Date: 20261103
Docket: CI 24-01-46851
(Winnipeg Centre)
Indexed as: Federated Insurance Company of Canada et al. v. Wynward Insurance Group
Cited as: 2026 MBKB 154

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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

FEDERATED INSURANCE COMPANY OF CANADA AND HILLSIDE CONSTRUCTION INC.,	)	Jarrod R. Sundmark Stefan Leicht for the applicants
applicants,	)	
- and -	)	Tyler J.Kochanski Myriam L. Hacault for the respondent
WYNWARD INSURANCE GROUP,	)	
respondent.	)	Judgment Delivered: November 3, 2026

TOEWS J.

INTRODUCTION

[1] This application arises as a result of the construction of a condominium project (the "Project") by the applicant, Hillside Construction Inc. ("Hillside") in 2012-2013, on lands located at 1106 Dawson Road in the Rural Municipality of Tache, Manitoba (the "Property"). Hillside is being sued by the current owner of the Property, Winnipeg Condominium Corporation No. 811 ("WCC"), for alleged defects arising from Hillside's construction of the Project.

[2] The applicant, Federated Insurance Company of Canada ("Federated"), insured Hillside for the Project. Approximately one month before the Project was completed, Hillside purchased a separate insurance policy from the respondent, Wynward Insurance Group (the "respondent" or "Wynward").

[3] The applicants seek relief in two stages.

[4] First, Hillside and Federated (jointly referred to as the "applicants") seek an interim order requiring Wynward to immediately pay an unspecified amount representing half of the defence expenses, damages, interest, and costs arising from the WCC's legal action, commenced under Court File No. CI 21-01-33282 (the "WCC Action").

[5] Second, the applicants seek a determination that Wynward must contribute to any future judgment and costs award in the WCC Action.

[6] This hearing and these reasons, including any findings made in the course of these reasons, deal with and are applicable to the first stage of the application only. The parties advise that the second stage of the application will be dealt with once the WCC Action has been concluded.

THE POSITION OF THE APPLICANTS

[7] The applicants seek an order compelling Wynward to indemnify Hillside for 50 percent of defence expenses incurred to date and hereafter in respect of the WCC Action. This relief is sought without prejudice to the ability of Federated, or any party, to challenge and seek a re-apportionment of the upon final resolution of the WCC Action.

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[8] In summary, Hillside acknowledges it was the general contractor of the Project which involved the construction of three condominium buildings. Construction of the Project commenced in May of 2012, and was completed in August of 2013. The completion dates for each building were staggered within this period. Federated insured Hillside pursuant to a commercial general liability ("CGL") policy of insurance until March 23, 2013. Thereafter, Hillside states Wynward insured Hillside pursuant to a CGL policy which was in place until March 23, 2019 and that both insurers insured Hillside during the construction of the Project.

[9] Several years after the completion of the Project, the WCC advised Hillside of certain alleged deficiencies in the work on the Project. Investigations undertaken by the WCC culminated in the commencement of legal proceedings as against Hillside, with the WCC Action being filed in 2023. The WCC Action alleges that as a result of deficiencies in the construction of the Project, the WCC has suffered loss and damage related to water infiltration, rotting of wood and OSB sheathing, and mould growth on the condominium property.

[10] The applicants state the allegations in the WCC Action give rise to a duty to defend on the part of Wynward. Given that Wynward and Federated insured Hillside for consecutive periods of risk with respect to the Project, the question then becomes what the appropriate method to allocate defence costs between the insurers is.

[11] It is the position of the applicants that the Federated and Wynward CGL policies are "occurrence" based policies. The triggering event for coverage under these policies in this instance is the date the alleged property damage occurred. They argue that

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since the property damage alleged by the WCC is latent and has developed over time, it is likely this damage has occurred for several years following the completion of the Project, only truly manifesting itself in 2019.

[12] The applicants state that Canadian courts have developed a number of approaches (also known as "trigger" theories) to assist in determining the timing of property damage which is latent, or developing over time, and which does not become apparent immediately for the purposes of allocating risk. This is commonly referred to as a "time-on-risk" assessment. In the circumstances, the applicants argue the "continuous" or "triple trigger" approach is applicable. Under this approach, the property damage is said to occur from the time of the initial exposure to the conditions causing the damage to the time of the manifestation or discovery of the damage.

[13] The applicants argue that in the present case, this results in coverage being engaged from the end of construction until the manifestation of the damage in 2019. Wynward was the insurer on risk for a vast majority of this period. Accordingly, the applicants take the position that the respective responsibility for the defence and indemnification of Hillside as between Federated and Wynward on account of the WCC Action cannot be determined with certainty at this stage in the WCC Action. The applicants therefore seek an equal allocation of defence costs incurred and to be incurred, pending the final resolution of the WCC Action. They state that this approach has been accepted as the fairest and most equitable allocation in such circumstances as an equal allocation of the defence costs as between Federated and Wynward will allow

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for the full and early participation of all insurers who are potentially liable, which promotes settlement and expedites the trial process.

[14] The applicants state that the issues to be determined in this application can be stated as follows:

a. Whether Wynward has a duty to defend Hillside with respect to the Action; and

b. If so, what is an appropriate basis upon which to allocate defence costs as between Wynward and Federated pending the outcome of the Action.

[15] The applicants note that the general principles of insurance policy interpretation applicable here were summarized by the Supreme Court in ***Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada***, [2010] 2 S.C.R. 245, 323 D.L.R. (4th) 513, where the court held at para. 22 - 24:

> [22] The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole (*Scalera*, at para. 71).
>
> [23] Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction (*Consolidated-Bathurst*, at pp. 900-902). For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties (*Gibbens*, at para. 26; *Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901), so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded (*Scalera*, at para. 71; *Consolidated-Bathurst*, at p. 901). Courts should also strive to ensure that similar insurance policies are construed consistently (*Gibbens*, at para. 27). These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.
>
> [24] When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* — against the insurer (*Gibbens*, at para. 25; *Scalera*, at para. 70; *Consolidated-Bathurst*, at pp. 899-901). One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly (*Jesuit Fathers*, at para. 28).

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[16] In respect of the test to be applied, the applicants submit there is a shifting burden and standard of proof applicable to insurance coverage disputes. The applicants have the burden of showing there is a "mere possibility" the claim falls within the insuring agreement of the Wynward Policy or within an exception to an exclusion clause. Once a "mere possibility" has been established, Wynward then has the burden of showing that the WCC's claim "clearly and unambiguously" falls within an exclusion clause.

[17] The applicants submit that in making this determination, the court must look beyond the labels selected by the respondent to ascertain the "true nature" or "substance" of the claim. The insurer's obligation to defend "will be triggered where, on a reasonable reading of the pleadings, a claim within coverage can be inferred". (See ***Urbanmine Inc. v. St. Paul Fire and Marine Insurance Company et al.***, 2017 MBCA 42, at paras. 32 – 33)

[18] The applicants take the position that, generally speaking, the duty to defend is determined solely on the allegations in the pleadings. However, "[e]xtrinsic evidence that has been explicitly referred to in the pleadings may be considered to determine the substance and true nature of the allegations". (See ***Urbanmine Inc.***, at para. 33)

[19] The applicants argue the language of the Wynward Policy is essentially similar to the language considered by the Supreme Court in ***Progressive Homes Ltd.*** and that the allegations made against Hillside in the WCC Action are analogous to those made against the contractor in ***Progressive Homes Inc***. The applicants state the alleged damage of "water infiltration, significant rotting of wood and OSB sheathing, mould

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growth" clearly fall within the definition of "property damage" in the Wynward Policy, as the similar allegations against the contractor in ***Progressive Homes Ltd.*** did. (See supplemental motion brief of applicants, at para. 46)

[20] The applicants submit that after ***Progressive Homes Ltd.*** it is settled law that an occurrence can include accidental construction defects and that what is alleged in the WCC Action falls squarely within this definition. The WCC Action alleges an occurrence on the part of Hillside as it relates to the alleged property damage, being the alleged negligence in the construction of the Project. Consistent with the conclusions of the Supreme Court in ***Progressive Homes Ltd.***, this is an "occurrence" within the meaning of the Wynward Policy.

[21] In summary, the applicants submit that on the basis of the language of the Wynward Policy, and the prevailing case law, the WCC Action relates to "property damage" caused by an "occurrence" within the meaning of the Wynward Policy. The WCC Action alleges there has been "water infiltration, significant rotting of wood and OSB sheathing, and mould growth" (the "property damage") as a result of the negligence and breach of duties owed by Hillside in its construction of the Project (the "occurrence").

[22] The allegations contained in the WCC Action therefore trigger coverage under the Wynward Policy, and engage Wynward's duty to defend.

THE POSITION OF THE RESPONDENT WYNWARD

[23] The respondent acknowledges that this proceeding deals only with the applicants' request for an interim Order requiring Wynward to immediately pay an

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unspecified amount representing half of the defence expenses, damages, interest, and costs arising from the WCC Action. In respect of the facts relevant to this proceeding, the respondent agrees with many of the material facts relied upon by the applicants.

[24] In summary, it is the position of the respondent that approximately one month before the Project was completed, Hillside purchased a separate insurance policy from the respondent. However, it states that this policy did not cover the Project. During negotiations, Wynward was asked to include the Project in its coverage and expressly refused. Before binding coverage, Hillside's broker confirmed that Hillside had obtained alternative coverage for the Project from another insurer.

[25] Furthermore, the respondent states that in 2015, when Hillside became aware of alleged construction deficiencies in the Project, Hillside investigated those deficiencies and performed remedial work over the following years, but did not notify Wynward.

[26] Wynward states that on October 29, 2021, the WCC filed a Notice of Application under s. 14(1) of Part II of ***The Limitation of Actions Act***, C.C.S.M. c. L150 (the "Part II Application"), seeking leave to commence an action against Hillside and various unnamed defendants. Hillside later waived its limitation defence under Manitoba's ***Limitation of Actions Act*** and, with Federated's assistance, responded to an application by the WCC to extend the limitation period. Wynward states it did not learn of these matters until 2023, when Federated provided only minimal information by email. To date, Hillside has never submitted a notice of claim under Wynward's insurance policy.

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[27] Wynward states it was not until 2024 that Hillside and Federated filed this Application, asserting that Hillside is entitled to coverage under its insurance policy with Wynward. Wynward submits that its duty to defend the WCC Action is not triggered because:

a. The Project was explicitly identified as excluded from the scope of the Wynward Policy during negotiations between the parties before coverage was bound;

b. The exclusions in the Wynward Policy apply and no coverage was extended for the allegations in the WCC Action made against Hillside; and

c. Hillside failed to comply with the mandatory requirements of the policy including as to timely and full notice of claims, and Hillside's conduct has caused material prejudice which disentitles Hillside and Federated from the relief claimed.

[28] In the alternative, the respondent argues that if Wynward is responsible for defence costs, then the apportionment allocated to Wynward should be no more than 10 percent of reasonable defence costs from the time that Wynward received notice of the claim, up to the limits of the Wynward Policy, and subject to any deductibles. That allocation reflects Wynward's pro-rata time-on-risk during the Project's construction period as pleaded by the WCC in the WCC Action:

a. The Project commenced in February 2012 and was completed in April 2013 (approximately 14 months or 65 weeks); and

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b. Of that period, Wynward was on risk from March 23, 2013 to the end of April 2013 (approximately six weeks).

[29] Wynward submits that the issues before this court are as follows:

a. Did Wynward agree to provide insurance coverage for the Project?

Wynward submits that it did not agree and that the Wynward Policy does not cover the Project.

b. If yes, then does the "Damage to Property" exclusion apply, excluding coverage for Hillside for the Project under the Wynward Policy?

Wynward submits that the "Damage to Property" exclusion applies, and that Hillside does not have coverage under the Wynward Policy.

c. If no, then does Hillside's failure to provide mandatory notice and the resulting prejudice caused to Wynward preclude Hillside from claiming coverage under the Wynward Policy?

Wynward submits that Hillside is precluded from claiming coverage due to its failure and the prejudice caused by it.

d. If the court determines that it is appropriate to grant the Application in part, then what is the appropriate relief?

Wynward submits that if the court orders Wynward to pay a portion of defence costs going forward, then it should only be with respect to reasonable defence costs incurred from the time Wynward received notice of the WCC Action onwards, subject to the limitations of the Wynward Policy, with Federated responsible for the greater portion.

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[30] The respondent states that an insurer's duty to defend is broader than its duty to indemnify, and that duty must be grounded in the specific claim made against the insured. The duty to indemnify against the costs of an action and to defend does not depend on the judgment obtained in the action. Accordingly, the respondent submits, where it is clear from the pleadings that an action falls outside policy coverage by reason of an exclusion clause, the duty to defend does not arise.

[31] The respondent submits that in considering whether a legal action gives rise to a duty to defend, courts apply the "pleadings rule." This determination turns on the specific facts alleged in the statement of claim and not based on extraneous assertions.

[32] The respondent states that the Supreme Court of Canada in ***Monenco Ltd. v. Commonwealth Insurance Co.***, 2001 SCC 49 (CanLII), [2001] 2 S.C.R. 699, at para. 28 described the pleadings rule as follows:

> 28 The starting premise for assessing whether an insurer's duty to defend has been triggered rests in the traditional "pleadings rule". Whether an insurer is bound to defend a particular claim has been conventionally addressed by relying on the allegations made in the pleadings filed against the insured, usually in the form of a statement of claim. If the pleadings allege facts which, if true, would require the insurer to indemnify the insured for the claim, then the insurer is obliged to provide a defence. This remains so even though the actual facts may differ from the allegations pleaded.

[33] The respondent argues that when implementing the "pleadings rule," the court must accept the allegations in the WCC Claim as true. The court should not engage in a fact-finding exercise when assessing whether the duty to defend has been triggered. Rather, it should be careful not to conflate the analysis of the duty to defend with an analysis geared towards the insurer's duty to indemnify.

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DECISION

[34] In arriving at the determination that the application should be dismissed, I have concluded that even if the applicants have demonstrated the "mere possibility" the WCC Claim falls within the insuring agreement of the Wynward Policy, I am nevertheless satisfied that the WCC Claim "clearly and unambiguously" falls within an exclusion clause of the Wynward Policy on the basis of the evidence properly before me.

[35] In view of my finding that the WCC Claim "clearly and unambiguously" falls within an exclusion clause of the Wynward Policy, it is not necessary for me accept Wynward's position that no coverage can exist with respect to the WCC Claim. That is an issue that will be determined in the second stage of these proceedings after the WCC Claim is concluded. Similarly, although I have found that on the basis of the evidence properly before me at this stage in the proceedings the WCC Claim "clearly and unambiguously" falls within an exclusion clause of the Wynward Policy, I note that a full consideration of the same issue on the basis of all of the evidence at the second stage may result in a different conclusion.

[36] In respect of the argument that the WCC Claim falls clearly and unambiguously within an exclusion of the Wynward Policy, I accept the arguments of the respondent regarding the evidence that I am obliged to consider at this stage and what may not be considered.

[37] In my opinion the extrinsic evidence which the applicants seek to rely upon at this stage of the proceedings is precluded from consideration for two reasons. First, the affidavits the applicants seek to rely upon were not filed on a timely basis in that they

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were filed outside of the timeframe agreed to by the parties. Second, the extrinsic material is not material which may be considered to determine the substance and true nature of the allegations at this stage of the proceedings.

[38] In my opinion the "pleadings rule" applies here and the court must accept the allegations in the statement of claim as true. As emphasized in the case law, the court should not engage in a fact-finding exercise when assessing whether the duty to defend has been triggered. It should be careful not to conflate the analysis of the duty to defend with an analysis geared towards the insurer's duty to indemnify. The evidence sought to be relied upon by the applicants invite the court to engage in a fact-finding exercise and conflates the analysis of the duty to defend with an analysis geared towards the insurer's duty to indemnify. Accordingly, it would be inappropriate for me to consider this evidence at this stage of the proceedings.

[39] The position advanced by the respondent in respect of the duty to defend, and which I accept, is that in the relevant pleadings Hillside admits that it was the owner of the Property throughout the construction period of the Project. In my opinion the pleaded allegations directly engage the "Damage to Property" exclusion.

[40] The WCC Action is the basis for the coverage analysis. It pleads, and therefore it must be accepted for the purpose of this analysis, that Hillside owned, developed, and constructed the Project, using contractors and subcontractors. I agree with the respondent that on the basis of the "pleadings rule" the Damage to Property Exclusion is clearly and unambiguously engaged. There is no need for me to consider the other

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arguments for and against coverage at this stage. They can be dealt with in the context of stage 2 and after the consideration of a more fulsome factual matrix.

[41] Accordingly, the request for relief made by the applicants in respect of the duty to defend arising in the first stage of the application is dismissed. The costs in respect of the first stage of this application may be spoken to at the second stage of the application following the conclusion of the WCC Action.

_____ J.

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