SUPREME COURT OF NOVA SCOTIA

Citation: *PK Construction Limited v. Aviva Insurance*, 2020 NSSC 209

Date: 20200730
Docket: Ken No. 487696
Registry: Kentville

Between:

PK Construction Limited

Applicant

v.

Aviva Insurance

Respondent

Judge:	The Honourable Justice John Keith
Heard:	February 26, 2020, in Windsor, Nova Scotia
Counsel:	George MacDonald, Q.C. and George Franklin, for the Applicant
	Nadia MacPhee, for the Respondent

By the Court:

BACKGROUND

[1] The Plaintiff insured operates a construction business and insured all vehicles used in the operation of its business with the Defendant insurer under a commercial automobile insurance policy (the "**Policy**"). The Policy was effective as of June 16, 2013 and continued to be in force until after the accident described below.

[2] One of the vehicles insured by the Defendant under the Policy was a "Ford Cutaway Van (Bus)" (the "**Ford**"). This Ford was a "modified 18-person vehicle which was used to transport employees to job sites and to transport tools." According to the Agreed Statement of Facts, the Ford "was also used as a dry and clean off-site location for meetings and for employees to eat lunch." The insurer's broker "was aware the Ford was being used in the Plaintiff's regular operations, and that one aspect of this use was transporting employees to job sites." The broker was also aware that the Plaintiff's owner, Peter Kalkman, "was using the Ford for personal use"

[3] On Saturday, May 7, 2016, in the late afternoon, the Plaintiff bought (and took delivery of) a new vehicle (the "**Vehicle**"). The insured was unable to notify the insurance broker of the purchase on that day because it was the weekend and Mr. Kalkman did not return from purchasing the Vehicle until after business hours.

[4] The Vehicle was a 1997 Bluebird school bus. Like the Ford, it had the capacity to transport numerous people to job sites. However, it differed from the Ford in several respects:

1. The Vehicle was larger than the Ford;

2. The Vehicle was modified to open at the back to accommodate another vehicle; and

3. Bench seating and a kitchen table had been installed in the Vehicle.

[5] Under the same Policy, the insurer also insured other modified vehicles, including a pickup truck that had been modified for snow removal and a Lincoln Town Car which had been elongated to accommodate additional seating.

[6] The Agreed Statement of Facts indicates that the Plaintiff intended to use the Vehicle in its business. However, and regardless of the insured's intentions, the Vehicle was involved in an accident the day after it was acquired.

[7] On Sunday, May 8, 2016, the Vehicle was involved in a single vehicle accident. Several passengers allege that they sustained injuries. Thus, the Vehicle was both acquired and involved in an accident within a single weekend.

[8] On Monday, May 9, an employee of the insured notified the insurer of the accident and the fact that the Vehicle had just been acquired. Minutes after this initial phone call, the owner of the insured called back to clarify that the Vehicle should not be added to the Policy "on a going forward basis as the Vehicle was no longer usable". The parties agree that the insured "did not indicate that the Vehicle should not be covered by the Policy for the time period from the date of purchase until Monday, May 9, 2016."

[9] Three of the passengers in the Vehicle on the date of the accident subsequently brought claims against the insured.

[10] By letter dated May 31, 2017, the insurer denied coverage. The insurer explained its decision by saying that the Vehicle "would not be considered a 'newly acquired vehicle'. If we had been requested to add it to the policy, we would have refused because it would have involved a material change to the risk insured by your policy." The insurer subsequently cancelled the Policy.

[11] The remaining factual context for determining this issue is contained within the Agreed Statement of Facts, a copy of which is attached as Appendix "A". The parties agree that the statement contains enough information to decide the matter, although the insurer concedes that the Court is obviously not bound by that understanding.

ISSUE

[12] The issue is whether the Vehicle is a "newly acquired vehicle" under the terms of the Policy and, as such, would be automatically insured within 14 days of acquisition – regardless of whether the insurer had either notice, or an opportunity to deny coverage, or an opportunity to charge additional premium for any increased risk.

[13] The insured argues that the Vehicle was automatically covered under the insurance policy for the following reasons:

1. The insurer bears the evidentiary burden of proving there is no coverage (*Ledcor Construction v Northbridge Indemnity Insurance Co*, 2016 SCC 37 ("***Ledcor Construction***")); and

2. The insured simply has to prove that it insured all its vehicles with the insurer; that it actually owns the vehicle; and that notice was provided within 14 days following acquisition - even if the notice occurred after the accident. It relies primarily upon the Nova Scotia decision in *Lane v Young* (1977), 20 NSR (2d) 631, 1977 CarswellNS 288 (SCTD); aff'd (1977), 21 NSR (2d) 420 (CA) ("***Lane***").

[14] The insurer states that the question of whether the new vehicle is covered under the Policy involves an assessment of risk. More specifically, did the new vehicle change the risk which the insurer was prepared to accept? The insurer says that the vehicle in question was not covered because it significantly (or materially) altered the risks contractually assumed by the insurer. For the insurer, risk should be measured against:

1. The nature of the insured's business (i.e. was the new vehicle reasonably related to or necessary for the insured's business); and

2. The nature of the vehicle itself. In this case, the vehicle was a converted bus.

In support of its position, the insurer relies primarily on *Hicks* v *Sinclair*, [2000] NSJ No 214 (SC) ("***Hicks***") and *Bates* v *Pettipas*, (1988), 83 NSR (2d) 94, [1988] NSJ No 62 (SC) ("***Bates***").

[15] The Plaintiff insured brings this motion under "Rule 12 - Question of Law" for an Order that the Vehicle was insured under the Policy and that the Defendant insurer must therefore provide coverage and pay any valid claims arising out of the accident on May 8, 2016.

BRIEF CONCLUSION

[16] The parties concede that the question of law under consideration revolves around the meaning and scope of the phrase "newly acquired vehicle" as found in Nova Scotia's Standard Automobile Policy.

[17] Accepting the agreed facts jointly submitted as accurate:

1. The Vehicle meets the definition of a "newly acquired vehicle" and was automatically covered under the Policy as at the date of the accident on Sunday, May 8, 2018 – which, for clarity, was within the 14-day period immediately following delivery to the insured on Saturday, May 7, 2016; and

2. The Defendant insurer has a duty to defend and pay any valid claims arising out of the accident on May 8, 2016 in accordance with the terms of the Policy.

ANALYSIS

[18] Neither party was able to locate a Canadian case addressing the question of insurance coverage under a commercial policy for an additional vehicle which was involved in an accident within 14 days of delivery. The parties suggest that this is the first case to deal with the issue.

[19] The agreed facts are undoubtedly unique, with the acquisition of the vehicle and accident occurring within a day of one another. To that extent, this may be a novel case. Nevertheless, the existing jurisprudence helps illuminate the applicable legal principles. For that reason, this decision begins with a brief, broad overview as to the nature of insurance; continues with the relevant, specific wording of Nova Scotia's Standard Automobile Policy (focussing on the phrase "newly acquired vehicle") and follows with the principles of contractual interpretation which generally apply to insurance policies. A survey of relevant jurisprudence across the country follows; bearing in mind, of course, the importance of the wording in Nova Scotia's Standard Automobile Policy. The decision continues with a distillation of the applicable legal principles in light of the Policy wording in Nova Scotia; and concludes with my decision on coverage.

What is Insurance?

[20] The business of insurance is premised on the notion that negative events such as accidents, human error, disaster and death are not random whims of fate but, instead, are better seen as various forms of risk that can be identified, measured and mitigated.

[21] As a method of identifying, measuring, and mitigating risk, insurance engages elements of both science and art. Insurance involves the science of statistics and calculating the odds of a certain negative event occurring; quantifying the likely financial consequences if the negative event occurs; and calibrating the cost of coverage (premiums) which an insured must pay to fairly allocate the underlying risks as between the party purchasing insurance coverage and the party providing that coverage.

[22] At the same time, insurance policies necessarily involve language: drafting contractual terms and the art of communication. Describing the risks being insured (and the risks which are excluded from coverage) requires clarity of expression. And unlike mathematical formulas, the words which are used to describe these risks show greater susceptibility to differing and often conflicting interpretations. Indeed, as will be seen below, it is the meaning of the words used to articulate insurance coverage, exemptions and exclusions that sets much of the resulting jurisprudence in motion. That is the case here as the parties argue over the scope and content of a "newly acquired vehicle".

Relevant Sections of Nova Scotia's Standard Automobile Policy

[23] In Nova Scotia, private insurers compete in the automobile insurance marketplace. Alberta, Yukon Territory, Northwest Territory, Ontario, New Brunswick, Newfoundland and Labrador, and Prince Edward Island all share this method for delivering automobile insurance to private customers.[1] Under this system, the terms of automobile insurance are contained within standard policies approved by the government. Moreover, at least in Ontario, there has been a concerted effort to ensure these standard policies be written in "plain language" so as to better ensure that the terms of insurance applicable to the members of the general public might be more easily understood (*Insurance Law in Canada*, at 17.1).

[24] "Section A – Third Party Liability" of the Nova Scotia Standard Automobile Policy confirms coverage for "the automobile". It states, in part:

> The Insurer agrees to indemnify the insured and, in the same manner and to the same extent as if named herein as the insured, every other person who with the insured's consent personally drives the automobile, or personally operates any

[1] In British Columbia, Manitoba, Quebec and Saskatchewan, government insurers provide compulsory minimum coverage.

> part thereof, against the liability imposed by law upon the insured or upon any such other person for loss or damage arising from the ownership, use or operation of the automobile and resulting from BODILY INJURY TO OR DEATH OF ANY PERSON OR DAMAGE TO PROPERTY.

[Emphasis added]

[25] "Section E" of the Policy provides a definition of "the automobile". It confirms that, except where stated to the contrary, "the automobile" means the automobile described in the policy or a "newly acquired vehicle". In this case, if the Vehicle (a converted bus) is covered, it must fit within the definition of a "newly acquired vehicle".

[26] The Policy defines a "newly acquired vehicle" as follows:

> an automobile, ownership of which is acquired by the insured and, within fourteen days following the date of its delivery to him, notified to the Insurer in respect of which the insured has no other valid insurance, if either it replaces an automobile described in the application or the Insurer insures (in respect of the section or subsection of the Insuring Agreements under which claim is made) all automobiles owned by the insured at such delivery date and in respect of which the insured pays any additional premium required; provided, however, that insurance hereunder shall not apply if the insured is engaged in the business of selling automobiles

General Principles for Interpreting Insurance Policies

[27] The Supreme Court of Canada has set out the principles of insurance policy interpretation on several occasions. In *Jesuit Fathers of Upper Canada v Guardian Insurance Co of Canada*, 2006 SCC 21 ("***Jesuit Fathers of Upper Canada***"), for example, Lebel J for the unanimous court, stated:

> 27 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.
>
> 28 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.
>
> 29 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" (*Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, pp. 901‑2; Non‑Marine Underwriters, at para. 71).
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> 30 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.

[28] More recently, in *Ledcor Construction*, Wagner J, for the eight-judge majority, wrote:

> [49] The parties agree that the governing principles of interpretation applicable to insurance policies are those summarized by Rothstein J. in Progressive Homes. The primary interpretive principle is that where the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole: para. 22, citing *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 71.
>
> [50] Where, however, the policy's language is ambiguous, general rules of contract construction must be employed to resolve that ambiguity. These rules include that the interpretation should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the language of the policy; it should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which

> the insurance policy was contracted, and it should be consistent with the interpretations of similar insurance policies. See Progressive Homes, at para. 23, citing *Scalera*, at para. 71; *Gibbens*, at paras. 26-27; and *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, at pp. 900-902.
>
> [51] Only if ambiguity still remains after the above principles are applied can the contra proferentem rule be employed to construe the policy against the insurer: *Progressive Homes*, at para. 24, citing *Scalera*, at para. 70; *Gibbens*, at para. 25; and *Consolidated-Bathurst*, at pp. 899-901. *Progressive Homes* provides that a corollary of this rule is that coverage provisions in insurance policies are interpreted broadly, and exclusion clauses narrowly.
>
> [52] It is also important to bear in mind this Court's guidance in *Progressive Homes* on the "generally advisable" order in which to interpret insurance policies (para. 28). Although that case involved commercial general liability policies and not builders' risk policies, the two types of policies share a similar alternating structure: they set out the type of coverage followed by specific exclusions, with some exclusions containing exceptions. As such, the insured has the onus of first establishing that the damage or loss claimed falls within the initial grant of coverage. The parties in these appeals have conceded that this particular onus has been met: trial judge's reasons, at para. 9. The onus then shifts to the insurer to establish that one of the exclusions to coverage applies. If the insurer is successful at this stage, the onus then shifts back to the insured to prove that an exception to the exclusion applies: see *Progressive Homes*, at paras. 26-29 and 51. Contrary to the Court of Appeal's statement at para. 26 of its reasons that the exclusion and exception in this case must be interpreted "symbiotically", I see no reason to depart from the generally accepted order of interpretation in analyzing the Policy and the Exclusion Clause.

THE CASELAW

Nova Scotia

[29] In Nova Scotia, the jurisprudence consistently confirms the following conclusions:

1. A replacement vehicle is automatically covered as a "newly acquired vehicle" under the Standard Policy for 14 days after acquisition or original use. Moreover, it is not necessary for the insured to have actually sold or disposed of the designated vehicle originally identified in the Standard Policy. If the designated vehicle is inoperative, an alternate vehicle being driven by the insured equally qualifies as a "replacement vehicle" for the purposes of coverage. (*Lane*; *Bates* and *Hicks*);

2. If the insured fails to notify the insurer of the "newly acquired" replacement vehicle within the 14 days set out in the Standard Policy, that omission may be used as a defence to a claim by the insured (e.g. for collision coverage). However, it may not be used as a defence to a claim by a third party against the insured for losses allegedly suffered. The explanation offered by MacKeigan, CJNS in *Lane* is instructive. He interprets the term "Newly Acquired Automobile ... acquired by the Insured" as being specific to the vehicle itself – separate and distinct from the 14-day notice provision. He states:

> I do not look upon the 14 days' notice phrase as part of the description. It is not needed to identify the subject. The rest of the definition is part of the insuring agreement. The notice phrase does not change or refine the definition or make the subject-matter either wider or narrower; it is thus not an exception to or exclusion from the insuring agreement. (at para 6)

Based on this interpretation, MacKeigan, CJ concludes that the notice provision "must then be merely a term of the policy which, if the insured failed to observe it by giving the insurer notice within 14 days of acquiring the replacement car, would cause a lapse in the collision coverage on that car which began the moment it replaced the previous car. Non-compliance with that term would give the insurer a good defence in an action against it by the insured in respect of an accident after the 14-day period had expired." (para 8). However, any default of the notice provision does not offer the insurer a defence against claims from third parties because section 98(4) (now section 133(4)) states:

> 98(4) The right of a person who is entitled under subsection (1) to have insurance money applied upon his judgment or claim is not prejudiced by
>
> . . . . .
>
> (b) any act or default of the insured before or after that event in contravention of this Part or of the terms of the contract;
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> . . . . .
>
> and nothing mentioned in clauses (a), (b) and (c) is available to the insurer as a defence in an action brought under subsection (1).

> MacKeigan, CJ further supports his interpretation of the Standard Policy by raising the question of fair allocation of risk when he asks the rhetorical question:
>
> > Where, as here, no possible prejudice is suffered by the insurer, why is it unfair to hold him liable to third parties for any operation by the insured of a standard vehicle, even though the insurer does not know whether the vehicle is the one described or one which has replaced the one described?"(at para 13)

[30] Four additional observations are germane to the legal question now being posed for judicial determination:

1. The Courts in Nova Scotia disagreed with certain conclusions reached in the earlier Manitoba decision in *Pascoe* v *Provincial Treasurer of the Province of Manitoba*, (1959), 17 DLR (2d) 234, 1959 CarswellMan 11 (Man CA) ("***Pascoe***"). More specifically, in *Lane*, MacKeigan, CJNS disagreed with the findings in *Pascoe* that the obligation to give notice to the Insurer within 14 days of acquiring the new vehicle was a condition precedent to coverage, and that failure to give the requisite notice precluded both the insured and any third party claimant from recovering under the insurance policy. I return to this issue below. For present purposes, I simply observe that this particular issue of notice is of limited relevance to the case at bar as it is agreed that the insured did provide the insurer with notice of the new Vehicle after the accident occurred but, nevertheless, still within the requisite 14-day period;

2. The jurisprudence discussed above is anchored in the earlier, important Supreme Court of Canada decision of Pigeon, J in *General Security Insurance Company of Canada* v *Highway Victims Indemnity Fund*, (1976) 10 NR 335 (SCC). This case is often cited as "*Belanger*" and is referenced in that same way in this decision. While the facts in *Belanger* involved an automobile in the Province of Quebec, many of the underlying-principles were found to be applicable in Nova Scotia.

3. All of the jurisprudence cited above is factually distinguishable from this case in that those cases involved "replacement" vehicles which were substituted for the designated vehicle described in the original contract. In this case, the Vehicle was not replacing an existing automobile but

was being added to the insured's fleet of vehicles under the terms of a commercial automobile insurance policy. There is no caselaw in Nova Scotia which considers the definition of a "newly acquired vehicle" in the context of an *additional* (not replacement) vehicle;

4. The jurisprudence in Nova Scotia rests heavily on the lack of prejudice to the insurer in the replacement vehicle context. In *Lane*, MacKeigan, CJNS applied the following general comment of Pigeon, J in *Belanger*:

> Why should the insurer be entitled to set up against the victims the failure to notify him of a change of care, which causes him no prejudice, when he certainly cannot set up the failure to give notification of an accident, which could be extremely prejudicial to him. (para 16)

Similarly, in the subsequent decisions of *Bates* and *Hicks*, the Court incorporated the following question into the applicable legal test: "Does the risk to the Insurer remain the same, that is, has the failure to notify the Insurer of the change in motor vehicles prejudiced the Insurer?" In both *Bates* and *Hicks*, the Court concluded that, in the specific facts of each case, the prejudice or risk to the Insurer was the same.

Manitoba

[31] As indicated, *Pascoe* determined that the Insurer was not obliged to cover damages claimed by either the insured or any third party where the insured failed to notify the Insurer of a new replacement vehicle within 14 days of acquiring it. Tritschler, JA, writing for the minority, concluded that section 227 of Manitoba's *The Insurance Act*, at the time, did not apply because the insured's failure to provide notice was neither a "default" nor a "violation" under the terms of the policy. Tritschler, JA wrote at paragraph 12:

> In my opinion, there was no default by the insured and no violation by him of the provisions of the Act or of the terms of the policy. If the insured desired to take advantage of the policy's provision for insurance in respect of a "Newly Acquired Vehicle" he was free to do so in the manner prescribed. But he was not under an obligation to do so.

In a separate brief judgment, the majority concurred with Tritscher, JA on this specific point but did not deem it necessary to extend the analysis beyond that point.

[32] Section 227 of the Manitoba legislation is substantially the same as section 98 (now section 133) of Nova Scotia's *Insurance Act*, RSNS 1989, c. 231, as amended 2020, c. 12. Nevertheless, the Courts in Nova Scotia reached a different conclusion on this point. At the risk of repetition, the Courts in Nova Scotia respectfully disagreed with the reasoning in *Pascoe* (see para 29 above). In doing so, the Nova Scotia Courts relied upon the general principles articulated by Pigeon, J in *Belanger*, even though *Belanger* involved a motor vehicle accident in Quebec and a statutory scheme which was somewhat different from either Nova Scotia or Manitoba.

[33] Interestingly, Tritschler, JA also went on to conclude that insurance was not "automatic" during the initial 14-day notice period. However, the majority of the Court of Appeal in *Pascoe* did not support that additional conclusion. In particular, the majority found it unnecessary in the circumstances of that case to make any determination as to whether insurance coverage was "automatic" during the first 14 days of acquiring a new vehicle (see para 2 of Chief Justice Adamson's judgment, concurred in the result by Schultz and Montague, JJA).

New Brunswick

[34] The relevant New Brunswick jurisprudence focuses primarily upon the definition of a "newly acquired automobile", although, again, in the context of a replacement vehicle. In *Cyr* v *Phoenix Insurance Co*, (1972) 5 NBR (2d) 95, [1972] NBJ No 31 (NBCA), Hughes, CJNB concluded that the vehicle in question did not "replace" the original, designated vehicle, but was merely a second vehicle which was purchased at a time when both the second vehicle and the original, designated vehicle were available for the insured to use. Indeed, the insured acquired the second vehicle "for the purpose of repairing and selling it at a profit as soon as he could find a purchaser" (para 14). As such, the insurer was not bound to extend coverage.

[35] The decision is relevant in two respects:

1. First, Hughes, CJNB accepted the plain and ordinary meaning of the words used in the definition. Thus, he concluded that "it is necessary to show that [the alleged replacement vehicle] was acquired to take to take the place of the automobile" (para 14) and, further, that a second vehicle acquired by the insured "in no sense replaced the [original, designated vehicle] which remained in [the insured's] possession and was available for his use" (para 14); and

2. Second, Hughes, CJNB considered the insured's underlying purpose in acquiring the vehicle and concluded that it was not to "replace" the original, designated vehicle.

Alberta

[36] Alberta's jurisprudence reveals increasing alignment over time with basic principles established by the Supreme Court of Canada in *Belanger*.

[37] In *Pannenbecker* v *Dominion of Canada General Insurance Co*, (1977), 76 DLR (3d) 132, 1977 CarswellAlta 222 (SC), a dispute arose between two potential insurers as to which was responsible to provide coverage for certain losses a passenger allegedly suffered during a motor vehicle accident. The facts were somewhat complicated. For the purposes of this decision, the critical question was when an *additional* vehicle (as opposed to a "replacement" vehicle) is covered under the terms of the standard automobile policy in Alberta.

[38] At trial, Laycraft, J determined that:

> …, on the plain wording of s. 5(b), if an insured, all of whose other automobiles are covered by the insurer, purchases an additional automobile, **coverage of the new automobile is automatic during the first 14 days**. If within that period the insurer is notified, coverage continues until an additional premium is required to be paid by the insurer and until (although this point is not necessary to this decision) there has been a reasonable time within which to pay it. If the insurer does not demand an additional premium, coverage continues during the life of the policy. (para 23)

[Emphasis added]

Laycraft, J relied primarily upon American jurisprudence in reaching this conclusion (paras 26 – 27).

[39] Laycraft, J also concluded that the issue was to be determined based on the wording of the policy and that the owner's intention (i.e. whether the owner "intended" to insure the vehicle under her existing insurance policy) was immaterial (para 28).

[40] The decision of Laycraft, J is notable in the context of this case because it analyses the scope of coverage for an "additional" vehicle under Alberta's standard policy. However, the decision was overturned on appeal ((1978), 93 DLR (3d) 450, 1978 CarswellAlta 286 (AD).

[41] The Alberta Supreme Court Appellate Division concluded that it was not necessary to decide whether the registered owner's intention was relevant, or whether coverage under the provision was automatic regardless of notice (paras 22 – 23). Instead, the Court overturned the decision on the basis that the case did not involve a "newly acquired vehicle" at all because the vehicle had never been "delivered" to the insured, as required by the definition. Rather, the vehicle had been delivered to, and operated by, the insured's son (not the insured herself):

> In order to come within the definition it is necessary that there be "delivery". Here there is no evidence at all of physical delivery, nor is there any evidence of a notional or symbolic delivery. There was not a bill of sale or other document proven in evidence that could constitute delivery, neither is there any evidence from which it can be inferred that Mrs. Amendt ever had physical possession of the vehicle. At the time of the registration it appears that Alfred Amendt was in Manitoba and later in Alberta, where he was licensed to drive. (para 24)

[42] In *Fraser* v *Travelers Indemnity Co of Canada*, (1981) 130 DLR (3d) 344, 1981 CarswellAlta 229 (ABQB) ("***Fraser***"), the issue of a "replacement" vehicle again arose. In addition, the Court considered the significance of notice to the insurer. The Plaintiff insured and a friend jointly acquired a 1971 Capri on September 16, 1978. On December 16, 1978, the Plaintiff purchased the car outright and became its sole owner. Later that same day (December 16, 1978), the Plaintiff was in an accident while driving the Capri. The car was demolished, and the Plaintiff became subject to third party claims.

[43] The Plaintiff testified that he intended to designate the 1971 Capri as a substitute vehicle but thought he had 14 days to do so after acquiring sole ownership. At all material times, the Plaintiff had insurance for a 1973 Charger under a policy issued by the Defendant/insurer. The Plaintiff stated that he did not intend to re-sell the Charger but, instead, would drive the 1971 Capri while the 1973 Charger was in the shop for improvements.

[44] Wachowich, J concluded that the Plaintiff insured's intentions were irrelevant. Wachowich, J further cited the decision of the New Brunswick Court of Appeal in *Cyr* and observed that a "replacement" vehicle involves "disposal in some conspicuous fashion" of the original vehicle and required "replacement in use" – none of which occurred in the facts before him (para 13).

[45] That said, Wachowich, J's decision ultimately turned on the issue of notice. He concluded that:

1. The Plaintiff insured "acquired ownership, delivery and control" of the 1971 Capri on September 16, 1978 when the car was jointly purchased by him and a friend. Thus, the 14-day notice period began to run from that date – not December 16, 1978 when he acquired sole ownership; and

2. "… the obligation of the defendant [insurer] to provide coverage would be based upon notification by the plaintiff [insured] to the insurer within 14 days of the date of acquisition of ownership, that is to say, September 16, 1978. This requirement was not met and accordingly, the defendant's [insurer's] obligation never arose." (at para 14)

[46] The Alberta Court of Appeal summarily dismissed the insured's appeal and in a brief statement concluded, "We agree with the conclusion of the learned trial judge that the vehicle in question, the Capri, was not a replacement vehicle whether viewed subjectively or objectively" ((1983), 148 DLR (3d) 191, 1983 CarswellAlta 504 (CA), at para 3).

[47] In *Hogan v Kolisnyk*, (1983), 25 Alta LR (2d) 17, [1983] AJ No 846 (QB) ("***Hogan***"), the Plaintiff Hogan obtained judgment against the defendant, Kolisnyk, for damages arising out of a motor vehicle accident. The question became whether the third party, Security Mutual Casualty Company, was liable to indemnify the defendant against the plaintiff's judgment.

[48] The defendant's-wife owned and operated a small private company called Melodies. After their marriage, the defendant and his wife worked together in the gravel trucking business and also in farming operations in Thorhild, Alberta. Both the defendant and his wife operated the equipment owned by Melodies as a family business. The Pontiac station wagon owned and insured by Melodies was used by the couple in the gravel trucking business purposes. However, it also served as their family car, and was used in their farming operations.

[49] The defendant and his wife decided that the Pontiac no longer served their purposes and determined that a half-ton Ford truck with additional passenger accommodation would better suit their business needs, while also being suitable for family pleasure usage. They acquired a 1980 Ford half-ton Lariat Model within 14 days of the accident which gave rise to the loss. At the same time, they also traded in the Pontiac station wagon.

[50] The defendant and his wife gave evidence that they did not think the accident was serious and they were unaware of the extent of the plaintiff's injury

and therefore, it did not occur to them to immediately notify the insurer about the accident. On September 25, 1980, the defendant was served with a statement of claim by the plaintiff's solicitor. The defendant notified the insurer on that same day.

[51] The insurer took the position that it was not on risk on August 28 because the vehicle was not a "newly acquired vehicle". The insurer further argued that the insured breached the 14-day notice provisions, thereby relieving it of any liability to indemnify the insured.

[52] On the definition of a "newly acquired vehicle" and, or in this case, whether the Ford truck replaced the Pontiac station wagon, the Court concluded that the insured met the two concerns (or preconditions) necessary to qualify as a "newly acquired vehicle". Both preconditions may be traced back to both the terms of insurance and the underlying question of risk. Miller, J concluded that:

> I am satisfied that the Ford meets the two pre-conditions namely, the Pontiac was disposed of at the time of the purchase of the Ford, so that no question arises of whether the insurer was at risk over more than one vehicle, and, secondly, that the disposition was simultaneous with the acquisition of the new vehicle. *If it were found to be necessary, I would also hold that the Ford was to be used for the same business and family purposes as the Pontiac had previously been employed.* (at para 25)

[emphasis added]

[53] As to the issue of notice, Miller, J determined that "there must have been something tangible intended by the insertion in the standard automobile policy of the 14-day notice clause". He continued that "this clause is a pragmatic recognition of the business fact that many purchasers of new vehicles would not automatically think of notifying their insurers of the existence of a replacement vehicle and is an obvious intent to give them some leeway in the matter without losing coverage" (para 47).

[54] As a further, important observation, Miller, J noted that "the insurer has collected a premium for bearing the risk of protecting the insured during the full term of the policy" (para 47). The "full term of the policy" included the 14-day notice period.

[55] Miller, J concluded that "coverage in this case was in effect under the Security [insurer's] policy issued to Melodies on the Ford vehicle on the 28th of August, 1980, when the accident occurred" (para 49).

[56] In *Canada West Insurance Company v Weiss*, (1996), 188 AR 171, [1996] AJ No 692 (QB) ("**Weiss**"), the defendant, Lynda Weiss, was married to Kevin Weiss. Kevin was employed as a business manager of Renfrew Chrysler Inc until October 1993, after which he was employed with Varsity Chrysler Inc. Throughout 1993 and until April 18, 1994, Lynda owned a 1983 Plymouth Turismo. The car was insured under a policy underwritten by Canada West Insurance Company for the period of January 14, 1993 to January 14, 1994.

[57] On July 16, 1993, a customer bought an automobile from Renfrew and traded in his 1979 Chevrolet Malibu. On December 26, 1993, Vicki Weiss, Lynda and Kevin's daughter, was operating the Malibu when it collided with another vehicle. The other driver filed an action against Lynda Weiss and her daughter Vicki, alleging that she was injured and suffered damages in the accident.

[58] Canada West started an action seeking a declaration that it was not obligated to provide Lynda or Vicki with a defence or indemnity arising from the action commenced against them.

[59] The issue turned on whether the 1979 Malibu was a "newly acquired vehicle" and thus covered under the policy issued for the 1983 Turismo. Lomas, J surveyed the relevant caselaw including the Nova Scotian decision of MacDonald, J in *Bates* and concluded that:

> If the Turismo was not operable and was replaced by the Malibu then there would be little or no increase in the risk to the Plaintiff and any failure to give notice within such 14 day period would not affect the insurance coverage of the Malibu for an accident that occurred during the 14 day period. If, however, the Turismo was operable and was not sold then *a failure to give such notice would increase the risk to the insurer if both the Turismo and the Malibu were to be covered by the Policy during that 14 day period*. As the Turismo was not sold during the 14 day period the important question is whether the Turismo was operable during that period (para 48).

[Emphasis added]

[60] Importantly, and as in *Bates*, the Court remained live to both the wording of the policy and the underlying allocation of risk as between the insurer and the

insured. The Court was particularly concerned with ensuring that the risk to the insurer was not unduly increased - or doubled - in the case of a second vehicle being acquired to replace the original insured vehicle.

Ontario

[61] In *Ontario (Minister of Consumer & Commercial Relations) v Waterloo Mutual Insurance Co.*, (1979), 25 OR (2d) 355, 1979 CarswellOnt 788 (HCJ) ("**Nickerson**"), Donna Nickerson had an insurance policy with Waterloo Mutual Insurance that provided coverage for a 1965 Chevrolet and a 1960 Pontiac. In September 1972, the 1965 Chevrolet was sold. A few days later, on September 18, Nickerson and her partner, Edward Vallee, purchased a 1971 Pontiac station wagon. The vehicle was registered in Nickerson's name.

[62] On September 29, 1972, Vallee was driving the 1971 Pontiac when it collided with a vehicle owned and operated by Paul Salfi. Salfi was injured and brought an action for damages against Vallee, who did not defend. Having obtained judgment against Vallee who, at the time, appeared to be an uninsured driver, Salfi successfully applied for payment out of the Motor Vehicle Accident Claims Fund.

[63] The Minister of Consumer & Commercial Relations, as assignee of Salfi's judgment, then brought an action against Waterloo Mutual, claiming indemnity for the amount paid out of the Fund. According to the Ministry, the 1971 Pontiac was insured as a newly acquired vehicle under Nickerson's policy.

[64] Justice Pennell was satisfied on all the evidence that Nickerson was the true owner of the 1971 Pontiac, and that Vallee was driving the car on the date of the accident with her knowledge and consent. After setting out the definition of a "newly acquired vehicle" (identical to the Nova Scotia provision), Pennell J concluded that the 1971 Pontiac was a "replacement" vehicle under the policy. He went on to consider whether coverage was automatically available within the first 14 days from the date of delivery – even if notice was not given to the insurer prior to the accident.

[65] Counsel for the insurer, Waterloo Mutual, relied upon the Manitoba decision in *Pascoe* for the proposition that notice was a condition precedent to coverage under the policy; and that a "newly acquired vehicle" is never insured without first giving the insurer notice (i.e. coverage was not automatic upon acquisition).

[66] Pennell, J disagreed and noted that the other Justices on the *Pascoe* appellate panel (Adamson, CJM, Montague and Schultz, JJA) concurred in the result but concluded that it was unnecessary to decide whether insurance was automatic within the 14-day notice period following acquisition. This was because the accident which gave rise to the decision in *Pascoe* occurred more than 14 days after acquisition. Thus, the question of whether coverage was automatic during the first 14 days was academic. In the end, Pennell, J distinguished *Pascoe* and concluded that "the matter in controversy in the *Pascoe* case was not that now under debate before me" (para 32).

[67] In Justice Pennell's view and consistent with the Nova Scotia Court of Appeal in *Lane*, the failure to give notice might be a defence to an action by the insured against the insurer, but not to an action by an injured third party. He wrote at paragraph 35:

> The contract between Donna Nickerson and Waterloo Mutual was a standard automobile policy. Waterloo Mutual was in a field of business actively which required the issuance of a large number of insurance policies to the members of the public. It could not expect them to be lawyers, except in rare instances, and fair dealings require a measure of adherence to what the ordinary reasonable person would understand to be the meaning of his policy of insurance.

[68] About 15 years later, in 1994, Ontario rewrote the Standard Ontario Automobile Policy in plain language in an effort to present the coverages and exclusions in an easier to understand format. The redrafted "newly acquired automobile" definition (s. 2.2.1) section read as follows:

> a NEWLY ACQUIRED AUTOMOBILE is an automobile or trailer that you acquire as owner and that is not covered under any other policy. It can be either a replacement or an additional automobile. The replacement automobile will have the same coverage as the described automobile it replaces. We will cover an additional automobile as long as:
>
> > we insure all automobiles you own, and
> >
> > any claim you make for the additional automobile is made against the coverage we provide for all your other automobiles.
>
> Your newly acquired automobile(s) will be insured as long as you inform us within fourteen days from the time of delivery and pay any additional premium required.

[69] Ontario's new section 2.2.1 was considered in *Hunter Estate v Thompson*, (2003), 65 OR (3d) 413, 2003 CarswellOnt 2276 (CA) ("***Hunter Estate***"). In this decision, the defendant Kozowy purchased a 1992 GMC pick-up truck on August 22, 1996. She had a valid insurance policy with the third party, Kingsway General Insurance ("**Kingsway**"), which insured her 1988 Ford Aerostar minivan. Kozowy also owned a 1991 Ford ½ ton pick up truck which the trial judge had described as "'parked', and not insured by any company" (para 6).

[70] On September 1, 1996, Kozowy's 1992 GMC pick-up was involved in an accident while it was being driven by the defendant Thompson with Kozowy's consent. The accident resulted in injuries to one person and the death of another. Kozowy did not notify Kingsway of her purchase of the 1992 GMC pick-up within 14 days of its purchase – and the accident did not occur within the first 14 days of purchase. In addition, she purchased the truck as an additional vehicle, not as a replacement vehicle. She intended to keep the Ford Aerostar on the road and insured.

[71] Prior to the hearing before Ontario's Court of Appeal, the parties agreed to the following additional fact that was not before the motions judge: "The said 1991 Ford half-ton pick-up truck was in operable condition and was not insured by any insurance company as of September 1, 1996 [the date of the accident]"

[72] The Ontario Court of Appeal concluded that the "plain words of s. 2.2.1 require the owner insure with the insurer all the automobiles he owns. If the insured owns automobiles that he insures with another insurer or that he leaves uninsured, the precondition is not met" (para 8).

[73] Because the 1991 Ford was clearly not insured by the insurer, the Ontario Court of Appeal determined that "the precondition in s. 2.2.1 was not satisfied, and there is no insurance coverage on the newly acquired vehicle" (para 9).

[74] The Ontario Court of Appeal further observed that if this precondition had been met (i.e. that all vehicles were actually insured by the insurer) then "on the plain wording of s. 2.2.1 it is automatically insured for fourteen days" (at para 10). Finally, the Court offered a rationale for automatic coverage where all vehicles were insured by the same insurer. While the Court acknowledged that the purpose of the precondition "is not entirely clear", "[i]t may be that if all other vehicles are insured by the same insurer, there is a statutory inference that the insured will also likely insure the newly acquired or replacement vehicle with the same insurer

thereby justifying the granting of a fourteen day period of coverage under the existing policy" (para 11).

[75] In *Sage* v. *Peel Mutual Insurance Co*, (2005), 32 CCLI (4th) 110, 2005 CarswellOnt 5907 (SCJ) ("***Sage***"), the Plaintiff Vivian Sage had a valid insurance policy issued by Peel Mutual Insurance Co. for a 1999 Chevy Tahoe. The effective period of that policy was April 9, 2002 to April 9, 2003. On September 28, 2002, the plaintiff Glen Sage entered into a lease agreement for a Dodge Durango. The Court accepted as a fact that the insured provide appropriate notice to the insurer requesting that the newly leased Dodge Durango be substituted for the Chevy Tahoe under the existing policy, and that the plaintiff Glen Sage be added to the policy as an insured.

[76] On December 2, 2002, the Dodge Durango was involved in an accident. The Plaintiff insured sought insurance coverage for the cost of repairing the Durango and the cost of a temporary replacement vehicle. The insurer denied coverage.

[77] The preliminary factual issue in dispute was whether the Plaintiff Sage notified the Defendant insurer of the new vehicle within 14 days of acquisition. Sage testified that she notified the insurer by fax. The insurer denied receiving any fax. Brown, J accepted Sage's evidence and concluded that Sage sent the required notice by fax sometime during the week of October 2, 2002 – within 14 days of acquisition.

[78] The legal issue then turned to whether there was coverage under the policy for the damage to the Durango. The specific legal issue in dispute was whether the failure to pay the additional premium was a breach of section 2.2.1, disentitling the Plaintiff to coverage. The additional premium for the Durango from the date of acquisition to the end of the policy term would have been about $90.00. However, the Defendant insurer never communicated the amount of any additional premium. As indicated, the insurer took the position that it did not receive notice of the Durango and, therefore, had no reason to seek additional premium payments. However, Brown, J found that the insured did provide the requisite notice. As such, the only remaining issue was whether the lack of any additional premium payment disentitled the insured to coverage under the policy – even if the insurer never actually sought additional premium payment. In other words, may an insured simply give notice to the insurer and then expect coverage for an indefinite period of time without having to pay any additional premium?

[79] Brown J began by concluding that there is no time limit on the obligation to pay any additional premium. He wrote:

> I do not read s. 2.2.1 of the Ontario Automobile Policy as putting a time requirement on when the additional premium had to be paid. Having found that Vivian Sage did send the fax of September 28, 2002 to Peel Mutual and that Peel Mutual did receive it sometime the week of October 1, 2002, I am satisfied that the requirement under s. 2.2.1 of the Ontario Automobile Policy to inform the insurer within 14 days from the time of the delivery of the replacement vehicle was met. As well, I am of the view that the Plaintiffs' failure to pay the additional premium on the Dodge Durango prior to the accident on December 2, 2002 does not amount to a breach of the provisions of s. 2.2.1 of the Ontario Automobile Policy. (para 40)

[80] That said, Brown, J went on to determine that an insured cannot simply provide the requisite notice and then expect additional coverage without paying any additional premium at all. An insured must act reasonably. In this case and having regard to the fact that the accident occurred only 2 months after acquisition, Brown, J concluded that the insured did act reasonably and was entitled to coverage in the circumstances:

> Given 1) the previous business dealings Vivian Sage had with Peel Mutual; 2) the relatively small amount of the additional premium required to be paid to the end of the policy period; and 3) the fact that Peel Mutual took no steps of their own to communicate the additional premium amount to the Plaintiffs, *I am of the view that the actions of the Plaintiffs in this case were reasonable in the circumstances*. Accordingly, I do not believe the failure of the Plaintiffs to remit the additional premium for the Dodge Durango within the 65 days between the delivery of the Dodge Durango and the accident on December 2, 2002, amounted to a breach of s.2.2.1 of the Ontario Automobile Policy provisions. (para 43)

[Emphasis added]

[81] Finally, I refer to *Rodriguez v Zhang*, 2015 ONSC 5644, [2015] OJ No 4856 ("***Rodriguez***"). The procedural and strategic contortions which arose in this case are somewhat bizarre. On September 13, 2011, the plaintiff, Ernesto Rodriguez, was driving a Vespa. Mr. Rodriguez was executing a U-turn when he was struck by the defendant's, Quanxing Zhang's, vehicle. Rodriguez had purchased the Vespa a few weeks before the accident and, on August 15, 2011, inquired with Tom Gorham, an insurance agent with Allstate Insurance Company, about insuring the Vespa. The Vespa was registered to Rodriguez on August 23. Before the

accident, Allstate had neither provided a quote nor was the Vespa expressly added to the Allstate policy that covered two of Rodriguez's other vehicles.

[82] Rodriguez filed an action claiming damages against Zhang for injuries he sustained in the accident, and against Allstate Insurance Company and Gorham (collectively, "Allstate") for negligence and breach of contract. In its Statement of Defence, Allstate denied that the Vespa was ever insured under one of its policies and asserted that Rodriguez's injuries were caused or contributed to by his own negligence or the negligence of Zhang. Zhang defended on the basis that Rodriguez's injuries were caused by his own negligence. Zhang also alleged that Rodriguez had no valid claim against him because he was uninsured at the time of the accident – an allegation which was consistent with Allstate's position.

[83] Subsequently, Allstate brought a motion for partial summary judgment in relation to Rodriguez's claims against it. At that time and despite initially defending on the basis that Rodriguez's Vespa was uninsured, Allstate now contended that Rodriguez *did* actually have insurance coverage and sought summary judgment to that effect. The motion judge described Allstate's reversal as "puzzling" but also commented on the potential strategic benefits. For example, if Allstate were successful in its motion for summary judgment, Rodriguez could drop its claim against Allstate and focus his attention on Zhang. In addition, Zhang's defence that Rodriguez was uninsured at the time of the accident, would be undermined.

[84] In the end, Allstate's motion for partial summary judgment involved the strange spectacle where:

1. Allstate fought for the ability to extend insurance coverage to an insured and effectively reverse its initial denial of coverage; and

2. Zhang was fighting to prevent an insurer (Allstate) from extending coverage to Allstate's own insured in respect of an accident in which Zhang was involved.

[85] There was no issue with respect to notice. Instead, the dispute ultimately revolved around:

1. Whether Rodriguez insured "all" of his vehicles with Allstate in accordance with the section 2.2.1 of Ontario's standard policy (the definition of "newly acquired automobile"); and

2. Whether Rodriguez failed to pay any additional premium in accordance with section 2.2.1 of the same standard policy.

[86] As to the first question, the Court determined that Rodriguez did not insure all of his vehicles with Allstate because there was an Audi which he owned in Mexico and which was insured by another company. As well, Rodriguez owned two motorcycles for off-road racing that were also insured by another company.

[87] As to the second question, the Court found that when Rodriguez initially approached Allstate about coverage, he was advised of a problem because Rodriguez did not yet have a full class M driver's license necessary to drive the Vespa. Rodriguez subsequently obtained the full class M driver's license,obtained plates for the Vespa,and began driving the Vespa without confirming coverage or paying any additional premium.

[88] The Court found that where the power to grant relief from forfeiture of insurance coverage "was contingent on the insured having acted reasonably in the circumstances" (para 49). The Court determined that the insured had not acted reasonably because:

> Rodriguez drove his Vespa prematurely knowing there was a coverage issue and before Allstate would have provided a policy and advised of the amount of a premium. In this sense and for this reason he was also in non-compliance with s. 2.2.1. (para 52)

SYNTHESIS

[89] The specific wording of the relevant Policy provisions is obviously important. In this case, the dispute centres on the definition of a "newly acquired vehicle" which is copied again here for convenient reference:

> an automobile, ownership of which is acquired by the insured and, within fourteen days following the date of its delivery to him, notified to the Insurer in respect of which the insured has no other valid insurance, if either it replaces an automobile described in the application or the Insurer insures (in respect of the section or subsection of the Insuring Agreements under which claim is made) all automobiles owned by the insured at such delivery date and in respect of which the insured pays any additional premium required; provided, however, that insurance hereunder shall not apply if the insured is engaged in the business of selling automobiles

[90] In my view, coverage is available for an additional (as opposed to replacement) vehicle under the terms of the Policy if all of the following conditions are met:

1. The insured insures all vehicles owned by the insured as at the date the insured acquired and took delivery of the additional vehicle in question;[2]

2. The accident (or date of loss) is within 14 days of the date of delivery of the additional vehicle acquired by the insured. Pausing here, I emphasize that coverage may also be available *beyond* 14 days from the date of delivery to the insured, assuming all other conditions for coverage are met. The availability and scope of coverage for an additional vehicle after 14 days from the date of delivery raises issues of notice by the insured to the insurer. On this, I refer to *Lane in obiter* and MacKeigan, CJNS's distinction between claims by the insured for collision costs, on the one hand, and claims by third parties for personal injuries, on the other. However, it is not necessary to consider these sorts of distinctions and how the failure to provide timely notice may compromise coverage in the circumstances of this case. Here, the additional Vehicle was acquired, delivered, and then involved in an accident all within 48 hours, over the same weekend, and certainly within the first 14 days of the date of delivery. In my view, coverage is not dependent upon the insured providing notice within the first 14 days of an additional vehicle being acquired and delivered. I note that this is subject to all other conditions for coverage being met (e.g. all of the insured's vehicles being insured by the insurer and the obligation to act reasonably, which obligation is described below in greater detail below).

3. The insured acts reasonably in the circumstances; or in a manner that reflects the reasonable expectations of the parties (*Jesuit Fathers of Upper Canada*). That said, the reasonable expectations of the parties are circumscribed by the express terms of the Policy and, if necessary, the application of the *contra proferentem* rule (*Ledcor Construction*). Thus, for example, an insured must only pay any additional premium

[2]The wording of the Nova Scotia Policy is clear on this issue. I also refer to *Hunter Estate* which reaches the same conclusion. I note that *Hunter Estate* is an Ontario decision where the wording of the Standard Policy has been redrafted with a view to achieving greater clarity through plain language. However, the basic requirement for the insured to insure *all* vehicles with the insured as at the delivery date as a condition of coverage is common to the Ontario and Nova Scotia Standard Policy.

reasonably required and within a reasonable period of time (*Rodriguez* and *Sage*).

[91] In this case, the insurer's primary arguments revolve around this final condition regarding the parties' reasonable expectations. However, the argument is not based on the insured acting reasonably in terms of paying additional premium. Rather, the insurer argues that the Vehicle would not be considered a "newly acquired vehicle" under the Policy because the Vehicle "involved a material change to the risk" (Agreed Statement of Fact, Exhibit "D"). The insurer says that the scope of coverage under the Policy necessarily involves an assessment of how the underlying risk has been altered by the addition of a new vehicle to the Policy; and that the nature and size of the Vehicle (a modified school bus) cannot be considered a "newly acquired vehicle" under the Policy because it materially increased the risk which the insured could reasonably be expected to cover.

[92] The insurer does not raise an entirely irrelevant issue. I agree that insurance policies involve the process of identifying, measuring, and allocating risk. The decisions in *Lane*, *Hicks*, *Cyr*, *Fraser*, *Pannenbecker*, *Hogan* and *Weiss*, among others, all speak to the issue of risk in the context of a replacement vehicle. Each of those decisions addresses the question of whether the original vehicle was actually replaced (and the original vehicle disposed of) as a mitigating factor when allocating the risk as between the insured and the insurer. The risk equation obviously changes somewhat when a vehicle is not simply replaced but, instead, is being added to a fleet of vehicles already insured with the insurer. Nevertheless, the underlying question of risk is germane.

[93] I also agree that insurance policies reflect (and are informed by) the parties' reasonable expectations.

[94] Having said all that, in my view, the nature of a "newly acquired vehicle" only becomes legitimate grounds for denying coverage in rare and exceptional circumstances. The nature of the "newly acquired vehicle" must be so dramatically different and unique as to sever any reasonable expectation of coverage. My reasons include:

1. The Policy clearly includes an additional or replacement automobile vehicle within the definition of a "newly acquired vehicle". Insurers charge, and insureds pay, premiums with that contractual possibility (and risk) in mind. The Courts are extremely reluctant to interpret insurance

policies in a manner which would allow an insurer to keep these premiums without risk (*Jesuit Fathers of Upper Canada*);

2. It goes without saying that any additional vehicle acquired by an insured increases the risk to an insurer, both during the initial 14-day period and beyond. It also goes without saying that the insurer is not in a position to assess the additional risk and establish new premiums until it receives notice of the additional vehicle. Those realities, in and of themselves, cannot be the basis for denying coverage. The mere presence of additional risk is not determinative of coverage under the Policy;

3. The existing premiums being paid by the insurer necessarily reflect the increased risk that arises if the insured acquires either a replacement vehicle or an additional vehicle. Again, the Policy and the legislation clearly contemplates both possibilities. Were it otherwise, the Policy and the legislation would exclude (and not expressly include) replacement vehicles and/or additional vehicles as a "newly acquired vehicle" insured under the Policy. They do not. Similarly, an insurer clearly could not deny coverage for claims which, as in this case, arose within 14 days of an insured acquiring and taking possession of a "newly acquired vehicle" on the basis that it either lacked the opportunity to assess a new premium or, alternatively, that the insured failed to pay any new premium which might have been instantly charged within those first 14 days. In my view, the reasons include the fact that the risk associated with a "newly acquired vehicle" is embedded in the premiums already being charged. In *Hunter*, the Ontario Court of Appeal discussed one potential explanation in the context of additional (as opposed to replacement") vehicles:

> The purpose of the precondition that all other vehicles be insured by the same insurer is not entirely clear. It may be that if all other vehicles are insured by the same insurer, there is a statutory inference that the insured will also likely insure the newly acquired or replacement vehicle with the same insurer thereby justifying the granting of a fourteen day period of coverage under the existing policy. (at para 11)

4. The legislature clearly contemplated some period of time during which an insured might reasonably expect automatic insurance coverage upon acquiring a replacement or additional vehicle. An insured does not lose

coverage if involved in an accident within a few days of acquiring a new vehicle and driving away. The legislature ultimately settled on 14 days (2 weeks) to notify the insurer and provide the insurer with an opportunity to assess the additional risk and charge additional premiums.[3] The risk is further mitigated by the proviso that the insured not be in the business of selling automobiles. Furthermore, in the context of an additional (as opposed to replacement) vehicle, all of the insured's vehicles must be insured with the insurer;

5. An insured's reasonable expectations around insurance coverage must equally be recognized. Assuming all other contractual conditions are met, an insured who acquires a new or additional automobile under the Policy should not routinely face a detailed critique into the nature and purpose of new vehicle, followed by a denial of coverage. Or regularly face the uncertainty of not knowing if automobile insurance coverage is in place – particularly where the insurer raises these concerns within the first 14 days of acquiring the vehicle and after the accident has already occurred.

[95] Finally, in considering these issues, I also conclude that subjective intentions are immaterial (*Fraser*). Thus, for example, whether the insured intended to insure (but did not actually insure) all of its vehicles with the same insurer is of no consequence. Where an insured acquires an additional (as opposed to replacement) vehicle, all of the insured's vehicles must be insured with the same insurer to be covered under the Policy.

APPLICATION TO THE FACTS

[96] Applying the conditions listed in paragraphs 90 – 95 above, I conclude that the Vehicle is a "newly insured automobile" under the terms of the Policy and, as such, would be automatically insured within 14 days of acquisition. In particular:

[3] In *Lane* and *Bates*, the Nova Scotia Courts considered the contractual consequences of not providing the required notice in the context of a replacement (as opposed to an additional) vehicle. That issue is not before me as the accident here occurred within a day of acquiring and taking possession of the Vehicle. In these circumstances, notice is not an issue and it is not necessary to consider whether coverage for collision is lost but third-party claims might still be covered in the context of an additional vehicle.

1. The Agreed Statement of Facts confirms that the Policy was effective as of June 16, 2013 and continued in force until after the accident. On this point, I note:

    a. The insured acquired and took possession of the Vehicle on Saturday, May 7, 2016;

    b. The single vehicle accident giving rise to the third-party claims occurred on the next day, Sunday, May 8, 2016;

    c. An employee of the insured contacted the insurer on Monday, May 9, 2016 to add the Vehicle to the Policy and notify the insurer of the accident. The parties agree that the owner of the insured called the insurer a few minutes later to clarify that he did not want the Vehicle added to the Policy "*on a going forward basis* as the Vehicle was no longer usable" (emphasis added). The insurer neither alleged nor argued that this subsequent call from the owner either invalidated the notice or constituted a waiver of coverage. I accept the parties' agreement that this call from the owner only clarified that the insured did not require insurance on the Vehicle from that point (i.e. the date of the call) forward as the Vehicle was no longer operable.

2. The insured paid all premiums changed by the insurer. There is no evidence that either:

    a. The insurer at any time demanded additional premium for the short period of time when the Vehicle was in the insured's possession prior to the accident (May 7 – 8, 2016); or

    b. The insured failed to pay any premiums reasonably charged by the insurer; bearing in mind that the insured would be given a reasonable period of time to pay any such additional premium.

3. The parties agree that "All vehicles PK Construction used in the operation of its business were insured under the Policy" (Agreed Statement of Facts, para 3);

4. The accident occurred within 14 days of the insured acquiring and taking delivery of the Vehicle. Indeed, the accident occurred within a day of

acquisition – and both the acquisition and the accident occurred over the same weekend (Saturday, May 7, 2016 – Sunday, May 8, 2016). In my view, coverage is automatic during those 14 days irrespective of notice and would have been in place as at the time of the accident but, to be clear, still subject to the remaining conditions set out in paragraphs 90 – 95 above;

5. The insured otherwise met the reasonable expectations of the parties under the Policy. In particular:

    a. On the question of notice, the issue is somewhat of a red herring because of the unusual facts in this case. Again, the acquisition of the Vehicle, the accident and ultimately notice to the insurer all occurred within a few days of one another; and within the first 14 days following acquisition when, in my view, coverage is automatic subject to satisfying the remaining conditions. There may be a future case in which any delay in providing notice outside the 14 days following acquisition affects coverage. However, it is not necessary to consider that hypothetical scenario as the facts at bar are decidedly different (see footnote 3 above);

    b. A rare and exceptional case may arise where the nature or purpose of the additional vehicle is so dramatically different or unique as to preclude coverage. However, this is *not* such a case. My reasons include:

        i. The Vehicle was larger but similar in function to the Ford which the insurer clearly covered under the Policy;

        ii. As with the Ford, the additional Vehicle's nature and primary function (transporting larger numbers of people) was rationally connected to the insured's construction business and was not so different so as to compromise the insured's coverage; and certainly not during the first 14 days of acquiring and taking possession of the Vehicle;

        iii. The Agreed Statement of Facts confirms that the insurer knew the Ford would be used, from time to time, for personal purposes. This fact did not preclude coverage under the Policy and, to that extent, is somewhat similar to

the circumstances in *Hogan* where the vehicle in question was insured under the family's gravel trucking business called Melodies but also served as a family car. This fact was not determinative of coverage in the circumstances of that case;

iv. The insurer previously insured several modified vehicles including trucks which were refitted to remove snow and a Lincoln Town Car that was lengthened (or "stretched") to accommodate additional passengers.

[97] In summary and accepting the agreed facts jointly submitted as accurate, I conclude that:

1. The Vehicle meets the definition of a "newly acquired automobile" and was automatically covered under the policy for the initial 14-day period immediately following delivery to the insured on Saturday, May 7, 2016; and

2. The Policy therefore provided insurance coverage on the day of the accident (Sunday, May 8, 2016); and

3. The Defendant insurer has a duty to defend and pay any valid claims arising out of the accident on May 8, 2016 in accordance with the terms of the Policy. The Vehicle was insured under the Policy and the Defendant insurer must therefore provide coverage and pay any valid claims arising out of the accident on May 8, 2016.

[98] I am prepared to hear the parties on costs and ask that any submissions on costs be delivered in writing within 30 days of this decision being released.

Keith, J

Appendix A

2019 Ken. No. 487696

SUPREME COURT OF NOVA SCOTIA

BETWEEN:

PK CONSTRUCTION LTD.

PLAINTIFF

and

AVIVA INSURANCE

DEFENDANT

AGREED STATEMENT OF FACTS

1. PK Construction Ltd (**"PK Construction"**) carries on construction, property maintenance and related business and is located in North Alton, Nova Scotia.

2. At all material times PK Construction's insurance broker was Jean Brown, formerly of Cosman & Associates and currently with Huestis Insurance Group.

3. Effective June 16, 2013, and continuing until following the subject loss described below, PK Construction had in force a Nova Scotia commercial automobile insurance policy with Aviva Insurance (the **"Policy"**). All vehicles PK Construction used in the operation of its business were insured under the Policy.

4. When Aviva agreed to insure PK Construction, PK Construction's business was described as contractor-excavation, snow removal (schools and parking lots), sand and gravel, landscaping and septic tank installation.

5. In May of 2013, an employee of PK Construction (Sylvia Best, Bookkeeper) contacted Ms. Brown and asked that a 1994 Ford E350 Van, also described as a Ford Cutaway Van (Bus) (the **"Ford"**) be added to their insurance policy in effect at that time.

6. The Ford was a modified 18-person vehicle which was used as a work vehicle to transport employees to job sites and to transport tools. It was also used as a dry and clean off-site

location for meetings and for employees to eat lunch. There was no table in the Ford. Photographs of the Ford are attached to this Agreed Statement of Facts as **Exhibit "A"**.

7. PK Construction advised Ms. Brown that the Ford would not be used as a paid passenger bus, but would be used for the company's use and the personal use of the owner of PK Construction, Mr. Peter Kalkman. An email chain to this effect between PK Construction and Ms. Brown is attached to this Agreed Statement of Facts as **Exhibit "B"**.

8. PK Construction removed the Ford from the Policy for a period of time, but then asked Ms. Brown in September of 2015 to add the Ford to the Policy again. From this point until Aviva canceled PK Construction's insurance, it was covered under the Policy.

9. When PK Construction contacted Ms. Brown in September of 2015, the Ford was described as a Ford Cutaway Van (Bus).

10. On Saturday May 7, 2016, in the late afternoon, Mr. Kalkman purchased a 1997 Bluebird school bus (the "**Vehicle**"). The Vehicle was modified to open at the back to accommodate a vehicle, bench seating had been installed and the Vehicle contained a kitchen table. Photographs of a bus similar to the Vehicle are attached hereto as **Exhibit "C"**.

11. PK Construction believed that the Vehicle would be covered by the Policy for two weeks from the date of purchase and that after this time, the Vehicle would have to be added to the Policy by Ms. Brown. This understanding was based on past discussions with Ms. Brown regarding the addition of other vehicles to the Policy wherein she indicated that PK Construction had a two-week window in which to add vehicles to the Policy. This was the common practice between PK Construction and Ms. Brown.

12. PK Construction intended to use the Vehicle as a work vehicle to transport employees to job sites, to transport tools and construction materials/equipment, to serve as a lunch location and to serve as a location for meetings. The intention was also to use the Vehicle to haul race cars. Aviva insured a 1993 International Rollback 'Tilt Deck' Truck to haul cars, trucks and equipment.

13. PK Construction intended to phase out the use of the Ford as the Vehicle had a lunch table and storage room in the rear which made the Vehicle more functional than the Ford. As with the Ford, the intention was to use the Vehicle for both business and personal purposes.

14. The Vehicle's registration was not up to date. It was last registered in Saskatchewan and its registration expired on June 24, 2015.

15. PK Construction was unable to notify its insurance broker of the purchase of the Vehicle on May 7th since it was a weekend and Mr. Kalkman arrived back from purchasing the Vehicle after hours.

16. Raymond Gates, an employee of PK Construction, was driving the Vehicle early on Sunday, May 8, 2016 with a number of passengers who were friends of Mr. Kalkman.

17. The Vehicle was involved in a single-vehicle accident and several passengers allege that they sustained injuries.

18. Mr. Gates is listed as an insured driver on the Policy.

19. On the morning of Monday, May 9, 2016 an employee of PK Construction contacted Ms. Brown to request that the Vehicle be added to the Policy and advised her of the accident.

20. Within minutes of the employee's call to Ms. Brown, Mr. Kalkman phoned Ms. Brown to advise her that the Vehicle was not to be added to the Policy and that, at this point in time, he believed that none of the passengers would be making a claim.

21. Mr. Kalkman did not want the Vehicle added to the Policy on a going forward basis as the Vehicle was no longer usable. He did not indicate that the Vehicle should not be covered by the Policy for the time period from the date of purchase until Monday, May 9, 2016.

22. Ms. Brown contacted Aviva to advise them of what she learned about the accident and the purchase of the Vehicle.

23. In April 2018, three of the passengers commenced an action against PK Construction, Mr. Gates and Mr. Kalkman, in relation to the May 8, 2016 accident (Ken. No. 475451).

24. Aviva denied coverage to PK Construction for the claims of the three passengers. Attached hereto as **Exhibit "D"** is a copy of the denial letter dated May 31, 2017.

25. While investigating the accident involving the Vehicle, Aviva became aware that PK Construction had been using the Ford as a passenger vehicle. Aviva then cancelled the Policy. Aviva had understood that the Ford was used in PK Construction's regular operations.

26. Ms. Brown was aware that PK Construction was using the Ford in its regular operations, and that one aspect of this use was transporting employees to job sites. Ms. Brown was also aware that Mr. Kalkman was using the Ford for personal use.

27. Aviva insured a number of other modified vehicles under the Policy including pickup trucks that were modified for snow removal and a Lincoln Town Car which had undergone

several modifications including being stretched and having additional seats installed. Ms. Brown was aware of these modification, and in regards to the Lincoln she commented that Mr. Kalkman was "driving in style".

AGREED TO this 7th day of ~~November, 2019~~ February 2020

George W. MacDonald, QC and
George R. Franklin
Pink Larkin
Solicitors for the Plaintiff,
PK Construction Ltd.

~~Nadia M.~~ MacPhee

Brenton Kean
Solicitor for the Defendant,
Aviva Insurance Company of Canada


FEW 190

From: PK Construction
To: info@pkconstructionns.ca
Subject: FW: Emailing: 1994 Ford E350 Van 001
Date: March 6, 2019 2:44:15 PM

-----Original Message-----
From: PK Construction <pkconstruction@ns.aliantzinc.ca>
Sent: May 9, 2013 12:06 PM
To: 'Jean Brown' <jean.brown@huestis.ca>
Subject: RE: Emailing: 1994 Ford E350 Van 001

PLPD just as a van. No lienholder.

-----Original Message-----
From: Jean Brown [mailto:jean.brown@huestis.ca]
Sent: May-08-13 4:06 PM
To: 'PK Construction'
Subject: RE: Emailing: 1994 Ford E350 Van 001

Hi Sylvia,
What is Peter using a passenger bus for? What coverages does he want? Lienholder?
Lets talk on Thursday :)

Jean Brown, CAIB
Account Manager, Commercial Lines
Cosman & Associates
Member of

321 Hwy, 303 Conway
Digby, NS B0V 1A0
Phone: 902-245-2595, Fax: 902-245-5043
jean.brown@huestis.ca

-----Original Message-----
From: PK Construction [mailto:pkconstruction@ns.aliantzinc.ca]
Sent: Wednesday, May 08, 2013 3:29 PM
To: Jean Brown
Subject: Emailing: 1994 Ford E350 Van 001

Hi Jean: Could you put insurance on this van/bus. It is not going to be used as a paying passenger bus or anything, it's just for company use or Peter's own use. In case you can't read the VIN it's 1FDKE30M5RHA72062 Would you please fax me a copy of the temporary insurance card. 678-5366 Thanks.

Sylvia Best
Bookkeeper
PK Construction Ltd.
(902) 678-6335
(902) 678-5366 (FAX)
pkconstruction@ns.aliantzinc.ca
www.pkconstructionns.ca

Your message is ready to be sent with the following file or link attachments:

1994 Ford E350 Van 001

Note: To protect against computer viruses, e-mail programs may prevent sending or receiving certain types of file attachments. Check your e-mail security settings to determine how attachments are handled.

Please note:
Coverage cannot be bound or amended until confirmed by an authorized representative. Veuillez noter qu'aucune couverture ne peut être mise en vigueur ou amendée avant d'être confirmée par un conseiller autorisé.

EXHIBIT C

AVIVA

2206 Eglinton Avenue East, Scarborough, Ontario M1L 4S8
Toll free phone: 1 (866) 692-8482 Toll free Fax: 1 (866) 805-8585
** Nothing herein contained is or shall be construed as either an admission of liability or a waiver or extension of any applicable notice, claim, or limitation

REGISTERED LETTER

May 31, 2017

P.K. Construction Ltd. and Peter A. Kalkman
4594 Highway 12
Kentville, NS
B4N 3V8

Re:		
	Policy number:	41204561
	Legal Entity:	Aviva Insurance Company of Canada
	Insured Name:	P.K. Construction Ltd. and Peter A. Kalkman
	Claim Number:	33754596
	Date of Loss :	May 8, 2016
	Claimants Names:	Susanna Atwell Robinson, Lori Hazel and Joy Power

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Dear Mr. Kalkman,

We have now had an opportunity to review this matter in detail. Regrettably, despite our thorough review, we were unable to find coverage under your insurance policy for this claim.

As such, we will not be able to defend or pay this claim on your behalf.

If you have not already done so, we would urge you to immediately retain a lawyer to protect your interests. Often there are strict time limits for taking steps to protect yourself, so any delay could result in financial or other hardship to you.

In essence, the claim against you is for bodily injuries sustained by the claimants, Susanna Atwell Robinson, Lori Hazel and Joy Power, as a result of a motor vehicle accident involving a school bus type vehicle (1997 Debert bus) on which they were passengers.

Your insurance policy does not provide coverage for this type of claim as our investigation of this incident determined that at the time of the accident, the vehicle in question was not insured by your Aviva policy. It would not be considered a "newly acquired vehicle". If we had been requested to add it to the policy, we would have refused because it would have involved a material change to the risk insured by your policy.

AVIVA

2206 Eglinton Avenue East, Scarborough, Ontario M1L 4S8
Toll free phone: 1 (866) 692-8482 Toll free Fax: 1 (866) 805-8585
** Nothing herein contained is or shall be construed as either an admission of liability or a waiver or extension of any applicable notice, claim, or limitation

We trust you will find the foregoing in order and that you will take immediate steps to protect your interests by hiring a lawyer to represent you.

If you have any questions or concerns, please do not hesitate to contact the undersigned.

Sincerely,

Michele Gaudet, CIP
Litigation Specialist, Aviva Insurance Company of Canada
Phone: (866) 692-8482 x60278
E-mail: michele.gaudet@aviva.com
Fax: (866) 805-8585

cc. Jean Brown
Cosman & Associates

cc. Kevin Spruin
Senior Specialist Commercial Lines Automobile