CITATION: Receiver Reliance Insurance Company, 2015 ONSC 7489
COURT FILE NO.: 01-CL-4313
DATE: 20151202

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

IN THE MATTER OF
RELIANCE INSURANCE COMPANY

AND IN THE MATTER OF THE
INSURANCE COMPANIES ACT, S.C. 1991,C.47,AS AMENDED

AND IN THE MATTER OF THE
WINDING-UP AND RESTRUCTURING ACT, R.S.C. 1985, C.W-11, AS AMENDED

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

AND

RELIANCE INSURANCE COMPANY

Respondent

BEFORE: Newbould J.

COUNSEL: *Graham Smith, Francy Kussner and Kirby Goldstein*, for KPMG Inc. Liquidator of Reliance Canada

William Manuel and Farzin Yousefian, for the Ministry of the Attorney General

Jeffrey S. Leon and Sean Zweig, for Her Majesty the Queen in Right of British Columbia, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan

Mark E. Meland and Avram Fishman, for the Quebec Class Action Representatives

HEARD: November 2, 2015

ENDORSEMENT

[1] Reliance Insurance Company is a property and casualty insurer incorporated in Pennsylvania. It carried on business in Canada through a branch, Reliance Canada. In 2001, Reliance Insurance Company was put into supervision status in Pennsylvania and subsequently into liquidation. The Pennsylvania Commissioner of Insurance was appointed liquidator of Reliance Insurance Company.

[2] On October 4, 2001, the Superintendent of Financial Institutions in Canada took control of the assets of Reliance Canada pursuant to the Insurance Companies Act ("*ICA*") under which Reliance Canada is regulated. On application by the Attorney General (Canada), it was ordered on December 3, 2001 that Reliance Canada be wound-up under the *Winding-Up and Restructuring Act* ("*WURA*"). KPMG Inc. was appointed the liquidator of Reliance Canada.

[3] The Liquidator has brought motions to approve settlement agreements with Rothmans, Benson & Hedges Inc. ("RBH"), a holder of 12 excess liability policies issued by Reliance Canada ("RBH Policies") and with Imperial Tobacco Company Limited ("ITCAN"), a holder of 11 excess liability policies issued by Reliance Canada ("ITCAN Policies").

[4] The Quebec Class Action Representatives obtained a judgment on May 27, 2015 against RBH, ITCAN and JTI-MacDonald for approximately $15.5 billion. It is under appeal.

[5] Her Majesty the Queen in right of Ontario has commenced an action for $50 billion against fourteen defendants, including RBH and ITCAN, to recover the health care costs the Crown has incurred and continues to incur as a result of tobacco-related wrongs allegedly committed by the defendant tobacco manufacturers, pursuant to the *Tobacco Damages and Health Care Costs Recovery Act*, 2009, SO 2009, c 13. British Columbia, Manitoba, New

Brunswick, Nova Scotia, Prince Edward Island and Saskatchewan have also commenced similar claims under their legislation similar to the Ontario legislation against RBH, ITCAN and a number of other tobacco manufacturers.

[6] The Quebec Class Action Representatives and the seven provincial Crowns oppose the proposed settlements by reason of the fact that the settlements contain a condition requiring court approval of releases being provided that would release any claims that third parties, including these opposing parties, would have against Reliance Canada or its reinsurers. They all assert that they have rights directly against Reliance Canada by reason of various statutory provisions. The Provinces also assert that they are not subject to the *WURA* and that if they are, there is no basis for the Court to grant releases from their actions.

[7] The Liquidator contests all of these positions taken by the opposing parties and also takes the position that the Reliance Canada policies issued to RBH and ITCAN do not cover the claims made by the Quebec Class Action Representatives and the seven provinces because of exclusion clauses regarding smoking risks. This is contested.

[8] The settlements with each RBH and ITCAN provide that each company and related parties release and discharge Reliance Canada and related parties, including a release of and from any and all claims made or asserted, or that could be made or asserted, in any way connected with the policies issued by each company, reported or unreported. Under various provincial statutes, the Crowns assert that they have direct claims against Reliance. The Ontario provision, which is similar to the legislation in the other provinces, provides in section 132(1) of the *Insurance Act*:

> Where a person incurs a liability for injury or damage to the person or property of another, and is insured against such liability, and fails to satisfy a judgment awarding damages against the person in respect of the person's liability, and an execution against the person in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy, but subject to the same equities as the insurer would have if the judgment had been satisfied.

[9] The Quebec Class Action Representatives assert that under Quebec legislation they have a direct action against Reliance. The Liquidator does not acknowledge such rights of these parties but in order to achieve certainty in the settlements, requires as a condition of settlement confirmation that the settlement also constitutes a discharge and release of any such potential derivative claims including claims of the named plaintiffs, plaintiff class members and plaintiff governments in the actions brought, governments that have not as of this point brought an action in the nature of the healthcare costs recovery claims, and unknown potential derivative claimants.

The *Winding-Up and Restructuring Act*

[10] The *WURA* is a federal statute. The *WURA* provides a framework to address the financial difficulties of certain federal corporations, financial institutions and insurance companies incorporated under provincial legislation. The general scheme of the *WURA* is to provide a mechanism for the orderly gathering and realization of the assets of a debtor corporation and the distribution among that corporation's creditors of its assets under the supervision of the court. Any claim against the company in liquidation is stayed and claims must be pursued in a claims process conducted by the liquidator under the *WURA*. The purpose was described by Gonthier J. in *Coopérants, Mutual Life Insurance Society (Liquidator of) v Dubois*, [1996] 1 SCR 900:

> **36** In *Re J. McCarthy & Sons Co. of Prescott Ltd.* (1916), 38 O.L.R. 3, at p. 9, the Ontario Court of Appeal described this purpose as follows:
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> > The purpose of the Act is to wind up, finally, the affairs of the company as inexpensively and speedily as possible, in the interests of the creditors, and all others concerned in it, primarily; and, for the common good, all are equally deprived of some of their ordinary rights, including a right of action, and all that may follow upon that right, such as mode of trial, right of appeal, etc., and all are confined to the remedies which the Act provides or permits.
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> **37** The purpose of the statute is to arrange for the closing down of the company's business in an orderly and expeditious manner while minimizing, as far as possible, the losses and harm suffered by both the creditors and other interested parties and by distributing the assets in accordance with the Act. The mechanism provided consists in requiring the court's leave for proceedings by the

> creditors (ss. 21 and 22) and giving responsibility for the company's affairs to a court-appointed liquidator, who acts as an officer of the court, under its control and in accordance with its directives (s. 19)...

[11] Section 38 of the *WURA* gives the Liquidator the power to compromise claims. It is that section under which the Liquidator has settled the claims of RBH and ITCAN subject to court approval. It provides:

> 38. A liquidator may, with the approval of the court, make any compromise or arrangements that the liquidator considers appropriate with
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> > (a) in the case of a company other than an authorized foreign bank, creditors of the company.

Are the Crowns bound by the *WURA*?

[12] The Crown has immunity subject to certain exceptions. Section 17 of the *Interpretation Act*, RSC, 1985, c I-21 provides:

> No enactment is binding on Her Majesty the Queen or affects Her Majesty the Queen or her Majesty's rights or prerogatives in any manner, except as mentioned or referred to in the enactment.

[13] The reference to Her Majesty the Queen in section 17 has been held to encompass both the Crown in right of Canada, as well as the Crown in right of a province. See *Alberta Government Telephones v Canadian Radio-television and Telecommunications Commission*, [1989] 2 SCR 225 and *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3

[14] The Crowns take the position that they have made no claim against Reliance in the liquidation or sought to take advantage of any part of the *WURA*. They say that there is no jurisdiction under *WURA* for a court to approve a settlement that would release Reliance or its reinsurers from claims by the Crown. The Ontario Crown takes the position that if it obtains a judgment against Reliance, it will look to the assets of Reliance which it says are not the assets of the Liquidator. The Crowns from the other six provinces take the position that they take their chances and it is their risk that when they obtain a judgment against Reliance there may be no assets left as they have all been paid out by the Liquidator.

[15] Prior to the enactment of section 17, the common law provided that a statute did not bind the Crown unless it expressly said the Crown was bound or unless it could be said that the Crown was bound by necessary implication. See *Province of Bombay v Municipal Corporation of Bombay,* [1947] AC 58. In *Alberta Government Telephones*, the Supreme Court expressed three situations under section 16 (now section 17) of the *Interpretation Act* in which it could be held that the Crown was bound by a statute. Chief Justice Dickson stated:

> **130** ... It seems to me that the words "mentioned or referred to" in s. 16 are capable of encompassing (1) expressly binding words ("Her Majesty is bound"), (2) a clear intention to bind which, in *Bombay* terminology, "is manifest from the very terms of the statute", in other words, an intention revealed when provisions are read in the context of other textual provisions, as in *Ouellette, supra*, and, (3) an intention to bind where the purpose of the statute would be "wholly frustrated" if the government were not bound, or, in other words, if an absurdity (as opposed to simply an undesirable result) were produced. These three points should provide a guideline for when a statute has clearly conveyed an intention to bind the Crown.

[16] There is a related principle which provides that even if a Crown is not bound by a statute, it may be taken to have waived its immunity and be bound by the statute by having taken the benefit of the statute. It involves a benefit/burden analysis. See La Forest J. in *Sparling v. Caisse de Depot et Placement*, [1988] 2 S.C.R. 1015:

> **13** There can be no disputing the existence of the benefit/burden exception (sometimes referred to as the "waiver" exception) to Crown immunity. It is of ancient vintage; see *Crooke's Case* (1691), 1 Show. K.B. 208 at pp. 210-11, 89 E.R. 540 at p. 542...

(i) Express language

[17] The *WURA* does not contain any language expressly binding the Crown.

(ii) Clear intention to bind the Crown

[18] A clear intention to bind the Crown must be found in the language of the statute. Such intention is revealed if one is irresistibly drawn to that conclusion through logical inference. The context must include the circumstances which led to the enactment of the statute and the

mischief to which it was directed. See *Friends of the Oldman River Society v Canada (Minister of Transport)*, [1992] 1 SCR 3 at paras. 73 and 74.

[19] I do not see any language in the *WURA* that reveals a clear intention that the Crown is bound to the terms of a settlement by a liquidator of a company under liquidation. The Liquidator points to section 164 that provides that any government in Canada must, if ordered by the winding up Court, transfer any assets deposited with it that are held for the company or for the protection of the policyholders. That section has nothing to do with claims or the settlement of claims.

[20] The Liquidator relies on the case of *Kansa General International Insurance Co. (Re)*, [1999] Q.J. No. 557, a decision of Justice Durand in the Quebec Suerior Court. I do not see that case as assisting the Liquidator. In that case, the Ontario Crown was a co-defendant in two actions seeking damages as a result of the transfusion of tainted blood. The Crown submitted a proof of claim in Kansa's liquidation under the *WURA* seeking coverage under its general liability policy of insurance. Kansa's liquidator denied coverage and refused to provide a defence to the Claim. The Crown subsequently sought a declaration that it was not bound by the stay order and could exercise any right or recourse against Kansa. Durand J. held that as the Crown had filed a claim in the liquidation, it was bound to the liquidation proceedings under the *WURA* by the benefit/burden principle.

[21] The Liquidator also relies on the case of *Christian Brothers of Ireland in Canada, Re* (2000), 49 C.B.R. (4^{th}) 12 in which Blair J. (as he then was) upheld a settlement of claims under the *WURA*, essentially by applying the *Soundair* principles involving a receiver to the decision of a liquidator in settling claims. The Crown was the largest creditor, having filed subordinated claims with the liquidator for payments made on claims made against the Christian Brothers. In discussing Crown priority, which was relevant to various arguments made, Blair J. in *obiter* made statements regarding Crown priority but expressly declined to rule on the issue of Crown priority. He did however state that the Crown was not free to assert a claim in the winding-up proceeding and then take the position that the winding-up court did not have jurisdiction to deal with objections regarding its claim, stating that if the Crown seeks to participate in and benefit from the winding-up proceedings, it exposes itself to the jurisdiction of the court under the

WURA. I do not see this as helping the Liquidator in this case as the Crowns have not made any claim in the liquidation.

[22] The Crowns rely on cases that held that the Crown was not bound by the *CCAA* before the *CCAA* was later amended to specifically make the Crowns bound by it. See *Fine's Flowers Ltd. v Creditors of Fine's Flowers Ltd.*, (1993), 16 OR (3d) 315 (CA), *Gaston H. Poulin Contractor Ltd. (Re),* [1992] OJ No 709 and *Canada (Attorney General) v Enterprises Jean Mercier Ltèe*, [1992] RJQ 642, 15 CBR (3d) 35 (CA).

[23] The Liquidator says these cases are not apt as the objects of the *CCAA* are different from the recognized objects of the *WURA*. It says that the distinct nature of the *CCAA* gives the debtor the opportunity of dealing with less than all classes of creditors, which is the opposite situation to that of the *WURA*, which by its very terms sets up a winding-up regime to deal with all claims and which, in the case of financial institutions, is the only regime to carry out an insurance insolvency and deal with all claims of creditors.

[24] The Liquidator also contends that its implication analysis is now supported by the Supreme Court's analysis in *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 and the goal to have harmonization amongst insolvency legislation. That is, the *CCAA* and the *BIA* expressly binds the Crown, and thus so should the *WURA*. This argument is inconsistent with the position of the Liquidator that the objects of the *CCAA* are different from the objects of the WURA.

[25] In any event, I do not see *Century Services* as assisting the Liquidator. The contest in *Century Services* was between the *Excise Tax Act* and the *CCAA* and the treatment of a deemed trust for GST deductions. The *CCAA* expressly provided that deemed trusts in favour of the Crown, with certain exceptions, did not apply. The *ETA* provided that the GST deemed trust did apply notwithstanding any other statue except the *BIA*. The Court held that as a matter of construction, the *ETA* did not override the *CCAA*. Included in its reasoning was that there should be harmonization of aspects of insolvency law common to the two regimes of the *BIA* and the *CCAA*. But there was no issue of the Crown not being bound by the *CCAA* and I would not read

Century Services as providing grounds to override the basic principle of Crown immunity in the *WURA*.

[26] I would not hold that *WURA* binds the Crown under this second test.

(iii) Would the *WURA* be wholly frustrated if the Crown were not bound?

[27] The Liquidator contends that if the Crown need not participate in the winding-up by the Liquidator, it leaves the Liquidator with uncertainty as to when the Crown will or may assert a claim in the liquidation. It also leaves the Liquidator with the uncertainty of whether it is protected by the Court's authorization to date to make distributions or in the end to release surplus funds. It states in its factum "Taken to its logical end, the Crowns' position is that if an estate can never be finalized and the assets distributed in satisfaction of all claims – the very core object of the WURA - so be it". In argument it was said that a paradox could occur if the Liquidator were eventually discharged and then sued by a Crown for having distributed to Reliance the balances that remained after the accepted claims were paid.

[28] With respect, I do not see these calamitous results. If the Crowns do not at all participate in the winding-up being carried out by the Liquidator and file no claims with the Liquidator, the Liquidator can apply to Court and be authorized to make distributions to those claimants who have filed claims and have had them accepted by the Liquidator. The scheme for creditors' claims and their payment in the *WURA* makes that clear. Section 74 provides for time limits for submitting claims to a liquidator. Section 76 provides for distribution of assets to creditors with accepted claims without reference to any claims that have not been sent to the liquidator. It provides:

> **76.** (1) After the notices required by sections 74 and 75 have been given, the respective times specified in the notices have expired and all claims of which proof has been required by due notice in writing by the liquidator in that behalf have been allowed or disallowed by the court in whole or in part, the liquidator may distribute the assets of the company or any part of those assets among the persons entitled to them and without reference to any claim against the company, or, in the case of an authorized foreign bank, against the authorized foreign bank in respect of its business in Canada, that has not then been sent to the liquidator.

[29] Moreover, section 77 provides that claims sent in after a partial distribution of assets are eligible for future distributions.

[30] So far as paying out the balance to an insurer if the estate becomes solvent, as will be the case with Reliance, provision is made for payment out after all claims have been made. Regarding foreign insurers like Reliance, section 161(10) provides:

> (10) The liquidator may, with the approval of the court, release to the foreign company any balance of the assets remaining after payment of claims in the order of priority prescribed by subsection (9).

[31] If the Liquidator applied to Court for such approval, and the Crowns had not filed any claims with the Liquidator, I fail to see how the Liquidator could somehow be liable for ignoring a non-claim from the Crowns once the payout was authorized by the Court.

[32] I cannot find that if the *WURA* did not bind the Crowns the purpose of the statute would be wholly frustrated or that there would be an absurdity as opposed to simply an undesirable result. I would not hold that *WURA* binds the Crown under this third test.

(iv) The benefit/burden test

[33] The Liquidator contends that a benefit/burden analysis indicates that the Crown is subject to the *WURA*. It points to language of La Forest J. in *Sparling* that indicates that the analysis is not necessarily restricted to looking only at one statute such as the *WURA*:

> **21** ...It is quite correct to conclude that whenever the question of the application of the benefit/burden exception arises, the issue is not whether the benefit and burden arise under the same statute, but whether there exists a sufficient nexus between the benefit and burden. As McNairn, op. cit., at p. 11, puts it:
>
> > It is not essential ... that the benefit and the restriction upon it occur in one and the same statute for the notion of crown submission to operate. Rather, the crucial question is whether the two elements are sufficiently related so that the benefit must have been intended to be conditional upon compliance with the restriction.

[34] The Crowns say that as they have made no claim under the *WURA*, they have not sought any benefit that requires them to bear any burden under the *WURA*. The Liquidator say that this is not a correct analysis and that provisions of the provincial legislation relied on by the Crowns must be considered. In particular, as the Ontario Crown relies on section 132(1) of the *Ontario Insurance Act* as giving it a right of action directly against Reliance, and the other Crowns rely on similar legislation in their provinces, the analysis must include an analysis to see if the regimes of the provincial insurance legislation are sufficiently related to the *WURA* to make acting under the provincial legislation conditional upon being subject to the burdens of the *WURA*.

[35] Reliance Canada is regulated under the federal *Insurance Companies Act*. Under the *ICA*, the Superintendent requested the Attorney-General to seek a winding-up order of Reliance Canada, the branch of Reliance operating in Canada, under the *WURA,* which was granted. Under the *WURA*, a comprehensive regime is prescribed for taking control of all the assets of the branch and payment of all claims of policyholders and any other creditors of the branch from the assets in Canada and assets under control of the chief agent within the meaning of the *ICA.* This is apparent from the statute and has been recognized as early as the case of *Maritime Bank v. Robinson* (1887), 26 N.B.R. 297 (N.B.S.C.).

[36] The position taken by the Liquidator is that if the Crowns wish to avail themselves of the provincial insurance legislation which they say gives them a right to recover against Reliance, they cannot claim against the assets of Reliance Canada without running into the regime governing insurance policies of a foreign insurer in Canada. The regime, a combination of the *ICA* and the *WURA*, puts the branch assets in their entirety in the hands of the Liquidator from which valid claims are to be paid by the Liquidator. Thus the Liquidator says the Crowns are bound by the *WURA*.

[37] I can see that if the Crowns attempt to collect from the assets of Reliance Canada that they would be bound to take action under the claims process under the *WURA* and be bound by

any of the burdens of that legislation.[1] But at this stage, the Crowns have sued RBH and ITCAN. The Ontario Crown has not attempted to take action against Reliance Canada under section 132(1) of the *Insurance Act of Ontario*, nor have the other provincial Crowns attempted to do so under their similar provincial legislation. They could not do so as the legislation requires an unsatisfied judgment against an insured before action can be taken on it. But also, they have not made any claim against the assets of Reliance Canada that would bring the *WURA* regime into play. I do not see the fact that one day they may choose to claim against the assets of Reliance Canada, if there are any assets left after the liquidation proceedings, that by such a potential claim they perforce are now bound by the *WURA*.

[38] I would not hold under a benefit/burden analysis hold that the Crowns at this stage are bound by the *WURA*.

(v) Conclusion

[39] I conclude that the Crowns are not at this stage bound by the *WURA* and are not bound by the terms of any release made by the Liquidator with RBH and ITCAN.

Other issues

[40] In light of the conclusion that the Crowns are not bound by the *WURA*, there is no need to deal with the other issues raised as the settlements with RBH and ITCAN are conditional on the Crowns being barred from making any claims against them. However, I make a few comments regarding some of the issues raised.

[41] As to whether the policies issued by Reliance Canada to RBH and ITCAN respond to the claims against RBH and ITCAN, the issue relates to exclusions that in one way or another

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[1] In this regard, I do not accept the argument of the Ontario Crown that it could claim against the assets of Reliance Canada and disregard the *WURA* and its implications as the assets do belong to Reliance Canada and not the Liquidator.

prevent coverage for cancer or other diseases of the human body as a result of the use of tobacco products. The Crowns and the Quebec Class Action Representatives say that there is not a sufficient record of all of the policies and other information required to adequately deal with the coverage issue. Had I found that the Crowns were bound by the *WURA*, I would have directed a separate hearing with a full record to deal with the issue. Whether the actions by the Crowns against the tobacco companies would have to be determined before the issue could be dealt with would be a matter of argument at that hearing. I agree that the record is not complete, but I make no comment as to where the fault lies for that.

[42] Regarding the position of the Quebec Class Action Representatives that Quebec law governs their right to the proceeds of any policies issued by Reliance Canada, that is an issue that would require a separate hearing with a full record. There is no full record before me. I would not be in a position at this stage to make any finding and I would have directed a separate hearing with a full record to deal with the issue.

[43] Whether section 132(1) of the *Ontario Insurance Act* or the equivalent provisions of the legislation in the other provinces would make Reliance Canada liable to the Crowns was argued really on a matter of first impression. If this case goes further on appeal, any view I might have would make little difference. However, my view is that the positions of both sides are arguable but the position of the Liquidator is the correct one. That is, the person who may recover against the insurer under section 132(1) of the *Ontario Insurance Act* is the person damaged by the actions of the insured and not a third party such as a province that suffers health care costs as a result of damage caused to the person insured.

[44] Whether it is reasonable to provide for a release in favour of RBH and ITCAN at the expense of the claims by the Crowns and the Quebec Class Action Representatives would depend in part on the strength of their claims against Reliance Canada, which in turn would depend on whether the policies responded to the claims against RBH and ITCAN.

Conclusion

[45] The motion of the Liquidator is dismissed. No party other than the Quebec Class Action Representatives has asked for costs. In my view, the issues raised are novel and there was reason for the Liquidator, an officer of the Court, to apply to Court for a determination of this matter. This is not a matter for costs.

Newbould J.

Date: December 2, 2015