KEEPING CURRENT

January 27, 2021

Patrick Brown "takes down" insurance company

By Stephen Thiele

Stephen Thiele
Partner
416.865.6651
sthiele@grllp.com

An issue that sometimes arises in defamation actions is whether the costs of a prosecution or a defence is covered by an insurance policy. This issue arises particularly when a politician is either a plaintiff or a defendant and the impugned defamatory words are published in the course of the politician's duties.

But as seen in *Brown v. Soveriegn General Insurance Co.*, 2021 ONSC 511, the issue of insurance defence coverage also applies in the area of entertainment law and book publishing.

In this case, Patrick Brown, the former leader of the Ontario PC Party and now Mayor of Brampton, entered into an agreement to publish a non-fiction book with Optimum Publishing International ("OPI"). OPI was a division of J.F. Moore Lithographers Incorporated ("J.F.Moore").

Under the agreement, there were a number of provisions which applied personally to Brown. For example, among other things, Brown was responsible for pre-selling a minimum of 800 copies of the book, and was obligated to provide the publisher with critical materials such as photographs and illustrations, to make revisions at the publisher's request, and to co-operate in the promotion of the book.

The publishing agreement also obligated the publisher to include Brown as an "insured" in any publishing liability insurance that was in effect and that applied to the book. While the publisher had insurance coverage under a Media Professionals Policy, it failed to add Brown as an insured thereunder. Brown's book, "Takedown: The Attempted Political Assassination of Patrick Brown" was published in November 2018. Within a month of publication, elected official Vic Fedeli complained that parts of Brown's book defamed him. Fedeli sent a Notice of Libel to Brown, who in turn contacted the publisher to arrange for the publisher's insurer to provide Brown with a defence.

Fedeli subsequently sued Brown for defamation and Brown sought coverage from the insurer for his defence.The insurer denied that it was obligated to

Continued on page 2

provide Brown with a defence on the basis that neither OPI nor Brown were "insureds" under the Media Professionals Policy. This Policy only named J.F. Moore, and any director or employee of J.F. Moore.

Dissatisfied, Brown gave notice to the insurer that he intended to sue for the wrongful denial of insurance coverage. In response, the insurer maintained its position that Brown was not an insured. The insurer contended that Brown was neither named in the policy as an insured, and that was not retained by the publisher under either a "personal service contract" or as an "independent contractor" as those terms were used in the policy. The insurer further argued:

> "…Mr. Brown was not retained to provide any services on behalf of J.F. Moore nor was Mr. Brown retained to perform any of J.F. Moore's professional business activities.

The decision of Justice Perell turned on the interpretation of the insurance policy. Whereas the insurer argued that Brown simply did not meet his burden of proving that he was an insured, Brown argued that the policy applied to him because coverage thereunder was provided for: (a) individuals or personal service contracts or personal service agreements, and (b) any independent contractor for which OPI had agreed in writing to provide the insurance with respect to the insured's professional business performed by such independent contractor on behalf of OPI…

Justice Perell found in Brown's favour.

As a matter of contractual interpretation, His Honour reviewed the leading decisions in contractual interpretation, including *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 and *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21.

Justice Perell explained at paragraph 24 of the decision that the goal of contractual interpretation was to determine the intent of the parties and the scope of their understanding giving the words used by the parties their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract, and that the court was obligated to seek an interpretation from the whole of the contract that advanced the intent of the parties at the time they signed the contract.

With respect to insurance contracts, standard principles of contractual interpretation required that any ambiguities be interpreted against the insurer, with coverage provisions to be interpreted broadly and exclusion provisions to be interpreted narrowly.

As well, Justice Perell noted at paragraph 30 that where an insurance policy is ambiguous, the reasonable expectation of the parties was to be considered. These principles are well-established in the law.

The crux of the case turned on whether Brown was an independent contractor *that performed with respect to OPI's "professional business" as a publisher* and whether Brown's contract with OPI was a "personal service contract". The insurer submitted that Brown's contract was akin to a manufacturing contract for the production of a product or the delivery of a good such that Brown could not have been an independent contractor engaged in the publishing business. This argument was rejected.

Justice Perell found that Brown's publishing

contract was in an intellectual property agreement under which Brown licensed or assigned his rights to make copies of his intellectual property. He was not an employee of OPI, and therefore was an independent contractor with respect to his copyright in the book. The contract was thus an engagement in OPI's professional business of publishing copyrighted work.

The policy provided that an "insured" meant any individuals or personal corporations who from time to time had been retained under personal services contracts or personal services agreements, and this included Brown, who under his contract was obligated to provide a personal service to OPI.

Brown's contract, indeed, was a classic personal services contract because its performance could not be delegated to anyone else.

The relationship between Brown and OPI was confirmed through OPI's obligation under the publishing contract to provide Brown with liability insurance coverage.

As a result, Brown was entitled to recover from the insurer the legal fees he had incurred in responding to Fedeli's defamation complaint and action. The amount of his legal fees to the date of the decision was $187,313.41.

This case is valuable for the following reasons. First, it demonstrates that in certain defamation actions it is important to consider whether a claim is covered under an insurance policy. For a defendant, this could provide relief for the payment of legal defence costs. For a plaintiff, it could be a consideration when seeking a settlement.

Second, the case provides an excellent review of the general principles of contractual interpretation that apply to all contracts and the principles that specifically apply to insurance contracts. The application of these principles is often critical to determining the scope of the duties, obligations and rights of parties, particularly in the field of insurance law.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact the Chair of our dispute resolution group, **Stephen Thiele**, at 416.865.6651 or via email at sthiele@grllp.com.

(This newsletter is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP.)