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We've Been Busy

The dust had barely settled on the *Childs v. Desormeaux* decision, when we received news of yet another big win. Our firm successfully represented an insurance agent who had been arbitrarily dismissed by Manulife after a stellar 30 year career. The trial of this complex commercial case took place over 22 days in May and June 2005.

latest on *Herbison v. Lumbermans Mutual Casualty Company* see The Intervener on page 4.

The other big news out of our office is that Eric Williams has been recognized as one of this nation's best lawyers. See the blurb on page 3.

As we reported in the last edition of the *Legal Observer*, in December Mark Charron and Jaye Hooper will be arguing before the Supreme Court of Canada for the second time this year. For the

We welcome this year's articling student Kelly Hart. Kelly, who originally hails from Manitoba, is a graduate of the University of Ottawa's law school. He will be with us for the next year. 

A Corporate David and Goliath Story

David 1: Goliath 0 - So read the headline in the Cobourg Daily Star, Reg Ward's hometown newspaper. This epic battle, which pitted a small town insurance agent against one of Canada's largest insurance companies, demonstrates how corporate power run rampant can significantly affect the life of one individual.

insurance agent and was affiliated with Monarch Life. Reg's clients were mostly salaried employees and farmers living in and around Cobourg, Ontario. With persistence and hard work, Reg built up a solid reputation with the company and became one of Monarch's top sales people.

The Investigation

A year after the merger, things turned sour for Reg. Without any notice, Manulife commenced an internal investigation of Reg's son, Steve Ward, who worked at the Ward agency. The investigation soon included Reg as well. Several months later, with no reason or explanation, Manulife gave Reg a 30-day notice terminating the Producer's Agreement. The insurer then assigned five agents to Reg's block of business.

Eric Williams and Jaye Hooper represented Reg Ward, whose agency agreement was terminated after 30 years of productive and loyal service. Manulife was represented by the Toronto law firm of Cassels Brock.

In 1983, Reg became associated with North America Life when it purchased Monarch. In 1991, Reg entered into an agreement with North American Life to be paid 5% commissions on all policies he had sold from 1967 onwards. These commissions represented his retirement fund and the right to receive them had vested.

In an attempt to salvage his livelihood, Reg wrote to his clients explaining that he was no longer with Manulife and asking them to sign an "agent of record" letter. Reg's clients rallied around him. This did not go over well with Manulife who sent out its own letter to Reg's clients as well as a cease and desist letter to Reg.

A Business is Born

In 1967, after 15 years working as a hydro linesman, Reg Ward decided to become an

In 1996, North America Life and Manulife merged their operations and continued operating under the Manulife name. Following the merger, Reg was presented with an agency agreement, entitled Producer's Agreement, on a take it or leave it basis. Reg signed the agreement since he was required to have a contract with an insurer in order to keep his insurance licence. Manulife did agree to honour the agreement Reg had struck with North America Life concerning his commissions.

In March 1998, Manulife filed a complaint with the Ontario Insurance Commission against Reg and Steve. At one point Manulife even sent a letter to Reg's lawyer indicating that they were considering contacting the RCMP's Commercial Fraud Unit.

see **David** page 2

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DAVID - continued from page 1**The Class Action**

A year after terminating Reg's contract, Manulife poured further salt on the wound when it froze Reg's commission account and refused him access to it. Manulife claimed a set off for unproven claims of negligence in connection with a 1996 class action commenced against it by disgruntled customers who had purchased an off-set premium policy.

In the early eighties, the insurance industry developed a product called an offset premium policy. The idea behind this policy was that the insured would pay premiums for a restricted period of time, after which the accumulated dividends plus the future dividends would be sufficient to pay all subsequent premiums. Insurance agents, including Reg, were strongly encouraged to sell this policy.

Manulife eventually settled the class action and set up a Policy Review Process as part of the settlement. Reg had not been named in the lawsuit and he was not informed about the Policy Review Process. Despite these facts, Manulife wanted Reg to reimburse it for the monies it had paid out to Reg's clients.

Reg was not a young man and Manulife's actions, particularly freezing his commissions, began to take a toll on his health. Instead of looking forward to his retirement, Reg was now forced to continue working to support he and his wife.

The Trial

This David and Goliath battle came to a head in May 2005 when the parties were finally able to present their respective stories and evidence to Justice Power of the Ontario Superior Court of Justice.

Reg accused Manulife of a number of wrongdoings, including that Manulife

- acted in a high-handed manner with disregard for his rights prior to and following termination of the Agreement;
- breached their contract;
- breached the fiduciary duty owed to him;

- provided false information to his clientele about him; and
- wrongfully attempted to effect a suspension of his insurance licence.

For its part, Manulife argued that it had acted within its contractual rights to terminate the agreement as it did and that pursuant to the Producer's agreement, it had the right to freeze the payment of commissions owing to Reg. Manulife also brought a counterclaim against Reg for \$440,000, the monies paid out to Reg's clients in settlement of the class action.

Manulife continued its tactics throughout the litigation. For instance, during discovery it provided Reg's lawyers with more than 55,000 documents. Each page of each document was saved as an individual PDF and no index was provided. Five weeks before trial, Manulife produced an additional 5,500 documents. In addition, it did not serve its expert's report until two days after the trial started.

Justice Power's Findings

Justice Power's decision was a complete vindication of Reg Ward. The following are some of his comments about the various issues raised at trial.

Internal Investigation of Reg

"...Manulife's conduct in the investigation and the subsequent termination of Mr. Ward's contract was reprehensible."

Ontario Insurance Commission

"I find the filing of the complaint, and the subsequent discussions with OIC officials with respect to it, to be unfair, improper, and unwarranted."

Policy Review Process

"I find as a fact that, in administering the PRP, insofar as the Wards are concerned, Manulife did not administer the agreements diligently and in good faith."

Withholding of Commissions

"I find Manulife wrongfully deprived the Plaintiffs of commissions to which they were and are, entitled under the terms of the Producer's Agreement..."

Termination of Agreement

"The criticism of Mr. Ward's practices following the termination of the Producer's Agreement simply does not accord with his success and lack of complaints over decades of loyal service."

Duty of Good Faith and Fiduciary Duty

"Manulife's conduct leading to the termination of the Producer's Agreement and its subsequent conduct were in violation of both its duty of good faith and its fiduciary duty to the Plaintiffs."

Manulife's Counterclaim

"...I accept as valid and persuasive the submission of the Wards that the set-off claim and the counterclaim are abuses of process and, therefore, this Court should not entertain the defence of set-off nor should it entertain the counterclaim."

Decision to Award Punitive Damages

"It is my view that the Defendant's conduct in this matter was self-serving, malicious, arbitrary and high-handed... Therefore, it seems to me, its conduct is deserving of punishment through an award of punitive damages."

The Award

Justice Power concluded that Reg was entitled to a judgement of \$267,000 representing past earned commission income. In addition, Manulife was ordered to provide for payment of commissions in the future. Reg was awarded damages in the amount of \$150,000 for Manulife's breach of its fiduciary duty. He was also awarded punitive damages in the amount of \$250,000.

Epilogue

Manulife has appealed this decision to the Ontario Court of Appeal. On October 5, 2006, Eric Williams will move to have the stay with respect to the commission monies set aside on the grounds of financial hardship to Reg and that Manulife has wrongfully withheld Reg's assets as security for an unproven claim. ☞

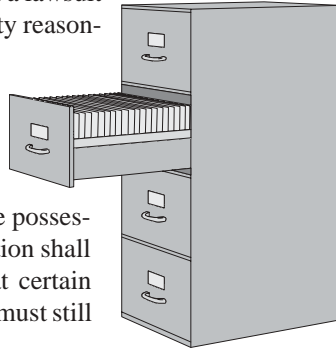
Ward v. The Manufacturers Life Insurance Company (00-CV-14495)

The Great Paper Chase

An integral part of our system of litigation is the concept of discovery. Discovery requires that during the litigation process, each party disclose to the other party all relevant facts and information, whether helpful or harmful to its own case. By requiring disclosure each party will have a better idea of the case to be met and surprises at trial should be avoided. Discovery also facilitates settlement, pre-trial procedure as well as the trial itself.

This duty to disclose arises not only when a lawsuit has been commenced but as soon as a party reasonably anticipates a lawsuit.

With respect to the scope of discovery, the *Rules of Civil Procedure* require that every document relating to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed. Even if a party claims that certain documents are privileged, their existence must still be disclosed.



Under the *Rules of Civil Procedure* the term document is broadly defined. A document includes:

- A sound recording;
- Videotape;
- Film;
- Photograph;
- Chart;
- Graph;
- Map;
- Plan;
- Survey;
- Book of account; and
- Data and information in electronic form.

These last items, data and information in electronic form, have given rise to a whole other dimension of discovery. With the proliferation of electronic communication the amount of information potentially available for discovery has drastically increased. E-mail, Blackberries, PDAs, text messaging, and voicemail are all new repositories of information.

Another interesting facet of e-discovery, as it is being referred to, is the ability to retrieve documents, including documents that were believed to have been destroyed. While it may be easy to delete a file from your program and even from the recycle bin, the document remains on your hard drive. In fact, it will remain on your hard drive until your computer recycles the space, a process that could take quite some time. And e-mail is virtually im-

possible to delete since it can exist in several different places long after the sent folder has been emptied.

This explosion of technical gizmos means that companies and organizations cannot wait until they are entangled in litigation to consider their data retention policies. Instead they must begin now to develop appropriate policies. In the words of Justice Cameron of the Ontario Superior Court of Justice, "..... a properly

run company should have a documents retention policy requiring retention of files for a reasonable period extending beyond the limitation period for civil cause of action in contract or tort and the limitation period for a reassessment under the Income Tax Act. Failure to do so risks a court making an adverse inference on the absence of evidence."

A key starting point is to educate your employees on the responsible use of company owned computers, e-mail, phones, Blackberries, and other communication devices. A sound document retention policy should

- be simple and clear;
- identify the retention periods set out in the relevant legislation and regulations;
- clearly identify the retention period of documents and their location as well as the categories of documents to be destroyed; and
- identify the employees responsible for implementing the policy.

It is also important to explain that the policy is not to be used to dispose of potentially incriminating evidence, rather it is a necessary tool in order to manage the company's documents. Finally it is important that the policy be applied consistently.

If you require assistance to develop a document retention policy for your organization please contact our firm. 

Home of One of the Best



Our own **Eric Williams** was recently voted one of the best lawyers in Canada. Over the course of a year-long survey, 3,190 ballots were cast by top lawyers in Canada to determine which of their peers should be featured in the inaugural edition of *The Best Lawyers in Canada*.

Congratulations Eric!

The Intervener

In our last issue of the *Legal Observer* we told you that our client's application for leave to hear the Appeal of *Herbison v. Lumbermans Mutual Casualty Company* had been granted. Mark Charron, who represents the insurer, will appear before the Supreme Court of Canada on December 11, 2006. Prior to the appeal, the Supreme Court will hear the Insurance Bureau of Canada's (IBC) application for intervener status in the case.

Interest groups like the IBC, often want to be heard if a legal case raises one or more issues of public importance. Although the case is between two individual parties, there are instances when the decision in the case will have a far reaching effect on a significant number of people.

To be granted intervener status an organization must demonstrate that it can contribute information that will assist the court in reaching its decision. For instance, the organization may be able to provide expert evidence in the area being litigated or it may be able to show that the people it represents will be significantly impacted by the decision.

The Ontario Court of Appeal has set out three factors to be considered before a public interest group may be granted intervener status in a case

- The nature of the case.
- The issues which arise and the likelihood of the applicant being able to make a useful contribution to their resolution.
- The intervention will not cause an injustice to the immediate parties.

Even when a party is granted intervener status, its role is quite limited. An inter-


venor's job is not to support the position of one side or the other, rather it is there to provide relevant information to the court.

To illustrate, consider the case of *Childs v. Desormeaux* which involved an intervener application by Mothers Against Drunk Driving (MADD).

When the Plaintiff appealed the trial decision to the Ontario Court of Appeal, MADD brought a motion for leave to intervene. The Plaintiff supported the application, the Defendant did not.

At the outset, the appellate Court recognized that intervener status should be carefully considered since an intervention could add to the costs and complexity of the litigation particularly since the dispute was essentially a private one.

Although the main issue raised in *Childs v. Desormeaux* was private in nature, the issue of whether to recognize that social hosts owe an actionable duty of care to members of the public transcended the dispute between the immediate parties. The Court concluded that MADD could make a useful contribution to the argument of the issues. The Court was also satisfied that intervention by MADD would not cause injustice to either party.

MADD was granted intervener status. However, its participation was limited to the issue of whether tortious liability of social hosts does or should exist in Canadian law. Further, the Court imposed a number of conditions on MADD, including that it could not submit any further material and that its oral submissions would be limited to 20 minutes. 



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