

Court of Queen's Bench of Alberta

Citation: Olchoway v. ING Insurance Company of Canada, 2011 ABQB 463

Date: 20110715

Docket: 0601 11837, 0801 11204

Registry: Calgary

Between:

Action No.: 0601 11837

Edward Olchoway and Ludmila Olchoway

Plaintiffs

- and -

ING Insurance Company of Canada

Defendant

And Between:

Action No.: 0801 11204

Edward Olchoway and Ludmila Olchoway

Plaintiffs

- and -

Markel Insurance Company of Canada

Defendant

**Memorandum of Decision
of the
Honourable Madam Justice J. Streckf**

I. Introduction

[1] This application was brought to resolve an insurance coverage dispute between two insurers arising out of a pedestrian-motor vehicle accident that occurred on October 21, 2005.

Edward and Ludmila Olchowoy were employed by Caravan Logistics Inc. as a long distance trucking and haul team. They were operating one of Caravan's freightliners on a job in California when Mr. Olchowoy was struck by a vehicle operated by a California resident while he was crossing the highway as a pedestrian to seek directions. The third party liability insurance of the California driver was limited to \$50,000 U.S. The Olchowoy's claim that their damages exceed that amount and that they are entitled to coverage under the family protection and inadequately insured motorists endorsement of both their personal vehicle insurance policy through ING Insurance Company of Canada (ING) and their employer's insurance policy through Markel Insurance Company of Canada (Markel).

[2] The Olchowoy's commenced actions against both ING (#0601-11847) and Markel (#0801-11284). All parties have consented to an Order directing that the actions should be consolidated pursuant to section 522 of the *Insurance Act*, R.S.A. 2000, c.I-3 and Rule 3.72 of the *Rules of Court*.

[3] The parties have also agreed, and I share the view, that it is appropriate to have the following issues determined in advance of trial pursuant to Rule 7.1 of the *Rules of Court*:

1. Does the exclusion in paragraph 22 of Change Form #A-008, OPCF 44R FAMILY PROTECTION COVERAGE in Markel's policy no. 2004330 underwritten in favour of Caravan Logistics Inc., and other insureds as defined in the policy, apply to exclude the claim of the Plaintiffs Edward Olchowoy and Ludmila Olchowoy against Markel under the said change form endorsement?

2. In the event that the Plaintiffs Edward Olchowoy and Ludmila Olchowoy, as "insured persons" and/or "eligible claimants" as defined in underinsured motorist coverage endorsements extended by both of the Defendants ING and Markel respectively under separate policies, are determined entitled to a payment from both ING and Markel respectively under their policies, for probable amounts recoverable under the said endorsement on each of the respective policies, which insurance is first loss, and which insurance is excess, pursuant to s.18(a) of each underinsured motorist endorsement, governing "multiple coverages"?

II. Preliminary Evidentiary Issue

[4] On the hearing of this application, ING applied pursuant to Rule 3.69(4) to strike out paragraphs four through nine and Exhibits A through C of the affidavit of Betsy Khan sworn January 28, 2010 on that basis that it contained irrelevant information. ING argued that these paragraphs contained inadmissible parol evidence which the court was not entitled to consider in interpreting the Markel insurance policy. Markel argues that this evidence is admissible as it provides the commercial context and/or factual matrix of the contract.

[5] There is a difference between admissible evidence of surrounding circumstances and inadmissible evidence of the parties' intentions: *Paddon-Hughes Development Co. v.*

Pancontinental Oil Ltd. (1998), 67 Alta L.R. (3d) 104 (C.A.). As the Supreme Court of Canada stated in *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 at para 54:

The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.

[6] Ms. Khan is an underwriter with Markel. Her affidavit purports to provide direct evidence as to what was intended by the policy endorsement at issue on this application and attaches internal coverage summaries prepared by Markel as exhibits. This information constitutes inadmissible extrinsic evidence that is not relevant to the issues on this application. While Rule 3.69(4) would permit this evidence to be struck out, it is sufficient to find that the evidence will be disregarded.

III. First Question

[7] The first question to be determined on this application is:

Does the exclusion in paragraph 22 of Change Form #A-008, OPCF 44R FAMILY PROTECTION COVERAGE in Markel's policy no. 2004330 underwritten in favour of Caravan Logistics Inc., and other insureds as defined in the policy, apply to exclude the claim of the Plaintiffs Edward Olchowyc and Ludmila Olchowyc against Markel under the said change form endorsement?

[8] ING's position is that the Family Protection Coverage in the Markel Policy applies to all Caravan vehicles, including the freightliner operated by the Olchowycs at the time of the incident. Markel's position is that such coverage only applied to light commercial vehicles or private passenger vehicles in the Caravan fleet and that such coverage did not apply to the freightliner operated by the Olchowycs.

[9] Markel provided vehicle insurance for the Caravan fleet. The Certificate of Automobile Insurance states that the Markel Policy applies to "all vehicles owned, registered, leased and/or operated on behalf of the named insured."

[10] Change Form #A-008 provided Family Protection Coverage which provided insurance in the event that injury was caused by an inadequately insured motorist. Paragraph 22 stated:

If more than one automobile is insured under this Policy, this change form shall apply only to the automobile(s) described as automobile(s) number LIGHT COMMERCIAL/PRIVATE PASSENGER ONLY in the schedule of automobiles attached to and forming part of this Policy, or as stated in the Certificate of Automobile Insurance. If this change form is designated with respect to more than one automobile, coverages shall be construed as if provided by separate policies of insurance with respect

to each automobile to which this change form applies, subject to the provision of section 18 of this change form.

[11] Change form #A-005 attached to the Markel Policy, which was entitled “Blanket Fleet Coverage for Ontario Licensed Automobiles”, stated that its purpose was to provide “an alternate method for identifying what automobiles are covered and calculating the premium for the policy period.” Paragraph 3.4 states:

If a schedule of automobiles is not attached to your policy, the following is a summary of the automobiles referred to in 3.1. This summary is the basis on which your policy is issued.

Number of Units	Type of Use or Description of Automobiles	Location	Unit Rate	Advance Premium Excluding Provincial Sales Tax
41	Tractor Hwy	Oakville		
44	Tractor Hwy	Oakville		
19	Tractor Local	Oakville		
54	Trailer	Oakville		
116	Trailer	Oakville		
1	Service	Oakville		
7	Private Passenger	Oakville		

[12] The principles of construction applicable to insurance policies require that ambiguities be construed against the insurer and that the *contra proferentum* principle be applied, that coverage provisions be construed broadly, that exclusion clauses be construed narrowly and that interpretations that result in a windfall to the insurer or unanticipated recovery to an insured are to be avoided: *Brissette v. Wesbury Life Insurance Co.*, [1992] 3 S.C.R. 87 (S.C.C.) per Sopinka J. at paragraph 4; *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252 per McLachlin, J. (as she then was) at paragraph 37; *Somersall v. Friedman*, 2002 SCC 59, [2002] 3 S.C.R. 109 per Iacobucci J. at paragraph 47.

[13] When paragraph 22 of Change Form #A-008 is read in the context of the entire Markel Policy, and applying the principles of construction with respect to insurance contracts outlined above, I am satisfied that the Family Protection Coverage contemplated in Change Form #A-008 applies only to light commercial or private passenger vehicles in the Caravan fleet and that it does not apply to the freightliner operated by the Olchowys at the time of the incident. While the paragraph is grammatically awkward, I do not find the clause ambiguous. The phrase “LIGHT COMMERCIAL/PRIVATE PASSENGER” is a reference to either light passenger or private

passenger vehicles and applies to the seven private passenger vehicles referred to in Change Form #A-005, as the summary in paragraph 3.4 provides the basis on which the Markel Policy is issued if no schedule of automobiles is attached. I am satisfied that ING's interpretation of paragraph 22 would provide a windfall of unanticipated coverage to Caravan/Logistics.

[14] The answer to the first question is yes, Change Form #A-008 does not apply to the Olchowys' claims.

IV. Second Question

[15] In view of my decision on the first issue, it is not necessary to decide the second issue. However, I will do so in the event that I am wrong on the first issue.

[16] The second issue is:

In the event that the Plaintiffs Edward Olchowoy and Ludmila Olchowoy, as "insured persons" and/or "eligible claimants" as defined in underinsured motorist coverage endorsements extended by both of the Defendants ING and Markel respectively under separate policies, are determined entitled to a payment from both ING and Markel respectively under their policies, for probable amounts recoverable under the said endorsement on each of the respective policies, which insurance is first loss, and which insurance is excess, pursuant to s.18(a) of each underinsured motorist endorsement, governing "multiple coverages"?

[17] Section 18 of Change Form #A-008 of the Markel Policy states in part:

The following rules apply where an eligible claimant is entitled to payment under family protection coverage under more than one policy:

- (a) (i) if he or she is an occupant of an automobile, such insurance on the automobile in which the eligible claimant is an occupant, is first loss insurance and any other insurance is excess;
- (ii) if he or she is not an occupant of an automobile, such insurance in any policy in the name of the eligible claimant is first loss insurance and any other such insurance is excess.

[18] The word "occupant" is a defined term in the Markel Policy. The Certificate of Insurance provides that the "contract of insurance between the named insured and the insurer (is) subject in all respects to the Ontario Automobile Policy (OAP1)." Change Form #A-008 provides that "EXCEPT AS OTHERWISE PROVIDED IN THIS CHANGE FORM, ALL LIMITS, TERMS, CONDITIONS, PROVISION, DEFINITIONS AND EXCLUSIONS OF THE POLICY SHALL HAVE FULL FORCE AND EFFECT". "Occupant" is defined in OAP1 as follows:

In this policy, an occupant is a person, including the driver, in or on an automobile, or getting into, on, out of, or off an automobile.

[19] In view of this definition, Mr. Olchoway did not qualify as an occupant within the meaning of the Markel Policy as he was a pedestrian crossing the highway at the time of the incident: *Kyriazis v. Royal Insurance Co. Company* (1991), 82 D.L.R. (4th) 691 (Ont.C.A.).

[20] The ING Policy includes the S.E.F. Family Protection Endorsement which contains a similar provision to that reproduced above from the Markel Policy. Section 7 states:

Subject to the provisions hereof, where an eligible claimant is entitled to payment under Family Protection Coverage under more than one policy and the insured person:

- (a) Is an occupant of an automobile, such insurance on the automobile in which the insured person is an occupant is first loss insurance and any other such insurance is excess;
- (b) Is not an occupant of an automobile, such insurance is any policy in the name of the insured person is first loss insurance and any other insurance is excess.

[21] The answer to the second question is that the ING Policy is first loss and the Markel Policy is excess pursuant to the underinsured motorist endorsements governing multiple coverages in both policies.

V. Costs

[22] If the parties are unable to agree on costs they may provide written submissions within 30 days of the date of this decision.

Heard on the 22nd day of June, 2011.

Dated at the City of Calgary, Alberta this 15th day of July, 2011.

J. Strekaf
J.C.Q.B.A.

Appearances:

Mr. D. Wachowich Q.C.
Fraser Milner Casgrain LLP
for the Defendant ING Insurance Company of Canada

Mr. D. Pick
Scott Hall LLP
for the Defendant Markel Insurance Company of Canada