IN THE SUPREME COURT OF NOVA SCOTIA

Citation: Nova Scotia (Attorney General) v. Royal & Sun Alliance Insurance Company of Canada, 2004 NSSC 15

Date: 20040120
Docket: S.H. 149142
Registry: Halifax

Between:

The Attorney General of Nova Scotia, Representing
Her Majesty The Queen in Right of the Province of Nova Scotia

Plaintiff

v.

Royal & Sun Alliance Insurance Company of Canada, Guardian Insurance Company of Canada, The Halifax Insurance Company, Wellington Insurance Company, General Accident Assurance Company of Canada and Quebec Assurance Company

Defendants

DECISION ON PRODUCTION OF DOCUMENTS FROM THE EMPLOYEE COMPENSATION PROGRAM

Judge: The Honourable Justice Gerald R. P. Moir

Heard: December 18, 2003

Counsel: Robert M. Purdy Q.C., Peter M. Rogers and Dale Darling for the Plaintiff, The Attorney General of Nova Scotia
George MacDonald Q.C. and Jane O'Neill for the Defendants The Halifax Insurance Company and Wellington Insurance Company
Daniel Ingersoll for the Defendant General Accident Assurance Company of Canada
Robert Bell and William Augustus Richardson for the Defendants Royal & Sun Alliance Insurance Company of Canada and Quebec Assurance Company

Moir, J.:

[1] The Province of Nova Scotia sued a number of parties who provided it with liability insurance coverage in the later half of the last century. It had come to light that some employees of the Province had abused children in the custody of provincial institutions. The Province sponsored an ADR Program under which many people who claimed to have suffered abuse as children at the hands of provincial employees were paid compensation. The suit seeks to recover those payments.

[2] At about the same time as the ADR Programme, the Department of Justice put together an "Internal Investigation Unit" to inquire into the actions of the provincial employees and to advance disciplinary measures where warranted. Many employees were suspended with pay during the lengthy investigation although few were disciplined or charged. According to the Honourable Fred Kaufman, who conducted a ministerial inquiry, innocent employees suffered as a result of allegations made during the ADR Programme and as a result of the suspensions during investigation by the IIU. The Province instituted another compensation programme. With the support of the other defendants, Royal and Sun Alliance Insurance Company of Canada and Quebec Assurance Company seek

production of documentation generated in the course of or collected by the Employee Compensation Programme. The plaintiff says that this documentation is irrelevant to the issues raised by the pleadings.

[3] *Approach* - The courts of this Province have adopted a liberal approach to disclosure and production of documents under rules 20.01 and 20.06 and full pre-trial disclosure is required: *Dowling* v. *Securicor Canada Ltd.*, [2003] N.S.J. 237 (C.A.) at para. 9 to para. 12. An application for disclosure or production involves "attempting to ascertain relevance on a preliminary basis" and the standard is sometimes described as a "semblance of relevancy" to distinguish the preliminary assessment from the more vigorous assessment that is required for rulings on relevancy in the course of trial: *Eastern Canadian Coal Gas Venture Ltd.* v. *Cape Breton Development Corporation*, [1994] N.S.J. 588 (S.C.) para. 17 and para. 20. This preliminary assessment of relevancy is made by considering the issues raised by the pleadings and the evidence of their apparent relationship, if any, to the documentation sought to be disclosed or produced: *Eastern Canadian Coal*, para. 20; *Dowling*, para. 9.

[4] *Pleadings* - The Statement of Claim pleads the policies and the coverages. Defences respond that the payments under the ADR Programme were not within coverage because they were not payable by reason of liability imposed by law. Also, the insurers allege breach of policy conditions to the actual prejudice of insurers, such as conditions for timely disclosure of claims and against unilateral settlements. The applicants argue that documentation generated by the Employee Compensation Programme is material to the issue of liability imposed by law and to the issue of prejudice caused to insurers on account of breach of conditions. One readily sees that the Programme may have documented information going to the allegations of abuse themselves. For the moment, we shall take a detour to visit the question of documented information going to the allegations of abuse themselves and then I shall return to the discussion of issues raised by the pleadings and their implications for less obviously relevant documentation as may be in the possession of the plaintiff under the Employee Compensation Programme.

[5] *Information Going Directly to the Allegations* - Counsel for the Province point out that the Employee Compensation Programme was supplied by the IIU with information concerning the allegations and all IIU documentation has been

disclosed. When I reserved decision I stated that, as a minimum, I would order the Province to serve a supplementary list of documents itemizing everything in the possession of the Employee Compensation Programme that contains any information about any of the allegations against employees. I said that if a document is a duplicate of one already disclosed through other offices of the government, then a copy need not be produced but the defendants are entitled to the assurance of an itemized list. Further, because the Employee Compensation documentation is in the control of the Department of Human Resources and because counsel have not been able to review all of the documentation, the Court cannot be assured that all information dealing directly with the allegations has been disclosed. For example, employees gave statement concerning their personal circumstances and we cannot be assured that those statements are silent on the allegations themselves. So, I suggested that the plaintiff get started on the process of inspecting all the Employee Compensation Programme documentation. Mr. Rogers questioned whether that would be restricted to "Included ADR Claimants" or would extend to "Excluded ADR Claimants", a distinction made in para. 29 to para. 32 of the statement of claim. I said that for the time being it would be restricted to the included claimants. In any event, I now confirm that I am allowing the application at least to the extent of requiring disclosure of all documentation in

the custody of the Employee Compensation Programme containing information about any allegation made by any "Included ADR Claimant" and requiring production of copies of any such documentation if it is not a duplicate of a document already produced from other sources.

[6] *Pleadings (Continued)* - Returning, then, to the question of issues raised by the pleadings as may make other Employee Compensation Programme documentation relevant, a semblance of relevancy may bear upon the Province's allegation that the ADR payments were on account of the insurers' refusal to provide defence and coverage and upon the insurers' retort that the ADR Programme was unreasonable. I discussed this aspect of the pleadings in *AG of NS* v. *Royal and Sun Alliance Insurance Co. of Canada and others,* [2003] N.S.J. 422 (S.C.):

> Paragraph 28 of the statement of claim alleges that the plaintiff received "a large number of Notices of Intended Action, Originating Notices, Statements of Claim, and other documents and claims" for compensation for injuries "arising from physical, sexual, and/or emotional assaults or abuse suffered by the claimants while attending various facilities owned and operated by the plaintiff". According to paragraph 33 the assaults were claimed to have been "perpetrated by employees of the plaintiff at the facilities" and the grounds of the Province's liability would be "negligence, breach of fiduciary duty and/or vicarious liability". Paragraphs 35 and 36 read:

35. Defendants were notified of the Claims by the Plaintiff as soon as reasonably possible after the Plaintiff became aware of the Claims, of the Policies and of the possible applicability of the Policies to the Claims. The Defendants were invited to participate in the investigation, defence, trial and/or settlement of those claims which were brought by way of civil proceedings in this Court. The Defendants have refused or declined to defend or indemnify the Plaintiff in respect of such claims and accordingly have breached the Policies.

36. Following notification to the Defendants inviting their participation and/or inviting the expression of any concerns the Defendants may have had in regards the Plaintiff's participation in an ADR process, the Plaintiff initiated a comprehensive ADR process to investigate and provide an efficient, cost-effective and humane manner for processing the claims of the nature described in Paragraph 28 above and compensating those claimants who were reasonably ascertained by the ADR process to have presented a valid claim. The Defendants have refused or declined to participate in the ADR process either by way of exercising their duty to defend or to indemnify the Plaintiff in respect of the Claims processed through ADR and accordingly have breached the Policies.

As Mr. Purdy makes clear in his brief on behalf of the Province, these pleadings set up a basis for recovery recognized by Chief Justice McEachern (as he then was) in *Cansulex Ltd.* v. *Reid Stenhouse Ltd.* (1986), 70 B.C.L.R. 273 (S.C.) at para. 196 and recognized as "well settled" by the British Columbia Court of Appeal in *Wright Engineers Ltd.* v. *U.S. Fire Insurance Co.*, [1986] B.C.J. 129 (C.A.) para. 37. Where a liability insurer is found to have wrongly denied coverage, the cost of a subsequent settlement is recoverable as damages for breach of the insurance contract if the settlement was reasonable in all of the circumstances. There is no need for a finding that the insured was liable to the settled claimant nor for any assessment of what the claim was worth. All that is necessary is that the settlement was reasonable. The amount of the settlement and the cost of getting it provide a full measure of the peace that was contracted by the insurer and wrongly denied, if the settlement was reasonable in all the circumstances.

> The defences engage this pleading. Paragraph 8 of the Guardian defence and 9 of the Halifax and Wellington defence states that those insurers were "not given an opportunity (or, in the alternative, any effective opportunity) to participate in the ADR process". They were "notified of the ADR process either after it had already begun or only shortly before it commenced." These insurers plead further that the ADR process was not reasonable. It "was one undertaken by the plaintiff in a negligent and inefficient manner resulting in invalid claims being paid and other claimants being over compensated." They plead that the ADR process was grossly prejudicial to the insurers' rights under the policies. The Quebec Assurance and Royal & Sun Alliance defence pleads, at para. 5 "that the validation of the claims within the ADR process referred to in the Statement of Claim was fundamentally flawed and that any payments made were unreasonable." The General Accident defence states, in paragraph 8, that a compensation fund and the program to compensate victims was set up in 1995 and, in paragraph 9, that General Accident was first contacted by the Province regarding claims or potential claims in 1996.

[7] *Evidence* - The Court has been provided with extracts from the report of the Honourable Fred Kaufman, QC, CM made up of the opening paragraph under "Impact on Employees" at p. 301 and the closing analysis at p. 310 to p. 311. Also, we have been given a copy of the government's response in the form of a typed speech given by the Honourable Michael Baker, QC, the Minister of Justice. In addition, we have extracts from an examination for discovery to which the Minister submitted. During argument it was asserted that, as a matter of crown law, the Minister's remarks may not bind the government. The plaintiff is free to make that argument at trial. For the purposes of determining obligations of disclosure, where the assessment of relevancy is not as stringent as at trial, the

Court ought to take unqualified statements by the chief law officer of the Crown as either binding upon or likely to be ratified by the Crown.

[8] The salient facts are nicely put by Mr. Bell in his brief as follows, with his cross references to the record omitted and some liberties taken with his paragraphing:

> In his report, the Honourable Mr. Kaufman made a finding that the Province's response to the claims of abuse was fundamentally unfair to some of the Province's employees, past and present, who themselves were victimized and suffered harm as a result of false accusations. This finding made by Mr. Kaufman was publicly accepted by Justice Minister Baker at a press conference held on March 26, 2002.
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> On September 8 and 9, 2003 the Minister of Justice, Michael Baker, was produced for examination for discovery on behalf of the Province. At his examination the Minister confirmed the existence of the employee compensation program, which he described as a "process". Legal advice was sought by the Province concerning the creation of the employee compensation process as it related to the issues in the within litigation. The budget set for compensation to employees ... is in the millions of dollars. The Minister was unable to advise as to the total number of employees paid or the total amount paid out under this process. No documentation was made available to provide the accurate response.
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> Employees were asked to provide information before any offer of compensation was made to them. The extent and nature of the information obtained from employees as part of the process is not known to the defendants.
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> "Letters of exoneration" were issued to employees by the government following RCMP investigations if allegations could not be confirmed or were determined to be false. The number of letters and names of employees have not

> been made available. Copies of the letters of exoneration; any information concerning which employees received such letters, have received compensation, or how much they have been paid; and any release obtained and who the alleged victims are of those who have been exonerated; and what the criteria were to be exonerated have [not] been produced in this litigation.

The reference to "letters of examination" is Justice Kaufman's language. It was introduced into the exchanges on discovery by examining counsel, Mr. MacDonald. The Minister followed this usage but eventually provided clarification. For the purposes of this application, all the Court knows is that some employees received letters which, as a minimum, told them they were no longer candidates for discipline on account of the allegations made in the ADR process.

[9] *Reasons* - In my assessment, information about the Employee Compensation Programme is marginally relevant to the issue of coverage for liability imposed by law. I fail to see any connection between the Programme and prejudice attendant upon any breach of condition. I have been satisfied by the applicants that there is a sufficient connection, for purposes of disclosure, between the issue of the reasonableness of the ADR settlements and the documentation in the possession of the Province under the Employee Compensation Programme. I stress that this is a preliminary assessment for the purposes of disclosure, where the standard is

sometimes referred to as “semblance of relevancy”, and not a ruling on admissibility at trial.

[10] As I said, I see no connection between the issue of prejudice to insurers or breach of conditions and the Employee Compensation Programme. If at trial an insurer establishes that there was a breach, then prejudice might be established by proving the sorts of fact that Justice Kaufman found, such as the impossibility of now distinguishing false claims from truthful ones. Compensation of employees is far removed from those issues.

[11] As regards the main insurance claim, and proof of liability imposed by law, Mr. Rogers writes for the Province:

> The ADR program that was set up by the Province in response to the sexual abuse claims must be adjudged in this litigation on the merits of the program itself and not based upon any conclusion, unsubstantiated by the evidence, that the employees eligible to participate in the employee compensation process were “falsely accused”. The presence or absence of any individual amongst the employees participating in the process does not indicate one way or the other that the employee was falsely or wrongly accused, only that they were not, and are not expected to be disciplined. As such, it is not an indicator that the ADR program paid money in respect of false claims against them. The employee compensation process and all related documentation requested by the Defendants are accordingly irrelevant to the insurance action.

> This is an argument to be advanced at trial. Whether the things said by the Province and the things done by the Province in the course of the Employee Compensation Programme constitute admissions that certain employees were falsely accused can only be ascertained through evidence of what was said and what was done. That is to say, the subjects have a semblance of relevancy at this pre-trial stage.

[12] The Employee Compensation Programme may also bear a semblance of relevancy to the question of reasonableness of the settlements, assuming the Province establishes a breach of duty to defend. We are now looking at the issue globally. The insurers will seek a finding that the entire ADR process was unreasonable. That question will be answered in the particular web of events when the ADR process was instituted and when it was implemented, not with hindsight. As I can see it now, the Court would be wrong to judge the reasonableness of the entire programme in light of what the Province knew when it established the Employee Compensation Programme rather than what the Province knew or ought to have known at the time of the ADR Programme. Therefore, I do not agree that paying compensation to employees would be an admission that the ADR

Programme was unreasonable from inception. However, the circumstances of each target of an allegation, including the employee's likely stance had there been an opportunity to respond, will go the reasonableness of individual settlements. The fact of payment holds little for this question. The amount holds little for this question. The information that was gathered about employees would be relevant in assessing the reasonableness of an individual settlement and, thus, towards an inference about the ADR Programme as a whole.

[13] *Documents to be Disclosed* - The Court knows little of the actual documentation. The foregoing reasons cast a fairly wide net. As possibly going to admission concerning the basic issue of coverage, and the context in which any alleged admissions may have been made, disclosure and production would include all records of compensation and all records rejecting such, all recommendations made, all analysis recorded, all arguments submitted, all evidence of information supplied in reference to employees who were the targets of included or excluded claims, all documentation concerning the initiation of the programme and all documentation evidencing its parameters, policies and criteria. In my opinion, information concerning excluded claimants, including their allegations and the targets of those allegations, could be used in assessing whether the Province has,

through the Employee Compensation Programme, made admissions concerning any liability owed by it to included claimants. The semblance of relevancy attached on account of the issue of reasonable settlements is not so wide as that concerning admissions. I need not comment further on that.

[14] *Conclusion* - A draft order has been submitted. It seems to me appropriate to these reasons. However, I am prepared to hear further from counsel as to the form of order. Also, we have already set a date for resolving further issues occasioned by this decision, such as any claims of privilege.

J.

Halifax, Nova Scotia
20 January 2004