IADC COMMITTEE NEWSLETTER

INSURANCE AND REINSURANCE

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The British Columbia Supreme Court recently reviewed the duty to defend in cases of several coverage as opposed to overlapping coverage. The case considered coverage for claims which fell partly under a commercial general liability policy and a comprehensive professional liability policy. The mere possibility of coverage triggers the duty to defend which is distinct from the duty to indemnify.

The Duty to Defend Between Several Insurers: *Northbridge General Insurance Corporation v. XL Specialty Insurance Company*, 2021 BCSC 1682

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In many cases, there may be more than one insurance policy that responds to all or part of the claim. The policies may be overlapping (each responding to the same loss), primary and excess, several (each responding to separate parts of the claim), or alternate (one or the other responding to the claim, but not both).

In the recent British Columbia Supreme Court case of *Northbridge General Insurance Corporation v. XL Specialty Insurance Company*, 2021 BCSC 1682, the court considered arguments on the duty to defend where several coverage was found. The Petitioner, Northbridge, sought to compel XL Specialty to contribute to the costs to defend PCA Valence Engineering Technologies in the underlying lawsuit.

A strata corporation in the ski resort community of Panorama, B.C., brought the underlying action against PCA Valence and others for damage which arose from a power outage to a transformer which resulted in freezing pipes and water damage. It was alleged that PCA Valence had been retained to inspect, test and maintain the transformer and that their breaches of duty caused or contributed to the damage.

Northbridge had issued a commercial general liability policy to PCA Valence. XL Specialty had issued them a comprehensive professional liability policy. Northbridge accepted that the pleadings gave rise to the mere possibility of coverage under its policy and had appointed counsel to defend under a reservation of rights. XL Specialty denied any such duty and Northbridge brought on this application seeking XL Specialty to contribute to ongoing defence costs.

The CGL policy of Northbridge was written under standard terms providing coverage for property damage, as defined, arising from an occurrence during the policy period. It also contained a professional services exclusion as follows:

> "[t]his insurance does not apply to":
>
> ... "property damage" due to the rendering of or failure to render by you or on your behalf of any "professional services" for others, or any error or omission, malpractice or mistake in providing those services.

Professional services were defined as this:

> "Professional Services" shall include but not be limited to:
> …
> g. Any engineer, architect or surveyor services including:
>
> i. The preparation or approval of maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications;
>
> ii. Supervisory, inspection, architectural, design or engineering services;

The XL Specialty provided professional liability coverage. It included "Professional

Liability for Construction Contractors and Construction Support Services Providers." It included the following terms:

> A. Professional Liability Coverage
>
> We will pay on behalf of the Insured for Professional Loss which the Insured becomes legally obligated to pay because of a Professional Liability Claim resulting from a negligent act, error, or omission in Professional Activities and Duties...
>
> Professional Activities and Duties ... means those activities whether part of, incidental to, or for which you have responsibility in your business as a construction contractor, construction manager, construction support services provider, or as stated in Sections 4. and 5. of the Application for this insurance policy executed by you, which are undertaken by or under the supervision of persons or personnel who have attained an appropriate professional qualification, certification or license, where applicable.

The Northbridge policy contained this other insurance clause:

> 9. Other Insurance
>
> If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A [Bodily Injury and Property Damage Liability], B or D of this Policy, our obligations are limited as follows:
>
> a. Primary Insurance
>
> This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

The XL Specialty policy contained this other insurance wording:

> Other Insurance … Where other valid and collectible insurance is available to the Insured, in addition to Design Professional's Insurance, our obligations to the Insured are as follows:
>
> 1. This insurance is excess over any other valid and collectible insurance, whether such other insurance is stated to be primary, contributory, excess, contingent or otherwise. …

In other words, as the judge stated, the XL Specialty policy was excess over other insurance that applied to the subject loss. If the other insurance did not apply, and XL Specialty was the only coverage available, it was primary.

The judge succinctly summarized the allegations in the underlying claim against PCA Vallance in these words:

> [40] The facts as set out in the pleadings (which I am to take as true) state there was a power outage on or around January 9, 2017, resulting in damage to the Strata property due to the failure of the transformer. PCA Valence, having provided the inspection, service, and maintenance of the transformer, is a named defendant in the underlying action. The Strata alleges PCA Valence failed to properly inspect, service, and maintain the transformer, failed to follow the manufacturer's instructions and industry standards, failed to retain qualified employees, and failed to ensure its work complied with all applicable codes, regulations, and industry standards. The Strata also alleges PCA Valence breached a duty of care to ensure the transformer was free of defects and operational issues, failed to provide warnings of risks associated with its transformer, failed to identify that the transformer was not durable, and failed to recommend replacement as needed.

The general principles on the duty to defend is well established in Canada by the leading Supreme Court of Canada decision in Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada, 2010 SCC 33.

> [19] An insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim (Nichols v. American Home Assurance Co., [1990] 1 S.C.R. 801, at pp. 810-11; Monenco Ltd. v. Commonwealth Insurance Co., 2001 SCC 49, [2001] 2 S.C.R. 699, at para. 28; Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada, 2006 SCC 21, [2006] 1 S.C.R. 744, at paras. 54-55). It is irrelevant whether the allegations in the pleadings can be proven in evidence. That is to say, the duty to defend is not dependent on the insured actually being liable and the insurer actually being required to indemnify. What is required is the mere possibility that a claim falls within the insurance policy. Where it is clear that the claim falls outside the policy, either because it does not come within the initial grant of coverage or is excluded by an exclusion clause, there will be no duty to defend (see Nichols, at p. 810; Monenco, at para. 29).

The duty to defend is distinct from the duty to indemnify. An insurer is required to defend if the pleadings allege facts which if proven would give rise to the mere possibility of a duty to indemnify. The facts alleged are assumed to be true. However, an insurer is not necessarily a slave to a third party pleader and the court can look at the true substance of a claim rather than the labels used by plaintiff. The primary focus is

on the language of the policies. The onus is on the insured to prove that the pleadings give rise to a mere possibility of indemnity. The onus then shifts to an insurer to prove any applicable exclusion from coverage. Such exclusions must clearly and unambiguously exclude coverage.

Northbridge conceded that it provided general coverage for property damage, subject to any exclusions. Part of the claim related to the maintenance of the transformer which arguably fell within coverage. But that was only part of the claim. It contended that there were other aspects of the claim which were excluded under the professional services exclusion, which included engineering services, inspection services and the preparation of reposts and opinions. Northbridge argued that each policy provided different coverage. XL Specialty provided for professional liability, which claims were excluded from the Northbridge policy, thus leaving XL Specialty as the only available coverage for such claims.

XL Specialty argued that PCA Valence was not an engineering firm. It was a mere engineering technologist firm. An engineering technologist only requires a two year diploma from a technical college. It was argued that PCA Valence was only providing maintenance services and not engineering services. For example, they would collect oil samples from a transformer and then send them to a third party for testing. As this was a maintenance claim, XL Specialty that both policies covered the same type of claim with XL Specialty providing excess coverage only in circumstances where there would be no excess claims.

I will not detail the entire analysis of the trial judge but only highly certain portions. It must be remembered that Northbridge accepted that some claims may fall within its coverage and outside of the professional services exclusion. XL Speciality made no such concessions and argued that all claims came within the CGL policy and that as such it was merely an excess insurer pursuant to the other insurance clauses. Some of the analysis of the trial judge contained this:

- The other insurance clauses in the policies only applied when the policies covered the same loss. They were not engaged when the polices covered separate aspects of the claim.
- She need not determine liability. She was only required to determine whether there was a mere possibility that some of the claims fell solely within the XL Specialty policy.
- She was not required to determine whether the professional services exclusion in the CGL policy clearly and unambiguously applied. Was there a mere possibility that certain claims may be excluded under the Northbridge policy for professional services and thus trigger a duty to defend under the XL Specialty policy.

- The judge was not required to determine whether she was entitled to examine any extrinsic evidence.
- XL Specialty's policy could only be excess over other insurance if that other insurance applied to the specific loss.
- Here, there were some claims that did not overlap and which gave rise to a mere possibility of indemnity under both policies.
- Transformers are technical pieces of electrical equipment and only personal with specialized skills and qualifications my test, inspect, maintain and service such equipment.
- The XL Specialty policy extended coverage to the business of the insured in electrical testing and consulting services that involve personnel with professional qualifications, certifications, or licenses. These are arguably professional services.
- Citing from other cases, "in determining whether a particular act or omission is of a professional nature the act or omission itself must be looked at and not the title or character of the party who performs or fails to perform the act. . . professional service must embrace both a mental or intellectual exercise within a recognized discipline and the application of special skill, knowledge and training to the particular function in question."

The trial judge concluded:

> [71] I find the allegations in the underlying action include claims against PCA Valence which, if true, could require Specialty Insurance to indemnify PCA Valence. At this juncture it is premature to determine whether such an outcome will materialize. But the mere possibility of such an outcome is sufficient to compel Specialty Insurance to comply with its contractual obligations. It must defend PCA Valence.
>
> [72] While Specialty Insurance employs an "other insurance" clause in its Policy, which purports to render that Policy excess over other insurance, this clause is not applicable if the other insurance does not extend coverage for the same item of loss. The Northbridge Insurance Policy and the Specialty Insurance Policy each cover, for the most part, different claims made against PCA Valence. To the extent that there is any overlap, I agree Specialty Insurance is excess. Such overlap may be unlikely because the allegations are either arising out of professional activities or arising out of non-professional activities. Nevertheless, there is a possibility that both Policies may ultimately be called upon to indemnify PCA Valence for different losses: Station Square at 67.
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> [73] In summary, based on the pleadings, the underlying action

> includes allegations against PCA Valence which, if true, could require Specialty Insurance to indemnify PCA Valence and to do so not merely as an excess insurer. The "mere possibility" test has been met on the basis of my consideration of the pleadings and the Policies. There is also some factual evidence that Mr. Bedard was performing professional services on behalf of PCA Valence, which supports this conclusion. In these circumstances, Specialty Insurance is obligated to defend PCA Valence in the underlying action for claims which may involve "professional duties and activities", as defined in the Specialty Insurance Policy.

The difficulty that I had with the argument of XL Specialty in this case was that they appeared to have misconceived the insuring intent of the Professional Liability Policy and the clear policy wordings. That policy provided Professional Liability for Construction Contractors and Construction Support Services Providers. It was not described as a mere excess policy to a CGL policy. What would the possible purpose be for providing such a policy to PCA Valence Engineering Technologies Ltd? The policy was described as a comprehensive professional liability policy and not a mere CGL policy. These questions were not clearly posed to counsel for XL Specialty. One wonders what their response would have been.

The other difficulty I had is that, in this duty to defend case, counsel was trying to draw what appears to have been rather esoteric and artificial arguments on the distinction between engineers and engineering technologists. That rather avoids the central issue of whether the claims made were for professional services, at least on the preliminary issue of a mere possibility of a duty to defend.

Throughout my career, I was told by many that if you have to struggle too hard to deny coverage, you should reconsider any possible denial. The judge will not struggle too hard to find a mere possibility of a duty to defend. They must be convinced beyond question that there is no reasonable possibility of coverage by clear and unambiguous language in the policy. Counsel and their insurers are always well advised to have their arguments reviewed vigorously by their colleagues.

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