



**THE ART AND SCIENCE OF POLICY  
INTERPRETATION:  
A REVIEW OF SUPREME COURT OF CANADA  
DECISIONS IN THE PAST 30 YEARS**

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TABLE OF CONTENTS

I.	THE CHRONOLOGY OF CASES .....	1
A.	<i>Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.</i> .....	1
B.	<i>McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada</i> .....	3
C.	<i>Scott v. Wawanesa Mutual Insurance Co.</i> .....	4
D.	<i>National Bank of Greece (Canada) v. Katsikonouris</i> .....	5
E.	<i>Brissette Estate v. Westbury Life Insurance Co.</i> .....	6
F.	<i>Reid Crowther &amp; Partners Ltd. v. Simcoe &amp; Erie General Insurance Co.</i> .....	8
G.	<i>Non-Marine Underwriters, Lloyd’s of London v. Scalera</i> .....	9
H.	<i>Derksen v. 539938 Ontario Ltd.</i> .....	10
I.	<i>Oldfield v. Transamerica Life Insurance Co. of Canada</i> .....	11
J.	<i>Somersall v. Friedman</i> .....	12
K.	<i>Martin v. American International Assurance Life Co.</i> .....	12
L.	<i>Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada</i> .....	13
M.	<i>Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada</i> .....	15
N.	<i>Co-operators Life Insurance Co. v. Gibbens</i> .....	16
O.	<i>Progressive Homes Ltd. v. Lombard General Insurance Company of Canada</i> .....	18
II.	THE ELEVEN PRINCIPLES OF INTERPRETING INSURANCE POLICIES .....	19

## THE ART AND SCIENCE OF POLICY INTERPRETATION: A REVIEW OF SUPREME COURT OF CANADA DECISIONS IN THE PAST 30 YEARS

Over the past 30 years, the Supreme Court of Canada has interpreted numerous types of insurance policies, with varying subject matters from construction defects to murder. In each case, the terms of the policies have differed; however, the Court's approach to interpretation has been relatively consistent. Set out in chronological order, the following collection of cases from the Supreme Court of Canada represents 30 years of policy interpretation. The chronology allows the reader to witness the development of the art and science of interpreting a policy of insurance.<sup>1</sup>

Our review begins with the seminal case of *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*<sup>2</sup>, wherein Justice Estey, writing for the Court, set out many of the principles of policy interpretation followed by Canadian courts today. The chronology ends with *Progressive Homes Ltd. v. Lombard General Insurance Company of Canada*<sup>3</sup> and Justice Rothstein's summary and extension of the principles espoused by Justice Estey in *Consolidated, supra*, thus fortifying their currency and significance in Canadian law.

### I. THE CHRONOLOGY OF CASES

#### A. *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*

The appellant, Consolidated Bathurst Export Ltd. ("**Consolidated**"), a manufacturer of paper products, suffered a loss as a result of the failure of three heat exchangers. Consolidated had a policy of insurance with the respondent, Mutual Boiler and Machinery Insurance Co. ("**Mutual Boiler**"), for certain property, including the heat exchangers. Mutual Boiler resisted Consolidated's claim for the loss on the basis that the damage to the heat exchangers was caused by corrosion and that this risk was specifically excluded from coverage.

In writing for the majority, Justice Estey set out the following interpretive principles of insurance contracts:

*Insurance contracts and the interpretative difficulties arising therein have been before courts for at least two centuries, and it is trite to say that where an ambiguity is found to exist in the terminology employed in the contract, such terminology shall be construed against the insurance carrier as being the author, or at least the party in control of the contents of the contract. This is, of course, not entirely true because of statutory modifications to the contract, but we are not here concerned*

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<sup>1</sup> Special thanks to Marlis Silver-Sweeney, articulated student with Clark Wilson LLP, for all of her assistance with this paper.

<sup>2</sup> [1980] 1 S.C.R. 888.

<sup>3</sup> 2010 SCC 33.

*with any such mandated provisions. Meredith J.A. put the proposition in *Pense v. Northern Life Assurance Co.* [(1907), 15 O.L.R. 131] at p. 137:*

*There is no just reason for applying any different rule of construction to a contract of insurance from that of a contract of any other kind; and there can be no sort of excuse for casting a doubt upon the meaning of such a contract with a view to solving it against the insurer, however much the claim against him may play upon the chords of sympathy, or touch a natural bias. In such a contract, just as in all other contracts, effect must be given to the intention of the parties, to be gathered from the words they have used. A plaintiff must make out from the terms of the contract a right to recover; a defendant must likewise make out any defence based upon the agreement. The onus of proof, if I may use such a term in reference to the interpretation of a writing, is, upon each party respectively, precisely the same. We are all, doubtless, insured, and none insurers, and so, doubtless, all more or less affected by the natural bias arising from such a position; and so ought to beware lest that bias be not counteracted by a full apprehension of its existence.*

*(Adopted in this Court in 1908 [(1908), 42 S.C.R. 246].)*

*Such a proposition may be referred to as Step one in the interpretative process. Step two is the application, when ambiguity is found, of the *contra proferentem* doctrine. This doctrine finds much expression in our law, and one example which may be referred to is found in *Cheshire and Fifoot's Law of Contract* (9th ed.), at pp. 152-3:*

*If there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity will be resolved against the party who has inserted it and who is now relying on it. As he seeks to protect himself against liability to which he would otherwise be subject, it is for him to prove that his words clearly and aptly describe the contingency that has in fact arisen.*

...

*Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal*

*meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.<sup>4</sup>*

**B. *McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada*<sup>5</sup>**

The issue in *McClelland* involved the definition of “effective date” in the context of a life insurance policy. The appellant, *McClelland and Stewart Ltd.* (“**McClelland**”), was the irrevocable beneficiary of a life insurance policy. The terms of the policy stated that *McClelland* was not entitled to the proceeds of the policy if the insured died by his own hands within two years of the effective date of the policy. The term, “effective date”, was not defined.

The majority of the Court found in favour of *McClelland*; however, Justice Estey, in writing for the dissent, held otherwise. In his judgment, Justice Estey followed his decision in *Consolidated, supra*, and again discussed the rule of *contra proferentem*:

*The appellant relies (as did the trial judge) on the doctrine of contra proferentem. That principle of interpretation applies to contracts and other documents on the simple theory that any ambiguity in a term of a contract must be resolved against the author if the choice is between him and the other party to the contract who did not participate in its drafting. The rule or principle, however, only comes into play if there is an ambiguity in the language of the contract. For those parts of the contract, as in the case of life insurance, which are mandated by legislation, the rule does not operate. Vide: Consolidated-Bathurst Export Limited v. Mutual Boiler and Machinery Insurance Company [(1980) 1 S.C.R. 888]. Here, assuming the statute does not limit the latitude of the author of the contract in the drafting of the self-destruction clause, the rule would come into play providing the wording*

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<sup>4</sup> *Supra* note 1 at 899-901.

<sup>5</sup> [1981] 2 S.C. R. 6.

*of the clause leads to more than one reasonable interpretation. Schroeder J.A., speaking for the Court of Appeal of Ontario in Losier v. St. Paul Mercury Indemnity Company [[1957] O.W.N. 97], after enunciating the contra proferentem rule at p. 98, went on to say:*

*Since exceptions are inserted in the policy mainly for the purpose of exempting the insurers from liability for a loss which, but for the exception, would be covered by the policy, they are construed against the insurer with the utmost strictness; and it is the duty of the insurers to except their liability in clear and unambiguous terms.<sup>6</sup>*

### **C. *Scott v. Wawanesa Mutual Insurance Co.*<sup>7</sup>**

In *Scott, supra*, the appellants', Cecil Scott and Femie Scott (the "**Scotts**"), home was damaged by a fire deliberately set by their 15 year old son without their knowledge or complicity. The Scotts were the holders of a homeowner's insurance policy with the respondent, Wawanesa Mutual Insurance Company, who denied the Scotts' claim on the basis that the loss occurred through the "wilful act ... of the Insured" within the meaning of an exclusion clause in the policy.

In writing for the minority, Justice La Forest discussed the modern approach to interpreting contracts of insurance as set out by Justice Estey in *Consolidated, supra*, and held that the courts must be guided by the reasonable expectation and purpose of an ordinary person when interpreting insurance policies:

#### *The Modern Approach*

*I am firmly of the view that the modern approach's primary focus on the meaning of the insurance contract is to be preferred to the old approach which is principally undergirded by public policy considerations extraneous to the contract. The modern approach seems to me to be entirely consonant with this Court's approach to the interpretation of insurance contracts. The guidelines for the interpretation of insurance contracts set out by this Court in Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888, provide an appropriate starting point for this analysis...*

*...in construing an insurance policy, the courts must be guided by the reasonable expectation and purpose of an ordinary person in entering such contract, and the language employed in the policy is to be given its ordinary meaning, such as the average policy holder of ordinary intelligence, as well as the insurer, would attach to it; see Morgan v.*

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<sup>6</sup> *Ibid.* at 15-16.

<sup>7</sup> [1989] 1 S.C.R. 1445.

*Greater New York Taxpayers Mut. Ins. Ass'n., 112 N.E.2d 273 (N.Y.C.A. 1953).*<sup>8</sup>

**D. *National Bank of Greece (Canada) v. Katsikonouris***<sup>9</sup>

This case involves a businessman, Dimitrios Katsikonouris (“**Katsikonouri**”), who obtained loans from the National Bank of Greece (Canada) and others, and pledged one of his properties as security for the loans. It was a term of the loans that Katsikonouri insure the property in favour of National and others. As such, Katsikonouri purchased a fire insurance policy from the respondents, Simcoe & Eric Insurance Company, General Accident Insurance and Balboa Insurance Company (“**Simcoe, et al.**”). The property was later destroyed and Simcoe et al. refused to pay the indemnity alleging that the policy was void *ab initio* as the result of misrepresentations by Katsikonouri when the policy was purchased (there were previous fire losses that were undisclosed). National and others brought an action against Simcoe et al. in reliance upon the standard mortgage clause contained in the fire policy: “this insurance...is and shall be in force notwithstanding any act, neglect, omission or misrepresentation attributable to the mortgagor, owner or occupant of the property insured...”.

In examining the effect of the standard mortgage clause, Justice La Forest, in writing for the majority, affirmed the principles discussed in his dissent in *Scott, supra*, and stated that insurance contracts should be interpreted as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law:

*Additionally, I am of the view that to adopt the interpretation of the Court of Appeal would be to ignore the well-recognized principle that it is necessary to interpret insurance contracts as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law. I have elaborated (in dissent) on this principle in Scott v. Wawanesa Mutual Insurance Co., [1989] 1 S.C.R. 1445, at pp. 1454-55. Here, in the absence of clear and explicit language pointing to a different meaning in the policy itself, I am at a loss to see how mortgagee purchasers of fire insurance, on reading that their coverage will not be denied for "any" misrepresentations or omissions of their mortgagor, could be expected to do other than take this statement at face value. If, in fact, the insurer were reserving to itself the right to invalidate the coverage of the mortgagee as a result of some misrepresentations and omissions of the mortgagor (i.e., those made at the inception of the contract between the insurer and the mortgagor), I would hold that it was incumbent on the insurer, in drafting its insurance form, to make this known in clear, express and easily intelligible terms. It can hardly be expected that a mortgagee deduce, on the basis of the type of subtle analysis engaged in by the Court of Appeal, that the insurer, despite expressly saying that coverage will not be denied for*

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<sup>8</sup> *Ibid.* at 1454-55.

<sup>9</sup> [1990] 2 S.C.R. 1029.

*"any" omissions and misrepresentations of the mortgagor, has, in fact, meant to say that coverage will not be denied for "some" omissions and misrepresentations.<sup>10</sup>*

**E. *Brissette Estate v. Westbury Life Insurance Co.*<sup>11</sup>**

A married couple, Gerald Brissette and Mary Brissette, purchased a life insurance policy from Westbury Life Insurance Co., formerly Pitts Life Insurance Company ("**Westbury**"), for a term of five years in the amount of \$200,000, which was payable to the survivor. Two years after the policy was purchased, Gerald Brissette murdered his wife and made a claim against Westbury for the proceeds of the policy.

The Court was asked to consider whether Westbury was absolved from paying anything under the life insurance policy given the circumstances of Mary Brissette's demise. In writing for the majority, Justice Sopinka discussed the principles of contract interpretation:

*In interpreting an insurance contract the rules of construction relating to contracts are applied as follows:*

*(1) the court must search for an interpretation from the whole of the contract which promotes the true intent of the parties at the time of entry into the contract;*

*(2) Where words are capable of two or more meanings, the meaning that is more reasonable in promoting the intention of the parties will be selected;*

*(3) Ambiguities will be construed against the insurer;*

*(4) An interpretation which will result in either a windfall to the insurer or an unanticipated recovery to the insured is to be avoided...<sup>12</sup>*

In the dissent, Justice Cory also commented on the basic rules for interpreting insurance contracts:

*A policy of insurance constitutes a contract. Yet there are some significant differences between a contract of insurance and an ordinary commercial contract. It must be remembered that the policy itself is drawn by the insurance company. It is the insurance company that chooses the language which sets out the terms and conditions of the policy. That language is not always a model of clarity which can be readily understood by laypersons. The policy is not negotiated between the parties. Rather it is submitted to a potential policy holder on a take-it-or-leave-it basis, with, I am sure, an emphasis by the insurance company representatives on benefits that the purchaser will receive...*

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<sup>10</sup> *Ibid.* at 1043.

<sup>11</sup> [1992] 3 S.C.R. 87.

<sup>12</sup> *Ibid.* at 92-3.



(ii) *The Canadian Approach*

*It has been held that the reasonable intention of the parties must be taken into account in the interpretation of the policy. Generally it would be expected that the intention of the parties entering into a life insurance contract would be that the insurance company would pay out the sum stipulated by the policy upon the death of the insured party, provided that the death was not within one of the listed exceptions to the policy. The principle that the reasonable intention of the parties must be taken into account in the interpretation of insurance contracts was set out by this court in Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888...*

*That same case also stressed the principle that any ambiguities found in the insurance contract should be construed in favour of the insured...*

*In Wigle v. Allstate Insurance Co. of Canada (1984), 49 O.R. (2d) 101 (leave to appeal to S.C.C. refused, [1985] 1 S.C.R. v), the Ontario Court of Appeal considered the principles that should be applied to an interpretation of a standard policy of insurance. There the majority of the court adopted some but certainly not all of the rules that have been applied in the United States to the interpretation of an insurance contract. It was said that the basic rules which should apply are as follows, at p. 117:*

- 1. the court should look at the words in the contract to determine if there is ambiguity;*
- 2. the court should ascertain the intention of the parties concerning specific provisions by reference to the language of the entire contract;*
- 3. the court should construe ambiguities found in the insurance contract in favour of the insured, and*
- 4. the court should limit the construction in favour of the insured by "reasonableness"... .*

*In my view, it is just and appropriate that the rules referred to in those cases be applied in interpreting insurance contracts.<sup>13</sup>*

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<sup>13</sup> *Ibid.* at 101-06.

**F. *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*<sup>14</sup>**

The appellant, Simcoe and Erie General Insurance Company, insured the respondent, Reid Crowther & Partners Limited (“**Reid Crowther**”), a professional engineering firm, for third party liability pursuant to the terms of a “claims-made” policy. Reid Crowther designed and supervised the construction of a municipal sewage and water system that was defective, and admitted to improperly supervising the project. Reid Crowther sought coverage under the policy.

In writing for the Court, Justice McLachlin cites some general principles of interpretation and expands upon the “reasonable expectation” doctrine:

*This brings me to the question raised by the first issue: does the word “claim” in Part I, Clause IV of the policy include a demand for compensation made after expiry of the policy for an error, omission or negligent act for which a prior demand was made within the policy period?*

*As suggested above, the distinction between “claims-made” and “occurrence” policies does not resolve this question. In each case the courts must examine the provisions of the particular policy at issue (and the surrounding circumstances) to determine if the events in question fall within the terms of coverage of that particular policy. This is not to say that there are no principles governing this type of analysis. Far from it. In each case, the courts must interpret the provisions of the policy at issue in light of general principles of interpretation of insurance policies, including, but not limited to:*

*(1) the contra proferentum rule;*

*(2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and*

*(3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.*

...

*I turn to the third relevant principle of construction, the reasonable expectations of the parties. Without pronouncing on the reach of this doctrine, it is settled that where the policy is ambiguous, the courts should consider the reasonable expectations of the parties: *Wigle v. Allstate Insurance Co. of Canada* (1984), 49 O.R. (2d) 101 (C.A.), leave to appeal to S.C.C. refused,*

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<sup>14</sup> [1993] 1 S.C.R. 252.

*[1985] 1 S.C.R. v. The insured's reasonable expectation is, at a minimum, that the insurance plan will provide coverage for legitimate claims on an ongoing basis. The presumption must be that the intention of the parties is to provide and obtain coverage for all legitimate claims on an ongoing basis, whether through renewal with the same insurer or through securing new insurance with a different insurer. This presumption is consistent with the discovery principle discussed earlier in these reasons, in that the insurer is able to secure a means of certainty in calculating its risk without unfairly creating gaps in coverage. Yet the construction of the policy which the insurer urges upon us may well not achieve that goal.<sup>15</sup>*

**G. Non-Marine Underwriters, Lloyd's of London v. Scalera<sup>16</sup>**

The issue in *Non-Marine Underwriters* was whether an insurance company was obliged to defend and indemnify its insured for alleged sexual assaults under a homeowner's insurance policy. The policy provided coverage for "compensatory damage because of bodily injury" arising from the insured's personal actions, excepting "bodily injury or property damage caused by any intentional or criminal act." The Court ruled against the appellant, Vincent Scalera, and held there was no duty to defend. In his reasons (concurring with the majority but for different reasons), Justice Iacobucci relied on the principles of reasonable expectations of the parties and *contra proferentem*, and also discussed the underlying economic rationale for insurance in his analysis:

*To begin with, I should like to discuss briefly several principles that are relevant to the interpretation of the insurance policy in question. While these principles are merely interpretive aids that cannot decide any issues by themselves, they are nonetheless helpful when interpreting provisions of an insurance contract.*

*(i) The General Purpose of Insurance*

*It is important to keep in mind the underlying economic rationale for insurance. C. Brown and J. Menezes, Insurance Law in Canada (2nd ed. 1991), state this point well at pp. 125-26:*

*Insurance is a mechanism for transferring fortuitous contingent risks. Losses that are neither fortuitous nor contingent cannot economically be transferred because the premium would have to be greater than the value of the subject matter in order to provide for marketing and adjusting costs and a profit for the insurer. It follows,*

<sup>15</sup> *Ibid.* at 268-71.

<sup>16</sup> 2000 SCC 24.

*therefore, that even where the literal working of a policy might appear to cover certain losses, it does not, in fact, do so if (1) the loss is from the inherent nature of the subject matter being insured, or (2) it results from the intentional actions of the insured.*

*In other words, insurance usually makes economic sense only where the losses covered are unforeseen or accidental: "The assumptions on which insurance is based are undermined if successful claims arise out of loss which is not fortuitous"...This economic rationale takes on a public policy flavour where, as here, the acts for which the insured is seeking coverage are socially harmful. It may be undesirable to encourage people to injure others intentionally by indemnifying them from the civil consequences. On the other hand, denying coverage has the undesirable effect of precluding recovery against a judgment-proof defendant, thus perhaps discouraging sexual assault victims from bringing claims...*

*(ii) Contra Proferentem*

*Since insurance contracts are essentially adhesionary, the standard practice is to construe ambiguities against the insurer...A corollary of this principle is that "coverage provisions should be construed broadly and exclusion clauses narrowly"...Therefore one must always be alert to the unequal bargaining power at work in insurance contracts, and interpret such policies accordingly.*

*(iii) Reasonable Expectations*

*Where a contract is unambiguous, a court should give effect to the clear language, reading the contract as a whole...Where there is ambiguity, this Court has noted "the desirability ... of giving effect to the reasonable expectations of the parties"...*<sup>17</sup>

**H. *Derksen v. 539938 Ontario Ltd.***<sup>18</sup>

In *Derksen*, a contractor, 539938 Ontario Inc., operating under the name "Roy's Electric", had contracted to lay cable. During the site clean-up, one of the employees of Roy's Electric left a steel base plate unsecured at the rear of his supply truck. As he drove away, the steel base plate flew off the compressor unit and through the window of an oncoming school bus, killing one child and seriously injuring three others.

The truck was covered by an automobile insurance policy. Roy's Electric also had a CGL policy and an excess coverage policy. The issue for this Court was whether coverage under the CGL policy was excluded by the automobile exclusion clause in that policy.

<sup>17</sup> *Ibid.* at 590-91.

<sup>18</sup> 2001 SCC 72.

In writing for the Court, Justice Major confirmed the principles of interpretation of insurance policies as stated in *Reid Crowther, supra*:

Whether an exclusion clause applies in a particular case of concurrent causes is a matter of interpretation. This interpretation must be in accordance with the general principles of interpretation of insurance policies. These principles include, but are not limited to:

*(1) the contra proferentum rule;*

*(2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and*

*(3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.<sup>19</sup>*

**I. *Oldfield v. Transamerica Life Insurance Co. of Canada*<sup>20</sup>**

The respondent, Maria Oldfield, and her husband, Paul, separated in 1995. They agreed that Paul Oldfield would maintain sufficient life insurance coverage in lieu of child and spousal support, and that Maria Oldfield would be the name beneficiary. Paul Oldfield died while carrying cocaine-filled condoms in his stomach, which burst. Maria Oldfield claimed the proceeds of the life insurance policy and the appellant, Transamerica Life Insurance Company of Canada (“**Transamerica**”), refused to pay. Transamerica denied the claim on the basis of public policy that a person should not be allowed to insure against his own criminal act.

Justice Major wrote the unanimous decision of the Court and concluded that the public policy exception operates independently from the rules of contract interpretation:

*The public policy rule at issue is that a criminal should not be permitted to profit from crime. Unless modified by contract, public policy operates independently of the rules of contract...*

*Generally, though, an insurer seeks the shelter of public policy rules because they have failed to specifically provide for the contingency that gives rise to the dispute. In the present appeal, the insurance policy did not provide for the result that would occur if the insured died while committing a criminal act. If the policy specifically excluded coverage, there would be no need to resort to public policy.<sup>21</sup>*

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<sup>19</sup> Ibid. at 417-18.

<sup>20</sup> 2002 SCC 22.

<sup>21</sup> Ibid. at 747-48.

**J. *Somersall v. Friedman***<sup>22</sup>

The respondents, Pearl Somersall and Gwendolyn Somersall, suffered injuries in a motor vehicle accident at the hands of an underinsured motorist. They recovered a portion of their damages from the underinsured motorist up to his policy limits, and then agreed not to pursue him personally for the excess (the “**Limits Agreement**”). The respondents then sought to recover the remainder of their losses from the appellant, Scottish & York Insurance Co. Ltd. (“**Scottish**”), pursuant to their underinsured driver coverage. Scottish denied the claim on the basis that the respondents interfered with its subrogation rights.

The majority of the Court held that that the Limits Agreement, like a limitation period, did not block the action and had no bearing on the right of the insured against the tortfeasor at the time of the accident. Justice Iacobucci relied on the principle of *contra proferentem* in his analysis:

*Although the language of a contract is always the first and most important matter to be examined in interpreting its terms, I prefer to preface this by recalling the applicable principles of insurance law, both interpretive and substantive.*

*The applicable principle of interpretation is that we interpret insurance contracts contra proferentem, or in favour of the insured. In Non-Marine Underwriters, Lloyd's of London v. Scalera, [2000] 1 S.C.R. 551, 2000 SCC 24, at para. 70, in comments reaffirmed in Derksen v. 539938 Ontario Ltd., [2001] 3 S.C.R. 398, 2001 SCC 72, the Court said:*

*Since insurance contracts are essentially adhesionary, the standard practice is to construe ambiguities against the insurer... . A corollary of this principle is that "coverage provisions should be construed broadly and exclusion clauses narrowly"... . Therefore one must always be alert to the unequal bargaining power at work in insurance contracts, and interpret such policies accordingly.*<sup>23</sup>

**K. *Martin v. American International Assurance Life Co.***<sup>24</sup>

In *Martin, supra*, the Court examined the proper interpretation of an accidental death benefit provision in a life insurance policy. The insured, Dr. Edward Joseph Easingwood, was a physician who developed an addiction to opiate medications. Dr. Easingwood was found dead in his office and the coroner concluded he died from an overdose caused by an intravenous injection of Demerol. Dr. Easingwood's life insurance policy stipulated that coverage would be provided only for deaths effected through "accidental means".

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<sup>22</sup> 2002 SCC 59.

<sup>23</sup> *Ibid.* at 136-37.

<sup>24</sup> 2003 SCC 16.

In concluding that the respondent (beneficiary) was entitled to the payment of the accidental death benefits, Justice McLachlin gave effect to the reasonable expectations of the parties:

*In my view, the phrase "accidental means" conveys the idea that the consequences of the actions and events that produced death were unexpected. Reference to a set consequences is therefore implicit in the words "means". "Means" refers to one or more actions or events, seen under the aspect of their causal relation to the events they bring about.*

...

*This interpretation of death by accidental means accords with the ordinary meaning of the phrase...*

*This reading of the phrase "accidental means" also accords with the principle that insurance contracts must be interpreted in a manner that gives effect, as far as is possible, to the reasonable expectations of the parties (Reid Crowther, supra). The appellants suggest that the reasonable expectations of insurers will only be respected if death by "accidental means" is read as excluding any death that is the natural result of a deliberate action. However, it is not clear that most insurers do expect the phrase to be interpreted in this narrow way, and not clear that they could reasonably expect this. This is so for two reasons. Firstly, if death by "accidental means" were read in this way, it would imply that many actions which the ordinary person would unhesitatingly classify as "accidental" means of death were not. It would imply, for instance, that a person who drinks a lethal substance believing it to be water does not die by "accidental means"; or that where, as in *Glenlight Shipping*, supra, a person drives his car off the deck of a ferry in the erroneous belief that it has docked and is then drowned, death is not by "accidental means". Secondly, the expectations of the insurers are not the only expectations at issue. The insured party also has expectations that must be taken into consideration. Any adequate interpretation of "accidental means" must attempt to strike a balance between these two sets of expectations, and the two sets of interests that underlie them. Insurers cannot reasonably expect the court to adopt an interpretation that gives more protection to their interests than to those of the insured.<sup>25</sup>*

#### **L. *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*<sup>26</sup>**

The appellant, Jesuit Fathers of Upper Canada (the "Jesuits"), operated and administered an Indian residential school from 1913 to 1958. The Jesuits purchased a CGL policy in 1988, which provided for errors and omissions insurance with respect to professional services. Through various means, the Jesuits became aware of allegations of abuse of students at the school. Once the Jesuits were aware of

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<sup>25</sup> Ibid. at 164-66.

<sup>26</sup> 2006 SCC 21.

the issue, they wrote to Guardian Insurance Co. of Canada (“**Guardian**”) and put Guardian on notice of the possibility of future claims. After receiving notice, Guardian refused to renew the CGL policy and defend the Jesuits for future abuse claims.

In delivering the judgment on behalf of the Court, Justice LeBel systematically went through the principles of interpretation as discussed in *Scalera, supra*, and found that the context of the particular risk must also be taken into account when assessing an insurance contract:

(2) *Interpretation of Insurance Policies*

(a) *Rules of Interpretation*

*Insurance policies form a special category of contracts. As with all contracts, the terms of the policy must be examined, in light of the surrounding circumstances, in order to determine the intent of the parties and the scope of their understanding. Nevertheless, through its long history, insurance law has given rise to a number of principles specific to the interpretation of insurance policies. These principles were recently reviewed by this Court in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551, 2000 SCC 24. They apply only where there is an ambiguity in the terms of the policy.*

*First, the courts should be aware of the unequal bargaining power at work in the negotiation of an insurance contract and interpret it accordingly. This is done in two ways: (1) through the application of the *contra proferentem* rule; (2) through the broad interpretation of coverage provisions and the narrow interpretation of exclusions. These rules require that ambiguities be construed against the drafter. In most policies, the drafter is the insurer and the insured is essentially required to adhere to the terms set out by the insurer. Of course, in a case like this one, where it appears that the policy was negotiated (and drafted, in part) by an insurance broker who selected from standard clauses, the identity of the drafter is less obvious. In *Reid Crowther, McLachlin J.* interpreted ambiguities against the insurer even though the custom policy was arranged through a broker. This may be, in part, a recognition by this Court that even where an insurance broker is involved, an imbalance in negotiating power may remain a characteristic of the relationship between insurer and insured. In this case, the trial judge found, as a matter of fact, that the double endorsement requirement imposed by the insurer gave it the “upper hand” in the negotiations (para. 18). In any event, as I will find that there is no ambiguity in the Policy, it will be unnecessary to resort to these principles.*

*Second, the courts should try to give effect to the reasonable expectations of the parties, without reading in windfalls in favour of any of them. In essence, “the courts should be loath to support a*



*construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract"...*

*Finally, the context of the particular risk must also be taken into account. The appellant put considerable emphasis on this factor in its argument on the scope of its coverage.<sup>27</sup>*

**M. Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada<sup>28</sup>**

The central issue in *Canadian National Railway Co., supra*, was the interpretation of the “faulty or improper design” exclusion within the context of an all-risks insurance policy. The appellant, Canadian National Railway Company (“CNR”), developed a process to design and construct a customized tunnel boring machine (“TBM”), the purpose of which was to drill a tunnel under the St. Clair River between Sarnia, Ontario and Port Huron, Michigan. The TBM was a state-of-the-art machine and was insured by CNR for “all risks of direct physical loss or damage...to all real and personal property...”. The policy did not insure “the cost of making good...faulty or improper design. In November 1993, the TBM sustained significant damage during operations and drilling was halted. CNR sought indemnity under the policy and the respondent, Royal and Sun Alliance Insurance Company, denied coverage based upon the aforementioned “faulty or improper design” exclusion.

In finding in favour of CNR and allowing the appeal, Justice Binnie relied on the principles set out in *Consolidated, supra*, and clarified the doctrine of *contra proferentem* in the context of manuscript policies:

*Some general principles governing the interpretation of insurance policies were set out by Estey J. in Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1 S.C.R. 888, at p. 901:*

*Even apart from the doctrine of contra proferentem as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted...*

*The key question that divided the Court of Appeal majority and the trial judge was how to define the scope of the "faulty or improper design"*

<sup>27</sup> Ibid. at 758-59.

<sup>28</sup> 2008 SCC 66.

*exclusion within the context of an "all risks" insurance policy which must be read as a whole: Parsons v. Standard Fire Insurance Co. (1880), 5 S.C.R. 233, at p. 238; Consolidated-Bathurst, at p. 899. In Reid Crowther & Partners, McLachlin J. observed that "coverage provisions should be construed broadly and exclusion clauses narrowly" (p. 269).*

*The CNR contends that the terms of the policy should also be read contra proferentem. However, while the language of the exception was fairly standard for an "all risks" policy, the entire policy had been negotiated between sophisticated parties. It was a "manuscript policy" rather than a policy of adhesion. The expression "faulty or improper design" requires interpretation but I do not think it is ambiguous. The contra proferentem principle applies, if at all, only "when all other rules of construction fail": Stevenson v. Reliance Petroleum Ltd., [1956] S.C.R. 936, at p. 953. In this case other rules of construction are adequate.*

#### **N. Co-operators Life Insurance Co. v. Gibbens<sup>29</sup>**

This appeal concerns a claim under an accident insurance policy. The respondent, Randolph Charles Gibbens ("Gibbens"), had unprotected sex with three different women and contracted genital herpes, which caused paralysis. Gibbens claimed compensation under a group insurance policy on the basis that the paralysis resulted "directly and independently of all other causes from bodily injuries occasioned solely through external, violent and accidental means, without negligence".

In allowing the appeal and dismissing Gibbens claim for coverage, Justice Binnie, writing for the Court, commented on the general principles of interpreting contracts of insurance and the need for continuity:

*The courts have developed a number of general interpretative principles that reflect a concern that customers not suffer from the imbalance of power that often exists between insurers and the insured but, on the other hand, that customers obtain no greater coverage than they are prepared to pay for. The exercise of interpretation should avoid "an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted"...*

(1) *Words Like "Accident" Should Be Given Their Ordinary Meaning*

21 *In Mutual of Omaha Insurance Co. v. Stats, [1978] 2 S.C.R. 1153, Spence J. stated that the word "accident" is "an ordinary word to be interpreted in the ordinary language of the people" (p. 1164). Such terms should be construed "as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law"...*

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<sup>29</sup> 2009 SCC 59.

(2) *A Generous Interpretation Should Be Given to the Term "Accident", Unless a Policy Clearly Restricts It*

*In Walkem, Pigeon J. observed that the jurisprudence assigns a generous meaning to "accident" in the absence of limiting language in the policy (p. 316). Yet, generosity has its limitations as a principle of contractual interpretation. Insurance is written to protect against certain defined risks. Care should be taken not to convert, for example, an accident policy into a general health, disability, or life insurance policy. Accident insurance is relatively cheap compared to the more comprehensive forms of insurance.*

...

(3) *The Words of an Insurance Contract, When Ambiguous, Should Be Construed Against the Drafter (i.e. the Insurer) (Contra Proferentem)*

*Whoever holds the pen creates the ambiguity and must live with the consequences. In Brissette Estate v. Westbury Life Insurance Co., [1992] 3 S.C.R. 87, at p. 114, Cory J. wrote:*

*It is right and just to interpret the ambiguities in favour of the insured. It is the insurance company which draws up a contract of insurance. It is the company which determines the clauses which will go into a standard form of contract. It is that standard form of contract which is offered to the people in all walks of life on a take-it-or-leave-it basis.*

*(See also Consolidated-Bathurst, at p. 899.)*

*This doctrine is complemented by other rules of contractual interpretation which can assist courts where ambiguity is present. None is relevant here.*

(4) *Where a Policy Is Ambiguous, Effect Should Be Given to the Reasonable Expectations of the Parties*

*In Consolidated-Bathurst, Estey J. wrote at pp. 901-2 that the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract. Similarly, in Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co., [1993] 1 S.C.R. 252, McLachlin J. urged "the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties" (p. 269).*

(5) *Continuity of Interpretation*

*As Newbury J.A. pointed out in the court below, “courts will normally be reluctant to depart from [authoritative] judicial precedent interpreting the policy in a particular way” (para. 30) where the issue arises subsequently in a similar context, and where the policies are similarly framed. Certainty and predictability are in the interest of both the insurance industry and their customers...<sup>30</sup>*

**O. *Progressive Homes Ltd. v. Lombard General Insurance Company of Canada*<sup>31</sup>**

*Progressive Homes, supra*, is the last in a six-year long string of cases dealing with CGL coverage for construction deficiencies and resulting damage. In an unanimous decision of the Court, Justice Rothstein held that claims for physical damage to a building resulting from construction deficiencies were covered by a typical CGL policy to the extent that the insurer’s duty to defend such claims was triggered. In his analysis, Justice Rothstein provides the following brief review of the general principles of insurance policy interpretation:

*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...*

*Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction...For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties...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...Courts should also strive to ensure that similar insurance policies are construed consistently...These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.*

*When these rules of construction fail to resolve the ambiguity, courts will construe the policy contra proferentem - against the insurer...One corollary of the contra proferentem rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly...*

...

*CGL policies typically consist of several sections...The policy will set out the types of coverage contained in the agreement, for example, property damage caused by an accident.*

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<sup>30</sup> Ibid. at 616-19.

<sup>31</sup> 2010 SCC 33.

*This is typically followed by specific exclusions to coverage. Exclusions to not create coverage – they preclude coverage when the claim otherwise falls within the initial grant of coverage. Exclusions, should, however, be read in light of the initial grant of coverage...*

*A CGL policy may also contain exceptions to exclusions. Exceptions also do not create coverage – they bring an otherwise excluded claim back within coverage, where the claim fell within the initial grant of coverage in the first place...Because of this alternating structure of the CGL policy, it is generally advisable to interpret the policy in the order described above: coverage, exclusions and then exceptions.*

...

*The focus of insurance policy interpretation should first and foremost be on the language of the policy at issue. General principles of tort law are no substitute for the language of the policy...*

## **II. THE ELEVEN PRINCIPLES OF INTERPRETING INSURANCE POLICIES**

Upon reflection, there are a number of principles of insurance contract interpretation that have been highlighted by the Supreme Court of Canada in the past 30 years. Whether you are an insurer, insurance broker, adjuster or an insured, these principles can be drawn upon to provide guidance and authority:

1. When the policy language is unambiguous, courts should give effect to clear language, reading the contract as a whole;
2. When the policy language is ambiguous, courts should rely on the general rules of contract construction and insurance contract interpretation;
3. Insurance policies should be interpreted in the following order: coverage, exclusions and then exceptions;
4. Insurance policies, other than manuscript policies, should be interpreted *contra proferentem* (against the Insurer) and only when all other rules of construction fail;
5. Coverage provisions should be construed broadly and exclusion provisions should be construed narrowly (corollary of *contra proferentem*);
6. The language employed in the policy is to be given its ordinary meaning, such as the average policy holder of ordinary intelligence, as well as the insurer, would attach to it;
7. Policies should not be interpreted in a manner 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;

8. The reasonable expectations of the parties must be taken into account in the interpretation of the policy, so long as such an interpretation can be supported by the text of the policy;
9. There should be a continuity of interpretation; similar insurance policies must be construed consistently;
10. The general purpose of insurance and its underlying objectives may be referenced when interpreting a policy; and
11. Public policy considerations may be taken into account to exclude coverage under a policy of insurance.

**Nigel P. Kent**

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