SUPREME COURT OF CANADA

CITATION: Jesuit Fathers of Upper Canada *v.* Guardian Insurance Co. of Canada, 2006 SCC 21 [2006] S.C.J. No. 21

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BETWEEN:

Jesuit Fathers of Upper Canada
Appellant
and
Guardian Insurance Company of Canada and ING Insurance Company of Canada
Respondents

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Abella and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 64) LeBel J. (McLachlin C.J. and Bastarache, Binnie, Deschamps, Abella and Charron JJ. concurring)

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jesuit fathers *v.* guardian insurance

Jesuit Fathers of Upper Canada *Appellant*

v.

Guardian Insurance Company of Canada and
ING Insurance Company of Canada *Respondent*s

Indexed as: Jesuit Fathers of Upper Canada *v.* Guardian Insurance Co. of Canada

Neutral citation: 2006 SCC 21.

File No.: 30709.

2006: January 10; 2006: June 1.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Abella and Charron JJ.

on appeal from the court of appeal for ontario

Insurance — Insurer's duty to defend — Comprehensive general liability policy — Indian residential school operated and administered by religious order — Order's general liability policy providing for errors and omissions insurance with respect to professional services — Policy stipulating coverage to "apply only to claims which are first made against the Insured during the policy period" — In claim presented

by former student insurer informed of physical and sexual abuse at school and put on notice during policy period that similar claims might be made by other former students — Whether insurer must defend only claims "first made" before policy expired — Whether policy imposed upon insurer duty to defend against actions where information of possible claims received by insurer during policy period.

Insurance — Comprehensive general liability policy — Scope of policy — Whether insurance contract claims-made policy — Definition of " claim" under policy.

The Jesuits operated and administered an Indian residential school from 1913 until its closure in 1958. In 1988, they purchased a comprehensive general liability policy which provided for errors and omissions insurance with respect to professional services. The policy was for a one-year period and was renewable annually. By January 1994, the Jesuits had, through various means, become aware of both general and specific allegations of abuse of students at the school. In the case of C, his lawyer had informed the Jesuits by letter dated January 27, 1994 of the former student's claim, detailing how he had suffered physical and sexual abuse, as well as cultural and physical deprivation. C's lawyer also had inquired about the possibility of a negotiated settlement. Counsel for the Jesuits wrote to the insurer on March 18, 1994 to raise the possibility that the Jesuits might be facing other claims in the near future. The letter identified the offending Jesuits, the dates and locations of offending acts, the nature of the possible claims and the names of 10 victims, including C. After receiving information about the claim and possible claims, the insurer refused to renew the policy beyond September 30, 1994. Numerous additional claims alleging similar allegations were made after the expiration of the policy. With the exception of C's claim, the insurer refused to defend any claims arising from the operation of the school because

those claims were only "first made" after the expiry of the policy and were not covered by the policy. In the Ontario Superior Court of Justice, the trial judge construed the insurance contract as a claims-made policy. He found that C's claim and the claims on behalf of the nine victims mentioned in the March 18, 1994 letter to the insurer fell within the temporal limit of the policy and that the insurer had a duty to defend against them. The Court of Appeal upheld the decision.

Held: The appeal should be dismissed. Except for C's claim, the insurer has no duty to defend the actions against the Jesuits resulting from the administration of the school.

Because there is no ambiguity in the policy, it is unnecessary to resort to the principles specific to the interpretation of insurance policies. The insurance contract, read as a whole, is a claims-made policy: the professional services coverage is only available for "claims which are first made against the Insured during the policy period". The policy requirement that both occurrences and claims be reported does not change the nature of the coverage offered under the policy. Even in a claims-made policy, an insurer may insist for a number of reasons that it be informed of relevant circumstances or accidents prior to any related claim. The occurrence-based elements of the policy do not expand the coverage available; rather, they generally restrict it. [27-29] [41-43]

Since the insurance contract was a claims-made policy, the meaning of a "claim" in that policy will determine whether a duty to defend was triggered in the circumstances of the present case. The policy does not define a claim, but the clause limiting the scope of the insurance coverage refers to "claims first made" suggesting that a claim must be actively made as opposed to merely being discovered. This

interpretation of the word "claim" is consistent not only with the wording of the policy, which distinguishes between an "occurrence or circumstance" and a "claim", but also with the definition of "claim" under the common law, which requires a third party to communicate an intention to hold the insured responsible for damages. The third party may communicate this intention through a representative. The key is that the representative be accurately communicating the intent of the claimant and that it is done with the claimant's full knowledge and approval. [45-53]

Here, with the exception of C, an intention to hold the insured responsible for damages was not communicated by former students during the policy period and, as a result, the insurer does not have a duty to defend the actions. Although the issue was not appealed in this Court, the trial judge erred in concluding that there were claims made by the nine other individuals named in the March 18, 1994 letter to the insurer. Nothing in the record suggests that the person who gave the names of these individuals to the Jesuits' investigator had the permission of these individuals, either express or implicit, to communicate an intention to hold the Jesuits responsible for injuries suffered at the school. In fact, it is unclear whether these individuals ever had such an intention. [1] [60]

Cases Cited

Referred to: *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551, 2000 SCC 24; *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6; *Andy Warhol Foundation for the Visual Arts Inc. v. Federal Insurance Co.*, 189 F.3d 208 (1999); *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801.

Authors Cited

Holmes, Eric Mills. *Holmes' Appleman on Insurance 2d*, 2nd ed. Newark, N.J.: Matthew Bender, 2005.

Reid, Linda Thompson. *Statement to the Jesuits on Behalf of the Survivors of Child Sexual Abuse By The Jesuit Priest*. Ontario: Committee on Sexual Abuse, First Nations Cape Croker Reserve, June 1992.

APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Moldaver and Gillese JJ.A.) (2004), 74 O.R. (3d) 79, 192 O.A.C. 102, 16 C.C.L.I. (4th) 24, [2005] I.L.R. ¶I-4351, [2004] O.J. No. 4641 (QL), affirming a decision of the Ontario Superior Court of Justice (Whitten J.) (2003), 68 O.R. (3d) 178, 6 C.C.L.I. (4th) 276, [2004] I.L.R. ¶I-4247, [2003] O.J. No. 4534 (QL). Appeal dismissed.

Donald G. McLean, Q.C., Wally Zimmerman and *Eugene Meehan, Q.C.*, for the appellant.

Vernol I. Rogers and *Thomas J. Donnelly*, for the respondents.

The judgment of the Court was delivered by

LeBel J. —

I. Overview

(1) *Issue*

1 At issue in this appeal is whether an insurance policy issued by the Guardian Insurance Company of Canada ("Guardian") to the Jesuit Fathers of Upper Canada ("Jesuits") imposed on the insurer the duty to defend certain actions for damages arising out of the operation of the Garnier Residential School for Boys near Spanish, Ontario ("Spanish School"). As we shall see, the policy was a claims-made policy. In order to engage the insurer's duty to defend, it required, at the very least, the communication by a third party during the policy period of an intention to hold the insured responsible for damages. Such an intention was not communicated during the policy period and, as a result, the insurer does not have a duty to defend the actions. The appeal should be dismissed.

(2) *Background*

(a) Operation of Spanish School by the Jesuits

2 Between the late 1800s and 1969, the federal government operated a number of residential schools in partnership with various religious orders. The objective of the schools was to educate Aboriginal children and facilitate their assimilation into the dominant western European culture. The federal government partnered with the Diocese of Sault Ste. Marie to operate and administer the Spanish School. The Diocese of Sault Ste. Marie retained the Jesuits to operate and administer the school from 1913 until its closure in 1958. The school drew Aboriginal children from reserves across Ontario. Given the limited federal funding, the students at the Spanish School were expected to participate in food cultivation and preparation, animal husbandry, the manufacture of clothing and the physical maintenance of the facility — all under the supervision of the Jesuits.

(b) Early Indications of Problems at the Spanish School

3 At the end of July 1988, following a reunion of former students over the civic holiday, the *Sudbury Sun* and the *Globe and Mail* newspapers published articles which were critical of the administration of the Spanish School. In particular, the criticism centred on harsh discipline and the negative impact on Aboriginal culture.

4 On July 11, 1991, an Aboriginal parishioner told the parish priest for the village of Cape Croker that he had been abused as an altar boy by Father George Epoch, a Jesuit who had worked at the Spanish School, and that residential schools had “screwed up” generations of native people. The parishioner’s wife added that “unnatural” sexual activity had occurred at the schools.

(c) Investigation into Allegations of Sexual Abuse

5 As a result of the July 11, 1991 allegations, the Jesuits appointed Father William Addley to investigate the allegations concerning Father Epoch. During the investigation, Larry Lavallee reported being physically abused by Father Brown while a student at the Spanish School between 1948 and 1956 and that his cousin had been sexually abused by another priest. Mr. Lavallee cautioned his son against providing more information to the investigator without first speaking to a lawyer. On October 16, 1991, the Cape Croker Band Council and representatives of the Jesuits met to discuss the allegations of impropriety made against Father Epoch. Some in attendance supported an investigation while others did not.

6 In June 1992, a report was produced by Linda Thompson Reid, a social worker, on behalf of the Committee on Sexual Abuse, First Nations Cape Croker Reserve. The report entitled "Statement to the Jesuits on Behalf of the Survivors of Child Sexual Abuse By The Jesuit Priest" dealt with the abuse by Father Epoch and, more generally, the "unresponsive" attitude of the Aboriginal community in Cape Croker, who had remained in denial of their own suffering in residential schools. The report also called on the Jesuits to take full responsibility and for victims to come forward and request compensation.

7 By January 6, 1993, the Jesuits learned that the Ontario Provincial Police ("O.P.P.") were investigating allegations at the Spanish School. The Jesuits fully co-operated with the investigation. On January 21, 1993, the Jesuit Advisory Committee was informed of the ongoing O.P.P. investigation and that a member of the Aboriginal community had acknowledged the fact of sexual abuse but would not discuss the matter further. Shortly thereafter, the Jesuits retained Mike Myers to act as a facilitator with the

Cape Croker community. Mr. Myers' interviews with the members of the community revealed that some allegations of abuse dated back to a time where Father Epoch worked at the Spanish School. The facilitator recommended that the Jesuits work and provide assistance to the First Nations Advocates Committee and Working Group of Survivors.

8 The Jesuits then hired an investigator, Mary Wells. Through her June 30, 1993 interview with Jane Mundy, a regular visitor at the Anishnabe Spiritual Centre, she was told: (1) James Mara, a cook at the Spanish School, may have abused residents; (2) there were rumours of abuse by several Jesuit teachers including Father Epoch; and (3) the names of ten former students she believed were abused. She did not have permission to disclose any additional names. Ms. Wells produced her preliminary report on October 18, 1993. She named ten possible victims including Peter Cooper and explained that Ms. Mundy had volunteered to contact victims and encourage them to speak with Ms. Wells. Ms. Mundy later became apparently dissatisfied with the investigation and asked for the return of her notes. She indicated that all further correspondence should be through her lawyer.

9 Some of the victims of the abuse allegedly perpetrated by Father Epoch retained a lawyer, Roger Tucker. Mr. Tucker wrote to the negotiator hired to resolve the matter explaining that there had been many allegations of abuse at the Spanish School and that it was not proper to support one group of victims (victims of Father Epoch — as parish priest) and not another group, their parents (victims of abuse at the Spanish School).

10 By November 1993, the Chiefs of the relevant First Nations told the Jesuits that their investigation would be disruptive to their community and that no further steps

should be taken without band council involvement and approval. The Jesuits responded that they would comply with the Chiefs' wishes.

11 In sum, by January 1994, the Jesuits were aware of both general and specific allegations of the abuse of students at the Spanish School. The O.P.P. investigation had been abandoned. Jane Mundy had named both suspected victims and perpetrators but only Mr. Lavallee had made his allegations directly to the Jesuits.

(d) Events Leading to Current Dispute

(i) *The First Claim: Peter Cooper ("Cooper Claim")*

12 By letter dated January 27, 1994, a lawyer, Helen Pierce, informed the Jesuits of a claim in regard to her client Peter Cooper. The letter explained that Mr. Cooper had been a student at the Spanish School from 1941 to 1949 and detailed how he had suffered physical and sexual abuse, as well as cultural and physical deprivation. The letter alleged that there had been insufficient supervision of both offending teachers and their students. The letter explained the impact of this treatment on Mr. Cooper's life. Ms. Pierce also inquired about the possibility of a negotiated settlement. A statement of claim was later issued on May 8, 1995 containing similar allegations.

(3) *Insurance Coverage in 1994*

13 The Jesuits purchased insurance from Guardian in the form of a comprehensive general liability policy (the "Policy") and an umbrella policy from September 30, 1988 until September 30, 1994. The general liability policy provided errors and omissions

insurance with respect to professional services. The policy had an annual limit of $1,000,000.00 for each occurrence and $1,000,000.00 in the aggregate. The umbrella policy was similarly structured, except that it increased the annual limit both individually and in the aggregate to $4,000,000.00.

14 Both parties agree that the allegations made in the Cooper Claim and the subsequent claims involve injury arising from the failure to properly render professional services. The insurer also concedes that the Cooper Claim was made, through the letter of Ms. Pierce, during the policy period and, therefore, it has a duty to defend against it.

(4) *Jesuits' report to Guardian ("Zimmerman Letter")*

15 Counsel for the Jesuits, W. Zimmerman, wrote to Guardian on March 18, 1994 to raise the possibility that the Jesuits might be facing other claims in the near future. Pursuant to the terms of the policies, the letter contained information about claims and potential claims and followed the requirements of Condition F1, Notice of Accident and Occurrence. The letter identified the offending Jesuits, the dates and locations of offending acts, the nature of the possible claims and the names of ten victims identified by Ms. Mundy, including Peter Cooper. The letter stated that none of the alleged victims had come forward (this was not true in the case of Peter Cooper). What happened in respect of the claims of these ten victims is not clear. Comments from counsel during the hearing in this Court suggest that these claims are now moot.

(5) *Additional Claims*

16 Numerous additional claims, approximately 100, were made after the expiration of the policy. These claims involved allegations similar to those reported in the Zimmerman Letter including physical, sexual and cultural abuse at the Spanish School resulting from the lack of proper supervision of staff and students by the Jesuits. These are the claims that the appellant submits should be covered by the Policy even though the specific demands for compensation were not made during the policy period. In settlement of these claims, the Jesuits have thus far paid $1.2 million. They have also expended more than $1.8 million in legal fees for the current litigation and for defending the claims for which coverage has been denied.

(6) *Guardian's Refusal to Renew Coverage*

17 After receiving information about the claims and possible claims arising out of the operation of the Spanish School in the Zimmerman Letter, Guardian refused to renew the Policy beyond September 30, 1994. The Jesuits ultimately obtained coverage from a different insurer but any claims arising from the operation of the Spanish School were explicitly excluded from coverage for sexual and physical abuse.

(7) *Guardian's Denial of Duty to Defend*

18 With the exception of the Cooper Claim, Guardian refused to defend any claims arising from the operation of the Spanish School. It took the position that those claims were not covered by the Policy since they were only "first made" after the expiry of the Policy.

(8) *Judicial History*

(a) Ontario Superior Court of Justice ((2003), 68 O.R. (3d) 178)

19 As a starting point for his analysis of the different issues, Whitten J. acknowledged that the appellant had rendered professional services covered by the policy. None of its exclusion clauses would operate to deny coverage. The issue was rather whether the claim had arisen outside the temporal limits of the policy. The trial judge construed the insurance contract as a claims-made policy, but incorporating occurrence-based elements:

> The Guardian policy is a claims-made or discovery policy with occurrence-based elements. The latter elements appear within the characterization of a claim and in the notice provisions under the policy. The notice provisions in particular required the reporting of any alleged injury to which the insurance applies. It is the occurrence based elements and the absence of a definition of "claim" and a formal demand with respect to a "claim" which led to an analysis based on context and what is objectively reasonable to determine what constitutes a "claim".
>
> ... The essential nature of the alleged negligence of the Jesuits is within the policy. The question then becomes, are there "claims" made for that coverage within the temporal limits of the policy? [paras. 130-31]

20 In assessing whether the claims were made within the temporal limits of the Policy, the trial judge found that the Cooper Claim and the claims on behalf of victims mentioned in the Zimmerman Letter fell within the scope of coverage and that Guardian had a duty to defend against them. On the other hand, claims which came up later would not be covered. A notice of a general belief that claims would be presented did not amount to a claim made during the policy period and would not trigger the duty to defend:

> Given the context of what the Jesuits faced in the early part of 1994, there is no doubt that the Peter Cooper claim is literally a "claim" within the policy, temporally and otherwise. The Cooper claim adds to that original context, and

> claims on behalf of those additional named victims in the correspondence of W. Zimmerman, dated March 18, 1994, can be equally so described. Therefore, there is a duty to defend on the part of the insurer with respect to those claims. Claims made on behalf of plaintiffs/complainants not described during the policy period are not "claims" for the purpose of the coverage, as they are neither "first made" during the policy period as is required by the policy, nor were they discovered as such during the policy period. A general belief as to the possible existence of further complaints "out there" lacks the specificity required for the basis of a claim under the policy. [para. 132]

(b) Ontario Court of Appeal ((2004), 74 O.R. (3d) 79)

21 In dismissing the appeal, the Ontario Court of Appeal endorsed the decision of the trial judge. It noted that:

> ... the appellant's knowledge of circumstances or prior events that could give rise to claims against the appellant for compensation at some point in the future could not be equated with a claim for the purposes of the insuring agreement provisions in the policy. [para. 2]

II. Analysis

22 The central issue before this Court is the scope of the Policy: is it claims-made? An ancillary issue then arises: what is a claim?

(1) *Insurance Coverage for Professional Negligence*

(a) Types of Policies

23 Significant variation may be observed in the nature and structure of policies insuring against risks arising from the offering of professional services. Generally, the drafting of such policies reflects two main approaches for the determination of whether a

claim is captured, from a temporal perspective. The first and more traditional approach, the occurrence-based approach, focuses on the occurrence of the negligent act. If the negligent act giving rise to the damages occurred during the policy period, the insurer is required to indemnify the insured for any damages arising from it regardless of when the actual claim is made. The second approach, the claims-made approach, focuses on the claim made by the third party. If a claim is made by a third party during the policy period, the insurer is required to indemnify regardless of when the negligent act giving rise to the claim occurred. Naturally, a particular policy may use the first or the second approach or a hybrid of both. The issue is always what a particular policy dictates. See generally, *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252.

24 The development and growing use of claims-made or hybrid policies was, in large part, a response to serious problems encountered by insurers in relation to occurrence-based policies. An occurrence-based policy works well where the damage resulting from a particular negligent act is immediately apparent (or becomes apparent shortly thereafter). It is less well-suited in cases of professional services such as medical, engineering or manufacturing services, where the damage from the negligent act may not be apparent for many years. First, the "long-tail" nature of the liability in the examples above makes it likely that many claims will be made well after the policy has expired. Second, the ongoing developments in law and science make it difficult for the insurer to estimate the potential liability arising from claims made many years in the future. Finally, where an insured repeatedly changes insurance companies, a claim made in the future could result in legal battles between insurance companies where the exact timing of the negligence is unknown or where the negligence was of an ongoing nature. These problems increase the difficulty of assessing actuarial risk. As a result, premiums

may rise sharply. Coverage may even become unavailable on the market. (See *Reid Crowther*, at pp. 262-63.)

25 On the other hand, claims-made and hybrid policies have their own drawbacks. Although considerably more affordable since there is no possibility of claims arising after the end of the coverage period, they also offer more limited coverage. They may even leave gaps in the coverage sought by the insured (*Reid Crowther*, p. 266). In a discovery policy, the insurer is liable to indemnify if the damages are discovered during the policy period. In a claims-made policy, the liability only arises if the claim is actually made during the policy period. Many claims-made policies offer even more restricted coverage. For example, the policy might exclude from coverage any negligence of which the insured is aware prior to the coverage period even if no claims have been made. This leaves the insured in the situation where, although consistently insured over a period of years, there are still certain claims that do not fall within the purview of the policy — namely, claims where the underlying damages (and related negligence) are discovered in one policy period but the claim is not made by a third party until a subsequent period. The current insurer may then be off the hook, while a new insurer will require an exclusion of the potential claims in its policy. The insured will fall between two stools.

(b) Additional Coverage Available

26 Given the potential for gaps in coverage with certain forms of claims-made and hybrid insurance policies, the insurance industry has developed additional coverage. It comes with a price. In particular, the insured may be given the option of including various clauses to avoid gaps in its professional negligence coverage. One such clause is

the "Extended Reporting Period", "Discovery Period" or "Tail Coverage". This clause would cover claims made for a specified length of time after the expiry of the policy. For example, a two-year extended reporting period option would capture claims made up to two years after the expiry of the policy (E. M. Holmes, *Holmes' Appleman on Insurance 2d* (2nd ed. 2005), at §146). This clause protects the insured against the possibility of an insurer refusing to renew a policy after being made aware of circumstances that may give rise to many claims in the near future. Another clause is the "Notice of Circumstance Clause", which permits the insured to report during the policy period circumstances that may give rise to future claims. Any claims related to those circumstances made after the expiry of the period are deemed made during the policy period. This form of coverage was available on the market when the Guardian policies were last renewed.

(2) Interpretation of Insurance Policies

(a) *Rules of Interpretation*

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 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. 901-902; *Non-Marine Underwriters*, at para. 71).

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.

(b) Context of Residential Schools

31 This Court has recognized the public purpose served by insurance. In particular, it can help ensure that the needs and expectations of third parties who are injured accidentally or through negligence are met by giving them access to a compensation fund. The appellant argues that, given this public purpose, the meaning of the word "claim" should be interpreted broadly in order to recognize the reality of abuse claims made in the context of residential schools.

32 No one questions that there is a public interest served by the compensation of victims of different forms of abuse in residential schools. How to compensate them remains a difficult problem. Given the psychological and social complexities of dealing with childhood abuse, victims cannot be expected to advance their claims on timetables convenient for insurers. In this case, those complexities are very well illustrated by the sequence of events leading to the first claims of abuse at the Spanish School almost three decades after the school was closed. Most victims were reticent to come forward in the early stages of the investigation. The Aboriginal communities involved also had legitimate concerns that aggressively seeking out claims could have devastating effects. The need for flexibility in the law when dealing with civil suits relating to sexual abuse, recognized by this Court in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, is even more relevant in the context of residential schools, where there are frequently many victims, the abuse can date back many years and an entire community has been affected.

33 Nevertheless, even with all these factors being considered, courts must remain mindful of the rules and principles governing insurance law. In the long run, a contextual but unprincipled approach would render a disservice not only to the industry, but also to insureds and to victims. It would lead to further difficulties in obtaining coverage and compensation. Both parties to an insurance contract are entitled to expect that well-established principles will be reflected in the interpretation and application of that contract. In this respect, another form of public interest is also at stake. For these reasons, courts must pay close attention to the structure and actual wording of the policy, read as a whole.

(3) *The Policy*

(a) Structure

34 The Policy is structured in a manner similar to many commercial liability policies:

Declarations
A. Insuring Agreement
B. Additional Insuring Agreements
C. Exclusions applicable to Section A. Insuring Agreements (1) and (2)
D. Limit of Liability
E. Definitions
F. Conditions
Schedule of Endorsements

35 The Declarations set out the name of the insured, Jesuit Fathers of Upper Canada et al., and policy period, September 30, 1988 to September 30, 1989 (renewed annually

to September 30, 1994). They also state the limit of liability under Insuring Agreement, clause A(2), as $1,000,000.00 each claim and $1,000,000.00 in the aggregate.

36 The Insuring Agreement establishes the parameters within which coverage is available. At issue in this appeal is the scope of the coverage provided by Insuring Agreement, clause A(2), which provides:

> To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages, because of injury arising out of the rendering of, or failure to render professional services in the practice of the Insured's profession, provided however, that coverage as provided herein shall apply only to claims which are first made against the Insured during the policy period as stated in the Declarations.

As such, the insurance coverage is available for claims "first made against the Insured during the policy period".

37 The Exclusions section identifies the claims that are not covered even though they would otherwise fall within the coverage under Insuring Agreement, clause A(1) or A(2). In particular, clause C(16) excludes from coverage claims arising from circumstances known prior to the coverage period in the following way:

> Any circumstance or occurrence which upon its application to a new Insured during the policy period, had already been presented to the Insured or which could result from acts or circumstances already known to the Insured and liable to give rise to a claim, whether or not these acts or circumstances are stated in the application.

38 The Limit of Liability stipulates that the limit of liability is the amount recorded in the Declarations. In explaining the operation of the liability limit, clause D(4) provides:

> The limit of the Insurer's liability under Section A. Insuring Agreement (2) of this policy shall be the amount stated in the Declarations as "each claim" (meaning one or more claims resulting from the same circumstances or the same event in the course of the Insured's profession which were rendered or should have been rendered to one or more persons) for all damages, including damages for death and for care and loss of services, because of each claim or suit covered hereby and, subject to such limit the amount stated in the Declarations as "aggregate" for all damages in any one period of twelve months terminating on an anniversary of the inception date of the policy.

39 The appellant argues that this provision provides insight into the meaning of claim. In its view, it supports an interpretation of claim that includes all legal actions arising from the same (negligent) event or circumstances involving one or more persons. The respondents, on the other hand, submit that this provision does not add any meaning to the word "claim" but rather lowers the limit of liability for multiple claims made in the same policy period where the claims arise from the same event or circumstances. It would apply where the aggregate policy limit is greater than the limit for each claim, which is not the case in this Policy.

40 The Conditions require the insured to notify the insurer of any accident or occurrence and of any claim or suit to which the insurance may apply. In particular, they provide as follows:

> Notice of Accident or Occurrence. When an accident or occurrence takes place or upon the Insured becoming aware of any alleged injury to which this insurance applies, written notice of such accident, occurrence or injury shall be given by or on behalf of the Insured to the Insurer or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and reasonably obtainable information respecting the time, place and

> circumstances of the accident, occurrence or injury, the names and addresses of the injured and of available witnesses and particulars of the damaged property.
>
> Notice of Claim or Suit. If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Insurer every demand, notice, summons or other process received by him or his representative.

(b) Claims-Made Policy

41 The Policy, as expanded in Insuring Agreement, clause A(2), and the related provisions, is a claims-made policy. The professional services coverage is only available for "claims ... first made ... during the policy period". As noted by Whitten J., the Policy also has certain occurrence-based elements. After reviewing the different provisions of the Policy, I conclude that the occurrence-based elements do not, as suggested by the appellant, expand the coverage available. On the contrary, these provisions generally restrict it.

42 First, the Policy requires reporting of both occurrences and claims. The reporting provisions do not, however, change the nature of the coverage offered under the Policy. This is particularly true since no ambiguity is found in the Policy itself. Even in a claims-made policy, an insurer may insist that it be informed of relevant circumstances or accidents prior to any related claim. Knowledge of the existence of circumstances or the occurrence of an accident to which the insurance applies allows the insurer to anticipate possible future claims and to make the relevant financial preparations. In the case of this Policy, the clause F(1) (Notice of Accident or Occurrence) serves two purposes: (1) it informs the insurer of circumstances that might engage the occurrence-based coverage in Insuring Agreement, clause A(1); and (2) it provides the

insurer with information about circumstances that might be excluded from coverage in subsequent coverage periods under clause C(16).

43 Second, the Policy excludes from coverage claims arising from circumstances known to the insured prior to the coverage period under clause C(16). In essence, clause C(16) is an occurrence-based restriction on the claims-made coverage offered under Insuring Agreement, clause A(2).

44 Finally, the Policy, under clause D(4), limits liability for all claims made in the coverage period arising from the same circumstances to the maximum amount for each claim. The limit of liability section does not expand the coverage available; nor does it define terms used throughout the Policy. Only claims are covered. I must now consider what is a claim for purposes of the interpretation and application of the Policy.

(4) *Nature of a Claim*

(a) Provisions of the Policy

45 The Policy does not define a claim. The Insurance Agreement, clause A(2) does, however, refer to "claims ... first made", suggesting that a claim must be actively made as opposed to merely being discovered. The Policy also distinguishes between a "circumstance or occurrence" and a "claim".

46 First, in the Exclusions section of the Policy, clause C(16) excludes from coverage the following:

> Any circumstance or occurrence which, upon its application to a new Insured during the policy period, had already been presented to the Insured or which could result from acts or circumstances already known to the Insured and liable to give rise to a claim, whether or not these acts or circumstances are stated in the application.

This clause illustrates a distinction in the wording of the Policy between a claim and the circumstances or occurrences giving rise to it.

47 Second, in the Limit of Liability section of the Policy, clause D(4) explains how the limit of liability is computed where multiple claims are made in the same year arising from the same occurrence or circumstances. In particular, it provides a definition of the term "each claim" used in the Declarations section of the Policy to set the maximum amount payable under the Policy for a particular claim. As noted above, clause D(4) reads:

> The limit of the Insurer's liability under Section A. Insuring Agreement (2) of this policy shall be the amount stated in the Declarations as "each claim" (meaning one or more claims resulting from the same circumstances or the same event in the course of the Insured's profession which were rendered or should have been rendered to one or more persons) for all damages, including damages for death and for care and loss of services, because of each claim or suit covered hereby and, subject to such limit the amount stated in the Declarations as "aggregate" for all damages in any one period of twelve months terminating on an anniversary of the inception date of the policy.

The Policy uses the language "one or more claims resulting from the same circumstances or the same event". Again, this suggests a clear difference between the event or circumstance giving rise to a claim and the actual claim.

48 Finally, in the Conditions section, the Policy provides two different reporting provisions. The first provision, F(1), requires that the insured notify the insurer of any accident, occurrence or alleged injury to which the insurance applies. It reads:

> Notice of Accident or Occurrence. When an accident or occurrence takes place or upon the Insured becoming aware of any alleged injury to which this insurance applies, written notice of such accident, occurrence or injury shall be given by or on behalf of the Insured to the Insurer or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and reasonably obtainable information respecting the time, place and circumstances of the accident, occurrence or injury, the names and addresses of the injured and of available witnesses and particulars of the damaged property.

The second provision, F(2), requires the insured to forward to the insurer any documentation received by the insured relating to a claim or suit against the insured in the following terms:

> Notice of Claim or Suit. If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Insurer every demand, notice, summons or other process received by him or his representative.

49 In addition to showing that there is a difference between an "accident or occurrence" and a "claim or suit", the clauses also provide insight into the meaning of a claim. Most notably, clause F(2) does not require a description of the claim but the actual "demand, notice, summons or other process received". Although not determinative, this wording implicitly suggests that, absent a demand or other process received, there would be no claim or suit.

(b) Common Law Doctrine

50 In *Reid Crowther*, at p. 273, McLachlin J. explained the requirement that, in order for a claim to be made, certain information must be communicated to the insured by the claimant:

> The authorities establish that as a general rule, for a "claim" to be made there must be some form of communication of a demand for compensation or other form of reparation by a third party upon the insured, or at least communication by the third party to the insured of a clear intention to hold the insured responsible for the damages in question.

51 In essence, a claim at common law requires a third party to communicate an intention to hold the insured responsible for damages. Naturally, the third party may communicate through a representative, whether a legal representative such as a lawyer or any other advocate such as a band leader, a friend or a counsellor. The key is that the representative be accurately communicating the intent of the claimant and that it be done with the claimant's full knowledge and approval. The issue of who may make a claim was considered in *Andy Warhol Foundation for the Visual Arts Inc. v. Federal Insurance Co.*, 189 F.3d 208 (2nd Cir. 1999), at p. 216, where it was found that:

> As a consequence, for an assertion or notice to the insured to be a claim it must be made by the party whose rights allegedly have been violated.
>
> ...
>
> To constitute a claim within the meaning of an insurance contract, the assertion must be made by or on behalf of the party making the claim.
>
> ...

52 The requirement that the claimant be the source of the claim is sensible. Since the claimants own the right to damages, their permission is required to further pursue the claim whether through negotiations or legal action.

(c) Circumstances Versus Claim

53 In support of its position, the appellant submits that all the requests for compensation resulting from abuses at the Spanish School are part of one claim within the meaning of the Policy — the Spanish School claim. In essence, according to its interpretation, a claim would be the set of circumstances (here, the lack of supervision at the Spanish School) potentially giving rise to demands for compensation. This position is inconsistent with the wording of the Policy which, as noted above, differentiates between a claim and an accident, occurrence or circumstance. It also cannot be reconciled with the definition of "claim" under the common law, which requires the communication of an intent to hold the insured responsible for damages. The meaning of a "claim" in the Policy determines whether a duty to defend was triggered in the circumstances of the present case.

(5) *Duty to Defend*

54 The duty to defend is an obligation arising from the insurance policy. Although directly related to the duty to indemnify, it is much broader in scope. It arises from the pleadings, but only in respect of claims which would fall within the coverage of the policy if they were established. As explained by McLachlin J. in *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, at pp. 810-11:

> [T]he duty to defend arises only where the pleadings raise claims which would be payable under the agreement to indemnify in the insurance contract...
>
> 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.
>
> Other Canadian authority overwhelmingly supports the view that normally the duty to defend arises only with respect to claims which, if proven, would fall within the scope of coverage provided by the policy: see *Dobish v. Garies* (1985), 15 C.C.L.I. 69 (Alta. Q.B.); *Thames Steel Construction Ltd. v. Northern Assurance Co.*, [1989] I.L.R. 1-2399 (Ont. C.A.); *Vancouver General Hospital v. Scottish & York Insurance Co.* (1987), 15 B.C.L.R. (2d) 178 (B.C.S.C.).

55 In essence, the "duty to defend arises when the underlying complaint alleges any facts that might fall within the coverage of the policy": *Non-Marine Underwriters*, at para. 78. In this case, it is accepted by the parties that, if the claims were made within the temporal limits of the Policy, the duty to defend is engaged. The claims allege some injuries apparently "arising out of the rendering of, or failure to render professional services in the practice of the [Jesuits'] profession" (see Policy, clause A(2)), and none of the exclusions obviously apply.

(6) *Application to Claims in this Case*

(a) Cooper Claim

56 Peter Cooper informed the Jesuits, through his legal counsel, that he had suffered injuries due to the lack of administrative supervision at the Spanish School and inquired about the possibility of a legal settlement. Mr. Cooper's lawyer's letter was a claim under the Policy. It communicated an intention to hold the Jesuits responsible for his injuries. The claim was made prior to the expiry of the policy on September 30, 1994 and, therefore, Guardian's duty to defend was engaged, as it acknowledges.

(b) Claims Made After the Expiry of the Policy

57 A number of demands for compensation relating to abuse at the Spanish School were made after the expiry of the Policy. The general circumstances that gave rise to those claims were slowly made known to the Jesuits between 1988 and January 1994. Through the publication of the newspaper articles in 1988, the investigation of the actions of Father Epoch and the reports of parishioners, the Jesuits knew of allegations that the Spanish School lacked supervision and that, as a result, some students had suffered deprivation and abuse at the hands of teachers, employees and other students.

58 Other than the case of Peter Cooper, the Jesuits were not aware of any other persons intending to hold them responsible for damages arising from the situation prevalent at the Spanish School until after the expiry of the Policy. Since the claimants did not communicate during the coverage period, either directly or indirectly, their intention to hold the Jesuits responsible for the damages they suffered, the duty to defend is not engaged.

(c) Nine Other Victims Named in Zimmerman Letter

59 The trial judge found that there were claims made during the policy period by the nine other victims named in the Zimmerman reporting letter. It is not clear whether any of these victims initiated legal action within the relevant limitations period. Although the issue was not appealed by the respondents and is now moot as I mentioned above, it still merits some comment.

60 The identity of the victims was discovered by Mary Wells, the Jesuits' investigator. She was informed of their names by Jane Mundy during an interview.

Ms. Mundy gave names of individuals who, in her view, had been victims of abuse at the Spanish School. Nothing in the record suggests that Ms. Mundy had the permission of the named victims to communicate this information. Consequently, Ms. Mundy could not make a claim within the meaning of the Policy. Moreover, a claim would need to communicate an intention to hold the Jesuits' responsible for injuries suffered at the Spanish School. Without the victims' permission, either express or implicit, Ms. Mundy could not communicate such an intention on their behalf. In fact, it is unclear whether the nine victims ever had such an intention. It was, therefore, an error for the trial judge to conclude that there were claims made by these nine individuals. Notably, his error has nothing to do with the form of communication, i.e. direct versus indirect. The error related to what was or, more accurately, what was not communicated.

(7) *The Scope of the Coverage*

61 The outcome described above properly reflects the scope and nature of the coverage in place at all relevant times. The Jesuits purchased claims-made professional liability insurance from September 30, 1988 until September 30, 1994. The Policy covered claims first made during the Policy period and included limitations and restrictions relating to multiple claims arising from the same circumstances and claims arising from circumstances known to the insured prior to the coverage. It also contained onerous reporting provisions.

62 A number of claims were made alleging the Jesuits were negligent in their administration of the Spanish School. While the general circumstances giving rise to these claims were known to the Jesuits prior to the expiry of the Policy, the specific claims were only made after the expiry of the Policy. Since the claimants (or their

representatives) did not, during the Policy period, communicate their intention to hold the Jesuits responsible for the damages they had suffered, Guardian's duty to defend was not engaged.

63 Other commercially available insurance policies would have covered claims made even after the end of the policy period. In particular, an occurrence-based policy or a policy with an occurrence-based extension would have covered claims made after the end of the coverage period where the circumstances giving rise to the claims were discovered during the coverage period. The Jesuits, however, never purchased such a policy and cannot now claim coverage under it.

III. Disposition

64 Except for the Cooper Claim, Guardian has no duty to defend the actions for damages resulting from the administration of the Spanish School. The appeal is dismissed, with costs awarded to the respondents.

Appeal dismissed, with costs.

Solicitors for the appellant: Zimmerman Lawyers, Hamilton; Lang Michener, Ottawa.

Solicitors for the respondents: Cassels Brock & Blackwell, Toronto.