

Case Name:

Hollinger International Inc. v. American Home Assurance Co.

Between

Hollinger International Inc. (Applicant), and
American Home Assurance Company, Chubb Insurance
Company of Canada, ACE INA Insurance Company, Zurich
Insurance Company, Royal & SunAlliance Insurance
Company of Canada, 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. 4425
Court File No. 05-CL-5951

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

October 26, 2007.
(14 paras.)

Civil procedure — Costs — Assessment or fixing of costs — Whether amount fair and reasonable — Two primary insurers who tendered joint limits of \$50 million to fund derivative action against Hollinger in Delaware awarded \$100,000 and \$120,000 in costs, respectively — Primary insurers achieved most success, while excess insurers achieved some lesser success — Amount of costs awarded were less than costs sought, but still substantial and fair.

Determination of costs payable to two primary insurers, Chubb and American Home, who tendered joint limits of \$50 million to fund derivative action settlement brought against Hollinger in Delaware — Parties agreed partial indemnity scale was appropriate — Chubb claimed fees of \$187,423, disbursements of \$6,795 and applicable GST —

American Home claimed fees of \$357,352, disbursements of \$11,650 and applicable GST — Excess insurers complained there was avoidable duplication between applicants and primary insurers, and that significant amount of time was spent on matters not relating to them — HELD: Chubb awarded total of \$100,000 and American Home entitled to total of \$120,000 — Participation of excess insurers was necessary and appropriate — All parties acted responsibly and efficiently in bringing complex set of applications — Elements of duplication were necessary due to varying interests of applicants — Largest measure of success was achieved by primary insurers and Hollinger — Excess insurers achieved some measure of success after being placed in difficult position — While awards were less than amounts claimed, they were substantial and fair.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 57.01

Counsel:

Eric R. Hoaken, Rory M. Barnable for Hollinger International Inc.

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

Richard H. Krempolec, Q.C., for American Home Assurance.

Mary Margaret Fox for Chubb Insurance.

Chris Reain, Pamela Pengelley for GCan (formerly Gerling).

Steven Stieber for Temple, Continental Casualty, Lloyd's Underwriters, and Encon/Axa.

Geoffrey Adair, Q.C., Marcella Saitua for Hollinger Inc.

George S. Glezos, for Conrad Black and Barbara Amiel-Black.

Don Jack, Lisa C. Munro, Gillian T. Hnatiw, for John A. Boulton.

Sean Dewart, for David Radler.

Peter F.C. Howard, Timothy M. Banks for Richard N. Perle.

Alex MacFarlane, Lisa Brost, for Richters, Receiver to Ravelston and Argus.

¶ 1 **C.L. CAMPBELL J.**— The disposition of costs has been outstanding for some time in respect of a number of related applications heard in 2006. It had been my hope that the necessity for making this disposition could have been avoided, but that was not to be.

¶ 2 The costs claimed by Hollinger International have been settled between the parties, leaving only the costs of the two Primary Insurers, which may be summarized as follows:

¶ 3 Chubb seeks costs on a partial indemnity basis, principally against the Excess Insurers, for fees of \$187,423 + GST and disbursements of \$6,795 + GST.

¶ 4 American Home on much the same basis seeks fees of \$357,352 + GST and disbursements of \$11,650 + GST, all on a partial indemnity basis.

¶ 5 By way of contrast, the responding Excess Insurers each submit that there be at the very least no costs awarded based on the relative degree of success. One of the Excess Insurers, Temple, seeks \$99,411.45 based on its claimed success.

¶ 6 Much of the background of this matter is set out in the Reasons delivered January 13, 2006 and need not be repeated. Suffice to say that American Home and Chubb (Primary Insurers) agreed to tender their joint limits (\$50 million) to fund a derivative action settlement brought against Hollinger International in the Chancery Court of Delaware (the Cardinal Settlement) subject to the approval of that settlement by the Delaware Court.

¶ 7 All parties agree that the partial indemnity scale is appropriate for any costs awarded. The main points of disagreement may be summarized as follows:

- (1) Each of the Applicants claims that their individual claims were necessary given their differing contractual positions and the positions of the Excess Insurers to each of their applications. The Excess Insurers claim that the Excess Insurers were unnecessary parties to the applications, as the Primary Insurers could have funded the settlement without their participation.

On this issue I accept the position of the Applicants. International in particular sought declaratory relief that would authorize American Home and Chubb to pay their limits to fund the Cardinal Settlement and this relief was granted. In this context alone, the Excess Insurers were appropriate and necessary parties. International sought and did bind the Excess Insurers to the relief sought.

- (2) The Excess Insurers claim at least partial success of the issues before the Court or at least lack of success on the part of International and the Primary Insurers to much of the relief sought.

International submits that the effect of the decision by this Court enabled International to do what the Excess Insurers opposed, namely, fund the proposed Cardinal Settlement. For their part, American Home and Chubb claim success by enabling them to be discharged from any further obligation under their policies by paying a combined \$50,000,000.00.

I recognize that this whole process would have been much more time-consuming and costly but for the cooperation of all counsel and their clients.

¶ 8 The initial actions could have given rise to a protracted and costly trial. There were various claims that were complex and convoluted in nature. One particular issue for which the 3 Excess insurers complain relates to some \$309,206 in defence costs that would otherwise be paid by the Primary Insurers but were excluded from any amounts for which the Primary Insurers would be held responsible by virtue of my earlier decision.

¶ 9 Other complaints of note are made by the Excess Insurers. The first is that there was avoidable duplication of counsel efforts as between the Applicants and the Primary Insurers. The second is that a significant portion of the time claimed related to the response to applications brought by Inc. or other insureds such as Conrad Black and Ravelston, which did not directly involve the Excess Insurers. Thirdly, the Excess Insurers complain that time spent by counsel in dealing with U.S. counterparts and matters related to the Cardinal Settlement did not directly involve the Excess Insurers and should not be reflected in a cost award on this motion.

¶ 10 This Court is engaged in the exercise of fixing costs at a partial indemnity scale. It is neither feasible nor appropriate, as noted above, to give a detailed review as would take place during an assessment.

¶ 11 As a result, I have reached some general conclusions that will guide my weighing of the factors to be considered under Rule 57.01. They are as follows:

- (1) Given the nature of the declaratory relief sought by International, it was appropriate that the Excess Insurers be made parties to the various applications.
- (2) While the Excess Insurers could have declined to participate, it was not only in their interest to participate but was of great assistance to the Court in so doing. Their participation was in no way frivolous or inappropriate.
- (3) All parties and counsel acted responsibly, efficiently, effectively and cooperatively in bringing on what otherwise would have been a lengthier and more complex set of applications.
- (4) While there was some element of duplication, given the varying interests of the Applicants, it was in my view understandable and to a large extent necessary.

- (5) Success was to the largest extent achieved by International and the Primary Insurers. International required and obtained the relief it sought in this Court as a necessary first step to the approval of the Cardinal Settlement in Delaware Court.
- (6) The approval sought and obtained by International and the Primary Insurers would in my view have been required even if the Excess Insurers had not opposed the relief. The Applicants derived substantial benefit from the result.
- (7) It would appear that some of the time of the Primary Insurers may be said to relate to other aspects of the overall settlement beyond the actual time associated with these Applications.
- (8) There was some success albeit limited, obtained by the Excess Insurers, which were put in a difficult position as a result of the relief sought.

¶ 12 Finally, our system of awarding and fixing costs follows the loser pays principle. In this case, I am of the view that the basis of that principle is appropriate but in the circumstances should be tempered by the factors referred to above.

¶ 13 Applying those factors as best as I am able, I conclude that recovery to American Home be the sum of \$120,000.00 and to Chubb the sum of \$100,000.00. Each sum is in respect of fees, disbursements and inclusive of GST.

¶ 14 While these awards are substantially less than the sums claimed, they are still very significant amounts. Applying, as I am required to do, the factors under Rule 57.01 and the factors above, I consider them in the circumstances fair and so order.

C.L. CAMPBELL J.

QL UPDATE: 20071121
cp/s/qlgxc/qllkb