Date: 19990426
Docket: CV07666/CV07797/CV07832

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN: (CV 07666)

HARRY SEETON

Applicant

- and -

COMMERCIAL UNION ASSURANCE COMPANY OF CANADA

Respondent

AND BETWEEN: (CV 07797)

ROBERT KOSTA

Applicant

- and -

WESTERN UNION ASSURANCE COMPANY

Respondent

AND BETWEEN: (CV 07832)

EDMUND SAVAGE

Applicant

- and -

ELITE INSURANCE COMPANY

Respondent

Applications for orders compelling the respondent insurers to provide a defence pursuant to liability policies; cross-applications by respondents for summary judgment dismissing the actions.

Heard at Yellowknife, Northwest Territories
on April 6 and 7, 1999

Reasons filed: April 26, 1999

Counsel for the Applicants: Austin F. Marshall
Counsel for the Respondent (Commercial Union): Eric R. Holden
Counsel for the Respondent (Western Union): Daniel W. Hagg, Q.C.
Counsel for the Respondent (Elite Insurance): Richard B. Lindsay

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REASONS FOR JUDGMENT

[1] These reasons address the applications and cross-applications brought in these three actions, applications which raise the same issues.

[2] The three applicants (Seeton, Kosta and Savage) are named as defendants in actions seeking damages for the wrongful death of nine miners at the Giant Mine in Yellowknife in 1992. The actions are brought by the family members of the deceased miners and, in one case, by a former employee of the mine. All of the applicants were employees at the mine who, at the time of the deaths, were out on strike. They have each brought an application by way of originating motion seeking an order to compel the respondent insurance companies to defend them in those actions.

[3] The respondents issued homeowner insurance policies to the three applicants. Each respondent has filed a cross-application to summarily dismiss the applicants' motions on the basis that they are not obliged to defend or indemnify their insureds with respect to the damage claims. The respondents rely on what is known as the "business pursuits exclusion" contained in each policy.

[4] Since these motions and cross-applications raise the same issues, they were argued at the same time. Hence this one set of reasons. I will deal with the issues by examining (a) the policies; (b) the general principles as to the interpretation of insurance policies; (c) the pleadings in the damage actions; and (d) the question as to whether there is a genuine triable issue as to the insurers' obligations under the policies.

The Policies

[5] In each case, the respondents issued a standard homeowner's policy of insurance covering both property and personal legal liability. The wording of the policies are slightly different but substantially similar.

[6] Each policy provides coverage for "all sums" which the insured "become legally liable to pay as compensatory damages because of bodily injury or property damage". The coverage extends to "legal liability arising out of (the insured's) actions anywhere in the world". The insurers agree to defend "any suit" against the insured seeking compensatory damages which alleges bodily injury or property damage "even if it (the suit) is groundless, false or fraudulent".

[7] The "business pursuits exclusion" in each policy are also substantially similar (with respect to Kosta and Savage, they are identical). In the policy issued to Seeton, the limitations section contains the following exclusion:

> You are not insured for claims arising from your business pursuits or from your business premises, unless stated in the Declarations.

The term "business pursuits" is defined as follows:

> "Business Pursuits" means any full-time, part-time or occasional activity of any kind undertaken for financial gain, and includes a trade, profession or occupation.

[8] In the policies issued to Kosta and Savage, the exclusion is worded as follows:

> You are not insured for claims arising from:
>
> ...
>
> (3) your business or any business use of your premises except as specified in this policy
> ...

The policies also define the term "business":

> "Business" means any continuous or regular pursuit undertaken for financial gain including a trade, profession or occupation.

[9] Respondents' counsel made the point that the reason for this type of exclusion should be obvious. Coverage for business endeavours is not normally necessary for the typical purchaser of a residential homeowner's policy (and no one suggested that these applicants were somehow atypical). Coverage for business activities can be purchased separately and often require specialized underwriting. Be that as it may, the question before me is whether the claims made against these insureds in the damage actions can be said to arise from their "business" pursuits as that term is used in these policies. That, it seems to me, is a question that is specific to the circumstances of each case and cannot be resolved on the basis of some industry policy.

The Interpretation of Insurance Policies

[10] No serious argument was put forward that the policies issued by the respondents did not, on their face, provide coverage for the types of claims made against the applicants. The focus of the argument was whether the exclusion applied so as to allow the insurers to avoid their obligation to defend those claims. There are some general principles of interpretation of insurance policies that apply to this issue.

[11] The Supreme Court of Canada outlined the general principles of interpretation in *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252 (at page 268):

> In each case the courts must examine the provisions of the particular policy at issue (and the surrounding circumstances) to determine if the events in question fall within the terms of coverage of that particular policy. That is not to say that there are no principles governing this type of analysis. Far from it. In each case, the courts must interpret the

> provisions of the policy at issue in light of general principles of interpretation of insurance policies, including, but not limited to:
>
> (1) the *contra proferentem* rule;
>
> (2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and
>
> (3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.

[12] In *Amos v. Insurance Corporation of British Columbia*, [1995] 3 S.C.R. 405, Major J., on behalf of the Court, wrote (at page 414):

> Traditionally, the provisions providing coverage in private policies of insurance have been interpreted broadly in favour of the insured, and exclusions interpreted strictly and narrowly against the insurer (Brown and Menezes, at p. 131). In *Indemnity Insurance Co. v. Excel Cleaning Service*, [1954] S.C.R. 169, it was held the construction given to a policy of insurance must not nullify the purpose for which the insurance was sold.

[13] The reference to the *contra proferentum* rule, in the quotation above from the *Reid Crowther* case, is the doctrine which provides that, where an ambiguity is found to exist in the terminology employed in the policy, such terminology shall be construed against the insurer as being the author of the policy. These motions were not argued on the basis of ambiguity in the policy language so the doctrine need not be applied. Any ambiguity here would have to involve the claims made in the damage actions. For, if there is uncertainty as to whether those claims come within the scope of the business pursuits exclusion, then such uncertainty has to be resolved in favour of the individual applicants. This merely reflects the long-held rule that the onus to establish an exclusion rests on the insurer: *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164.

[14] With respect to the duty on an insurer to defend its insured, many cases have said that it is the duty to indemnify that triggers the application of the defence clause. This obviously is because the duty to defend applies only to claims that are or may be payable under the policy (as the policies here state: “even if it is groundless, false or fraudulent”). Therefore, if the allegations made against an insured are such which, if proved, might require the insurer to indemnify the insured under the policy, then the insurer is obligated to defend its insured. The emphasis is on the word “might”. These points were

annunciated by McLachlin J. in *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801 (at page 810):

> ... general principles relating to the construction of insurance contracts support the conclusion that the duty to defend arises only where the pleadings raise claims which would be payable under the agreement to indemnify in the insurance contract. Courts have frequently stated that "[t]he pleadings govern the duty to defend": *Bacon v. McBride* (1984), 6 D.L.R. (4th) 96 (B.C.S.C.), at p. 99. Where it is clear from the pleadings that the suit falls outside of the coverage of the policy by reason of an exclusion clause, the duty to defend has been held not to arise: *Opron Maritimes Construction Ltd. v. Canadian Indemnity Co.* (1986), 19 C.C.L.I. 168 (N.B.C.A.), leave to appeal refused by this Court, [1987] 1 S.C.R. xi.
>
> At the same time, it is not necessary to prove that the obligation to indemnify will in fact arise in order to trigger the duty to defend. The mere possibility that a claim within the policy may succeed suffices. In this sense, as noted earlier, the duty to defend is broader than the duty to indemnify. O'Sullivan J.A. wrote in *Prudential Life Insurance Co. v. Manitoba Public Insurance Corp.* (1976), 67 D.L.R. (3d) 521 (Man. C.A.), at p.524:
>
> > Furthermore, the duty to indemnify against the costs of an action and to defend does not depend on the judgment obtained in the action. The existence of the duty to defend depends on the nature of the claim made, not on the judgment that results from the claim. The duty to defend is normally much broader than the duty to indemnify against a judgment. [Emphasis added.]
>
> In that case it was unclear whether the insurer might be liable to indemnify under the policy, so the duty to defend was held to apply.

[15] Where, as here, the insurer relies on an exclusion to avoid the obligation to defend its insured, then the insurer must prove that there can be no indemnity under the policy. In order to do that, it cannot litigate the issues in the action brought against its insured. After all, the allegations of fact in that action must be given a wide interpretation and must be considered as capable of being proven. It is on that basis that the insurer must prove the application of the exclusion in the policy.

[16] In *Slough Estates Canada Ltd. v. Federal Pioneer Ltd. et al.* (1994), 20 O.R. (3d) 429 (Gen. Div.), Rosenberg J. was confronted with a situation somewhat similar to these cases. There the insured applied for a declaration that the insurer was obliged to defend a claim against it; the insurer moved for summary judgment dismissing the

insured's application on the basis that the claim was not within the policy coverage (among other grounds). Rosenberg J. granted the insured's application and dismissed the insurer's motion. In doing so, he adopted the reasoning of the Supreme Court of California in *Montrose Chemical Corp. v. Superior Court*, 6 Cal. 4th 287 (1993). Rosenberg J. quoted (at page 444) from that case:

> To prevail, the insured must prove the existence of a potential for coverage, while the insurer must establish the absence of any such potential. In other words, the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot.

To this extent, the decision in *Montrose* reflects the law expounded in *Nichols*.

[17] The *Montrose* case, however, is also helpful in considering the summary judgment applications brought by the insurers here. The entire focus of a summary judgment application is to determine if there is a genuine triable issue. The pleadings and evidence must show that the claim has no reasonable prospect of success. So, the respondents here must bring forward "undisputed facts (that) conclusively show, as a matter of law, that there is no potential for liability" (per *Montrose*). If the facts are disputed, then summary judgment cannot issue. But, if the facts are undisputed, then the court may go on to decide whether those facts establish lack of coverage and, if they do, then summary judgment may issue. It is, in effect, determining the obligation to indemnify the insured. The insurers must establish that any claim for indemnity under the policy is bound to fail. The facts relied on, however, cannot be the very facts in dispute in the actions brought against the insured. The facts put forth by the insurer cannot be allowed to jeopardize any defence their insured may have to those actions. These points were made by the *Montrose* decision (and quoted by Rosenberg J. at page 444 of *Slough Estates*):

> There are at least two exceptions to the general rule barring declaratory relief on the insurer's duty to defend. First declaratory relief is available if the insurer can establish lack of coverage by means of facts that the insured does not dispute. Second, declaratory relief is available if the insurer's defense to coverage hinges on factual issues that are unrelated to the issues in the third party liability action. ... In each of these situations, the duty to defend can be determined without forcing the insured to litigate issues that may arise in the third party action.

[18] The respondents are thus left to the pleadings in the main actions and any facts undisputed by the applicants in order to satisfy the test for summary judgment. The whole point is to determine if the claims made in the pleadings may result in damages

which fall within the coverage. If so, the duty to defend arises and summary judgment cannot issue.

The Pleadings

[19] There are three different actions which name the applicants as defendants. They are by no means the only defendants. The actions seek to include a large number of defendants against whom there are many allegations.

[20] As noted above, the actions relate to the wrongful death of nine miners at the Giant Mine. They were killed in an underground explosion. The explosion was caused by a bomb set by one Roger Warren (also a defendant in those actions). Warren was subsequently convicted of second-degree murder and he is now serving a sentence of life imprisonment. He has exhausted all appeals. At the time of the explosion, the work-force at the Giant Mine had been locked out by the employer and had gone on strike. Warren was a striking member of the work-force. All of the applicants were members of the same union and also on strike. The applicant Seeton was also a union officer. All of the deceased miners were either union members who broke with the union and returned to work or contract replacement workers.

[21] The three actions are as follows:

(1) Action number CV 06408 was commenced by the relatives of the deceased miners. It names the applicants Seeton and Kosta among the defendants.

(2) Action number CV 06964 was also commenced by the family members. It essentially duplicates the first action, but names some different defendants. Kosta (who is named in the first action) is also named as a defendant in this action and so is the applicant Savage.

(3) Action number CV 07028 was commenced by James A. O'Neil, a person who was working at Giant Mine on the date of the explosion. He names most of the same defendants as in the other two actions including all three applicants here. He claims damages for traumatic shock suffered as a result of the explosion.

[22] The pleadings are extensive, but they are substantially similar as against these three applicants. In general terms, the pleadings allege that, because of their involvement with the strike at the Giant Mine and their activities on behalf of the union, these applicants owed a duty of care to the deceased miners so as to avoid or prevent any foreseeable risk

of personal injury or death. Essentially, the allegations are that these applicants, and others, created an atmosphere at the mine site that led to the risk of personal injury and death. Through their alleged influence or control over other workers, they either encouraged Warren and others to act in a dangerous manner or failed to prevent Warren and others from doing so.

[23] The claims sound in negligence and while they may be novel, considering all of the circumstances, they are at least arguable. But that is not the point. The respondents say that all of the claims made against the applicants are connected to and arise from their activities on behalf of the union which inherently arise from their "business" pursuits.

[24] I will summarize portions of the pleadings. In each case I have used (but edited) language directly from the pleading. Any portions emphasized, however, are emphasized by me.

[25] Action number CV 06408 names both Seeton and Kosta. With respect to Seeton, it is alleged that he was a senior officer of the union and in that capacity he exercised and was permitted by the union to exercise, or ought to have had, significant influence and control over striking members of the union, including the defendant Warren. Kosta is described in this Statement of Claim as a striking member of the union, a supporter of a striking member, or in a position of significant influence and control over a striking member, including Warren. With respect to both applicants, and others, the duty of care was framed in the context of exercising or failing to exercise influence and control over others in the union (including Warren). This is set forth in paragraph 21 of the Claim:

> 21. In exercising or attempting to exercise significant influence and control over Roger Wallace Warren in the Giant Mine, in permitting significant influence and control to be exercised or attempted to be exercised, or in assisting Roger Wallace Warren to do any of the things attributed hereinafter to Roger Wallace Warren, Harry Seeton, Allan Reymond Shearing, Timothy Alexander Bettger, Terry Legge, James Evoy, Dale Johnston, Robert Kosta, Harold David, J. Marc Danis, Blaine Roger Lisoway, William (Bill) Schram, James Mager, Conrad Lisoway, Wayne Campbell and Sylvaine Amyotte owed a duty of care to all persons (including the Nine Miners) who were lawfully upon the Giant Mine to avoid conduct which they or any of them knew or ought to have known could create an unreasonable and foreseeable risk of harm to all such persons including causing others to consider it acceptable, reasonable, justifiable or necessary to conduct themselves in a manner that could create an unreasonable and foreseeable risk of harm to some or all of such persons. As well, the said Defendants owed a positive duty to intervene and/or to prevent others including any members of CASAW Local 4 with or over whom they or any of them stood in a position of influence and control from creating an unreasonable and

> foreseeable risk of harm to some or all persons and/or a positive duty to warn all persons including the Nine Miners who were lawfully upon the Giant Mine of such risk of harm.

[26] The connection to a union role during the strike as the basis of these applicants' liability is also set out in a Reply to a Demand for Particulars filed on behalf of the plaintiffs. It is alleged that these defendants "exercised or attempted to exercise significant influence and control or permitted significant influence and control to be exercised over striking members of the union, including the defendant (Warren) or assisted (Warren) to do any of the things attributed to (Warren)."

[27] The use of the phrase "assisted (Warren) to do any of the things" attributed to him may be interpreted as alleged direct involvement in Warren's criminal activity. In my opinion, this is clearly not the intent of this pleading since it is followed by a list of particulars all of which identify activities involved in "events and circumstances pertaining to the labour dispute". Even those alleged actions that may be labelled as "rogue" activities or even criminal activities (such as threatening or applying force to other workers) are all characterized as part of union action during the strike.

[28] Action number CV 06964 is essentially a duplication of the first action. It names the applicants Kosta and Savage as defendants (among many others). They are described as active and vocal participants of the union during and in connection with the strike. The claim makes the additional following allegations:

- as a result of the foregoing they exercised or had the ability to exercise significant influence and control over each other and the other members of the union;
- by reason of the foregoing they owed a duty of care to avoid conduct which they knew or ought to have known could create an unreasonable and foreseeable risk of harm to the deceased miners;
- they owed a duty to intervene and/or prevent others from creating an unreasonable and foreseeable risk of harm.

The references above to "the foregoing" are to their status as active and vocal participants of the union.

[29] Action number CV 07028 is the one commenced by the plaintiff O'Neil and it names all three applicants as defendants. With respect to Kosta and Savage, the

allegations are the same as those set out above from action number CV 06964. With respect to Seeton, the claim alleges that:

- he was a senior officer of the union and in that capacity he exercised and was permitted by the union to exercise and had the authority and ability to exercise significant influence and control over the members of the union;
- by reason of the foregoing he owed a duty of care to all workers to ensure that they would not be exposed to any risk of injury or death as a result of the strike and that all persons over whom the defendant exercised or should have exercised substantial influence or control, understood that it was not necessary to cause or threaten injury or death to any worker.

[30] In this action as well there were particulars provided. Those particulars are framed in the context of these defendants taking "an active involvement in events and circumstances pertaining to the labour dispute".

[31] In all three actions there are extensive particulars set forth as to the alleged acts of the defendants. These particulars have to be viewed, however, in the context of the duty of care and the status of the defendants identified in the claims. They are all intrinsically related to these defendants' role as striking members of the union.

[32] The applicants, in their respective Statements of Defence, each state that they did not exercise influence and control "except for lawful picketing, demonstrating and other strike-related activities". Furthermore, each pleads that any action against them is statute-barred by virtue of the immunity from suit provisions of the *Workers' Compensation Act*, R.S.N.W.T. 1988, c. W-6. In other words, each claims to be a "worker" who is "in the employ" of an employer and who is being sued for death or injury to another worker arising "out of and in the course of ... employment", as those terms are used in that statute. Whether they are protected by that statute is irrelevant to the question before me, but it is illustrative at least of how the applicants view themselves *vis-à-vis* the damage claims.

[33] Counsel for the applicants conceded that, based on the pleadings, any liability that could attach to Seeton could only attach because of his role in the union. It seems to me that the same can be said for the other applicants since all of the allegations have as their foundation the fact that, whatever these men may have done, they did as participants in the union during the strike. Seeton, however, was in a primary executive role and all allegations are based on that status.

[34] There are also a certain number of undisputed facts, facts that arise from the cross-examinations of the applicants on their motions:

(a) The applicants were employees at the mine and members of the collective bargaining unit.

(b) Union membership was mandatory for employment at the mine.

(c) (i) Seeton was president of the union at the material time.

(ii) Kosta was a member of the union executive (secretary-treasurer) and he was a shop steward.

(iii) Savage was a shop steward and a member of the union's labour relations committee.

(d) Prior to the strike, it was a term of the collective agreement that union officials (such as the applicants) be given time off from work for union business. The union would compensate them for any lost wages.

(e) During the strike, Seeton did administrative work on behalf of the union. Whereas other strikers received strike pay based on the time each spent on the picket line, Seeton was paid for this administrative work in lieu of picketing. Among his duties was taking part in negotiations to end the strike.

(f) Kosta received pay from the union for his union work, including during the strike.

(g) Savage received strike pay during the strike.

[35] In terms of the objectives of the strike and the aims of the union generally, the following extract from Seeton's cross-examination provides a concise statement of the applicants' understanding of these points:

Q Certainly from your perspective in terms of your understanding of the objectives of the union and the union that you were president of, one of the objectives was to obtain a reasonable wage for you and the union members; is that correct?

A Yes.

Q And to maintain what you felt were reasonable working conditions for you and the members?

A Yes.

Q And to protect your employment and the employment of the members?

A Yes.

Q And that's why you were striking?

A Yes, yes, basically that would cover it.

[36] These facts are unrelated to the issues in the damage claims. They are undisputed and hence relevant on the summary judgment applications. The applicants are not required to litigate the issues in the damage claims and so it seems to me that the duty to defend, and the indemnity obligation, can be determined, determined in the sense of deciding whether the claims are possibly subject to the indemnity provided by the policies.

Genuine Triable Issue

[37] The position taken by the respondents is that all of the allegations made against the applicants are ones that arise from the applicants' membership in the union and participation in the strike. With respect to Seeton, in particular, the allegations relate specifically to acts or omissions by Seeton in his capacity as a senior executive officer of the union. With respect to Kosta and Savage, the allegations are based on their role as "active and vocal participants" in the union during the strike. These union activities, it is argued, are essentially a work or occupation-related activity. They are inextricably linked to the applicants' employment at the Giant Mine. They are part and parcel of the applicants' trade or occupation. The union exists to improve the applicants' work environment and to advance their pecuniary interests. As such, it was submitted, the claims made against the applicants arise from their "business" pursuits and are thus excluded from coverage.

[38] The applicants, on the other hand, argue that the term "business" as used in the policies requires some degree of continuity or regularity. The claims against the applicants, by contrast, arise from inherently irregular and unpredictable activities, specifically the strike, and thus cannot be regarded as a business pursuit. The applicants' means of livelihood were as mine workers, it was submitted, and that occupation was lost to them while the strike continued. There was a disruption in their business pursuits. Therefore, the exclusion does not apply.

[39] To analyze these arguments, I return first to the wording of the exclusion clauses themselves.

[40] All three policies use the phrase "claims arising from your business" (or "business pursuits"). The term "arising from" was definitively analyzed in the *Amos* decision of the Supreme Court of Canada (noted previously). The Court was asked to determine the meaning of that term in the context of an insurance policy that covered claims for death or injury caused by an accident that "arises out of" the ownership or use of a motor vehicle. The Court held that the phrase "arising out of" is broader than the phrase

"caused by" and must be interpreted in a more liberal manner. Major J. wrote (at page 417):

> ... the words "arising out of" have been viewed as words of much broader significance than "caused by", and have been said to mean "originating from", "having its origin in", "growing out of" or "flowing from", or, in short, "incident to" or "having connection with" the use of the automobile.

It seems to me that there can be no distinction drawn between the phrase "arising out of" and "arising from".

[41] The broad scope of the phrase "arising from" was specifically addressed in the context of a business pursuits exclusion by the Manitoba Court of Appeal in *Kaler v. Red River Valley Mutual Insurance Co.*, [1996] I.L.R. 1-3260. The insured, a taxi driver, had killed a passenger in an altercation over the fare. The altercation took place in a store some 20 minutes after the passenger had left the vehicle. The driver was convicted of manslaughter. The deceased's family then sued the driver for damages. The driver was insured under a homeowner's policy that contained the standard business pursuits exclusion ("You are not insured for claims arising from your business..."). A motions judge had held that the damage claim was not arising from business because there was a break in the "activity chain" as between the business activity and the activity of the insured as an aggressor in the altercation. The Court of Appeal reversed and held that the claim fell within the ambit of the exclusion. Huband J.A. wrote (at page 3741):

> It would seem obvious that the basic thrust of the liability coverage is to exclude claims related to the insured's business, on the basis that liability coverage for business claims should be separately rated and insured. This is, after all, a homeowners' policy.
>
> The word "business" is defined in the liability section of the policy: "business" means a trade, profession or occupation.
>
> It cannot be doubted that the altercation between Kaler and Asham arose out of Kaler's trade as a taxi driver. He was attempting to recover the $8 fare owing to him. ...
>
> With respect, I think the learned motions judge drew too fine a point. The entire altercation arose over a disputed taxi fare. It was Kaler's business to seek out Asham and insist upon payment.

[42] The next part of the exclusion clause to consider is the definition of "business" or "business pursuits". The definitions differ somewhat. In one policy (Seeton) the definition refers to "any full-time, part-time or occasional activity" while the other policies refer to "any continuous or regular pursuit". Both definitions, however, expressly refer to a "trade, profession or occupation". They also contain the phrase "undertaken for financial gain".

[43] Applicants' counsel argued that the hallmarks of a "business pursuit", by reference to the definitions, are whether the activity in question is one which can be said to bear the indicia of continuity and regularity and whether it is undertaken for financial gain: see *Tam v. Lee* (1998) 167 D.L.R. (4th) 353 (Ont. Ct. Gen. Div.). He submitted that a strike is neither continuous nor regular; nor can it be said that the applicants either gave services to the union or participated in the strike simply for financial gain. The applicants had no individual control over the outcome of the strike and therefore, it was said, any prospective gain from a successful conclusion to the strike was too tenuous so as to characterize the strike as an activity undertaken for financial gain.

[44] In my opinion, it is not the amount of pay or the eventual outcome of the strike that are significant. The question is whether the activity out of which the claims arise (that is, the applicants' activities during the strike) can be said to "arise from" (in the sense of originating from, flowing from, incident to, or having connection with) the applicants' business. That "business" of course is mining, not striking.

[45] Counsel for the respondent Commercial Union referred me to a decision of the Ontario Workers' Compensation Appeal Tribunal which held that union business should be viewed as "arising out of" employment. It is an activity that is "incidental to" employment: *Decision 631/91*, [1992] O.W.C.A.T.D. No. 101. That decision also addressed the connection between service on a union executive and employment:

> While it is obviously true that serving on the Executive of a Local Union is voluntary, it is equally self-evident that service on a Local Executive arises from union membership and union membership arises from employment. The sole raison d'etre of the Local Executive is the workers' relationship with employment.

[46] This decision is certainly not binding on me nor is it directly related to the application of the exclusion clauses in this case. It does, however, reveal what is a common thread in modern labour relations law, that being the view that union activity, and even going out on strike, is a legitimate part of employer-employee relationships: see, for example, *United Brotherhood of Carpenters and Joiners of America, Local 1928 v.*

Citation Industries Ltd., [1983] B.C.J. No. 52 (S.C.). This view is also reflected by various statutes across Canada (such as the *Canada Labour Code* and the *Public Service Act*, R.S.N.W.T. 1988, c. P-16) that stipulate that a person does not cease to be an employee by reason only of his ceasing to work as a result of a lawful strike.

[47] It seems to me that the conclusion is inescapable. The applicants belonged to the union as a necessary component of their employment. The objectives of the union were to pursue benefits for the members, both in terms of working conditions and financial compensation. These applicants' union activities necessarily arose from their employment. The strike was merely an extension of the employer-employee relationship in a collective sense (a collective that these applicants were active parts of). As several counsel submitted, the applicants' employment and union activities are inseparable, one is in support of the other. The applicants' union involvement has been continuous and regular.

[48] It also seems to me that the previously noted *Kaler* case also answers any argument that some of the allegations against these applicants can be labelled as allegations of "rogue" or "criminal" behaviour during the strike. A homicide, as in *Kaler*, is as "rogue" as one can be yet that did not preclude a finding that the activity in question emanated from, *arose from*, the insured's business. Here the "rogue" behaviour, if there was any as alleged, was part of the strike which arose from employment.

[49] The aspect of financial gain is also satisfied. There is no need for financial gain to be the sole reason for the applicants' activities: see *Canadian Universities Reciprocal Insurance v. Hallwell Mutual Insurance Co.*, [1998] O.J. No. 5322 (Ont. Ct. Gen. Div.). Even if all that can be said is that a union member's support for a union is indirectly for financial gain (through collective bargaining for example), here with each applicant the evidence also establishes that they were not mere members but officials who were compensated by the union for their union work. They may not have been compensated much but it was an activity undertaken for financial gain.

Conclusions

[50] In my opinion, the allegations advanced against the applicants in the three actions have their foundation in these applicants' role as union officials and members during the strike. Their legal relationship to the deceased miners and to Warren is based solely on their status as fellow workers and union members. The alleged acts and omissions of the applicants, arising as they do from the strike, arise from their employment. The claims

allege acts that “originate from”, “have their origins in”, “grow out of”, “flow from”, are “incidental to”, or “have connection with” their employment (to follow the *Amos* case).

[51] I have concluded that these claims clearly fall within the business pursuits exclusion of each policy. There is no genuine issue on that point. This conclusion flows from the pleadings and the undisputed facts placed before me. There is no indemnity available under the policies for these claims. Hence there is no obligation to defend.

[52] The applicants’ motions are each dismissed. The respondents’ applications for summary judgment are each granted. Costs may be spoken to if necessary.

J.Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 26th day of April, 1999

Counsel for the Applicants: Austin F. Marshall
Counsel for the Respondent (Commercial Union): Eric R. Holden
Counsel for the Respondent (Western Union): Daniel W. Hagg, Q.C.
Counsel for the Respondent (Elite Insurance): Richard B. Lindsay

CV07666/CV07797/CV07832

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

BETWEEN: (CV 07666)

HARRY SEETON

Applicant

- and -

COMMERCIAL UNION ASSURANCE COMPANY OF CANADA

Respondent

AND BETWEEN: (CV 07797)

ROBERT KOSTA

Applicant

- and -

WESTERN UNION ASSURANCE COMPANY

Respondent

AND BETWEEN: (CV 07832)

EDMUND SAVAGE

Applicant

- and -

ELITE INSURANCE COMPANY

Respondent

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.Z. VERTES