

CI 03-01-35150

THE QUEEN'S BENCH
WINNIPEG CENTRE

BETWEEN:)	R. Tapper, Q.C.
)	and Mr. C. Wullum
)	for the Applicant
DONALD POULIN,)	
)	Mr. M. Finlayson
Applicant.)	for the Respondent
)	
- and -)	
)	
SCOTTISH & YORK INSURANCE CO.)	
LIMITED, GAN CANADA INSURANCE)	
COMPANY, THE SOVEREIGN GENERAL)	
INSURANCE COMPANY, MARKEL)	
INSURANCE COMPANY OF CANADA,)	
ALLIANZ INSURANCE COMPANY OF)	
CANADA, THE CANADIAN SURETY)	
COMPANY,)	
)	Judgment delivered
Respondent.)	June 21, 2004

DUVAL, J. (Orally)

I want to indicate that I read all of the material prior to hearing submissions of counsel and I am now dealing with this application by the applicant, Mr. Poulin, who seeks an order declaring the applicant's limits of insurance coverage, for an order setting the limits of the insurance coverage or declaring them with respect to the policy

indicated as number 888363. The respondents are the insurers under that policy.

The factual background indicates that from August of 1994 until approximately April of 1996, the applicant contracted for one million dollars of coverage with respect to the operations of his business. In April of 1996 through Assiniboia Insurance Brokers, the applicant increased the coverage for a particular contract with Melrose Coffee to five million dollars. At that point in time, two additional excess liability policies of insurance were issued for two million dollars each, for a total of four million dollars, and that was over and above the existing policy of one million dollars. But it was limited to the Melrose Coffee contract and was limited to the period April 1, 1996 to August 1, 1996, a period of four months.

Subsequently an excess liability policy was issued for two million dollars coverage for two other contracts involving I.N.C. and Kalium Mines (phonetic) at three different locations. That excess liability policy issued on October 27, 1996 for the period October 25, 1996 to August 1, 1997. The basic underlying policy of insurance ran from August 1st of a year to August 1st of the next year. The Assiniboia Insurance Brokers inquired in January of 1997 on behalf of the applicant with respect to increasing liability coverage to two million dollars on all operations.

Subsequently a form of declaration and five endorsements were provided to the applicant on January 23, 1997. That is referred to in Exhibit L to the affidavit of Ms. Tomms (phonetic). It was for a period from January 23, 1997 to August 1, 1997. Again, it referred to the underlying insurance endorsement and the underlying policy, plus another one million dollars coverage in excess, and it is referred to as an excess liability policy.

At page 2 of Exhibit L, at that point in time

number 1 paragraph indicates:

Whereas the underlying insurance described herein is issued on a claims made basis, it is agreed that this policy shall apply to claims on the same basis as the underlying insurance, provided that:

- 1) The date any claim is first made is during the policy period of this policy;
- 2) Bodily injury or property damage occurred on or after the retroactive date described in the declaration hereto, but not after the end of the policy period of this policy.

Again, the retroactive date at that time was January 23, 1997.

Ultimately the issue is with respect to the declaration which has been filed as Exhibit Q to Ms. Tomm's affidavit, and which is also Exhibit C to Mr. Poulin's affidavit. The applicant's counsel submits that because the declaration form ultimately referred to a retroactive date of August 1, 1994 and the limits of liability speak to two million dollars, the coverage applicable at the relevant time is in the amount of two million dollars. Any ambiguity, if there is any, is to be considered on the basis of the contra proferentem rule, that is that the author, being the insurance company, that any consideration of any ambiguity would be in favour of the insured.

That declaration differs from the endorsements. In particular, endorsement number 5 is the relevant one. It is dated effective August 1, 1997, which counsel agree is the date that the declaration form as well as the other forms relevant to the contract and all five endorsements were provided to the applicant. Endorsement number 5 indicates that with respect to the policy, it is agreed that with respect to the one million dollar excess limits, i.e. in excess of first one million coverage applicable to, and "(b) the other operations of this insured," the retroactive date is January 23, 1997.

Counsel for the respondents argues that throughout the contractual arrangements between the parties, coverage under the underlying policy of insurance has always been for one million dollars with a retroactive date of August 1, 1994, but that the excess liability policies of insurance were not for that retroactive date, but either specified limits with respect to particular contracts, such as I.N.C. and Kalium Mines, wherein a retroactive date of October 27, 1996 was specified, or with respect to the Melrose Coffee contracts, or in this case with respect to a retroactive date of January 23, 1997 for all other operations of the applicant.

Counsel has referred to the matter of whether this is a claims based policy which is suggested by the description of the policy both on pages 1 and 2 of the underlying policy. And counsel have discussed the issue of whether this is a hybrid form of policy where the occurrence date is also relevant in terms of the retroactive date of occurrence.

I have concluded that I agree with counsel for the respondent that this is a hybrid type of policy that is not strictly claims based, but that the endorsement forms have limited the claim, either in some circumstances, to the

contracts involved for certain periods of time, or, in this case, with respect to a retroactive date of January 23, 1997.

When I have reviewed the correspondence between the parties through Assiniboia Insurance Broker and the Elliott insurer, it indicates to me the basis on which excess liability insurance was issued and does not suggest ambiguity. The course of conduct of the parties would suggest that there were limitations to the excess over one million dollars liability insurance coverage.

In the end result, I have determined that in terms of an order declaring the limits of coverage with respect to the event and based on the endorsement number 5, that the limit of coverage is one million dollars. I note that any determination of limits of the policy is subject to resolution of the question whether Mr. Poulin is insured or not. That was raised in the material and I add that proviso.

CERTIFIED COURT TRANSCRIPT
FROM THE OFFICE OF
TRANSCRIPTION SERVICES UNIT


TRANSCRIPTION SERVICES UNIT