

# Noteworthy

February 2003

**HUGHES AMYS** LLP  
BARRISTERS & SOLICITORS

## Triggering Defence And Indemnity:

by *Michael Teitelbaum*

In highly anticipated, and extensive, Reasons for Judgment, the Ontario Court of Appeal has addressed a number of insurance coverage issues in *Alie v. Bertrand & Frere Construction Co. Ltd.*, [2002] O.J. No.4697 . The Reasons were written “by the Court”, a panel consisting of Doherty, Charron and Feldman, J.J.A. The principal issues addressed by the Court were as follows:

1. Which policies were “triggered” to respond to the claims, and the payment and allocation of indemnity; and
2. Payment and allocation of defence costs.

Accordingly, this article will focus on those two points.

### Factual Background

Bertrand supplied concrete for the construction of about 140 homes in the Ottawa area in 1986-88. Bertrand used material known as type C fly ash supplied by Lafarge Canada Inc. as one ingredient in its ready-mix concrete. The concrete used in the foundations of the homes proved defective and in 1992 it was determined that the foundations needed total replacement. The defect was traced to the use of Lafarge’s fly ash.

At trial, Justice Roy found both

Lafarge and Bertrand negligent, allocating liability 80% to Lafarge and 20% to Bertrand. This result was upheld on appeal. Damages were in the approximate sum of \$19,550,000.00.

Actions were brought against the insurers who issued Comprehensive General Liability (“CGL”) policies to Bertrand and Lafarge for the years 1986 through 1992, inclusive. Both Bertrand and Lafarge had a primary insurer and one or more excess or umbrella insurers for each of the seven years in question. The issue of Bertrand’s insurers’ duty to defend was ultimately settled.

Justice Roy held that the Bertrand insurers were obligated to indemnify Bertrand for damages owed to the Plaintiffs. He also held that the damages occurred throughout the period from 1986, when the first foundations were poured, to 1992 when it was determined that the foundations had to be replaced, and that the policies in effect for any of the one-year periods between 1986 and 1992 were triggered. Damages sustained by the Plaintiffs whose foundations were poured in 1986 were spread equally over the seven policy periods from 1986 to 1992. For the foundations poured in 1987 and 1988, damages were spread equally over the six, and five, policy periods, respectively.

(Continued on page 2)

### In This Issue

## Triggering Defence And Indemnity: *Alie* And The Court Of Appeal

*Michael Teitelbaum*

## Noteworthy

(Continued from page 1)

Canadian General was Bertrand's primary insurer for the years 1986 to 1989, and Royal was the primary insurer from 1990 to 1992. Roy, J. held that to the extent that Bertrand's claims for indemnification exceeded the limits of the Canadian General policy, Bertrand could look to its excess insurers for the years to 1989 for indemnification. There was no need for a similar order with respect to the years 1990 to 1992 since Royal was both the primary and excess insurer. Roy, J. used the same approach in finding liability on the part of the Lafarge insurers.

### The Issues

1. Which policies were "triggered" to respond to the claims, and the payment and allocation of indemnity.

After finding that the Plaintiffs had suffered a loss because of property damage caused by an occurrence, the Court noted that in order for any particular insurance policy to be required to respond and cover the loss on behalf of the insured, the property damage must have taken place during the policy period. The issue, therefore, is when did the property damage occur in this case?

The Court observed that such a question is easily answered when the precipitating event and the damage are effectively simultaneous, for example, where property is destroyed by fire. However, where the precipitating event is the introduction of a defective product into a structure, together with the ongoing deterioration of the product, acted on by outside forces over

time, the timing of the damage to property may not be clear, or even determinable with precision.

The Court noted that four approaches have been developed in American and Canadian jurisprudence for determining the timing of property damage which is latent, or develops over time, and which does not become apparent immediately. These four "Trigger Theories" are the "Exposure Theory", the "Manifestation Theory", the "Injury in Fact Theory" and the "Continuous Trigger or Triple Trigger Theory". The Court observed, however, that the word "trigger" is not a term of art and is not used in the policy language. It is rather a term used in the jurisprudence to signify that the coverage afforded by a particular policy has been effectively called upon or activated and that the policy will respond to the loss. In effect, the trigger theories are each applications of the "injury in fact" theory to determine when the property damage has in fact occurred.

The Court also noted that whether the policy language has been triggered is determined by making findings of fact, or drawing inferences from the established facts, and applying those findings to that language. Thus, the issue of whether property damage occurred during the policy period is a question of fact, or mixed fact and law, but is not a question of law alone. As a result, different trigger nomenclature may be applicable in different cases depending on the factual findings.

The Court further noted the case law suggests that the type

of insurance policy may affect which trigger is applicable, as Courts have applied different triggers when dealing with first party indemnity policies and third party liability policies. The Court held that the divergence of view on the applicable trigger for first party policies suggests that it is not the type of policy which dictates the appropriate trigger but, rather, the requirements of the policy language together with the facts of the specific case, including the evidence of when the injury actually occurred, when it was manifest and how many insurance policies are potentially available and liable to respond.

At trial, Roy, J. concluded that the combination of the injury in fact and the continuous or triple trigger theories should be applied.

In the result, Roy, J. found that all insurers whose policy periods were between 1986 and 1992 were required to indemnify Bertrand. He apportioned liability *pro rata* based on the policy periods as well as the number of foundations poured in 1986, 1987 and 1988.

The Court of Appeal upheld the Trial Judge's finding. It noted that the gradual deterioration of the concrete itself is not the damage that is covered by the policies. What is covered is the ongoing process of deterioration caused by the moisture's effect on the defective concrete which, together with the initial defect caused by the inclusion of the fly ash, eventually made the foundations unsafe, thereby causing the damage to the houses. It is that process of ongoing deterior-

(Continued on page 3)

(Continued from page 2)

ration culminating in the need for total replacement which is covered by the policies. As a result, all policies in effect from the beginning to the end of that process must respond to the loss.

Thus, the Court has formulated an approach to triggers in property damage and, arguably, all cases which, in effect, states that the language of the CGL policies dictates that the appropriate question is when did the injury in fact occur. However, depending on the evidence in each case, the answer to that question may be that the damage was either at the time of exposure, at the time of manifestation, it may be repeated and continuing, or it may not be possible to pinpoint a specific time and, therefore, the damage is continuous and progressive. If the latter is the case, then all policies between the time of exposure and manifestation, (i.e., the discovery of the damage), are exposed to payment of the loss. In such circumstances, the allocation of the loss will be done on a *pro rata* basis.

## 2. Payment and allocation of defence costs

Lafarge was obliged to fund its own defence. It looked to recover the costs of that defence from its 18 insurers in third party actions. The Trial Judge ultimately held that eight of the Lafarge insurers were obligated to contribute to those costs. They included the primary insurers, Boreal and Cigna, as well as Kansa, Scottish & York, American Home,

Guardian, Reliance and National Union, the insurers who provided one or more layers of excess coverage up to the limit of \$10 Million, which was the amount of anticipated exposure.

Roy, J. apportioned the defence costs by dividing them into seven equal segments, each segment representing one of the seven policy periods. He then apportioned the costs for each policy period equally among the various insurers who are obligated to contribute to costs during that policy period. For example, one-seventh of the defence costs was attributed to the 1992 policy period. Cigna and National Union were liable for the defence costs attributable to that period. Each was obliged to pay one-half of one-seventh of the defence costs.

In addressing the defence obligation of the various insurers, the Court had to deal with the obligation that falls on an excess insurer and the meaning of the Court of Appeal's earlier decision in *Broadhurst & Ball v. American Home Assurance Co.* (1990), 1 O.R. (3d) 235.

The Court stated the following premises:

1. Absent a statutory obligation to defend, (which did not exist here), an insurer's obligation, if any, to contribute to defence costs incurred by an insured in the defence of an action, must be found within the four corners of the controlling policy.
2. *Broadhurst & Ball* does

not impose a duty to defend on excess insurers by virtue of the possibility that those insurers will be required to indemnify the insured if the claim is successful. The principle in *Broadhurst & Ball* operates where the primary and excess insurer have a concurrent duty to defend imposed by their respective policies and addresses the question of contribution as between those insurers. *Broadhurst & Ball* instructs that where an excess insurer has a duty to defend and is put at risk by the claim, then the excess insurer should contribute to defence costs. The exact nature of the contribution as between those insurers with a duty to defend will depend upon the equities of the specific case.

The Court also observed that where a policy provides a duty to defend, the operation of that duty will be determined prospectively by reference to the allegations made in the claim unless the policy expressly indicates to the contrary. If the insurer is potentially liable to indemnify under the terms of the policy, the insurer will be obligated to defend.

The Court noted that there are sound policy reasons for this approach as a duty to defend determined only after the trial of the claim may come much too late to assist an insured who paid through its premium for that defence, but is unable to fund the litigation itself. The prospect of the determination

(Continued on page 4)

of a duty to defend also facilitates the expeditious resolution of claims made against the insured through the early involvement of the insurer who may eventually have to indemnify the insured.

While the case law deals with a primary insurer's duty to defend, the Court found there was no reason to depart from the presumption in favour of a prospective determination of a duty to defend based on the nature of the claims made where it is an excess insurer that has undertaken that obligation. The Court proceeded to review the wording of the various excess policies and concluded that they contain prospective language in the duty to defend covenant obliging the excess insurers to defend. This interpretation was consistent with policy considerations.

The Court concluded that where there is a concurrent duty to defend between the primary and excess insurers, *Broadhurst & Ball* applied, and the excess insurer's obligation

to contribute, if any, was a "matter of equity" or "fairness" as among the insurers who are under a duty to defend the claim with the determination of the equities depending on the circumstances of the particular case. Those equities included the first-in-line status of the primary insurer, the nature of the risk insured by each insurer, the potential windfall to an excess insurer who is not obliged to contribute to a defence which potentially benefitted that insurer, and the contractual obligation of the excess insurer to the insured.

In assessing the wording of the various excess policies in the instant appeal, the Court found that all but one of the excess insurers (Guardian) had an obligation to defend. Insofar as the Trial Judge's ruling in respect of Guardian is concerned, the Court found that he had erred in requiring Guardian to contribute to the costs of the defence.

Insofar as the apportionment of defence costs is concerned, the Court noted that *Broadhurst & Ball* held that the allo-

cation of defence costs as among insurers who have a concurrent obligation to defend is essentially a matter of fairness as among those insurers. As such, the allocation of costs is not an exact science and a Trial Judge's determination is owed considerable deference.

Thus, in terms of the defence obligation, and the allocation of defence costs among multiple insurers, whether primary or excess, the Court determined that where it is uncertain which insurers may be required to indemnify, an equal distribution of defence costs among insurers with a duty to defend is the fair and reasonable approach. This is consistent with the Court of Appeal's decision in *St. Paul Fire & Marine Insurance Co. v. Durabla Canada Ltd.* (1996), 29 O.R. (3d) 737, which dealt with primary insurers with concurrent obligations to defend over multiple policy periods.

### Conclusion

As can be seen, the *Alie* case dealt with a multiplicity of