Citation: Guilbert v Economical Mutual Insurance Company, 2022 MBCA 1
Date: 20220104
Docket: AI21-30-09658

IN THE COURT OF APPEAL OF MANITOBA

BETWEEN:

PATRICK GUILBERT and GUILBERT ENTERPRISES LTD.	)	***J. R. Beddome***
	)	*for the Applicants*
(Plaintiffs) Applicants	)	***G. C. Lisi***
	)	*for the Respondent*
- and -	)	
	)	*Chambers motion heard:*
ECONOMICAL MUTUAL INSURANCE COMPANY, trading as the ECONOMICAL INSURANCE GROUP	)	***August 19, 2021***
	)	*Decision pronounced:*
	)	***January 4, 2022***
(Defendant) Respondent	)	

COVID-19 NOTICE: As a result of the COVID-19 pandemic and pursuant to r 37.2 of the MB, *Court of Appeal Rules*, MR 555/88R, this motion was heard remotely by teleconference.

BEARD JA

I. THE ISSUE

[1] The plaintiffs seek an order under r 42 of the MB, *Court of Appeal Rules*, MR 555/88R (the *Rules*), extending the time to file a notice of appeal of the judgment of Kroft J of the Court of Queen's Bench, Winnipeg Centre, pronounced on March 21, 2019, signed on April 26, 2019 and entered on April 30, 2019 (the Kroft decision). Specifically, the plaintiffs are applying to appeal the finding that Patrick Guilbert (Mr. Guilbert) set the fire that destroyed their business premises, thus voiding the insurance and leaving them liable to the defendant, Economical Mutual Insurance Company (the insurer), for payments that it made under the policy.

[2] The insurer is opposed to the extension of time on the bases that: (i) there was no continuous intention to appeal and no reasonable explanation for the delay; (ii) there are no arguable grounds of appeal; and (iii) an extension would cause prejudice to it, such that it would not be in the interests of justice to grant the extension.

II. THE BACKGROUND

[3] Mr. Guilbert was the operating mind of Guilbert Enterprises Ltd. (GEL), which owned and operated a Home Hardware store in Neepawa, Manitoba. It also owned the building out of which the business was operated, which included four apartments on the second floor. The insurer had insured both the business and the building, on which there were two mortgages.

[4] Shortly after 6:00 p.m. on February 25, 2015, there was a fire in the building that completely destroyed the entire building, including the Home Hardware store.

[5] GEL applied for payment under the insurance policy, but the insurer denied coverage on the basis that Mr. Guilbert had deliberately set the fire. The insurer also alleged that GEL, through Mr. Guilbert, misrepresented facts or failed to provide sufficient information during the investigation and in its sworn proof of loss claim, all of which breached GEL's statutory, contractual and common law duties to it (the plaintiffs' breach of good faith). Notwithstanding the denial of coverage, the insurer was required to pay out the mortgages, which totalled $596,112, and clean-up costs of $45,773.20.

[6] In response to the denial of coverage, the plaintiffs sued the insurer for coverage under the policy and for punitive damages, alleging that the

insurer had breached its duty of good faith in its dealings with the plaintiffs (the insurer's breach of good faith).

[7] The insurer defended the insurance claim, alleging that Mr. Guilbert had set the fire, and filed a counterclaim for the amounts paid out to the mortgagees and for the clean-up costs.

[8] During the trial, there was a *voir dire* in which the trial judge determined that the report of the polygraph test taken by Mr. Guilbert would be admissible as evidence, but only as part of the insurer's defence to the plaintiffs' claim alleging the insurer's breach of good faith.

[9] The trial judge dismissed the plaintiffs' claim and granted the insurer's counterclaim in his judgment dated April 26, 2019. The judgment, including interest and costs, resulted in a judgment debt of $1,052,293.71 (the judgment debt).

[10] On August 2, 2019, the plaintiffs filed for bankruptcy. On August 14, 2019, the insurer applied to have the stay of proceedings under the bankruptcy lifted in respect of the Kroft decision and the judgment debt, and for permission to commence an application that the judgment debt would survive the bankruptcy, which was then granted on January 29, 2020 (the Zinchuk order).

[11] The application to have the judgment debt survive the bankruptcy was granted on December 9, 2020 (the Menzies order). In the result, the judgment debt was not extinguished by the bankruptcy, but remained outstanding and payable by the plaintiffs to the insurer. The plaintiffs retained counsel and opposed both applications.

[12] The plaintiffs sent an unfiled copy of the notice of motion to extend the time to appeal and a copy of Mr. Guilbert's supporting affidavit to the insurer's counsel on April 28, 2021, but those documents were not filed in court until August 6, 2021.

III. THE TEST FOR AN EXTENSION OF TIME TO APPEAL

[13] The criteria for determining whether to extend the time to commence an appeal under r 42 of the *Rules* are well known and were recently confirmed in *Samborski Environmental Ltd v The Government of Manitoba et al*, 2020 MBCA 63 (at para 36):

> . . .
>
> 1. whether there was a continuous intention to appeal from a time within the period when the appeal should have been commenced;
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> 2. whether there was a reasonable explanation for the delay;
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> 3. whether there are arguable grounds of appeal;
>
> 4. whether any prejudice suffered by the other party can be addressed; and
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> 5. whether it is right and just in all of the circumstances that the time for commencing the appeal be extended.
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> [citations omitted]

IV. ANALYSIS

(i) Continuous Intention to Appeal

The Parties' Positions

[14] The plaintiffs argue that there was a continuous intention to appeal, as demonstrated by the many steps that Mr. Guilbert took to oppose the Kroft decision and challenge the proceedings, including consulting counsel about appealing, making a complaint to the Law Society of Manitoba regarding the conduct of the insurer's counsel during the trial and hiring an investigator post-judgment to obtain further information regarding irregularities with the witnesses.

[15] Mr. Guilbert explains that he was financially ruined by the fire and the destruction of his business, following which he had health problems that resulted in him being laid off from work, so that the plaintiffs lacked the financial means to retain counsel and pay for trial transcripts to undertake an appeal. He states that he has been further restricted in pursuing an appeal by additional child care responsibilities so his wife could work and by other limitations related to the pandemic.

[16] The insurer's position is that the plaintiffs have provided no evidence of any intention to appeal between May 5, 2019, when Mr. Guilbert last spoke to a lawyer about filing an appeal, and the spring of 2021, when he took steps to proceed with this application. It also argues that there has been no explanation for the delay between taking initial steps to appeal in the spring of 2021 and August 2021, when the plaintiffs filed appeal documents in court.

[17] The insurer's position is that, instead of filing an appeal following the Kroft decision, the plaintiffs decided to file for bankruptcy in August 2019, indicating an intention to pursue options other than an appeal. It argues that that intention continued until it was clear that the judgment debt would not be extinguished by the bankruptcy, and it was only then that the plaintiffs formed the intention to appeal.

Analysis

[18] The purpose of an appeal period is to bring finality to legal proceedings, as it is not in the public interest, and it does not serve the interests of the administration of justice, for litigants to have matters hanging over their heads for lengthy periods of time. Access to justice requires that matters be resolved within a reasonable time, so that parties can move on. (See, for example, *Wong v Grant Mitchell Law Corporation et al*, 2017 MBCA 49 at para 6.) Extending the time to file an appeal, especially where the delay has been lengthy, brings uncertainty to legal proceedings and is not in the public interest.

[19] The jurisprudence applying this criterion provides the following guidelines:

- An intention to appeal must be distinguished from displeasure at a court's unfavourable decision or merely considering whether to appeal. (See *Arndt v Arndt*, 1987 CarswellMan 284 at para 11 (CA); and *R v Giesbrecht (EH)*, 2007 MBCA 112 at paras 20-21.)

- An applicant should show that an actual intention to appeal was formed during the appeal period and continued through the time that the extension was sought—an intermittent interest in doing so is not sufficient. (See *Giesbrecht* at paras 20-22.)

- A delay in appealing to pursue other legal remedies constitutes a break in the intention to appeal. (See *Wong* at para 3; see also *R v Fraser*, 2016 MBCA 9 at paras 17-19.)

[20] It is clear from the evidence that the plaintiffs were dissatisfied with the trial judge's decision and that Mr. Guilbert made timely inquiries and obtained information about pursuing an appeal. By early May 2019, he had talked to three different lawyers, two of whom were senior practitioners. While he does not specifically say so, it is difficult to believe that he was not told that he had a limited time within which to commence that appeal.

[21] Instead of appealing, the plaintiffs filed for bankruptcy on August 2, 2019. If successful, the bankruptcy would have effectively wiped out the judgment debt and removed the need to appeal the decision. The plaintiffs continued down the bankruptcy path, rather than pursuing an appeal, by opposing the insurer's steps to avoid the extinguishment of the judgment debt in the bankruptcy.

[22] In the course of doing so, the plaintiffs retained a new lawyer, being counsel on this application. In the summer of 2020, he advised Mr. Guilbert to pursue an appeal of the Kroft decision, but Mr. Guilbert again decided not to do so, citing a lack of financial resources. Instead, he continued to put his resources into opposing the insurer's applications to have the judgment debt

exempted from the bankruptcy. That issue was determined in favour of the insurer in the Menzies order.

[23] On or about April 9, 2021, Mr. Guilbert instructed current counsel to proceed with an application to extend the time to appeal. That application was not filed until August 6, 2021, and there has been no evidence offered to explain that further delay.

[24] The facts of this case are similar to those in *Wong* and *Fraser*, where the applicants received advice on pursuing an appeal and, instead of doing so, made a decision to pursue another remedy. In both of those cases, the courts found that there was no continuous intention to pursue an appeal. In my view, the same result must follow in this case. Instead of filing a notice of appeal to protect their right to appeal, the plaintiffs chose to file for bankruptcy and to pursue the extinguishment of the judgment debt. By doing so, they abandoned any intention to appeal that may have existed, at least until the bankruptcy proceedings were finally concluded in favour of the insurer. Thus, in my view, there was no continuous intention to appeal.

[25] While an important finding, the lack of a continuous intention to appeal does not necessarily determine the application, as there is, as noted above, a residual discretion in the court to grant the extension if it is in the interest of justice to do so, even if the other criteria for an extension have not been met. Thus, I will consider whether the plaintiffs have raised arguable grounds of appeal.

(ii) Arguable Grounds of Appeal

[26] The plaintiffs raise three grounds of appeal: (a) an error in admitting the polygraph results into evidence; (b) an error in giving any weight to expert evidence based on unproven hearsay evidence; and (c) an error in applying the test for fraudulent misrepresentation.

[27] The bar for establishing an arguable ground of appeal is low, and will be met where the ground cannot be dismissed after a preliminary examination. As noted by Steel JA in *C (S) v C (AS)*, 2011 MBCA 70 (in Chambers), it is "a realistic ground which, if established, appears of sufficient substance to be capable of convincing a panel of the court to allow the appeal" (at para 8). (See also *Samborski* at paras 37-38.)

[28] In determining whether any of the grounds of appeal meet the test for arguable grounds, it is necessary to consider the standard of review that would be applied to review each ground at the appeal. In this case, that standard would be that set out in *Housen v Nikolaisen*, 2002 SCC 33, being that questions of law are reviewed on the standard of correctness (see para 8), questions of fact are reviewed on the standard of palpable and overriding error (see para 10), and questions of mixed fact and law are reviewed on the standard of palpable and overriding error, unless there is an extricable question of law (see paras 36-37).

[29] The interpretation and application of legislation raise questions of law and are reviewed on the standard of correctness. (See *McLean et al v Canada (Attorney General)*, 2021 MBCA 15; and *Sagkeeng v Government of Manitoba et al*, 2021 MBCA 88 at para 31.)

[30] The decision to admit evidence is a discretionary decision. Provided that the trial judge applies the correct legal principles and makes no errors of law, a ruling on the admissibility of evidence will be entitled to deference if it is reasonable and supported by the evidence. (See *R v Beaulieu*, 2018 MBCA 120 at para 5; see also Donald JM Brown with the assistance of David Fairlie, *Civil Appeals* (Toronto: Thomson Reuters, 2021) vol 2 (loose-leaf updated 2021, release 3), ch 12 at section 12:76; and Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence in Canada*, 5th ed, (Toronto: LexisNexis, 2018) at sections 2.75-2.83.)

(a) Error in Admitting the Polygraph Results

[31] The RCMP undertook a criminal investigation into the cause of the fire and whether there were grounds for criminal charges, in the course of which Mr. Guilbert agreed to take a polygraph test. The results indicated that he was not being truthful when he denied, on three occasions during the interview, that he set the fire. The trial judge's decision to admit the polygraph report into evidence is at issue.

The Parties' Positions

[32] The plaintiffs argue, based on *Phillion v The Queen*, [1978] 1 SCR 18; and *R v Béland*, [1987] 2 SCR 398, that evidence regarding a polygraph test or test results is not admissible. Alternatively, they argue that, even if the fact that there was a polygraph test taken was admissible to address the lack of good faith claim, it was an error in law to admit the report and the actual results, which were irrelevant to the determination of lack of good faith.

[33] They also argue that the test results should not have been admitted because, as stated by La Forest J in *Béland*, judges are not infallible and may be swayed by the test results (see p 434).

[34] The insurer's position is that these decisions are more limited in their application and must be considered in the context of the use to be made of the results. Its position is that, in this case, the results were neither offered nor used to determine whether Mr. Guilbert set the fire or whether he was a credible witness. Their only use related to the plaintiffs' claim that the insurer failed to act in good faith, and their purpose was to explain the steps that the insurer took and the information upon which it relied in coming to the decision to refuse coverage under the insurance policy.

[35] The insurer argues that both the fact of the polygraph test and the results are relevant and important to determining whether it failed to act in good faith, and they are admissible for that limited purpose.

Analysis

[36] Polygraph evidence consists of evidence of questions put to a party/witness related to the matter in dispute and the corresponding answers (the questions and answers), together with the opinion of the polygraph examiner as to the truthfulness of those answers (the test results). In this case, there are three types of polygraph evidence to be considered: (1) evidence of the fact that a polygraph test was offered/taken, without the report being filed or any reference to the test results; (2) evidence of the test results with no report being filed; and (3) the polygraph report with the test results both being

filed. A fourth type of evidence, not applicable here, is the entirety of the questions and answers from the interview without the test results or the report.

[37] The trial judge admitted the polygraph report as evidence in the trial, but only for the limited purpose of defending against the plaintiffs' breach of good faith claim.

[38] The following is a summary of the principles in *Phillion* and *Béland*:

- Where the person taking the polygraph test is not called to testify, evidence of the questions and answers, where exculpatory and provided to prove the truth of the answers, is inadmissible because it is both self-serving and second-hand evidence, and the rules do not permit the admission of the opinion of the polygraph technician for the same reasons (see *Phillion* at pp 24-25).

- There is no exception to admit the questions and answers, which are hearsay, because they form the basis of expert opinion evidence, where the purpose is to prove the truth of the answers or the truthfulness of the person giving the answers (see pp 27-28).

- Where a witness testifies and the results of a polygraph test are called to bolster that witness's credibility, the results are inadmissible because they breach the rules against oath-helping (see *Béland* at p 408); the rules against the admission of past or out-of-court statements by a witness (see pp 411-12); and the rules against calling character evidence (see p 414).

- Where polygraph evidence is offered as expert opinion evidence regarding a person's veracity, it is inadmissible because it would not meet the criteria for the admission of expert evidence, in that it would disrupt the proceedings, cause delays, and is unnecessary because the issue of credibility is within the experience of judges and juries and one for which no expert evidence is required (see *Béland* at pp 417-19).

[39] These decisions have been applied in many cases and remain authoritative today for the principles set out above. (See, for example, *R v Trochym*, 2007 SCC 6 at para 62; *British Columbia (Director, Child, Family and Community Services) v DMG*, 2007 BCCA 415 (in Chambers) at paras 5, 9, 14; *R v Bingley*, 2017 SCC 12 at para 47, Karakatsanis J dissenting, but not on this point; *Cardinal v Bonnaud*, 2018 QCCA 1357; and *R v Gale*, 2019 ONCA 519 at para 10.)

[40] It is important to note, however, that the jurisprudence, including *Phillion* and *Béland*, does not hold that all evidence related to polygraph tests is inadmissible for all purposes. For example, evidence related to polygraph tests has been admitted in the following circumstances:

- An offer by an accused to take a polygraph test can be admitted and considered, together with other after-the-fact conduct, to show that his/her conduct after the arrest was inconsistent with having committed the crime, provided that the probative value of the evidence exceeds the prejudicial effect. (See *R v B (SC)* (1997), 119 CCC (3d) 530 at paras 31-38 (Ont CA); and *R c Bélanger*, 2020 QCCA 1539 at paras 53-61.)

- Evidence that the insureds had offered to take a polygraph test, which was rejected by the insurer without explanation, was admitted to show that they had acted in good faith. On appeal, the Court found that the evidence was not tendered to bolster their credibility, but as one part of the evidence regarding their conduct, which was relevant to the determination and assessment of their punitive damages claim. (See *Whiten v Pilot Insurance Co* (1999), 170 DLR (4th) 280 at paras 31-34 (Ont CA) (*Whiten CA*), rev'd on other grounds, 2002 SCC 18; and *1076440 Ontario Inc v Economical Mutual Insurance Co*, 1999 CarswellOnt 2339 at paras 7-11 (Sup Ct J).)

- In the criminal context, a police officer relying on information provided by an informant to obtain a wiretap authorization could rely on the results of a polygraph test as evidence supporting the police officer's belief that the informant was being truthful, which was relevant to whether the officer had reasonable and probable grounds to obtain the authorization. The polygraph test results were admissible in determining whether to permit the cross-examination of the police officer on his affidavit to obtain the authorization (see *R v Pires; R v Lising*, 2005 SCC 66 at paras 64, 66-67 (*Lising*)).

[41] It has also been recognized that polygraph tests are useful tools in other contexts, such as investigative tools in both criminal and civil contexts and in settling insurance claims. (See, in the criminal context, *Lising* at paras 64, 67; *Boucher c R*, 2006 QCCA 668 at para 45; *Trochym* at para 62;

Bingley at para 47; and *Gale* at para 10. In the civil context, see *Whiten CA* at para 34; and *1076440 Ontario Inc* at paras 8-11.)

[42] In summary, the jurisprudence states that the fact or results of a polygraph test are not admissible in a trial to prove the credibility of a witness or a party. They may, however, be admissible for other purposes, such as to explain conduct or the reason for actions or decisions, where those matters become issues in a trial or proceeding. Examples from the jurisprudence include addressing allegations of both good and bad faith and whether there was reasonable cause. They may also be used as investigative tools, so that, where there are issues related to that investigation, the polygraph evidence becomes admissible to address those issues.

[43] This use was approved in *Lising*, where Charron J, for the Court, explained (at paras 66-67):

> . . . It is in the context of setting out the factual basis for his belief in the existence of reasonable grounds that [the police officer] related in para. 11 the information provided to him by [the examiner] about the polygraph test.
>
> Regardless of the inherent limitations of polygraph testing, the polygraph results were relevant to the material issue — it formed part of the grounds advanced for believing that [the informant] was a reliable informant. . . .

[44] In this case, in order to answer the plaintiffs' claim that the insurer had breached its duty of good faith, the insurer applied to admit the polygraph report to explain the steps that it took and the information on which it relied in coming to the decision to deny coverage. This is similar to the use of the polygraph results in *Lising* to explain the police officer's actions.

[45] In his reasons on the *voir dire*, the trial judge was very clear as to the basis upon which he was admitting that report, being "to establish [that the insurer] did not act in bad faith, as alleged by Mr. Guilbert. It goes to course of conduct, nothing else." He also explained how the polygraph report would not be used:

> . . .
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> . . . I further order that it won't be referred to or relied on or used in any way in the context, argument, or the determination of the issues [of] arson, fraud, breach of statutory conditions, and/or breach of duty of good faith, as pled by [the insurer]. [This relates to the plaintiffs' statutory and contractual duty of good faith to the insurer.]
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> . . .

[46] In admitting the polygraph report, the trial judge stated that "at the end of the day, when I assess the evidence as a whole, the polygraph may prove to be of little or of no weight, or somewhere in between." In fact, he did not make any reference to it at all in his reasons (see 2019 MBQB 48), leading to the conclusion that, in the end, he did not rely on it at all.

[47] The plaintiffs argue that, even if the fact that a polygraph test was taken is admissible, it was an error in law to admit the report and the results. In some cases, the relevant evidence is whether or not there was an offer to take a polygraph test, so the results are not important. That is not the case here. The insurer relies on the results—the opinion that Mr. Guilbert was not being truthful—in denying coverage, not on whether there was an offer to take a test.

[48] As the insurer argued at the *voir dire*, if the polygraph results had shown that Mr. Guilbert was being truthful and it had rejected those results, it is highly likely that the plaintiffs would have argued that the rejection was evidence supporting their claim of breach of good faith on its part. This argument was followed in *Lising*, where Charron J stated that, "if the officer reported a certain result in the face of a contrary conclusion by the polygraph examiner, one would hope that cross-examination would be permitted" (at para 68).

[49] The interpretation of the legal principles in *Phillion* and *Béland* raises questions of law reviewable on the standard of correctness, and I am of the view that the trial judge correctly interpreted and applied the principles in those decisions. The trial judge's decision to admit the polygraph report for the limited purpose that he imposed was both reasonable and supported by the evidence, and I am of the view that the proposed ground of appeal regarding its admission does not raise any appealable issues.

[50] Finally, the plaintiffs argue that the *voir dire* should have been conducted by a different judge because "it is [difficult] to see how the references to the polygraph test would not have coloured his subconscious in a way that taints the ultimate findings of fact with respect to the cause of the fire." For this, he relies on a comment by La Forest J in *Béland* (see para 64), which referenced McIntyre J's majority decision (see para 20).

[51] This argument was not made at the trial stage, rather, it would be raised for the first time on appeal; thus, there is no applicable standard of review.

[52] I do not accept the plaintiffs' interpretation of *Béland*. Their argument relates to two references to fallibility in the decision (see paras 20, 64). In my view, they both refer to the fallibility of the polygraph examiner, not to the judge.

[53] The suggestion that a judge will be tainted by hearing inadmissible evidence has been rejected by the courts. The jurisprudence was recently summarized by Watson JA in *R v Settle*, 2021 ABCA 221 (in Chambers) (at para 41):

> . . . There are, indeed, commonplace assumptions that: (a) judges know the basics of law and apply it even if they do not say so expressly (***R v Burns***, [1994] 1 SCR 656 at paras 17-18; ***R v F(G)***, 2021 SCC 20 at para 74, [2021] SCC 20 (QL)); (b) judges hear and consider what may come to be inadmissible evidence on *voir dires* routinely and know to exclude it from their minds if that happens (***R v Sekhon***, 2014 SCC 15 at para 48, [2014] 1 SCR 272; ***R v Leaney***, [1989] 2 SCR 393 at para 38); and (c) when a judge says they have excluded it from their mind they should be taken at their word (***R v O'Brien***, 2011 SCC 29 at para 18, [2011] 2 SCR 485).

[54] In *R v Leaney*, [1989] 2 SCR 393, McLachlin J (as she then was) noted (at pp 415-16):

> . . .
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> . . . Judges often hear evidence which turns out to be inadmissible, for example on *voir dires*. So long as the judge does not consider such evidence in arriving at his or her independent conclusion, no unfairness can be said to arise, nor has there been a miscarriage of justice.
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> . . .

(See also *R v O'Brien*, 2011 SCC 29 at paras 15-18.)

[55] In *R v Sekhon*, 2014 SCC 15, the majority observed that judges "are accustomed to disabusing their minds of inadmissible evidence" (at para 48).

[56] In my view, these statements apply in the current case, where the trial judge admitted the polygraph evidence for a limited purpose. It is to be presumed that, having admitted the evidence for a limited purpose, the trial judge used it for only that purpose and did not let it taint the rest of his reasoning or his decision.

[57] The plaintiffs have not pointed to anything in the trial judge's decision that would suggest that he misused the polygraph evidence. To suggest that there was some kind of "subconscious" tainting goes against the assumption in the jurisprudence that a judge would exclude the evidence that he/she found inadmissible. In my view, there is no evidence to support this argument and no basis upon which to conclude that the trial judge's finding as to the cause of the fire was tainted by the polygraph evidence.

[58] For the above reasons, I am satisfied that the proposed ground of appeal—that the trial judge erred in admitting the polygraph report into evidence, for the limited purpose that he outlined—does not meet the test in *C (S)* for raising an arguable ground of appeal.

(b) Error in Use of Expert Evidence

[59] The parties each called expert evidence as to the cause of the fire. In the proposed ground of appeal, the plaintiffs argue, based on *R v Lavallee*, [1990] 1 SCR 852 at 893; and *R v Abbey*, [1982] 2 SCR 24, that the trial judge

erred in relying on the opinion of the insurer's expert because it was based, in part, on hearsay evidence of disputed facts given by a witness, Arlene Vaughan (Ms Vaughan), who was not called to testify at the trial. Therefore, there was no proven evidence from her on which to base the expert opinion, and it should have been given no weight.

[60] Ms Vaughan was an employee of GEL, and she was at work on the day of the fire. She gave several statements to the RCMP in which she said that, when she left the store at just after 6:00 p.m., the trap door to the basement was open and the ladder to access the attic was closed. These two facts were important to the determination of whether the fire was intentionally set, and were key to the opinions of the experts.

[61] While Ms Vaughan did not testify, the evidence in her report regarding the position of the trap door and the closed ladder was contained in the statements of several other witnesses, and was repeated in their *viva voce* evidence during the trial. Those witnesses were store employees Victoria Adamyk and Sharon Howe, who left the store with Ms Vaughan shortly after 6:00 p.m., and firefighters Yves Guillas, Derrick McGorman and Kyle Kostenchuk.

[62] In my view, there was ample direct evidence led at the trial to establish the key facts in Ms Vaughan's reports that were important to the insurer's expert opinion. In the result, the insurer's expert report was not based on inadmissible hearsay evidence, and the proposed ground of appeal related to the failure of the insurer to call Ms Vaughan to testify does not meet the test in *C (S)* for raising an arguable ground of appeal.

(c) Error in the Test for Fraudulent Misrepresentation

[63] The plaintiffs argue that the trial judge applied the wrong test to the issue of whether there was fraudulent misrepresentation in relation to their claim. They state that, while the trial judge applied the test of whether the misrepresentation had "the capacity to affect the mind of [the insurer]", the correct test is whether it "did in fact affect the decision of the [insurer] in that [it] relied on that representation in making a decision." This ground of appeal deals with the interpretation and application of legislation and raises questions of law, which would be reviewed on the standard of correctness.

[64] The insurer argues that the plaintiffs have misunderstood the nature of the counterclaim related to their alleged bad faith. Its position is that the counterclaim is based on "the plaintiffs' breach of their duty of utmost good faith" and, in particular, on the breach of Statutory Condition 7 (see Schedule B of *The Insurance Act*, CCSM c I40 (the *Act*)), which "provides that any fraud or wilfully false statement in a proof of loss will invalidate the claim of the person who made the wilfully false statement". It is alleging that the plaintiffs made wilfully false statements in their proof of loss that invalidated their claim.

[65] Pursuant to section 136.4(2) of the *Act*, Statutory Condition 7 is part of every insurance contract in Manitoba, and it provides that, "[a]ny fraud or wilfully false statement in a statutory declaration . . . invalidates the claim of the person who made the declaration." That condition applied to the plaintiffs' insurance contract in this case.

[66] While there does not appear to be any jurisprudence in Manitoba interpreting this provision, there are several cases from British Columbia that have interpreted the same provision found in its corresponding legislation. In *Inland Kenworth Ltd v Commonwealth Insurance Co* (1990), 72 DLR (4th) 594 (BCCA) (*Inland*), McEachern CJBC, for the Court, stated (at p 598):

> . . .
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> I agree that a wilfully false statement which is not material may not usually be relied upon by the insurer. Materiality is, however, one of the fundamental principles of insurance law and it manifests itself in many ways. The classic test of materiality in insurance law is whether a statement is capable of affecting the mind of the insurer.
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> . . .
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> I believe a fraud or wilfully false statement about the quality or condition of the insured property—the subject of the claim—which is capable of affecting the mind of the insurer regarding the claim must be material. In this case, the fraud was discovered before the insurer paid the claim, but I do not think it is necessary for the insurer to show actual prejudice. . . .
>
> It is sufficient, in my view, if the fraud or wilfully false statement is capable of affecting the mind of the insurer either in the management of the claim or in deciding to pay it. . . .
>
> A contract of insurance is one of utmost good faith and one cannot commit frauds or make wilfully false statements a[b]out the subject matter of the claim for any purpose without risking the loss of the right to indemnity if it turns out to be material on any issue.
>
> . . .

[67] This interpretation of the legislation was followed by that Court in *Brown v Insurance Corp of British Columbia*, 2004 BCCA 254, wherein

Rowles JA, for the majority, stated that the trial judge fell into error when determining whether the impugned statements were material (see para 20). She found that "[w]hat the trial judge ought to have considered was whether the false statement was capable of affecting the mind of the insurer rather than considering what the insurer actually did or did not do in the management and payment of the claim" (*ibid*). Further, after referring to *Inland*, she said that "to hold that lack of prejudice negates materiality is an error in principle" (at para 22).

[68] These principles were endorsed by that Court in *Skuratow v Commonwealth Insurance Co*, 2005 BCCA 515, the decision that the trial judge followed. Prowse JA, for the Court, explained (at para 24):

> In my view, although the trial judge correctly stated the test for materiality found in ***Inland*** and ***Brown***, she erred in the manner in which she applied that test to the facts before her. Instead of determining whether the false statements made by [the insured] had the capacity to affect the mind of the insurer, either in the management of the claim or in deciding to pay it, she looked at whether [the insurer] had actually been misled by the false statements. She found that [the insurer] had not been misled and concluded, therefore, that the statements were not material.

[69] In my view, this interpretation of what constitutes a "wilfully false statement" would apply to those words in Statutory Condition 7 of the *Act*. Thus, the trial judge was correct in his interpretation of the law, as is argued by the insurer.

[70] The plaintiffs also argue that the trial judge made palpable and overriding errors in finding that there were any misrepresentations. The trial judge's analysis of the facts was lengthy and detailed, and his factual findings

regarding misrepresentations and false statements are all supported by the evidence. In my view, there is no basis for this argument, and it does not raise an arguable ground of appeal.

[71] In conclusion, for the reasons set out herein, I am satisfied that none of the proposed grounds of appeal put forward by the plaintiffs raises an arguable issue for appeal.

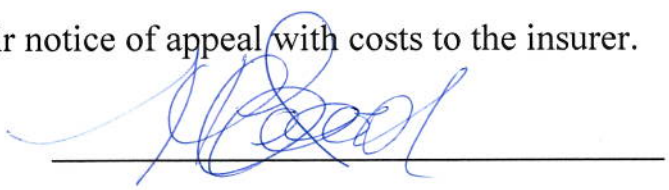
(iii) Discretionary Extension

[72] The plaintiffs argue that the Court should exercise its discretion to grant an extension, stating, if the insurer is successful on appeal, any costs can be addressed by an order for costs.

[73] In my view, there is no basis upon which to grant a discretionary extension. The delay is significant, being over three years, there was no intention to appeal for a significant portion of that time, none of the proposed grounds of appeal has a realistic chance of success, and, whether costs can be ordered does not, particularly in this case, make it in the interests of justice to grant a discretionary extension. That said, given the plaintiffs' present financial situation and the significant amount already owing to the insurer, it is unlikely that an order for costs, even if granted, would be enforceable.

V. DECISION

[74] For the reasons set out herein, I am dismissing the plaintiffs' motion to extend the time to file their notice of appeal with costs to the insurer.



JA