

## INTERPRETING BUSINESS INTERRUPTION INSURANCE POLICIES

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Purchasing an insurance policy is a useful way to help an individual or corporation reduce its financial risk; however, it is prudent to spend time examining the exact terms of a policy because the details of coverage can vary quite widely. In addition, insurance law is heavily predicated on the wording of each policy so any disputes between insureds and insurers require analyses of the appropriate policy clauses as they relate to the specific facts of a case. Fortunately, the majority of policy wordings are similar in nature and principle so the courts' past interpretations of similar phraseology are likely to be followed when they describe similar coverages.

Three cases over the past several years in British Columbia and Alberta demonstrate this judicial practice quite clearly in the area of business interruption insurance. The B.C. Supreme Court decided the first, *FFP Holdings Limited v. The Boiler Inspection and Insurance Company of Canada*, in 2001 and the B.C. Court of Appeals upheld the ruling in the following year. The facts of the case were simple enough but the legal issues were more complex. The insured had agreed to sell its business; however, the boiler broke down prior to the transfer of ownership. In order to mitigate losses, the selling company made minor repairs and scheduled the full repairs for the upcoming maintenance shutdown which was to occur post-sale. Since the purchase agreement stipulated that the machinery be in working order, the seller paid the purchaser an amount equal to the income losses they would suffer resulting from the repairs. To recover this sum, the seller sought indemnity from its insurance company.

The policy provided coverage if the business "be interrupted or interfered with solely as the result of an accident which occurs while this coverage is in effect" with the indemnification amount established as the "loss of gross profit resulting from such interruption or interference." The main question facing the Court was whether the policy covered lost profits arising from damage caused during the policy period; however, the seller's losses had to be calculated by referring to events that occurred after it ceased to own the insured property.

This case drew two important conclusions. The Court determined that, if damage occurs to an insured's property during the policy term, any resulting loss, even if it is incurred by the insured after it sells the property, is recoverable. In addition, the Court analyzed the terms, "interrupted"

and “interfered with”, to decide if a business must have completely closed to trigger coverage or if impairment of the operations is sufficient. The Court found that the two verbs had different meanings that provided coverage for both partial and full shutdowns.

In the second B.C. Supreme Court case, *J.K. Expressions Inc. v. Gerling Global General Insurance Company*, (decided in 2002), the insured had an earnings form that covered “loss directly resulting from necessary interruption of business caused by destruction or damage by the perils insured against, to building(s), structure(s), machinery, equipment or stock on the described premises.” While the physical loss form expressly excluded coverage for loss of jewellery stock (for which the insured company carried a separate policy), the Court found on a plain interpretation that *there was coverage for business interruption caused by loss of jewellery stock*. In fact, the Court found that business interruption caused by a loss of stock in general was an expressly covered loss. To indicate a contrary intention that would have limited coverage to “insured stock”, the insurance company simply needed to use that exact phrase.

While the Court maintained that it was interpreting the policy as a whole, it also stated that it “looked at all parts of the policy but only transported the wording in one section to another section when necessary to give the policy a clear meaning.” The practical effect of this case is to show that the unique composition of insurance policies can result in a slight adjustment to the traditional interpretation of commercial contracts. While a policy containing multiple forms of insurance constitutes a single contract, it will first be interpreted by form; a judge will only refer to wording outside specific sections in a policy when the wording is ambiguous or directly cites other parts of a policy.

Earlier this year the Alberta Court of Appeal in *Neste Canada Inc. v. Allianz Insurance Company of Canada* interpreted a contingent business interruption policy that covered loss of income triggered by damage to property that belonged to the insured’s suppliers. To make matters additionally complicated, the property damage that caused the insured’s loss was to one of the suppliers of the insured’s primary supplier. However, the Court found that this was not a bar to recovery and focused its attention on other issues that it considered more germane.

The Court took into account the fact that, while the insured’s premises were shut down due to lack of product supply (in this case, butane), the insured carried out yearly maintenance. The insurance company argued that the ability to perform this was a collateral benefit that should reduce the overall loss since the insured had no need to do the maintenance at another time. However, the Court said: “If the expense to the insurer is not increased by a penny (no deprivation), and the downtime or repairs or towing might well not have occurred without the insured peril (doubtful benefit), the insurer has no legitimate concern if the insured does something to draw some collateral benefit from the situation.”

The Alberta Court also noted that the start of the waiting period was not specified in the policy. The insured argued it should run from the time the property damage occurred, that is from the moment of the explosion that caused all the problems. Taking a contrary position, the insurance company claimed the waiting period should run from the first instance of business loss for the insured. This began at a later date when supply of butane stopped. Since the policy did not indicate what would be an express trigger for the waiting period, the Court undertook a contextual interpretation of the policy. It found that the waiting period commenced when the loss to the insured commenced, not the time of physical damage. Accordingly, the insured had to absorb part of the loss.

While these cases demonstrate that courts treat insurance policies in a slightly different manner from more traditional contracts, the outcomes of these cases indicate they try to arrive at commercially reasonable results and take heed of the purpose behind specific insurance clauses. The ability to understand an insurer's purpose in including certain clauses (like deductibles) and how the courts will interpret insurance policies allows companies to plan their business affairs more effectively. In addition, they can ascertain their rights if faced with a loss. These cases further demonstrate that a careful reading and analysis of insurance policies with an eye to commercial realities is worthwhile to prevent future surprises for both insurance companies and those purchasing insurance.