

DOLDEN

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THE SCOPE OF COVERAGE AFFORDED TO ADDITIONAL INSUREDS IN CANADA

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The Additional Insured Endorsement in Canada

A. *Introduction*

The past five years have seen a surprising amount of litigation concerning the issue of what insurance coverage is extended to insureds who are added to a liability policy by way of an Additional Insured Endorsement. Courts in British Columbia and Ontario have led the charge, releasing a series of decisions which, while attempting to provide guidance, have left both insurers and their counsel with only a modest ability to predict how they might extend or limit coverage in the future.

Lease agreements, facility rental agreements, and a variety of other contractual arrangements often provide that one party will agree to indemnify and obtain insurance for another party. The insurance, when obtained, is often provided through nothing more than an indication on a 'Certificate of Insurance' that a party has been added as an additional insured, usually with the restriction that coverage is extended, but only with respect to the operations of the named insured.

Let us consider a not-so-uncommon situation which faces a liability insurer:

A woman slips and falls on a walkway leading to a parking lot. Her fall was caused, she says in part, by "*the presence of ice and snow on the surface of the walkway.*" She sustains injuries and sues several defendants, including the parking lot operator and its snow removal contractor. The parking lot operator, in turn, cross-claims against its snow removal contractor on the basis of the "indemnity" and "insurance" provisions in their snow removal agreement, and seeks coverage under the contractor's liability insurance policy, having been added as an additional insured, "*but only in respect of liability arising out of the [operator's] operations*". To what extent is the additional insured entitled to coverage under the Named Insured's policy, and in particular, will the policy respond to provide coverage to the parking lot operator for their own negligence?

The purpose of this paper is to explore the jurisprudence in Canada as it pertains to the scope of coverage which is available to additional insureds and to identify the problems associated with the manner in which Canadian courts have extended, or confined, that coverage.

B. *The Additional Insured Endorsement*

Let us initially consider the different terms pursuant to which additional insureds are purported to have coverage under a liability policy.

A common extension of coverage pursuant to an Additional Insured Endorsement may provide:

This Form includes the party or parties named in the Declarations as an Additional Insured but only with respect to the operations performed by or on behalf of the Named Insured. Such insurance as is afforded by this Extension does not insure liability arising out of the operations of the Additional Insured or its employees.

Alternatively, coverage may be afforded to an Additional Insured through a form which extends coverage to the additional insured,

but only with respect to liability arising out of the activities of the named insured.

We also find reference to wording such as:

[parties] have been added as additional insureds, but only with respect to their interest in the operation of the named insured.

Despite the variations in wording as noted above, courts surprisingly remain focused on one main consideration in determining whether coverage is extended to the additional insured: whether a claim can be said to be “arising out of” the named insured’s operations. In other words, despite the fact that the endorsement may use the term “arising out of”, Canadian courts ‘hone’ in on the nature of the connection between the claim and the operations of the named insured.

C. *The Scope of Coverage available to Additional Insureds*

As with all things in life, the situations in which courts have faced the issue of what coverage is extended to an additional insured are varied. As will become clear from the caselaw which is discussed below, the issue of whether an additional insured is entitled to coverage, and the nature of the coverage that is afforded, is highly fact specific. Minor differences in pleadings (and indeed I would argue negligible differences) can lead to completely different results.

(a) The Ontario Approach

In *Dominion of Canada General Insurance Company v. ING Insurance Company of Canada*¹, Intact Insurance (ING), insured the operators of a banquet hall pursuant to a general liability policy. Dominion of Canada insured the owner of the building.

The plaintiff was injured in the parking lot adjacent to the banquet hall after slipping on ice. A lease agreement between the banquet hall operator and the building owner provided that the building owner was responsible for the maintenance of the parking lot. The ING policy provided that the building owner was an additional insured, but “only with respect to liability arising out of the ownership, maintenance or use of that part of the premises....leased to” the banquet hall.

The issue before the application judge was whether the additional insured endorsement in the ING policy was broad enough to provide coverage to the building owner. Upon application in first instance, the judge found that the building owner was entitled to coverage under the ING policy. Interestingly, the application judge determined that, although the lease agreement arguably would not have included the parking lot as “premises”, she instead turned to the definition of “premises” located in the Commercial Building and Contents Broad Form section of the ING policy to infer that the area in which the slip and fall occurred was “premises” for the purpose of the additional insured endorsement.

On appeal to the Divisional Court, ING argued that the application judge had erred in determining that the “premises” included the parking lot, and further argued that the accident was not causally connected to the banquet hall, but arose out of the negligent conditions in the parking lot.

The Divisional Court agreed with ING and the appeal was allowed, noting that “*the parties cannot have intended that insurance coverage for the landlord would be extended to cover injuries caused by the use of other areas of the property that the landlord was required to maintain.*”² The court specifically indicated:

9 *The Application Judge concluded that the definition of “premises” contained elsewhere in ING’s policy included the place where Mr. Greco was injured. She found that the definition of premises in the lease between Vitullo and Greco as not of much assistance because of the specific definition of “premises” in the policy. In doing so, she erred.*

¹ 2011 ONSC 3841

² *Ibid.*, para. 14

10 *The Application Judge used the definition of "premises" found in Form BF02, the Commercial Building and Contents Broad Form section of the ING policy (at p. 142 of the Appeal Book). That definition was on its face clearly restricted to Form BF02 and does not apply to the policy as a whole.*

11 *In our opinion, the Application Judge also erred in failing to give proper effect to the words of the endorsement limiting coverage to "liability arising out of the ownership, maintenance or use of that part of the premises designated in the Declaration Page(s) leased to the Named Insured" (emphasis added). In order to determine whether there was insurance coverage, it was necessary to first determine the part of the premises that was leased to the named insured, and then to determine whether liability of Vitullo "arose out" of the ownership, maintenance, or use of those leased premises.*

12 *Although the description of the demised premises contained in the lease was not as clear as might be wished, the demised premises clearly did not include any area of Vitullo's property outside of the banquet hall itself. When the lease is read as a whole, it is evident that the lease was for the interior space, although Premier was allowed to use the parking area under certain conditions.*

14 *The respondent nevertheless argues that Vitullo's liability arose out of the use of the banquet hall, as Mr. Greco was leaving the hall when he was injured in the parking lot. The Application Judge appears to have come to that conclusion, although she was acting under the conclusion that "premises" was as defined elsewhere in the policy to mean "the entire area within the property lines ...".*

15 *In our opinion, the words "arising out of ... the use of the premises" in the ING policy requires a causal connection between the injury to Mr. Greco and the premises demised, that is the banquet hall....³*

In *Riocan Real Estate Investment Trust v. Lombard General Insurance Co.*,⁴ Riocan operated two mall properties in Sault Ste Marie and was a defendant in two actions where plaintiffs had sought damages for personal injuries arising out of separate slip and fall incidents. Riocan had contracted with Palmer Paving, requiring Palmer to provide snowclearing services for the parking lots. Those contracts further provided that Palmer would indemnify Riocan for losses suffered as a result of anything arising from

³ *Ibid.*, paras 9-12; 14-15

⁴ (2008), 91 O.R. (3d) 63 (SC)

the work performed by Palmer under the contract. The contractor was also required to maintain a contract of insurance and to name Riocan as an additional insured. Lombard insured Palmer for these contracts and named Riocan as an additional insured.

The court noted:

[14] *Each of the underlying actions alleges negligence against the owner specifically for failing to properly maintain the parking lot free of ice and failing to salt or sand. The failures alleged in these claims could be attributable to the failure of the contractor to perform its obligations under the contract. These claims, if proven, would fall within the policy coverage and would therefore trigger a clear duty to defend Riocan as a name insured with respect to the work under the contract.*

[15] *However, in each of the actions, there are also claims asserting breaches of Riocan's statutory obligation as an occupier. The contractor's insurance coverage does not cover Riocan's own negligent acts or breaches of the Occupiers' Liability Act. For these claims the duty to defend Riocan is not independently triggered.*

[16] *Notwithstanding the multiple theories pleaded by the plaintiffs, the fundamental issue raised in each of the actions is that the plaintiffs' slip and fall on the ice covered parking lot occurred because of the failure of the owner to keep the parking lot free of ice. The true nature of the claim is that the defendant was negligent in failing to maintain an ice-free parking lot and as a result the plaintiffs fell and sustained injuries.*

Summarizing the issue of whether the Lombard policy would have to respond, even where there were allegations which may fall outside of coverage, the judge noted:

I am of the view that in most situations where there is a duty on an insurer to defend some, or only one, of the claims made against an insured and that claim embodies the true nature of the claim, a duty to defend the entire claim arises. This is so even where the pleadings include claims that may be outside the policy coverage. Conflict issues can be addressed in a number of ways.

Another case that recently that recently focused on the phrase "arising out of" was the Ontario decision *Lacombe v. Don Phillips Heating Limited and Francis Fuels Ltd.*⁵ Here, the plaintiffs' sought damages which were alleged to have resulted from oil spill at their residence in 2003. The plaintiffs allege that, in the winter before the oil spill, they hired the defendant Francis to replace the plaintiffs' oil furnace. Francis, in turn,

⁵ 2005 CanLII 33036 (ONSC)

subcontracted with the defendant Don Philips Heating Limited (“Phillips”) to run a new fuel oil feed line to the tank from the furnace. Shortly thereafter, the plaintiffs noticed the smell of fuel.

Aviva, in addition to being the plaintiffs’ insurer, was also Phillips’ liability insurer under this separate policy. Under this policy, Francis was an additional named insured. The endorsement adding Francis as an additional named insured limited coverage to Francis “solely with regard to liability arising out of the operations of the named insured”. Aviva denied coverage on the basis that the loss arose out of independent operations of Francis, namely failing to inspect following installation of the furnace.

In the course of determining what coverage would be available to Francis, the court noted:

“The term “arising out of” has a broader significance than “caused by”. In Amos v. I.C.B.C. [1995] 3 S.C.R. 405 (S.C.C.), at para. 21, the Supreme Court of Canada held that the words “arising out of” have been said to mean “originating from”, “having its origin in”, “growing out of”, “flowing from”, “incident to”, or “having connection with”. So long as Francis’ liability has any connection to the actions of Phillips coverage will be available.” (emphasis added)

In order to avoid coverage, the Court held that the insurer had to “draw a clear line between the actions of the [Named Insured] and the [Additional Insured]”, which had not been done. There was no claim against the [Additional Insured] that was completely independent of the actions of the Named Insured. Hence, coverage was available to the Additional Insured in the circumstances.

In other words, the court construed the term “arising out of” very broadly in this case.

In *Harris v. Memorial Boys’ & Girls’ Club Inc.*,⁶ the plaintiff was injured after using a horizontal bungee amusement at the London Rib Fest. She brought an action against the amusement operator, the company which she thought owned the amusement, the Memorial Boys’ and Girls’ (“the Club”) which operates the Rib Fest and the City of London (“the City”) as owner of Victoria Park. The City brought an application seeking to recover its share of the settlement paid to the plaintiff from the Club’s liability insurer.

The Club’s liability insurer provided coverage to the City as an additional insured “*but only with respect to their interest in the operations of the named insured.*” The court, in

⁶ [2008] O.J. No. 2750 (QL)(SCJ),

concluding that the City was entitled to coverage under the Club's liability policy, the court noted:

[29] *Having considered the foregoing, I have concluded that the City is entitled to indemnity from the Club for any contribution it made to settlement with the plaintiff. I recognize that Clause 4 of the Rental Agreement makes it clear that care, custody and control of Victoria Park and equipment remains with the City. In my view, the term "equipment" necessarily refers to City property and not equipment brought in by users of the Park given the exclusion in the concluding words of the clause. That clause is to be read together with Clause 5 which states that "the applicant will indemnify and save harmless the City against all loss, costs, claims, damages, actions, suits of any nature and kind whatsoever which may arise as a result of the use of the facility" [emphasis added]. There is nothing ambiguous about this clause and it is certainly very broadly worded, sufficiently so, in my view, to require the Club to indemnify the City in the circumstances of this case.*

[30] *I do not consider it necessary to determine whether the indemnity clause is sufficiently broad to cover any negligence on the part of the City. I respectfully agree with the decision in Potvin but would distinguish it from the facts of this case. The plaintiff's injuries here were causally connected to the activities being carried out by the Club and its vendor in the park. There is, therefore, a proximate connection between the injury and the use of the park by the Club. It seems to me that the plaintiff's injury is closely connected to the activity that the Club's insurer agreed to insure. Ms. Harris would not have been injured but for the Club's decision to put on the Rib Fest. (emphasis added)*

One should contrast the decision in Harris with the conclusion of the court in *Waterloo (City) v. Economical Mutual Insurance Co.*⁷ The plaintiff, attended at annual Oktoberfest parade, was injured by a passing train. The parade was organized and operated by K-W Oktoberfest Inc. The City of Waterloo had been added as an additional insured on K-W Oktoberfest's insurance policy with Economical.

The additional insured endorsement stated:

This insurance applies to those stated on the declarations as "additional insureds", but only with respect to liability arising out of the operations of the named insured.

The court, in holding that Economical's policy was not obligated to respond, noted:

⁷ [2006] O.J. No. 5252 (QL)(SC)

In my view this is a common, clear and unambiguous limitation of coverage. The words “arising out of” have been interpreted in the cases to include such meanings as “originating from”, “growing out of”, “flowing from”, “incident to”, or “having connection with”.

These words define the pertinent liability for which coverage is provided. The pleadings on their face do not allege facts in support of liability “flowing from” or “incident to” the operations of K-W Oktoberfest Inc. And the plaintiffs have not sued K-W Oktoberfest Inc. The K-W Oktoberfest parade was merely the site or occasion of the Hepditches unfortunate accident with the train.

*...
All of the allegations of negligence against the City stand alone and are neither expressly or by necessary inference derivative of or arising out of the operations of K-W Oktoberfest Inc.*

*Tinkess v. N.M. Davis Corp.,*⁸ is an example where the Ontario court interpreted the words “arising out of” narrowly. Indeed, the fact situation initially posited in the introduction to this paper was exactly the situation faced by the court in *Tinkess*. The plaintiff slipped and fell on a walkway leading to a parking lot. Her fall was caused, she alleged, by “the presence of ice and snow on the surface of the walkway.” She sustained injuries and sued several defendants, including the parking lot operator and its snow removal contractor. The parking lot operator, in turn, cross-claims against its snow removal contractor on the basis of the “indemnity” and “insurance” provisions in their snow removal agreement.

As the court noted, “the issue that arises on this motion is whether the snow removal contractor is contractually required to defend and indemnify against all claims, including those involving the parking lot operator’s negligence or just the claims arising out of its own negligence.”⁹

The agreement between the snow removal contractor and the parking lot operator provided:

“7. Indemnity/Hold Harmless Agreement. Parkway shall not be liable for any injury or damage to any person or property whatsoever by reason of, or in any manner arising out of, any of [Total’s] acts or failures to act under or pursuant to the Agreement. [Total] shall indemnify, defend, with counsel acceptable to Parkway and hold

⁸ [2007] O.J. No. 1026 (QL)(SCJ)

⁹ *Ibid.*, para. 3

harmless Parkway and its affiliates from and against any and all claims...arising from the acts or failure to act of [Total]...in connection with the matters governed by this Agreement..."

"8. Insurance. [Total] shall at its own cost and expense carry commercial general liability insurance (including insurance against assumed or contractual liability under this Agreement) with a minimum combined single limit of one million dollars...and naming Parkway and its affiliates as additional insureds..."¹⁰

The snow removal contractor argued that the "indemnity agreement," required the contractor to indemnify the parking lot operator's acts of negligence (or failures to act) but does not require the snow removal contractor to indemnify the operator for the operator's own acts of negligence.

In essence, the snow removal contractor argued that the contractual right to indemnify and defend only applies where the claim being made against the operator arises from the allegedly negligent acts of the contractor, not those of the operator. As for the insurance obligation, the contractor argued that section 8 simply "mirrors" the liability set out in section 7 - *"that is, the operator is required to obtain insurance coverage that includes coverage for the contractual liability described in section 7, which imposes liability on [the contractor] for its own negligent acts, not those of [the operator]."*¹¹

In finding that the snow removal contractor was not required to indemnify nor provide a defence to the operator, the court noted:

In my view, the plain meaning of the two provisions when read together is that Parkway is to be covered by Total's insurance for all claims "arising out of the acts or failure to act" of the snow removal contractor, not those of Parkway. One can imagine numerous situations where the CGL policy would respond to provide coverage for Total's alleged negligence - for example, if one of its snow-plow operators damages a parked car while plowing snow on the parking lot, or if it fails to respond within the two-hour time frame to a call from Parkway to remove ice from the walkway and someone is injured. Parkway would likely be sued in both situations and would sensibly want to make sure that Total had insurance coverage for the damage or the injuries that were actually caused by the latter's negligence. This is not a case where the CGL policy obtained by Total would have no subject matter if Parkway's own negligence was not covered.¹²

¹⁰ *Ibid.*, para. 5

¹¹ *Ibid.*, para 13

¹² *Ibid.*, para. 15

An example of how a court narrowed coverage available to an additional insured is found in *Atlific Hotels & Resorts Ltd. V. Aviva Insurance Co. of Canada*.¹³ In that case, a resort was named as an additional named insured under an Aviva policy which had been issued to a snow removal contractor, but only with respect to liability arising out of the snow contractor's operations. There were three distinct types of allegations made in the statement of claim against all defendants:

- a) negligence relating to snow and ice removal;
- b) negligence on the part of the resort in the operation and management of the hotel;
- c) liability arising from the *Occupier's Liability Act*.

The reader will recall that in the *RioCan* case, with similar circumstances, the court analyzed the statement of claim and determined that the "true nature" of the claim arose solely from negligence arising from the failure to properly remove snow and ice. Here, however, the court did not attempt to determine the "true nature" of the claim; rather, the court concluded that there were in fact 3 separate and distinct types of allegations which were advanced. As a result, the court held that Aviva did not have to defend the entire action. While the insurer was required to defend the resort on a complaint of negligent snow removal, the broader claims relating to the manner in which it organized guest activities or designed safety features were held not to be matters arising from the activities of the snow removal contractor.

To summarize as it relates to the Ontario cases, the nature of the relationship between the allegations advanced against a party and the ability to secure coverage as an additional insured tend to be very fact specific. It is difficult to reconcile certain of the cases, for example *Atlific* and *RioCan*, where facts which on their face are almost identical led to completely different findings from the courts. Where the court aims to determine the "true nature of the claim", then this is likely to guide the court to narrow down the potential bases of a claim to one "type" of claim. To the extent that the "true nature" of the claim arises from the operations of the named insured, then the additional insured is likely to obtain coverage for the entire claim.

(b) The BC Approach

In British Columbia, it would appear that consensus as to the approach that will be taken by the courts has been achieved through a recent Court of Appeal decision. Let

¹³ 2009 CarswellOnt 2697 (SC)

us briefly address some of the recent cases which have informed the British Columbia approach and resulted in the recent decision of the Court of Appeal.

In *Cowichan Valley School District No. 79 v. Lloyd's Underwriters*, 2003 BCSC 1303.¹⁴ In this case, the underlying action involved a baseball player who was injured in the course of a baseball game and sued the School District, who was the owner of the subject baseball field. The School District sought coverage under a Lloyd's policy, issued to a sports club (the "Club"). The School District entered into a "Use Agreement" with the Club, allowing it to use the baseball field and requiring that the Club obtain third party liability coverage. The School District was added as an additional insured pursuant to an endorsement which provided:

It is understood and agreed that the following are added as Additional Insureds, but only with respect to liability arising out of the operations of the Named Insured for the coverage term indicate.

Lloyds denied coverage, arguing that the claims against the district did not "arise out of" the operations of the Club, as required by the policy's language, but instead were founded upon the district's entirely independent occupier's liability obligations as the owner of the field.

Lloyd's argued the district owed the same duty of care to any casual, uninvited user of the field regardless of whether any tournament was being held. Hence, so the argument went, coverage was not triggered in the circumstances.

In addressing the Lloyds' argument and concluding that the School District was in fact entitled to coverage under the Lloyds' policy, the court noted as follows:

[17] There is some logic in Lloyd's position, and it might have carried the day if Mr. Mayo's claim were not so clearly associated with the very activity Lloyd's agreed to insure, vis playing baseball. Had Mr. Mayo's head been injured in the field's parking lot when a tile fell off the roof and struck him, then it would be no great feat to locate a distinction between Appollo's operation of hosting the tournament and the District's obligation to keep the grandstand roof in good repair.

[18] However the pleadings in this case clearly connect Mr. Mayo's injury closely to the very activity that Lloyd's agreed to insure. Mr. Mayo would not have injured his ankle but for Appollo's decision to put on the tournament.

¹⁴ 2003 BCSC 1303

[19] I have no difficulty concluding that part of Appollo's operation of the tournament was to provide a reasonably safe environment for the ball games. The pleadings clearly allege that Appollo failed in that aspect of the operation. That is to say, the pleadings allege that Appollo failed to inspect and warn users of the field of hazards.

[20] The pleadings also allege that Appollo failed to maintain the field and, to the extent that that duty was to repair damage to the field caused by the tournament itself, I have no difficulty concluding that it was part of Appollo's operation to maintain the field, at least to the extent of making such ad hoc repairs.

[21] Mr. Mayo's injuries are alleged to have arisen out of those failings. They are connected to the ball tournament. There is a clear nexus on the pleadings between the tournament, the alleged negligence and the alleged injury. Mr. Mayo's claims arise, therefore, out of the operations of Appollo as host of the tournament.

[22] As Mr. Mayo's pleadings have been drafted, the allegations against the District are inseparable from the allegations against Appollo. With respect to failure to inspect and warn, those allegations are obviously associated with Appollo's operation of the tournament. With respect to failure to maintain, a liberal reading of the pleadings allows for the possibility that the putative hole at the second base developed during play and that it was not repaired by proper maintenance.

[23] Both theories of negligence arise out of the operations of Appollo, and are connected to the ball tournament. The allegations against the District are not separate and distinct from the allegations against Appollo. The allegations against the District depend on Appollo having hosted the tournament and on Mr. Mayo's game having taken place at the District's field. Those were the very operations that Lloyd's agreed to insure.

Cowichan Valley, supra, was followed in a 2009 decision of the British Columbia Supreme Court, *Liu v. Chu*.¹⁵ The plaintiff alleged that she was struck by a delivery cart operated by an employee of Maxim Bakery. The collision allegedly occurred at Metrotown Centre, a large Vancouver-area shopping mall, where Maxim was a tenant. The mall was owned by Manufacturer's Life Insurance Company ("Manulife"). The plaintiff's only basis for asserting liability against Manulife was that Manulife, as landlord, had breached the statutory duty imposed by the *Occupiers Liability Act* to keep the mall's common areas reasonably safe. Manulife sought a declaration that Sovereign General, Maxim's comprehensive liability insurer, owed a duty to defend Manulife against the plaintiff's claim. Manulife was listed as an "additional insured" in the Sovereign policy

¹⁵ 2009 BCSC 753

with respect to any liability “arising from the Legal Operations of the Named Insured [i.e., Maxim]”. The policy also contained the following limits on coverage:

“Additional Insured Extension Endorsement This Form includes the party or parties named in the Declarations as an Additional Insured but only with respect to the operations performed by or on behalf of the Named Insured. Such insurance as is afforded by this Extension does not insure liability arising out of the operations of the Additional Insured or its employees.”

The insurer argued that it did not have to defend Manulife because the plaintiff’s claim against Manulife only related to Manulife’s statutory duties as the “occupier” of Metrotown’s common areas. The claim “stood alone”, separate and apart from Maxim’s activities, and did not constitute “...operations performed by or on behalf of the Named Insured”. It thus fell outside the scope of the Endorsement cited above. Sovereign relied on *D’Cruz v. B.P. Landscaping Ltd.*,¹⁶ where the court distinguished between a plaintiff’s claims against a landowner as *occupier* and against the landowner’s contractor in *negligence*; the contractor’s insurer did not owe a duty to defend the landowner for any breach of its statutory duties.

In response, Manulife argued that all of the plaintiff’s allegations ultimately arose from the actions of Maxim and its employee, and therefore coverage should be provided. Manulife relied on *Cowichan Valley*, arguing that the insurer owed a duty to defend because the pleadings established a “clear nexus” between the tenant’s activities, the alleged negligence and the alleged injury. The Court agreed, deciding that the insurer owed a duty to defend Manulife pursuant to the policy. It found that the plaintiff’s claim arose from an integral part of Maxim’s operations, and not through any independent obligation on Manulife as occupier of the mall’s common areas. In particular, the court found that the pleadings, activity, and injuries which the insurer had agreed to cover were connected and inseparable:

“...the collision is clearly connected to the operation that Sovereign agreed to insure. The defendant employee injured the plaintiff while delivering goods in the course of his employment with Maxim’s. The allegations contained within the statement of claim are predicated upon that act of the employee. Even a broad reading of the pleadings still discloses a nexus between the injury and Maxim’s operations, which Sovereign agreed to insure.”¹⁷

¹⁶ [2007] O.J. No. 2704 (QL)(SCJ),

¹⁷ *Liu v. Chu*, para. 30

The Court also concluded that there were no claims or facts alleged against Manulife that were “separate and distinct” from the plaintiff’s claim against Maxim, distinguishing *D’Cruz, supra*, and following *Cowichan Valley, supra*, on that basis.

The recent decision in *Williams (Litigation Guardian of) v. B.C. Conference of the Mennonite Brethren Churches*,¹⁸ highlights how the extension of coverage to an additional insured can have far-reaching consequences for a liability insurer. In this case, injuries were sustained by several people following the collapse of a church floor during the course of a concert. The promoter of the concert band had been issued a liability policy of insurance.

In *Williams v. Mennonite Brethren*, several people were injured when the floor of a church collapsed and they were plunged into the church’s basement. The collapse occurred during a rock concert that was being held at the church. The promoter of the rock bands that were playing had liability insurance. The church and the performers sought coverage under the promoter’s policy as additional insureds. The court described the claims as being that the church and the performers failed to act appropriately, including by failing to ensure the floor and equipment were safe for the concert, by failing to ensure that the concert attendees' behaviour did not get out of control and by failing to ensure that the concert was stopped when there were indications of floor vibration and equipment instabilities.

In finding that the church was entitled to coverage under the promoter’s policy, the court noted:

[82] ...the allegations in this case are clearly connected to the very operation that Lloyd's/Temple agreed to insure. As Southin J.A. stated in Monenco, "[s]uffice it to say that if this project had not existed, there would have been no claim, ergo the claim arises out of it." Had the promoter not put on the concert, then no injuries would have occurred. Thus, the potential liability arises out of the operations of the insured, Unite, and there would be no restrictions upon the coverage potentially available to the conference and the other additional insureds even if the wording had been included in the certificates.

Similarly in *Penticton (City) v. AXA Pacific Insurance Co.*,¹⁹ where the contractor was the named insured and the city, for whom the contractor was doing a project, was the additional insured with regard to claims “arising out of the operations” of the insured

¹⁸ (2010), 86 C.C.L.I. (4th) 107 (B.C.S.C.)

¹⁹ 2009 BCSC 1404

contractor, there was a direct link between the city's potential liability and the contractor's actions.

[68] ...had the Contractor not been working on the construction contract at the particular intersection in issue and had it not removed and relocated the stop sign, there would have not have been any claims. Thus the liability arises out of the operations of the insured, the Contractor.

[69] All of these claims allege a state of facts which, if proven, result in allegations that arise out of the operations of the Contractor in initially removing and relocating the stop sign and failing to notify the City of the steps it had taken with respect to the stop sign and in failing to fulfill its obligations as to the safety of the construction site and traffic flow in that area as stipulated in the Contract Documents.

Finally, the British Columbia Court of Appeal has recently given consideration to this issue. In *Saanich v. Aviva Insurance Company of Canada*,²⁰ Aviva Insurance Company appealed a trial decision, ordering it to defend the District of Saanich, an additional insured listed in a policy insuring the BC Lacrosse Association.

In this case, the District entered into a rental contract with the Pacific Rim Field Lacrosse Association, which operates under the auspices of the B.C. Lacrosse Association, permitting the Pacific Rim Field Lacrosse Association to use a specified area of the recreation centre for lacrosse practices. Other organized activities also took place at the recreation centre. One of these activities was dog obedience classes. The plaintiff alleged that he was injured when struck by an errant lacrosse ball while walking to a dog training class being held on an adjacent area of the recreation centre.

At trial, the judge posed the question before her as “*the extent to which the alleged liability ‘arises out of’ the named insured’s operations or activities*”. The trial judge held:

[46] ... The claim brought by Mr. Wright does not allege that his injuries were caused by anything other than the errant lacrosse ball. The pleadings do not disclose a cause of injury independent of the lacrosse activities. Mr. Wright does not assert that his fall and resultant injuries may have been caused by, say, debris from the vending machines or water on the floor, or that his injuries in any way result from Saanich’s failure to generally maintain its premises in a safe manner for its patrons. But for the lacrosse activity, there would have been no obligation on Saanich to provide alternate access to the patrons of the dog obedience class. The only reason the usual source of access to the dog obedience class allegedly

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became unsafe was because lacrosse was being played at the centre at the time the dog obedience class took place.

[47] *Mr. Wright alleges that Saanich failed in its duty to keep the path of travel to the class safe, but as Saanich asks, safe from what? The answer is, safe from errant lacrosse balls. The path of travel was otherwise safe. No alternate access was required so long as no lacrosse activities were underway.*

[48] *Particulars of the negligence alleged with respect to Saanich are not identical to those concerning the Lacrosse Defendants, but they are inextricably linked. In many cases cited to me, the particulars of negligence were identical. However, that is not a necessary prerequisite to establish the duty to defend where the policy contemplates coverage so long as the potential liability arises out of the activities of the named insured.*

...

[50] *In the present case, there is a clear nexus or causal connection between the possible liability of Saanich and the activities of the named insured.*

On appeal, Aviva contended that judge erred in applying the test for the duty to defend to the pleadings, arguing that the pleadings were not capable of establishing Saanich's liability "arising from" the lacrosse activities.

Interestingly, the Court specifically considered the *Atlific* case, discussed above. The court noted:

[30] *Atlific is an interesting application of the principles at the trial level. I do not consider, however, that its reasoning is transferable to the case before us, as it involved three separate complaints against the resort, only one of which directly engaged the issue of snow removal, which was the risk covered by the insurer. The claims of inadequate lighting and other safety deficiencies, as well as the organization of the guests, could support a claim against the resort for loss in a slip and fall, independent of the adequacy of snow removal. In contrast, the case pleaded against Saanich cannot stand, absent an errant lacrosse ball.*

The Court of Appeal agreed with the trial judge, holding that in the pleadings, there was an causation link between the alleged negligence of Saanich and the injury to the plaintiff. The Court indicated:

[32] *... the unbroken chain of causation, alleged in the pleadings encompasses both the actions of the unknown lacrosse player and the actions of Saanich that placed Mr. Wright in a position to be struck by the lacrosse ball. The true nature of the substance of the claim is a claim arising from the lacrosse associations'*

activities, in the context of Saanich's role in facilitating them, whether or not liability attaches to the lacrosse associations. In other words, the pleadings contain allegations of the requisite unbroken chain of causation; there is no independent fault alleged against Saanich which would support an action in negligence absent the activities of the lacrosse associations. Consideration of the "errant" aspect of the lacrosse ball intimately implicates the actions of Saanich.

D. Summary

Insurers are often surprised at the nature and extent of coverage that courts will afford to additional insureds. In *Williams*, the promoter's liability insurer was left defending allegations against the church (relating to the safety and construction of the flooring) which the insurer could not have reasonably foreseen. It would seem that the courts, in both British Columbia and Ontario, are trending towards a broad interpretation of coverage that is available to additional insureds.