THE LAWYER'S DAILY

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Insurance

Appeal Court ruling on data exclusion clauses significant for insurance bar, say lawyers

By **John Schofield**

(March 26, 2021, 8:07 AM EDT) -- Insurance lawyers are hailing a recent Ontario Court of Appeal decision as the high court's first test of data exclusion clauses that are increasingly a fixture of commercial general liability policies.

"It's a case that's right on topic with what is happening in the data and cyberworld," Deepshika Dutt, a Toronto-based partner with Dentons said of the Appeal Court's March 15 unanimous decision in *Family and Children's Services of Lanark, Leeds and Grenville v. Co-operators General Insurance Company* 2021 ONCA 159.

Deepshika Dutt, Dentons

"There aren't that many insurance cases, especially in Canada, that talk about that area of jurisprudence at all," she added. "It's also interesting because I think we'll see more and more of these issues as people continue to depend on technology and the cyberworld more and more."

In applying established principles of insurance contract interpretation to this new area, the Court of Appeal ruled that Co-operators General Insurance Company of Guelph, Ont., did not owe a duty to defend Brockville, Ont.-based Family and Children's Services of Lanark, Leeds and Grenville (FCSLLG) or Peterborough, Ont. consulting firm Laridae Communications Inc. in two lawsuits stemming from an April 2016 data hack that targeted FCSLLG. The hacker took a confidential report that contained details about case files and investigations involving 285 people and posted a hyperlink to the report on two Facebook pages.

In the wake of the hack, FCSLLG was hit with a $75-million class action alleging that the agency was negligent in securing its website and that the leaked document contained defamatory material. FCSLLG in turn launched a third-party claim against Laridae for negligence and breach of contract.

Both FCSLLG and Laridae were insured by Co-operators and argued that the insurer had a duty to defend them in the claims. Co-operators denied having a duty to defend either company because of data exclusion clauses in their policies that exclude claims arising from the distribution or display of data by means of an Internet website.

FCSLLG, Laridae, and Co-operators brought applications to interpret the policies and in her May 2020

judgment, Superior Court Justice Andra Pollak held that the data exclusion clause did not exclude Co-operators' duty to defend the two insured in the class action or the third-party claim. But deeming the matter a "novel interpretation issue," she ruled that the duty to defend should only be decided through a full trial, not by application.

In reasons reported in *Laridae Communications Inc. v. Co-operators General Insurance Co.* 2020 ONSC 2198, she also found that neither FCSLLG nor Laridae had any reporting obligations to Co-operators because of the conflict of interest between the two insured and the insurer.

In its appeal, Co-operators argued that the duty-to-defend issue could properly be determined by way of application and that the data exclusion clauses precluded coverage of both the class action against FCSLLG and the third-party claim brought by FCSLLG against Laridae. Even if there were a duty to defend, it contended, Co-operators would have the right to participate in the insured parties' defences.

The Court of Appeal agreed, relying on key decisions such as *Fort William Band v. Canada (Attorney General)* 76 O.R. (3d) 228; *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada* 2010 SCC 33; *Monenco Ltd. v. Commonwealth Insurance Co.* 2001 SCC 49; and *G & P Procleaners and General Contractors Inc. v. Gore Mutual Insurance Co.* 2017 ONCA 298.

"Like the insurer in *G & P Procleaners*, the Co-operators' policies do not insure against all risks. They clearly articulate what is and is not covered," Court of Appeal Justice Julie Thorburn wrote for the three-judge panel, which included Justice David Brown and supernumerary Justice Alexandra Hoy.

"In summary," she added, "I find that Co-operators owes no duty to defend either FCS or Laridae because (i) the exclusion clauses are unambiguous, (ii) all claims asserted in these proceedings are covered by the clear language of the exclusion clauses, and (iii) denial of coverage would not nullify the policies."

Even if a duty to defend were found, the Appeal Court agreed, it would not deprive Co-operators of its right to participate in the defence, including receiving reports from counsel.

Danielle Marks, SV Law

Danielle Marks, a partner with Guelph-based SV Law who served as counsel for Co-operators with SV Law partner Robert Dowhan and Kenneth Gerry of Richmond Hill, Ont.-based Malach Fidler Sugar + Luxenberg said the decision reinforces the analysis on duty to defend applications and marks the first time, to their knowledge, that a higher court has considered a data exclusion clause.

Prior to the decision, she said, a trend was developing in Ontario for lower courts to interpret exclusion clauses narrowly and forgo the rest of the analysis.

"In this case," she told *The Lawyer's Daily*, "the application "judge really was not comfortable deciding the issue on the duty to defend application, and the Court of Appeal made it absolutely clear

that declining that analysis is not an option, especially, as in this case, where the parties have agreed to proceed by application.

"That's important," she added. "The duty to defend analysis, especially on an application, is important because of the urgency and the need for the clarity and predictability for both the insurers and the insured. It's supposed to be an expedited process because there's always this background proceeding that starts the duty to defend, that starts the claim. And everybody, all the players, are waiting for that analysis by the courts."

Marks said that the determination of whether an insurer has a duty to defend has a significant impact on the strategy of the litigants in the actual claim, so it needs to be an expedited process.

Robert Dowhan, SV Law

Dowhan agreed that the decision sends a clear signal to the courts and the insurance bar. "It's like a beacon, where the court is saying, hey, hold on, you have to do the test that you're obligated to do," he told *The Lawyer's Daily*. "At the same time, the beacon to the bar is don't be afraid to bring an application if the claim falls within the exclusion because the court's going to look at it properly."

The decision also underlines the importance of insurers using plain and simple policy language for easier interpretation, he added, and serves as a message from the courts regarding policy nullification.

"What the court was saying here was, hold on a second, we all know that a commercial general liability policy is the basic policy meant to cover businesses for personal injury and property damage caused by normal and ordinary risks," he said. "You're allowed to exclude, and simply by excluding something doesn't suddenly nullify or render the rest of the coverage in the policy void."

Dutt, who focuses on professional liability, class actions and insurance-related matters as a member of Dentons' litigation and dispute resolution group, said the Court of Appeal hadn't dealt yet with data exclusion clauses because most of coverage issues, especially in the data exclusion realm, end up getting settled before they reach the courts.

She said she wholeheartedly agreed with the Ontario Court of Appeal's decision because courts as high as the Supreme Court of Canada have ruled that the best way to determine a coverage application is on an application record.

"I think the courts have become more and more bold in taking a stance and interpreting contracts of insurance as strictly as they should be," she told *The Lawyer's Daily*, "especially in cases like this where they're not dealing with a poor old lady who slipped and fell. These are sophisticated parties that have entered into sophisticated contracts."

The decision will have clear precedential value, predicted Dutt.

"You don't get coverage decisions every day from the Court of Appeal because they're not as often litigated as they ought to be, frankly," she said. "So it reaffirms a lot of the principles on coverage and I think it is clear guidance on these data exclusion clauses, especially as all of us are going remote and the data world is increasing in its threats. This will provide much needed guidance on that subject."

David Boghosian, a managing partner with Toronto-based Boghosian+Allen LLP who served as counsel for Family and Children's Service of Lanark, Leeds and Grenville, did not respond to a request for comment.

Timothy Hill, a partner with Toronto-based Aird & Berlis LLP, who served as counsel for Laridae Communications Inc. with Aird & Berlis partner Brian Chung also did not reply to a request for comment.

If you have any information, story ideas or news tips for The Lawyer's Daily *please contact John Schofield at* john.schofield@lexisnexis.ca *or call 905-415-5891.*
