that imposed a territorial limit that was inconsistent with the Act. The Court of Appeal held that there was no conflict or inconsistency between the legislation and the policy, and no ambiguity in the language of the legislation or the policy. It found that the introductory words to the clause: "insofar as applicable, the General Provisions, Definitions, Exclusions and Statutory Conditions . . . also apply . . .", were not so ambiguous as to preclude, on a plain and clear reading of the policy, the territorial limit provision from applying to the uninsured motorist coverage in the policy. Justice Sharpe's reasoning in **Ortiz** is applicable to the case at bar, and I adopt it.

Conclusion

[55] The territorial limit clause in Part 6 of the Policy applies on its face to the whole policy. The Endorsement forms, in plain and unambiguous terms, a part of the policy, and is therefore subject to the "General Provisions" of the Policy, including the territorial limit.

[56] The term "the automobile" in the territorial limit clause is defined in both the Policy (Clause 5 of the "General Provisions") and the Endorsement. The six

definitions in Clause 5 of the Policy, none of which cover the circumstances of the plaintiff in the case at bar, expressly restrict the clause 5 definition to coverage under sections A, B, C and D of the Policy, and clause 5 is prefaced with the words "except where stated to the contrary". The Endorsement contains a definition of "automobile", which definition encompasses the circumstances of the plaintiff in the case at bar and which is a "contrary" definition to those enumerated in Clause 5. It is therefore clear and unambiguous that the definition of "automobile" in the Endorsement is the meaning of "automobile" for the purposes of the application of the territorial limit to the coverage contained in the Endorsement. This view is reinforced by the words in Section 11 of the Endorsement which read: "except as otherwise provided in this Endorsement, all . . . definitions . . . of the policy shall have full force and effect".

[57] It would be difficult to find, in the context of an insurance contract, which by its very nature is long and multi-faceted, any clearer way to establish the applicability of the territorial limit to the coverage under the Endorsement.

[58] The absence of a provision in the **Insurance Act** restricting the territorial limit respecting under-insured motorists' claims is no more determinative of the

issue than the absence of any other terms, provisions, definitions, limits and exclusions that are contained in automobile policies generally and endorsements specifically (and that are not expressly set out in the **Insurance Act**). To the contrary, the **Insurance Act** specifically authorizes policies and endorsements, with such terms and conditions as are approved by the Superintendent, and which are in fact not fully set forth in the Act or Regulations.

D. SECOND ISSUE Has the plaintiff established that the mini-bus was under-insured?

[59] Determination of this issue requires answers to three questions:

(a) Is the defendant insurer estopped from denying that the tortfeasor's vehicle was under-insured?

(b) If not, are the letters from the Guyana lawyer admissible?

(c) If the letters are admissible, do they establish that the tortfeasor's vehicle was under-insured?

D.1 Estoppel

[60] When retained, counsel for the plaintiff consulted H.N. Ramkarran, an attorney in Georgetown, Guyana, with respect to the plaintiff's remedies in Guyana. By letter dated November 5, 1998 ("first Ramkarran letter"), Ramkarran wrote in part:

> When an accident involving motor vehicles occurs in Guyana, the drivers or owners are usually required by the police to produce their insurance certificates. Failure to do so is a minor criminal offence. Upon production of the insurance certificate the police would make a note and it is from that note that the information would be available. While this usually happens I cannot say that it always happens.
>
> You should know that in Guyana insurance companies give limited motor insurance coverage for third parties. The maximum of which is about Guyana $300,000.00 which is slightly less than Canadian $3,000.00. Only one insurance company gives greater coverage but it is highly unlikely that if taxis are involved the coverage will be greater than abovementioned. In these circumstances recovery of any judgment awarded would most likely be difficult if not impossible.

[61] Based on this advice, LaPierre did not sue Griffth, King or Roraima Airways in Guyana, but instead plaintiff's counsel wrote the insurer on November 10, 1998, in part as follows:

> We give this letter further to our duty to provide notice that there is an SEF44 FPE issue in this matter. Our preliminary investigations have revealed that the motor vehicle in which my client was a passenger was grossly underinsured.

> . . . .
>
> We wish to comply with all appropriate provisions of the SPF contract in this matter. Kindly advise if you wish a statement to be given and arrangements will be made.

[62] The insurer replied on November 23, 1998, acknowledging the existence of an SEF 44 endorsement but stating:

> We would like to advise however that the S.E.F. #44 is subject to all terms limits, conditions and provisions of the S.P.F. # 1 Auto policy which it forms part of and is attached to.
>
> One of these conditions is "Territory" which binds the coverage of the policy to accidents occurring in Canada or the United States and on vessels plying between their ports.
>
> This unfortunately excludes this claim in question.

[63] In October, 1999, LaPierre sued the insurer for SEF 44 benefits and in the alternative, his broker, for negligence. (As noted above, the claim against the broker was dismissed by consent shortly before trial.) In February, 2000, the insurer filed a standard defence, denying everything and putting the plaintiff to strict proof of its allegations. The defence did not specifically deny that the tortfeasors were underinsured, or allege a breach of condition 6(a)(ii) of the Endorsement.

[64] In a February 18, 2003 letter, during preparation of an Agreed Statement of Facts for an application to determine if the territorial limit applied to the plaintiff's claim, insurer's counsel addressed, for the first time, the subject of underinsurance as follows:

> It appears we also have never received written confirmation from you that the vehicle in which Mr. LaPierre was seated at the time of the motor vehicle accident in Guyana was underinsured. Obviously, I would like confirmation of that also before we proceed with the April Applicatioin. If the vehicle was not underinsured, there is no need to proceed with the Application.
>
> I await your early reply.

[65] In response, plaintiff's counsel relayed, on February 20th, the substance of the information in the first Ramkarran letter. On March 7th, insured's counsel advised that the information was not sufficient and reminded counsel that he was required to present the necessary information. On August 25, 2003, plaintiff's counsel forwarded to insured's counsel the first Ramkarran letter, and advised that, while not admitting it was necessary to do so, he was seeking confirmation of the exact coverage available. Again, counsel for the insured replied that the first

Ramkarran letter was insufficient to fulfill the insured's obligation under s. 6(a)(ii) of the Endorsement.

[66] On December 18, 2003, plaintiff's counsel forwarded to insurer's counsel a second letter from attorney Ramkarran, dated December 16, 2003, ("second Ramkarran letter") which reads in part:

> Unfortunately we appear to have no information regarding the name of the insurer of the taxi or any particulars relating to an insurance policy.
>
> Since more than five years have elapsed there is little likelihood that any such information would be available from any source to which we may have access.
>
> We are in a position to advice, however, that the minimum insurance legally required is Guyana $25,000: (twenty five thousand dollars) which is the equivalent of approximately Canadian $225.00 (two hundred and twenty five Canadian dollars).
>
> In our experience the vast majority to taxis at the present time and in the past insured their vehicles for the minimum required by law.
>
> The maximum motor insurance against third party risks available in Guyana at the present time ard five years ago is Guyana $300,000: (three hundred thousand dollars) which is the current equivalent of Canadian $2,400: In 1998 it would have been Canadian $3,000.

[67] The plaintiff states that the four and one-half year delay by the insurer in seeking the details of other insurance have prejudiced the plaintiff who was, by that time, unable to obtain the information. The plaintiff says the insurer is estopped by its conduct and silence from disputing that the tortfeasor(s) were under-insured. The plaintiff cites **Habib Bank Ltd v. Habib Bank AG Zurich** [1981] 2 AllE.R. 650, referenced at paragraph 25 in **Vaid v. Insurance Corp. of British Columbia** [1999] B.C.J. 2303, for the proposition that estoppel by conduct is, "essentially the application of a rule by which justice is done where the circumstances of the conduct and behaviour of the party to an action are such that it would be wholly inequitable that he should be entitled to succeed in the proceeding".

[68] The insurer responds that it was misled by the statement in the plaintiff's November 10, 1998 letter to the effect that the tortfeasor's vehicle was grossly under-insured.

[69] The Agreed Statement of Facts and correspondence does not support the defendant's argument that it was misled by the November 10th, 1998 letter. The insurer's November 23rd letter simply states that the Endorsement is subject to the

territorial limits of the policy itself which “unfortunately” excluded the plaintiff’s claim.

[70] The Endorsement sets out, in clear language, the obligations of the parties and entitlement of the insured. Section 2 says that the insurer shall indemnify each eligible claimant for the amount that claimant is legally entitled to recovery from inadequately insured motorist as damages for bodily injury sustained by accident arising out of the use or operation of an automobile. The underlined words are defined in the Endorsement. The parties dispute whether the tortfeasor(s) were inadequately insured motorists.

[71] The insurer is only liable under the Endorsement if the tortfeasors were either (a) under-insured; that is, carried less third party liability coverage than the third party liability coverage in the plaintiff’s Policy, or (b) uninsured, but, in the latter event, the insurer is only liable to the extent that the plaintiff’s damages exceed the plaintiff’s Section D coverage (which in this case is $500,000.00).

[72] The Endorsement sets out in Section 6 (called “Procedures”) the preconditions to establishing the liability of the insurer. Section 6(b) requires the

insured to provide the insurer with a copy of any action commenced against a tortfeasor. Subsection 6(c) requires any action against the insurer to be commenced within twelve months of the time the insured knew or ought to have known of the inadequate insurance, and in any event within two years of the accident. Subsection 6(a) sets out three more conditions precedent to the insurer's liability. The first is that the claimant promptly give written notice of any accident and of any claim made on account of the accident. The third requires the eligible claimant, and the insured person (if different), to submit to examination under oath and produce for examination all relevant documents in their possession or control. The second condition is key to the determination of this issue. It reads in full as follows:

> 6 (a) The following requirements are conditions precedent to the liability of the insurer to the eligible claimant under this endorsement.
>
> . . .
>
> (ii) the eligible claimant shall, <u>if so required</u>, provide details of any policies of insurance, other than life insurance, to which the eligible claimant may have recourse;

This second condition precedent is unusual in the sense that it is only a condition "if so required", which I infer to mean if required by the insurer. Said differently, it is not a condition precedent to the liability of the insurer to the eligible claimant that the claimant provide any details of any policies of insurance against which it may have recourse, unless (and therefore until) required to do so by the insurer.

[73] The insured through his counsel, on November 10, 1998, notified the insurer of its claim and expressly offered to comply with all appropriate provisions of the contract.

[74] Only in February, 2003, more than four and one-half years after the accident, and more than four years after the notice by the plaintiff of its claim against the insurer and its offer to comply with all appropriate provisions, did the insurer request evidence of inadequate insurance. When the insurer rejected the evidence that the plaintiff relied on (the first Ramkarran letter), the insured contacted Kamkarran again, in reply to which Kamkarran advised that since five years had now past there was "little likelihood that such information would be available from any source to which he had access".

[75] The evidence before the Court does not show what efforts were made by the plaintiff to get the particulars of the tortfeasors' insurance(s) in 1998, other than the communication with Ramkarran resulting in the first Ramkarran letter. Even in the absence of a request at that time by the insurer (to provide particulars of the other insurance), it would have been prudent for the plaintiff to have explored this possible requirement further; however, I agree with plaintiff's submission that, unless and until the insurer asked for particulars, it had no duty to obtain or provide them. Said differently, provision of details of other insurance to which the plaintiff had recourse was not a condition precedent to the liability of the insurer until the insurer made it one. When the insurer made it a requirement, four and one-half years after the accident, it was apparently not available.

[76] It is on these facts that the plaintiff, relying on Lord Justice Oliver's words in **Habib**, submits that the insurer is estopped from now requiring the plaintiff to provide the details of other relevant insurance as a condition precedent to its liability to the plaintiff under the Endorsement.

Analysis of estoppel issue

[77] The text Insurance Law in Canada by Craig Brown and Julio Menezes (Carswell: Looseleaf), at Chapter 12, discusses the theoretical basis for, and the application of, the concepts of waiver and estoppel in the insurance context. Estoppel by representation is defined in that text at page 12-3 as follows:

> . . . where one person has made a representation to another person in words or by acts and conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the face of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.

This definition is a direct quote from **Pannenbecker v. Dominion of Canada General Insurance Co**, 1978 Carswell Alta 286 (ACA), at paragraph 37, and very similar to the conclusion reached by the Ontario Court of Appeal at paragraph 46 in **Canadian Bank of Commerce v. London and Lancashire Guarantee & Accident Co**., 1958 CarswellOnt 111.

[78] The text writers appear to set out two requirements for establishing estoppel by representation (although the Ontario Court of Appeal in the **Canadian Bank of Commerce** case at paragraph 52 described three requirements) as follows:

> (a) there must be a representation to the insured by words, or by acts or conduct, or by silence or inaction where a duty to speak or act exists; and
>
> (b) the insured must have relied on the representation and acted to his potential detriment as a result.

[79] The alleged representation in this case is the insurer's silence and inaction for four and one-half years after receipt of the insured's November 10th, 1998 letter making a claim and offering to do whatever was necessary to comply with all appropriate provisions of the contract, before requesting details of the other insurance; that is, bringing into play as a condition precedent, subsection 6(a)(ii) of the Endorsement.

[80] In **Pannenbecker**, a second insurer of the plaintiff had asked the first insurer the nature of its defence, and the first insurer had outlined two defences it intended to rely upon. At trial the first insurer relied upon and succeeded on a third defence to the prejudice of the second insurer. The court declined to infer from the first insurer's answer to the second insurer that no other defence would be relied upon, but more importantly stated that the first insurer owed no duty to the second

insurer as there was no relationship between them upon which a duty could be founded.

[81] In the **Canadian Bank of Commerce** case, the Bank was found liable to a pedestrian for injuries occurring during demolition of a Bank property. The Bank paid the plaintiff and gave notice to two insurers. It pursued one insurer at a time. When it pursued the second insurer, the second insurer denied liability based on a policy condition that would have allowed it to defend the claim. Based on the insurer's knowledge of the proceedings throughout, and its failure to object (that is its silence), the trial court held the defendant insurer was estopped from relying on the breach of condition. The Court of Appeal overturned this decision; it held that the defendant's silence was not shown to have been intended to induce a course of conduct on the Bank's part which would work to the Bank's detriment and further held that the plaintiff's omission to act in its own best interest was not induced by the defendant's omission. All parties were aware of the terms of the policy and all of the relevant requirements and facts to comply with the policy were within the knowledge of both the plaintiff and defendant insurer. (In the case at bar, unlike this case, no condition existed until the insurer requested the details of other policies in February 2003, at which point the insured was unable to obtain them.)

[82] This Court has reviewed several cases where the insurers were estopped from relying on policy conditions, including **Caldwell v. Stadacona Fire & Life Insurance Co.** 1883 CarswellNS 9 (SCC), **Cadeddu v. Mount Royal Assurance Co.** 1929 CarswellBC 37(BCCA), **Uswak v. ICBC** 1978 CarswellBC 626 (BCCtyCt), **Hlokoff v. Snodgrass** 1984 CarswellBC 38(BCSC), and **Zed v. Barristers Society of New Brunswick** 1986 CarswellNB 64 (NBQB).

[83] In **Zed**, beginning at paragraph 76**,** the Court emphasized that the delay of the insurer of one and one-half years, after knowledge of the possible breach of the policy condition, before denying coverage, was a strong factual circumstance for estoppel.

[84] In the case at bar there was no duty on the insured to provide the insurer with the particulars of any other available insurance unless and until the insurer requested that it do so.

[85] The substantial delay of the insurer in making the request has clearly prejudiced the plaintiff. While there is no evidence that the insurer’s silence or

inaction before February, 2003, was with the intention of inducing the insured not to obtain such details, the insured had no duty to do so until required by the insurer.

[86] The insurer's action unfairly placed the insured in a position where he could not, when his duty arose, fulfill that duty. As a matter of equity, it should be open to this court to determine where the consequences for the insurer's silence should fall; however, the description of estoppel set out in paragraph 24 , adopted from the **Pannenbecker** and **Canadian Bank of Commerce** appeal court decisions, includes a requirement that the "representation" (in this case, silence) be "with the intention (actual or presumptive)", as well as with the result, of inducing the insured, on the basis of the silence, to alter his position to his detriment. No evidence exists that the insurer in this case intended (actually or presumptively) to induce the insured to alter his position with respect to collecting or providing details of other insurance to which he had recourse.

D.2 & 3 Hearsay and Proof of Under insurance (Second and Third Questions)

[87] The second question relates to the admissibility of the two Ramkarran letters as principled exceptions to the hearsay rule, and the third question is whether, if admissible, they establish under-insurance.

[88] The plaintiff acknowledges that the letters are out-of-court statements offered for the proof of their contents. He submits that the factual evidence in the Ramkarran letters is admissible for the truth of their contents under the principled exception to the hearsay rule. He submits that the twin prerequisites of necessity (reasonable necessity), and reliability (threshold reliability) are met, and that the probative value of the evidence substantially outweighs any prejudicial effect.

[89] With respect to necessity, the plaintiff cites:

(a) Lamer, C.J.C.'s reference at paragraph 37 in **R. v. Smith** [1992] 2 S.C.R. 215, to Wigmore's non-exhaustive list of situations where necessity arises as including, most commonly, situations where the person making the statement is out of the jurisdiction or otherwise unavailable, and where:

> the assertion may be such that we cannot expect, again or at this time, to get evidence of the same value from the same or other sources . . . The necessity is

> not so great; perhaps hardly a necessity, only an expediency or convenience, can be predicated. But the principle is the same.

(b) **R. v. Wilcox**, 2001 NSCA 45, for the proposition that the impossibility of otherwise presenting the evidence is not a requirement, or that the proposed hearsay evidence is the only evidence available; and

(c) **R. v. KGB** [1993] 1 S.C.R. 740, for the proposition that necessity cannot be isolated from reliability and that circumstantial guarantees of reliability may offset the fact that only expedience or convenience mitigate in favour of admission.

[90] As to threshold reliability, the plaintiff notes that the test, per **R. v. Starr**, 2000 SCC 40, is not ultimate reliability, but rather a determination of whether the circumstances surrounding the statement provide circumstantial guarantees of trustworthiness. In **R. v. Khan** [1990] 2 S.C.R. 531, the Supreme Court found that a statement made by a disinterested person with no motive to lie met the threshold test. Absence of an opportunity for cross-examination only went to weight. In **KGB**, the assertor's understanding of the importance for telling the truth was a relevant consideration.

[91] As to the balancing of probative value against prejudicial effect, the plaintiff submits that the letters are highly probative with little prejudicial effect. He cites McLachlin, J., (as she then was) for the majority in **R. v. Seaboyer** [1991] 2 S.C.R. 599, at paragraph 69, for the court's support of a flexible approach that

> . . . reflects a keen sensibility to the need to receive evidence which has real probative force in the absence of overriding countervailing considerations.

[92] Finally, the plaintiff quotes Lord Denning in **Mood Music Publishing Co. v. DeWolfe Ltd.** (1976) 1 All E.R. 763, cited with approval at paragraph 66 in **Dhawan v. College of Physicians & Surgeons of Nova Scotia** (1998) 168 N.S.R. (2d) 201 (NSCA), to the effect that unlike the reluctance of courts to admit similar fact evidence in criminal cases, courts "have not been so chary of admitting it" in civil cases, and further:

> . . . In civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue; provided that it is not oppressive or unfair to the other side; and also that the other side has fair notice of it and is able to deal with it.

[93] Applying this law to the case at bar, the plaintiff says:

(a) respecting necessity, that Mr. Ramkarran is in Guyana, and while not unavailable in the strict sense of impossibility, on the balance of expediency and convenience, the admission of his statement without his attendance for cross-examination meets the reasonable necessity test;

(b) respecting reliability, because Mr. Ramkarran is an attorney in Guyana and understands the importance of telling the truth, and is a disinterested person with no motive to lie, the circumstantial guarantees of reliability and trustworthiness are high and meet the threshold reliability test; and

(c) respecting the balancing of probative value and prejudicial effect, the letters relate directly to the issue of under-insurance, without any significant countervailing consideration.

[94] The insurer does not, in either its written or oral submissions, oppose the admission of the Ramkarran letters as principled exceptions to the hearsay rule,

either on the basis of necessity or threshold reliability. Its objection is that the letters are not probative of the issue of underinsurance.

[95] In its December 5, 2006, memorandum, counsel states:

> . . . the SEF No. 44 requires, as a condition precedent, that the Plaintiff produce evidence of the actual insurance status of the tortfeasor/motorist in question so that it can be established if the Defendant General Accident is liable to the Plaintiff and if so, to what extent.

[96] In its December 8, 2006, memorandum, counsel adds:

> 12 General Accident has no objection to the admission of solicitor Ramkarran's letters for the purpose of establishing the law of Guyana with respect to purely legal matters such as the minimum insurance limits that motorists are required to carry in Guyana which appears to be Guyana $25,000.00 (or $225.00 Canadian). General Accident does not even object to Mr. Ramkarran's lay opinion that usual maximum auto insurance available in Guyana is Guyana $300,000.00 ($3,000.00 Canadian) excepting that one insurance company gives greater coverage. General Accident does not challenge the factual accuracy of these comments.
>
> 13 However, these comments are irrelevant. . . . All that is relevant is whether: (a) the mini-bus in question had insurance at all; and (b) if so, what were the limits of that insurance . . . . Neither issue is addressed by solicitor Ramkarran.
>
> 14 It is solicitor Ramkarran's comments about the degree of likelihood that a "taxi" carried coverage above $3,000.00 Canadian that are objectionable. This is not evidence of any sort. It is not a legal opinion nor is it factual evidence. It is

> mere speculation. It would not even be admissible if Mr. Ramkarran was sitting in the witness box. . . .
>
> 15. It would be one thing if the Plaintiff produced a letter from the Registry of Motor Vehicles for Guyana setting out the insurance status of the mini-bus in question . . . . Such a document might well fall within the Wigmore analysis . . . However, the Ramkarran Letters are entirely different. They **do not contain statements of fact** as to the actual insurance status of the mini-bus: . . . . This speculation has no probative value whatsoever and, to the contrary, is extremely prejudicial. Furthermore, . . . the letters simply do not address whether the mini-bus even carried insurance: if it did not, the Plaintiff's claim is covered by Section D, not SEF No. 44, ...

Analysis

[97] The apparent acceptance by the defendant of the admissibility of the Ramkarran letters as exceptions to the hearsay rule means that I will admit the letters as exceptions for the purposes of this analysis.

[98] Having decided reluctantly that the insurer is not estopped from requiring proof of under-insurance, the onus is on the plaintiff to prove, on a balance of probabilities, that the mini-bus was operated by an inadequately insured motorist, which, for the purposes of this case means an under-insured motorist, as opposed to a fully insured motorist, or an uninsured motorist (in which instance Section D of the Policy, not the SEF 44 Endorsement, applies).

[99] The Ramkarran letters do establish, on a balance of probabilities, that it is unlikely that the mini-bus was fully insured; that is, that third party liability insurance existed in the amount of the one million Canadian dollars - the third party liability limit in the plaintiff's Policy.

[100] On the other hand, there is nothing in the Ramkarran letters from which a court might conclude (let alone on a balance of probabilities) that the mini-bus was not uninsured; that is, that it had insurance at all. The fact that the minimum legally-required coverage was the equivalent of $225.00 Canadian dollars does not lead to the inevitable inference that the mini-bus had such coverage. If anything, the statement in the first Ramkarran letter noting that drivers or owners are usually required by police to produce their insurance certificates (failure constituting a minor criminal offence); and the fact that the accident report contains no reference to insurance coverage, could lead to an inference that there was no insurance on the mini-bus.

[101] An uninsured motorist is not an inadequately insured motorist except to the extent that damages exceed the plaintiff's Section D coverage; in this case,

$500,000 (Canadian). There is no evidence before this court that the claim for damages exceeds, or might exceed, that amount.

[102] I conclude that the plaintiff has failed to prove, on a balance of probabilities, that he is legally entitled to recover from an inadequately insured motorist.

Costs

[103] The court will hear the parties as to costs if requested.

J.