



## Case Comment: Insurance

### *Monenco Ltd. v. Commonwealth Insurance Co., 2001 SCC 49*

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In *Monenco Ltd. v. Commonwealth Insurance Co., 2001 SCC 49*, the Supreme Court of Canada has reaffirmed the applicability of the “Pleadings Rule” in determining whether an insurer is bound to defend a claim. The court went on to state that in making this determination, courts could, in the appropriate circumstances, go beyond the pleadings and look to extrinsic evidence to determine the “substance” and “true nature” of the claim.

In this case the appellant-insured, Monenco, had a number of insurance policies with different insurers including a comprehensive general liability insurance policy with the respondent, Commonwealth Insurance. This insurance policy had two exclusionary provisions: the first was a “turnkey exclusion” which applied to claims arising out of a project for which the insured performed professional architectural and/or engineering services and actual construction or manufacturing services. The second exclusionary provision was a “professional services exclusion” which covered claims based on the insured’s rendering or failure to render professional services.

With this comprehensive general liability insurance and professional liability insurance from a different insurer in place, Monenco and its subsidiary, 67669 Alberta Inc., entered into a joint venture known as ABM Engineers. ABM Engineers entered into a contract with Suncor Inc., whereby ABM Engineers would, among other things, design and construct the power and electrical system for Suncor’s plant. In so doing, ABM Engineers used polyvinyl chloride jacketed electrical cables (“PVC cables”).

A number of years later, Suncor’s plant was destroyed by a fire. Suncor alleged that a significant factor in the extensiveness of the destruction was the way in which the fire travelled along the PVC cables from its source to other areas of the plant.

Monenco looked to its professional liability insurance policy with the other insurer to provide a defence to the claim advanced against it and its subsidiary in



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the action brought against them by Suncor. This insurer undertook the defence and paid the full settlement and defence costs in excess of the deductible.

Monenco requested that the respondent, Commonwealth Insurance, provide a defence to those claims to the amount of the deductible that Monenco paid to its professional liability insurer. Commonwealth Insurance declined to do so claiming that it was exonerated from its duty to defend by two exclusions contained in the comprehensive general liability insurance policy, as set out above.

The Supreme Court of British Columbia concluded that the “turnkey exclusion” in the insurance policy operated to relieve Commonwealth Insurance from a duty to provide a defence. The Court of Appeal and the Supreme Court of Canada affirmed this decision.

The Supreme Court of Canada noted that the starting premise for assessing whether an insurer’s duty to defend has been triggered requires a review of the allegations made in the pleadings filed against the insured. If the pleadings allege facts that, if true, would require the insurer to indemnify the insured for the claim, the insurer is obliged to provide a defence; this is commonly referred to as the “Pleadings Rule”. It follows then that the proper basis for determining whether a duty to defend exists in any given situation requires an assessment of the pleadings to ascertain the substance and true nature of the claims.

The court then considered the issue of whether, in seeking to determine the substance and true meaning of a claim, a court is entitled to go beyond the pleadings and consider extrinsic evidence. The court concluded that extrinsic evidence that has been explicitly referred to within the pleadings may be considered to determine the nature of the allegations.

The trial court found that the turnkey exclusion applied because the claim arose out of a, “...project for which the professional architectural and/or engineering services were performed by [Monenco] the Insured and the actual construction, installation, erection, fabrication, assembly or manufacture thereof is performed by the Insured, or any legal entity wholly or partly owned by the Insured”.

Monenco raised several arguments; among them, that it, *in fact*, provided no services pursuant to the contract between Suncor and the joint venture. The Supreme Court of Canada adopted the reasoning of the trial judge who found, in this respect, that Monenco’s argument missed the point. A court must consider the allegations in the pleadings to determine the applicability of an exclusionary provision, and not what actually occurred. Monenco further argued that Suncor’s allegations in regard to the duty to warn of the danger associated with the use of PVC cables did not fall within the turnkey exclusion. The Court of Appeal found



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that if there was any duty to warn post-completion, it arose because the joint venture built the project, which was within the scope turnkey exclusion.

The Supreme Court adopted the reasons of the lower courts in finding that an analysis of the Amended Statement of Claim as a whole put it beyond a doubt that every one of Suncor's claims against Monenco and its subsidiary was for loss "arising out of the project" as this phrase was used in the turnkey exclusion.

With respect to extrinsic evidence, the court found it appropriate to examine relevant agreements referred to in Suncor's pleadings. These revealed that Monenco and its subsidiary undertook to perform design and construction services for Suncor therefore Commonwealth Insurance did not have a duty to defend Monenco and its subsidiary from the claim brought by Suncor because of the application of the turnkey exclusion.