RELIEF FROM FORFEITURE IN INSURANCE LAW — RECENT DEVELOPMENTS

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The Manitoba Court of Appeal recently handed down two judgments which may have changed the law respecting relief from forfeiture in insurance cases.[1] Beginning with a brief discussion of a court's power to grant an insured relief from forfeiture in insurance law cases, this paper will explain and critically analyze the judgments of these two cases.

The consequences of an insured's failure to meet his contractual obligations are more serious than for any other contract breaker; almost any breach results in the forfeiture of his claim under the policy. Legislation ameliorates the harshness of this situation to some extent. In each of the common law provinces, except for British Columbia, the insurance legislation contains the following provision:

> Where there has been imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or other matter or thing required to be done or omitted by the insured with respect to the loss insured against, and a consequent forfeiture or avoidance of the insurance in whole or in part, and the court deems it inequitable that the insurance be forfeited or avoided on that ground, the court may relieve against the forfeiture or avoidance on such terms as it deems just.[2]

This "relief against forfeiture" provision applies to all insurance contracts generally except life insurance and, in most but not all provinces, marine insurance.[3] In addition, the statutes embodying the government automobile insurance schemes in Manitoba and Saskatchewan contain a very similar provision.[4]

Canadian courts have recently given a broader interpretation to the relief from forfeiture provision. In *Minto Construction Ltd.* v. *Gerling Global General Ins. Co.*[5] the Ontario Court of Appeal noted that this section is an ameliorating provision and it should therefore be given a fair, large, and liberal construction. The court held that its power to relieve against forfeiture is not confined to breaches of statutory conditions *per se* but extends

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1. *Bonne* v. *Irvine* (1984), [1985] 2 W.W.R. 362, 31 Man.R.(2d) 81, 15 D.L.R. (4th) 693, [1985] I.L.R. 1-1884 (Man. C.A.) [hereinafter *Bonne* cited to W.W.R.]; *Finateai (Finateri)* v. *Goring and Manitoba Public Insurance Corp.* (1985), [1985] 6 W.W.R. 55 [hereinafter *Finateri*] (Man. C.A.).

2. *Insurance Act*, R.S.A. 1980, c. I-5, s. 205; *The Insurance Act* R.S.M. 1970, c. I-40, s. 130, C.C.S.M. I-40; *Insurance Act* R.S.N.B. 1973, c. I-12, s.110; *Insurance Contracts Act*, R.S.N. 1970, c. 178, ss 10 and 22; *Insurance Act*, R.S.N.S. 1967, c. 148, s. 25B; *Insurance Act*, R.S.O. 1980, c. 218, s.106; *Insurance Act*, R.S.P.E.I. 1974, c. I-5, s. 91; *The Saskatchewan Insurance Act*, R.S.S. 1978, c. S-26, s. 109. In British Columbia, the provision extends further and empowers the court to relieve against forfeiture not just where there has been a situation of imperfect compliance with a statutory condition as to proof of loss, but also where there has been a termination of the policy by a notice that was not received by the insured due to his absence from the address to which the notice was sent: *Insurance Act*, R.S.B.C. 1979, c. 200, s.12.

3. The 'relief against forfeiture' provisions cited *supra* also do not apply to accident and sickness insurance. For this type of insurance, though, there is contained in the insurance legislation of every common law province except British Columbia another section having the same effect: *Insurance Act*, R.S.A. 1980, c. I-5, s. 385; *The Insurance Act*, R.S.M. 1970, c. I-40, s. 230.9, C.C.S.M. I-40; *Insurance Act*, R.S.N.B. 1973, c. I-12, s. 222; *Accident and Sickness Insurance Act*, R.S.N. 1970, c.2, s. 38; *Insurance Act*, R.S.N.S. 1967, c. 148, s. 74L; *Insurance Act*, R.S.O. 1980, c. 218, s. 281; *Insurance Act* R.S.P.E.I. 1974, c. I-5, s. 209; *The Saskatchewan Insurance Act*, R.S.S. 1978, c.S-26, s. 262.

4. *The Manitoba Public Insurance Corporation Act*, R.S.M. 1970, c. A-180, s. 17, C.C.S.M. A-180; *Automobile Accident Insurance Act*, R.S.S. 1978, c. A-35, s. 62. British Columbia also has a mandatory government automobile insurance scheme, but its legislation confers on the government-insurer, not the court, the power to grant relief against forfeiture: *Insurance (Motor Vehicle) Act*, R.S.B.C. 1979, c. 204, s. 18, and B.C. Reg. 428/73, ss 2.14 and 3.20.

5. (1978), 86 D.L.R. (3d) 147, 19 O.R. (2d) 617, [1977-1978] I.L.R. 1-989 (C.A.).

to forfeitures created by breach of purely contractual terms of the insurance policy. It is clear though that the imperfect compliance must relate to a matter arising after the loss. There has never been a case where a court has granted this relief with respect to imperfect compliance occurring before the loss (e.g., where the insured breached his duty of full disclosure or where the insured was in arrears in his premiums).

In *Bonne* v. *Irvine*,[6] the Manitoba Court of Appeal granted relief from forfeiture notwithstanding that the breach of a statutory requirement was antecedent to the loss. Rather than exercising the specific relief power found in section 17 of *The Manitoba Public Insurance Corporation Act*[7] (hereinafter referred to as *The MPIC Act*), the Court used its general statutory power to relieve against penalties and forfeitures as set forth in section 63, Rule 7 of *The Queen's Bench Act* : "The court may relieve against all penalties and forfeitures, and, in granting such relief, to impose such terms as to costs, expenses, damages, compensation, and all other matters as may be deemed just."[8]

In *Bonne* v. *Irvine*, the plaintiff Bonne was the owner and operator of a motor vehicle and was insured under *The MPIC Act*. Bonne was involved in an automobile accident caused solely by the defendant, Irvine, who was also insured by the Manitoba Public Insurance Corporation. At the time of the accident, the plaintiff was in breach of a condition of his insurance policy by having allowed his driver's license to lapse, thereby causing it to be suspended, and also by failing to pay a fine for a speeding infraction. He was thus unable to make a claim for his damages under his own policy. The plaintiff however advanced against the defendant a claim which was defended by the Manitoba Public Insurance Corporation. The trial judge applied section 33 of *The MPIC Act*[9], which reduces a tortfeasor's liability by the amount that the plaintiff forfeited under his own policy (i.e., the amount of the collision damage to the plaintiff's motor vehicle) because of his failure to insure his vehicle and to comply with the requirements to maintain his coverage in good standing, and held for the defendant. The plaintiff could recover only the amount of his deductible and the cost of renting a substitute vehicle while his vehicle was being repaired, but not the cost of repairing the damage to his motor vehicle. On appeal, Huband J.A., with whom Matas and O'Sullivan JJ.A. concurred, agreed with the trial judge's application of that section of the Act. He noted that section 17 of *The MPIC Act*, the relief from forfeiture provision, was not applicable in this case because here the forfeiture of insurance resulted from a breach of a condition that took place before the loss had occurred. Huband J.A. then, however, referred to section 63, Rule 7 of *The Queen's Bench Act* (the

6. *Supra*, note 1.

7. *The Manitoba Public Insurance Corporation Act*, R.S.M. 1970, c. A-180, s. 17, C.C.S.M. A-180.

8. *The Queen's Bench Act*, R.S.M. 1970, c. C-280, s. 63, Rule 7. Note that the superior courts of most common law provinces are conferred with the same power stated in almost identical terms: *Judicature Act*, R.S.A. 1980, c. J-1, s. 10; *Law and Equity Act*, R.S.B.C. 1979, c. 224, s. 21; *Judicature Act*, R.S.N.B. 1973, c. J-2, s. 26(3); *Judicature Act*, R.S.O. 1980, c. 223, s. 22; *Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 44, Rule 5. The superior courts of the remaining three common law provinces also have this power but it is stated implicitly in a section discussing the court's equitable jurisdiction: *Judicature Act*, R.S.N. 1970, c. 187, s. 21; Judicature Act, S.N.S. 1972, c. 2, s. 38; *Judicature Act*, R.S.P.E.I., 1974, c. J-3, s.9(1) as en. S.P.E.I., 1974 (2d),c. 65, s. 2(a).

9. *The Manitoba Public Insurance Corporation Act*, R.S.M. 1970, c. A180, s. 33, C.C.S.M. A180.

court's general relief power) and relieved the plaintiff from forfeiture of his insurance under that provision on the following bases: (a) the provision of *The MPIC Act* constitutes a penalty and works a forfeiture; (b) the relief power is discretionary, and each case is to be considered according to its particular facts; and (c) in the Court's opinion, the plaintiff's breaches of the insurance conditions were more technical than significant, and therefore the Court ought to exercise its discretion in the plaintiff's favour.[10] In coming to this decision, Huband J.A. seems to have assumed without question that the Court is able to invoke this general relief power notwithstanding the existence of a specific and, in this case, inconsistent relief power provided for in *The MPIC Act*. Indeed, Huband J.A. did not even address that as being an issue in the case.

The Manitoba Court of Appeal was soon provided with another opportunity to elaborate on this point in *Finateri* v. *Goring and M.P.I.C.*[11] The facts of *Finateri* paralleled those of *Bonne* insofar as there was a motor vehicle accident between the plaintiff, Finateri, and the defendant, Goring, for which the defendant was entirely to blame. The plaintiff was unable to make an insurance claim against the Manitoba Public Insurance Corporation because he had no insurance (the plaintiff had moved from Ontario to Manitoba, obtained a Manitoba driver's license, but had not yet insured or registered his motor vehicle). The plaintiff brought an action against the defendants to recover the cost of repairing the damage sustained by his motor vehicle. Here the question was whether the tortfeasor's liability was reduced by the amount of the benefits that the plaintiff had forfeited by reason of failure to obtain his own insurance coverage. The learned trial judge, following the *Bonne* decision, applied section 63, Rule 7 of *The Queen's Bench Act* to relieve the plaintiff of that penalty imposed under section 33 of *The MPIC Act*, and thereby held that the plaintiff could recover fully from the tortfeasor.

The defendants successfully appealed the trial decision. In allowing the appeal, the Manitoba Court of Appeal did not, however, overrule *Bonne* v. *Irvine*. Huband J.A. affirmed the *Bonne* decision, but he distinguished the case on its facts. In the course of so doing, the learned justice addressed the issue of whether or not the general relief provision of *The Queen's Bench Act* can be invoked in an insurance case. After citing the decision of the Judicial Committee of the Privy Council in *R.* v. *Canadian Northern Railway Co.*,[12] for the proposition that this general statutory authority to relieve against forfeitures and penalties does not extend to relief against statutory penalties, Huband J.A., it is submitted, explained that in *Bonne*, where an insurance contract was in existence, the requirements of *The MPIC Act* were, in effect, terms of the contract between the insured and the insurer. Therefore, Huband J.A. continued, the penalty of forfeiture provided for in section 33 was not a statutory penalty, but rather a contractual penalty, and it was open to the court to relieve against forfeiture by exercising its

10. *Supra*, note 1 at 368-69.

11. *Supra*, note 1.

12. (1923), [1923] A.C. 714, [1923] 3 D.L.R. 719, [1923] 3 W.W.R. 547 (P.C.) [hereinafter cited to A.C.].

general discretionary power under *The Queen's Bench Act*.[13] Huband J.A. distinguished *Finateri* on the basis that since Finateri had never applied for or acquired any insurance under the statutory scheme, his forfeiture operated not because he had violated a term of a statutory contract, but because he was not, and never was, insured at all. That is, there was no contract; section 33 was operating as a pure statutory penalty, in respect of which the Court was powerless to permit relief.[14]

It is arguable that the judgments of Hall and Philp JJ.A., while expressly concurring with Huband J.A.'s decision in the result, cast some doubt on Huband J.A.'s judgment. Hall J.A., who did not expressly disagree with his brother justice's reasons, may have implied this when he stated "I agree in the result with my brother Huband but am content to base my decision on the simple proposition that the court has no jurisdiction to grant relief to the plaintiff because of his failure to apply and pay for insurance."[15] Similarly, disagreement with Huband J.A.'s reasons may be inferred from Philp J.A.'s comments: "I have had the opportunity of reading the reasons of my brother Huband and I agree in the result. Section 63, R. 7, of *The Queen's Bench Act* cannot be invoked to relieve against a statutory penalty or forfeiture. . . . [The *R.* v. *Canadian Northern Railway Co.*] decision, it would seem, was not considered by this court in *Bonne* v. *Irvine*."[16] Arguably, one can infer from Philp J.A.'s judgment that Huband J.A.'s distinction between *Bonne* and *Finateri* really is not a material distinction at all, and that *Bonne* was wrongly decided. Yet given that the *Bonne* decision was not overruled, and given that Huband J.A.'s judgment in *Finateri* was at most only impliedly refuted by his two brother justices, it is arguable that in Canada there now is appellate authority for the proposition that a court is entitled to invoke its general statutory relief power to grant an insured relief from forfeiture in situations lying outside of those contemplated by the specific relief provision contained in insurance legislation. In determining the likelihood of other courts adopting this proposition, it is necessary to consider whether or not there are any legal justifications or sound policy reasons supporting such a proposition.

A relevant consideration that was absent in the judgments in both *Bonne* and *Finateri* is the presumption of statutory interpretation, *generalia specialibus non derogant*. Translated literally, this means that "general words do not derogate from special."[17] In his text on statutory interpretation, E. A. Driedger explains this presumption more fully by citing Rinfret J., who said that the principle is "that where there are provisions in a special Act and in a general Act on the same subject which are inconsistent, if the special Act gives a complete rule on the subject, the expression of the rule acts as an exception of the subject-matter of the rule from the general Act."[18]

If this interpretive presumption had been applied in *Bonne*, it is submitted that it would not have been open to the court to even consider

13. *Finateri, supra*, note 1 at 58.
14. *Ibid.* at 58-59.
15. *Ibid.*, at 56.
16. *Ibid.*, at 59.
17. *Black's Law Dictionary*, 5th ed. (St. Paul: West Publishing Co., 1979) at 616.
18. *Ottawa* v. *Eastview* (1941), [1941] S.C.R. 448 at 462, [1941] 4 D.L.R. 65, in Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 227.

exercising its discretion under section 63, Rule 7 of *The Queen's Bench Act*. Clearly, all of the conditions stated by Rinfret J. were met in *Bonne*. There were two provisions, one in a special Act *(The MPIC Act)* and the other in a general Act *(The Queen's Bench Act)*. The provision in the special Act (section 17 of *The MPIC Act)* appears to provide a self-contained complete rule on the subject of relief from forfeiture. Finally, there was an inconsistency insofar as the plaintiff fell within the requirements of the general provision, but outside the requirements of the special provision. According to this presumption of statutory interpretation, then, the court ought not to have turned to section 63, Rule 7 of *The Queen's Bench Act*, once it had concluded that section 17 of *The MPIC Act* was not available to the plaintiff.

While there is no Supreme Court of Canada authority dealing with this issue of whether or not the general relief provision is available to a court in an insurance case (indeed there are very few cases that have ever had to consider this question) the cases have consistently held that the court's general power to grant relief does not apply to contracts of insurance. The court's power to relieve against forfeiture in insurance cases is derived solely from the provisions in insurance legislation.[19] However, as first explained by Meredith J.A. in *Johnston* v. *Dominion of Canada Guarantee and Accident Insurance Co.*, the courts' rationale for this position is not the above-noted presumption of statutory interpretation, but rather the sanctity of contracts.[20] That is to say, the application of this general relief provision to insurance contracts would create a revolution in the law of insurance as it would effectively require the court to step out of the realm of adjudicating rights under the contract, and into the realm of legislating such rights.

The legal and policy considerations of that reasoning aside, it is submitted that the *generalia specialibus non derogant* rule of statutory interpretation is a stronger and more appropriate basis for refusing to apply the general relief provision to insurance cases. Given that the court is, after all, dealing with statutory, not contractual, provisions, it would seem reasonable that the court would apply rules of statutory interpretation first. Only if those rules fail to yield a clear result should the court turn to other legal considerations.

Next, assuming, but not accepting, that the general relief power was available to the court in *Bonne*, was it proper for the court to apply it in that kind of case? Answering this question requires an analysis of this equitable power.

The leading case on this matter is that which Huband and Philp JJ.A. cited in *Finateri: R.* v. *Canadian Northern Railway Co.*[21] There, the Crown

19. *Johnston* v. *Dominion of Canada Guarantee and Accident Insurance Co.* (1908), 17 O.L.R. 462 (C.A.). See also *Stenhouse* v. *General Casualty Insurance Co.* (1934), [1935] 1 D.L.R. 193, [1934] 3 W.W.R. 564, 2 I.L.R. 36 (Alta.C.A.); *King* v. *Freeman* (1942), [1942] O.R. 561, [1942] 4 D.L.R. 182 (H.C.); *Swan Hills Emporium and Lumber Co.* v. *Royal General Insurance Company of Canada* (1977), 2 A.R. 63, 2 Alta.L.R.(2d) 1, [1977] I.L.R. 1-844 (Alta. C.A.); *Kallos* v. *Saskatchewan Government Insurance* (1983), 14 D.L.R. (4th) 34, [1984] 2 W.W.R. 183, 30 Sask.R. 185 (Sask. Q.B.); *Prentice* v. *Co-Operators General Insurance Co.* (1984), 4 C.C.L.I. 237 (Ont. Dist. Ct.).

20. *Ibid.*, *Johnston* at 482.

21. *Supra*, note 12.

was seeking to collect statutorily-imposed penalties from the defendant railway company, which had failed to pay a tax pursuant to the statute in question. In the Privy Council, Lord Parmoor, referring to the Alberta Court of Appeal and Supreme Court of Canada judgments from which the appeal came, said the following:

> The Chief Justice [Harvey C.J.A.] expresses the opinion that if the power given to the court to relieve against penalties applied to statutory penalties, this would, in effect, be giving an authority to enable the court to repeal statutes. This decision was unanimously confirmed in the Supreme Court of Canada. Idington J. says in his judgment "that the power of the court to relieve from penalties seemed to him to be applicable only to such contractual penalties and forfeitures as those as to which the Court of Chancery had exercised jurisdiction." Their Lordships are of the opinion that on this point the cross-appeal fails.[22]

In short, the Privy Council based its refusal to apply the power to relieve against a forfeiture imposed by a statutory penalty on two stated rationales: (1) the perceived lack of legislative intent to confer on the courts the power to effectively repeal statutory penalties; and (2) a recognition of the history of the equitable jurisdiction of the Court of Chancery. With respect to this second rationale, both Ashburner's *Principles of Equity* as well as Keeton's and Sheridan's *Equity* state that the power of a court of equity to relieve against penalties is confined to provisions in contracts, not to statutory or statutorily-authorized penalties and forfeitures.[23]

This restriction on the court's general power to relieve against penalties and forfeiture has been unanimously accepted by subsequent courts.[24] Indeed, even the Manitoba Court of Appeal in *Finateri* expressly accepted this restriction, but it may be recalled that Huband J.A. then curtailed its effect by viewing *The MPIC Act* regulations that had been breached as contractual, not statutory, terms and accordingly the forfeiture provision in the statute as a contractual, not statutory, penalty. At present, there are no authorities supporting this particular creative judicial reasoning, and in light of the comments of Hall and Philp JJ.A., noted above, it is uncertain whether the Manitoba Court of Appeal itself approves such reasoning.

It appears, then, that the legal merits of Huband J.A.'s judgments in *Bonne* and *Finateri* are dubious at best. Despite that, however, there may be legitimate policy reasons in support of his decisions. As mentioned at the outset, Canadian courts have never used the relief from forfeiture provision of insurance legislation to grant relief where the insured's imperfect compliance was in respect of a pre-loss, rather than post-loss, requirement. This view is founded upon a literal interpretation of the section.[25] Yet one must consider whether there is any logical basis for distinguishing, in the context of the court's power to relieve from forfeiture where forfeiture would

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22. *Ibid*, at 722.

23. Ashburner, *Principles of Equity*, 2d ed. (Sydney: Legal Books Pty. Ltd., 1983) at 26; Keeton and Sheridan, *Equity*, 2d ed. (Milton: Professional Books, 1976) c. 14.

24. *A.G. of Canada* v. *Wheeler* (1941), [1944] O.R. 138, 1 D.L.R. 784, 81 C.C.C. 1 (Ont. H.C.); *Magnussen* v. *B.C. Ins. Corp.* (1978), 88 D.L.R.(3d) 474, 6 B.C.L.R. 193, [1978] I.L.R. 1- 1016 (B.C. Co.Ct.); *World Land Ltd.* v. *Daon Development and Olympia and York Developments* (1981), [1982] 4 W.W.R. 577, 20 Alta. L.R.(2d) 33 (Alta. Q.B.); *Olympia and York Developments* v. *City of Calgary* (1983), 45 A.R. 204, 26 Alta.L.R.(2d) 307, 22 M.P.L.R. 166 (C.A.); *Martin Mine Ltd.* v. *R.in Right of British Columbia* (1985), 62 B.C.L.R. 107 (C.A.).

25. *Supra*, note 2.

be unjust, between breaches of conditions occurring before the loss has occurred and breaches of conditions occurring after the loss has occurred. On the one hand, it could be argued that most pre-loss requirements are substantive in nature, in the sense that they relate to the insurable interest and the risk insured against, and as such affect the validity and currency of the insurance. In contrast, most post-loss requirements are not related to the validity and risk of the insurance policy, but are only procedural in nature. Yet one could also argue quite the contrary. Not all breaches of pre-loss requirement affect the insurable interest or the risk in any way. For example, a failure to pay a premium will seldom have any effect on the validity or risk of the insurance. Should it, therefore, be treated any differently, in respect of the availability of relief from forfeiture, than, for example, a failure to notify the insurer of the loss within a reasonable time? Certainly the latter has the potential of being much more prejudicial to the insurer, given that the accuracy of the findings from the investigation of the loss can often be affected by the lapse of time between the loss-occurring event and the investigation.

If there is no logical basis on which to distinguish, in some cases at least, between pre-loss and post-loss breaches, is it just that a court is precluded by a rule of equity that has become rigid from exercising its general relief power in circumstances where forfeiture would be inequitable? Given that equity evolved for the purpose of mitigating the severity of rules of law, it seems improper that this general power of granting relief from forfeiture has been applied with such strict formality as has happened since *R.* v. *Canadian Northern Railway Co.*[26]

Notwithstanding his expressed affirmation of *R.* v. *Canadian Northern Railway Co.*, perhaps this was the foundation underlying Huband J.A.'s creative explanation of *Bonne* v. *Irvine* in his *Finateri* judgment. Unfortunately, though, that must remain completely speculative as no mention of these policy considerations was made by any of the judges in the two cases.

If that was, in fact, the basis of the decision, then it should be noted that Huband J.A. is not alone in favoring that policy position. In *Long* v. *Commercial Union Assurance Company of Canada* where the issue concerned an alleged failure to notify the insurer of a change material to the risk, Linden J. indicated, in obiter, his willingness to interpret the specific relief from forfeiture provision in Ontario's *Insurance Act* as applying to pre-loss, not just post-loss, breaches.[27] Linden J.'s approval of this other method of granting relief against a forfeiture that resulted from a pre-loss breach lends support to the notion that the courts ought to be able to relieve an insured from forfeiture where forfeiture would be inequitable, regardless of whether the forfeiture resulted from pre-loss or post-loss imperfect compliance.

In conclusion, the effect, if any, that the *Bonne* and *Finateri* cases will have on the law respecting a court's power to grant relief from forfeiture

26. *Supra*, note 12.

27. (1981), 32 O.R.(2d) 388 at 403, [1981-1982] I.L.R. 1-1467, 611 at 620 (S.C.).

in insurance cases is difficult to predict. On the one hand, despite their shortcomings, it is arguable that these two appellate authorities have changed the law in Manitoba and opened the door for reform-minded courts in other provinces to do likewise. On the other hand, it is just as arguable that (a) *Bonne* and *Finateri* did not change the law, and that they are completely consistent with past authorities, or (b) if they did change the law, they are relevant only to cases involving mandatory government automobile insurance schemes, not to insurance law generally. The only thing that is certain is that the law on this point is not as clear as it was prior to Mr. Bonne's appeal.