

Case Name:

Hollinger Inc. v. American Home Assurance Co.

Between

Hollinger Inc., (Applicant), and
American Home Assurance Company, Chubb Insurance
Company of Canada, ACE INA Insurance Company, Zurich
Insurance Company, Royal & SunAlliance Insurance
Company, Gerling Global Canada, Temple Insurance
Company, Continental Casualty Company, Lloyd's
Underwriters, AXA Corporate Solutions Assurance,
The Ravelston Corporation Limited, Hollinger Inc.,
Conrad M. Black, Barbara Amiel-Black, John A. Boulton,
David Radler, Daniel W. Colson, Richard N. Perle, Mark
Kipnis, Argus Corporation Limited, Ravelston Management
Inc., 3396754 Canada Ltd., 504468 N.B. Inc., Hollis
McCurdy, W. John McKeag, Ana Porter, Ronald Riley,
Stephen Hastings and Mark Horning, (Respondents)

[2007] O.J. No. 4424
Court File No. 05-CL-5951C

Ontario Superior Court of Justice
C.L. Campbell J.

Heard: February 28, and March 1, 2007.
Judgment: March 22, 2007.
(55 paras.)

Counsel:

Geoffrey D.E. Adair, Q.C. for Hollinger Inc.

Eric Hoaken for Hollinger International Inc.

Gary H. Luftsprung for Royal & SunAlliance, Zurich and ACE INA.

Steve Steiber for Temple.

Christopher Reain, Pamela Pengelley for GCan.

George S. Glezos for Lord Black and Lady Amiel-Black.

REASONS FOR DECISION

¶ 1 **C.L. CAMPBELL J.**— Hollinger Inc. ("Inc.") is one of a number of companies in the empire formerly controlled by Conrad Black, which together with officers and directors were named insured entities under liability policies of insurance that formed a ladder and were in effect from July 1, 2002.

¶ 2 Inc. seeks declaratory relief and payment in respect of what it asserts are defence costs it has incurred under claims that it asserts are covered under the policies of insurance in issue.

¶ 3 Conrad Black and Barbara Amiel-Black seek much the same relief in respect of claims made in various proceedings against them.

¶ 4 The insurance policies in issue are part of what is known as a ladder.

Insurer	Policy	Limits	Type
American Home Assurance Company	426 90 85	\$20 Million USD	Primary Policy
Chubb Insurance Company	8180-5152	\$25 Million USD	First Excess
American Home Assurance Company	426 90 86	\$5 Million USD	Second Excess
Royal & SunAlliance/ACE INA/ Zurich	1000807	\$40 Million USD	Third Excess
Gerling Global/ Temple/Continental Casualty/Lloyd's/ ACE INA/AXA	PCS00284 (02)	\$40 Million USD	Fourth Excess

¶ 5 The Primary policy and the First and Second Excess were exhausted as a result of a settlement of an action initiated in the State of Delaware against Hollinger International and certain of its officers and directors known as the "Cardinal" settlement. The coverage of that claim was approved in this Court and the propriety of the settlement in the Court of Chancery in Delaware.

¶ 6 The various actions and amounts submitted to insurers by Inc. are set out below.

Action Proceeding	Accounts Submitted to Insurers
Catalyst Fund General Partner I Inc. Application for Appointment of Inspector	\$1,093,509.22
Illinois Shareholders Consolidated Class Action	\$2,444,916.58 USD
Saskatchewan Shareholders Class Action	\$124,714.44
S.E.C. v. Black, Radler and Hollinger Inc.	\$983,127.92 USD
O.S.C. Proceeding	\$424,500.17

¶ 7 I accept that Inc. has been made a defendant in various actions in both Canada and the United States. Inc. is also the subject of regulatory proceedings before the Ontario Securities Commission. Inc. has insured much in the way of expense for the investigation and defence of these various actions/proceedings. The quantum of expense submitted to each insurer listed in paragraph 4 herein prior to July 20, 2006, is as set out in the chart forming part of paragraph 6 herein.

¶ 8 I have concluded that much of the relief sought by Inc. and all of the relief sought on behalf of the Blacks is for reasons that follow premature. The one exception is the amounts sought in respect of the Inspectorship in this Court.

¶ 9 The Third and Fourth Excess insurance policies provide coverage of the kind generally known as "follow form." That is to say that the insurers agree to provide insurance coverage excess of the underlying policies "in accordance with and subject to the same warranties, terms, conditions, exclusions and limitations (except as regards the premium, the amount and limits of liability, the Policy Period, and except as otherwise provided herein) as are contained in or as may be added to the Primary Policy." The Fourth Excess employs different wording but essentially provides coverage on the same basis. It is accordingly important to consider the provisions of the American Home primary policy in determining the coverage issues addressed in this Application.

¶ 10 It is the position of the Respondents, the Third Excess Insurers, that there is either no coverage available to the Applicant, or there are exclusions applicable with respect to the claims for which the Applicant seeks indemnification, by virtue of the terms of the policies of insurance.

Catalyst Fund General Partner I Inc. Application

¶ 11 Catalyst is a shareholder of Inc. and in the summer of 2004 commenced an application naming Inc., Conrad Black and others as respondents. The relief sought was the appointment of an Inspector under s. 229 of the Canada Business Corporations Act [See Note 1 below] (the "CBCA") to investigate and report on the purpose extent and details of various related-party transactions between Black and other officers of Inc. and Ravelston (a corporation controlled by Black) with respect to "noncompetition" payments.

Note 1: Canada Business Corporations Act, R.S.C. 1985 c. C-421 as amended

¶ 12 Black as well as other officers opposed on behalf of Inc. the appointment of the inspector that was made by this Court in September 2004. A further motion was brought by Catalyst in October 2004 seeking to remove Black and others as directors of Inc. This was initially opposed by Inc. The costs submitted to insurers on behalf of Inc. are for the defence of the Inspectorship in the two matters noted above. It should be noted that Inc. has paid the costs of the Inspectorship throughout on a "without prejudice" basis.

¶ 13 There are more than \$20 million in that have been incurred by Inc. in defending not only the Catalyst proceeding but is well various actions and administrative proceedings in Canada and the United States.

¶ 14 It is not disputed that Inc. falls within the definition of the word "organization" in the following paragraph of the Policy:

Coverage B: Organization Insurance

- (i) Organization Liability: This policy shall pay the Loss of any Organization arising from.
 - (a) a Securities Claim;
 - (b) an Oppressive Conduct Claim or
 - (c) a Canadian pollution Claim,

made against such Organization for any Wrongful Act of such Organization.

¶ 15 The following definitions from the Policy are relevant to the claim for defence costs:

the term "Securities Claim" shall include an administrative proceeding against an Organization, but only if and only during the time that such proceeding is also commenced and continuously maintained against an

Insured Person.

"Oppressive Conduct Claim": a Claim brought by or on behalf of a shareholder of an Organization against the Organization, or, any Executive of the Organization with respect to such shareholder's interest in securities of such Organization, whether directly or by elms action, which alleges a violation of the oppression or unfairly prejudicial provisions of the Canada Business Corporations Act, R.S.C. 1985. c. C-44 or similar provisions of any Canadian provincial law.

"Wrongful Act": ... with respect to an Organization, any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, by such Organization, but solely in regard to: (a) any Securities Claim or Oppressive Conduct Claim ...

"Loss" means damages, ... settlement, judgments (pre-post judgment interest on a covered judgment), Defence Costs and Crisis Loss; however, "Loss" (other than Defence Costs) shall not include (1) civil or criminal fines or penalties; (2) taxes; (3) punitive or exemplary damages; (4) multiplied portion of multiplied damages; (5) any amounts for which an insured is not financially liable of which are without legal recourse to an insured; and (6) matters which may be deemed uninsurable under the provincial or state law pursuant to which this policy shall be construed.

"Defence Costs": ... reasonable and necessary fees, costs and expenses consented to by the insurer (including premiums for any appeal bond, attachment bond or similar bond arising out of a covered judgment, but without any obligation to apply for or furnish any such bond) resulting solely from the investigation, adjustment, defence and/or appeal of a Claim against an Insured, but excluding any compensation of any Insured Person or any Employee of an Organization.

"Claim":

- (1) a written demand for monetary, non-monetary or injunctive relief,
- (2) a civil criminal, administrative, regulatory or arbitration proceeding for monetary, non-monetary or injunctive relief which is commenced by (i) service of a Writ of Summons, Statement of Claim or similar originating legal document (ii) return of it summons, information, indictment or similar document (in the case of a criminal proceeding); or (iii) receipt or filing of a notice of charges: or
- (3) a civil, criminal, administrative or regulatory investigation of an Insurance Person:
 - (i) once Such Insured Person is identified in writing by such investigating authority as a person against whom a proceeding described in Definition (c)(2) may be commenced; or
 - (ii) in the case of an investigation by any PSC or similar foreign securities authority, after the service of a subpoena upon such Insured Person.

The term "Claim" shall include any Securities: Claim, Employment Practices Claim, Oppressive Conduct Claim, Canadian Pollution Claim and Statutory Claim.

¶ 16 In elaboration of their position that there is either no coverage or claims excluded, The Third and Fourth Excess Insurers assert the claims advanced by Inc.

- [a] do not represent proper Oppressive Conduct Claims as defined by the Policy;
- [b] do not allege a Wrongful Act by Inc. as defined by the Policy;
- [c] do not seek reimbursement of Loss as defined by the Policy;
- [d] are excluded as having been brought by a Major Shareholder by virtue of Endorsement 7 of the Policy; and
- [e] to the extent there are any covered versus uncovered claims, there would have to be an allocation of the Defence Costs claimed

¶ 17 The position of the Insurers is that the Policies are indemnity policies only, with no duty to defend terms. Accordingly, the Third Excess Insurers urge they have no obligation to appoint defence counsel, nor defend any actions or proceedings against the Insureds Defence Costs are only reimbursable for the defence of claims covered under the Policies. Further, Defence Costs are part of, and not in addition to, the Policies' Limits of Liability and are subject to the Retention.

¶ 18 The Applicant submits that the catalyst fund General Partner I Inc. Application ("Catalyst Application") constitutes a claim of Oppressive Conduct, within the meaning ascribed to that phrase in the Primary Policy. and as such, qualifies as a covered Claim. The Respondents' position is that the Catalyst Application does not trigger coverage under the wording of the Primary Policy, because the Catalyst Application is not an Oppressive Conduct Claim. Instead, the Catalyst Application provides notice that such a Claim may be brought by Catalyst in the future, depending on the findings made by the Inspector.

¶ 19 I accept the submission on behalf of the Insurers that there has to date been no finding of oppressive conduct on the part of Inc. this Court appointed the Inspector pursuant to s. 229 of the CBCA on the basis of the appearance of improper conduct of certain officers and directors of Inc. that might be oppressive of non-majority shareholders.

¶ 20 There is a very straightforward explanation as to why there has not been a specific finding of oppression as against Inc. in the proceedings commenced by Catalyst. Part of that explanation is as follows:

1. The Board of Directors of Inc. during the time that wrongful acts are

- alleged has been replaced.
2. The guiding and indirectly the controlling shareholder of Inc., Conrad Black, is at trial in Chicago on a number of counts of fraud, which includes among other matters what are alleged to be unlawful non-competition payments made through Inc. to Black and certain officers of Inc.
 3. The differing evidentiary provisions under Canadian and United States law with respect to self-incrimination have inhibited the gathering of information by the Inspector and others.
 4. Since the institution of the criminal charges against Black and others in the United States, with the exception of the Cardinal settlement referred to above, virtually all of the civil proceedings in Canada and the United States have been formally stayed or simply not proceeded with pending the outcome of the criminal trial now underway.

¶ 21 It may well be that this Court may not in the future be called upon to make a determination of oppression by Inc. of its minority shareholders.

¶ 22 I accept the proposition advanced by Mr. Adair on behalf of Inc. that the investigative processes and remedies provided under the CBCA are complementary tools in advancing a case of oppressive conduct.

¶ 23 The difficulty is that to date there has been no finding by any court either in Canada or the United States that would support that conclusion of oppressive conduct as it relates to Inc. As I understand the defence of at least Conrad Black to the criminal charges he faces, all his conduct was legal proper and approved insofar as Inc. is concerned by its Board of Directors.

¶ 24 I am not satisfied that opposing the a appointment of the Inspector without a finding of at least impropriety by the Company as opposed to by its directing mind, much less illegality, comes within the "oppression" coverage, at least at this stage, or that they are appropriately considered as defence costs.

¶ 25 I conclude that sufficient doubt has been raised that defence costs should not be required to be paid by the Insurers, at least at this time. Should oppression remedy be sought and granted on evidentiary findings, the result may be different.

¶ 26 The second reason for declining to the declaratory Order requested is that it is less than legally clear that defence costs would be payable even if the coverage issue were certain.

¶ 27 The Policy in issue does not contain a duty to defend. I accept the proposition that Canadian law is clear that the duty to defend is entirely contractual: there is no duty to defend unless the policy provides that there is one [See Note 2 below].

Note 2: Jesuit Fathers of Upper Canada v. Guardian Ins. Co. of Canada, [2006] S.C.J. No. 21 at para 54

¶ 28 The Policy is one of indemnity. I accept the proposition that in an indemnity policy, one must look to see which claims could result in indemnity. If they cannot, there can be no obligation to advance defence costs. See *Non-Marine Underwriters, Lloyd's of London v. Scalera* [2000] 1 S.C.R. 551 at paragraph 79 per Iacobucci J.

¶ 29 Mr. Adair has referred to *In re Worldcom Securities Litigation* 354F. Supp. (2d) 455 (SDNY 2005) as support for the proposition that the duty to pay defence costs is to be equated with the duty to defend and is distinct from and broader than its duty to indemnify. Further, it is urged, the case stands for the proposition that a duty to pay defence costs exists whenever a complaint against the insured alleges claims that may be covered under the insurer policy.

¶ 30 The above statement does appear to be more expansive than any Canadian case to which I have been referred. The factual context in which it was made is markedly different.

¶ 31 The issue in *Worldcom* was whether a former chairman of the company was entitled to payment of defence costs arising from claims arising from the collapse of the company. There did not seem to be an issue in the *Worldcom* decision that the costs in issue were properly defence costs.

¶ 32 The issue here in respect of the Catalyst Fund inspectorship is whether what was incurred were or are defence costs. A different question. It is for this reason that the matter is left open, at least at this stage. There is at least, the potential for a different conclusion if oppression is ever established.

¶ 33 The additional reason for ruling that the present claim for defence costs is at best premature is the potential for its being excluded under Endorsement #7 of the Primary Policy, which reads:

the Insurer shall not be liable for any Loss in connection with any Claim against any Insured which are made by any individual(s) or entity/ies that own or control (whether legally or beneficially, directly or indirectly) 10% or more of the outstanding voting stock of the Organization (hereinafter "Major Shareholder") or by any security holder of the Organization whether directly or derivatively, unless such security holder's Claim is instigated and continued totally independent of, and totally without the solicitation of, or assistance of, or active participation of or intervention of any Major Shareholder.

¶ 34 With respect to the Catalyst Application, the Applicant confirms that the request for an Inspector was made by a 37% shareholder approval of Inc.

Catalyst Fund General Partner I Inc. Application for Appointment of Inspector. Illinois Shareholders Consolidated Class Action Saskatchewan Shareholders Class Action; S.E.C. v. Black, Radler and Hollinger Inc. O.S.C. Proceeding

¶ 35 The above-noted claims are of a different nature and for a different reason I have concluded that the request for defence costs is premature.

¶ 36 The Insurers point to two matters that in their view give rise to a conclusive determination that there can be no coverage due to exclusions in the Primary Policy.

¶ 37 The exclusion is contained in Section 4(c) of the Policy and reads as follows:

- (c) arising out of, based upon or attributable to the committing in fact of any deliberate criminal or deliberate fraudulent act by the Insured ...

For the purpose of determining the applicability of the foregoing Exclusions 4(a) through 4(c) ... only facts pertaining to an knowledge possessed by any past, present or future chairman of the board, president, chief executive officer, chief operating officer chief financial officer or General Counsel (or equivalent position) of an Organization shall be imputed to an Organization.

¶ 38 On or about September 20, 2005. F. David Radler ("Radler") entered into a voluntary Plea Agreement with the United States Attorney for the Northern District of Illinois (the "Plea Agreement"). Radler pleaded guilty to a criminal indictment by the U.S Attorney's Office with respect to mail fraud, non-compete agreements and related-party transactions.

¶ 39 The Insurers assert that in the Plea Agreement, Radler pled guilty to the "participat[ion] in a scheme to defraud [Hollinger] International and [Hollinger] International's public shareholders of money property and their intangible right of honest services, to defraud the Canadian tax authorities of tax revenue, and to obtain money and property from these victims by means of materially false and fraudulent pretences, representations, promises and omissions." In addition, Radler pled guilty, to among other things, (a) fraudulently inserting himself and Hollinger Inc. as recipients of non-competition fees that should have, otherwise been paid exclusively to Hollinger International; (b) fraudulently causing Hollinger International to mischaracterize bonus compensation paid to him as non-competition fees, in order to defraud the Canadian tax authorities; (c) engaging in fraudulent accounting practices by failing to disclose self-dealing to International's Audit Committee; and, (d) aiding and abetting breaches of fiduciary duty by failing to maximize the benefit to international with respect to various transactions, and failing to seek international's approval for related-party transactions, after full disclosure of all material facts.

¶ 40 During the relevant time period, Radler served as Deputy Chairman of the Board of Directors, president and Chief Operating Officer of Inc. In addition, he also owned an

equity interest in the Inc. and Hollinger International, Inc. through a 14.1% ownership in the Ravelston Corporation, which owned a majority of the Applicant's stock and stock voting rights. Accordingly, the knowledge possessed by Radler is imputed to Inc.

¶ 41 The Applicant suggests that precise limitations of the Plea Agreement materially limit what knowledge should be imputed to the Applicant.

¶ 42 There have been further events transpire since the oral hearing in this matter. On Friday, March 10, 2007, it was announced in the public press that David Radler had reached settlement in a civil suit brought in the United States by the Securities & Exchange Commission.

¶ 43 Not only is Radler a defendant in that action, which alleges significant improprieties including but not limited to those for which the plea of guilty wets given, but Inc. is also a defendant and Radler was at the relevant time an officer and director of Inc.

¶ 44 Counsel for the Insurers point to two actions taken by Inc. itself which strongly in their view bring into doubt whether the amounts claimed could ever be included as defence costs. The first is the co-operation agreement entered into on May 15, 2006, between the Company and the United States Attorneys' Office for the Northern District of Illinois, acknowledging criminal responsibility based on illegal acts conducted by one or more of its officers and directors.

¶ 45 The agreement in question pledges Inc. to co-operate with the District Attorney in the criminal prosecution of Conrad Black. The above facts have persuaded me that at its very best, the request for defence costs in the above styled matters is premature. The various actions and proceedings are all stayed or not Proceeding pending the outcome of the criminal trial in Chicago.

¶ 46 Inc. points to the proposition that coverage is to be construed broadly and exclusives narrowly I agree. Until more is known, the plea and settlement by Radler and the Agreement made by Inc. at the very least require further exploration.

¶ 47 There is no suggestion in the material before me that either Inc. or Radler advised or sought approval from Insurers for their actions. If the defendants in the criminal trial now proceeding are acquitted and/or civil proceedings are not proceeded with Inc. may re-apply before me and renew its request.

Conrad & Barbara Amiel Black

¶ 48 The claim for defence costs on behalf of Mr. Slack is in my view premature for the above and additional reasons.

¶ 49 In the first place, there were no bills In the material to be able to see the nature of the costs that would be claimed.

¶ 50 In response to the Insurers' assertions with respect to the Radler plea, Mr. Glezos on behalf of the Blacks submitted that Mr. Radler would be found to be a liar in the criminal trial.

¶ 51 Given the currency of the trial and the fact that there are no civil matters currently proceeding. I see no overriding interest to be served by making a determination at this time.

¶ 52 If Conrad Black is acquitted and civil proceedings do not proceed, he may well be entitled to claim defence costs of the civil proceedings named above and can renew his request at that time.

Conclusion

¶ 53 For the above reasons I have concluded that the Application on behalf of Inc. and the separate application by Conrad and Barbara Amiel-Black should be dismissed as premature at this time.

¶ 54 If and when Inc. deems it appropriate to do so, the matter may be brought on for further determination.

¶ 55 If it is necessary to deal with the issue of costs on this motion, written submissions should be made within 14 days.

C.L. CAMPBELL J.

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