October 2020

BRIEFING NOTE

Guild Yule LLP
BARRISTERS AND SOLICITORS
2100 – 1075 Georgia Street
Vancouver, BC V6E 3C9
www.guildyule.com
P 604 688 1221
F 604 688 1315
E feedback@guildyule.com

I. Introduction

In the recent decision of ***Nagy v. BCAA Insurance Corporation***, 2020 BCCA 270, the B.C. Court of Appeal reviewed Statutory Condition 1 under s. 29 of the ***Insurance Act***, R.S.B.C. 2012, c. 1, which imposes the following condition on anyone applying for an insurance policy against loss or damage to property:

> **Misrepresentation**
>
> 1. If a person applying for insurance falsely describes the property to the prejudice of the insurer, or misrepresents or fraudulently omits to communicate any circumstance that is material to be made known to the insurer in order to enable it to judge the risk to be undertaken, the contract is void as to any property in relation to which the misrepresentation or omission is material. [Emphasis added.]

In particular, amongst other things, the Court addressed the issues: What is a misrepresentation, as compared to an omission? Does telling a half-truth constitute a misrepresentation or an omission? Whose state of mind must be considered, when assessing whether something constituted a misrepresentation or a fraudulent omission?

The Court provides a fairly straightforward framework for anyone seeking to apply this Statutory Condition – whether that be an insurer seeking to deny coverage by voiding the policy or an insured seeking to avoid that draconian outcome.

II. The Common Law/Applicable Legislation

At common law, it was generally accepted that an insured must disclose all material facts on applications for insurance. Where an insured withheld or misrepresented material information on an application for insurance, the insurance policy would be rendered void. This was true whether the insured acted innocently, negligently or fraudulently.

The classic exposition of the principle is found in ***Carter v. Boehm*** (1766), 97 E.R. 1162, an old English case involving the sacking of a fort by French forces, "by the connivance and assistance of the Dutch". There, subject to some exceptions to the rule, Lord Mansfield defined the insured's duty of representation, as follows:

> Insurance is a contract upon speculation.

> The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.
>
> The keeping back [of] such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the under-writer is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run, at the time of the agreement.

Up until 1924, this was the state of the common law and it is also what was incorporated into the earlier insurance legislation (see, e.g., ***Insurance Act***, R.S.O. 1914, c. 183): an insurance policy was void if the insured, on an application for that policy, made any material misrepresentations or omissions. Whether they were made innocently, negligently or fraudulently was of no matter.

This approach was modified by statute in 1924, however, when Ontario first introduced the wording that is still found in B.C.'s current Statutory Condition 1 ("misrepresents or *fraudulently* omits to communicate). The Uniformity Commissioners had pressed for the section to read as "fraudulently misrepresents or omits to communicate". The insurers did not want the word "fraudulently" to be used at all. This clause was a compromise.

Shortly after this clause's introduction, the Supreme Court of Canada had occasion to consider the effect of the phrase "fraudulently omits". In ***Taylor v. The London Assurance Corporation et al.***, [1935] S.C.R. 422, the Court held that the adverb "fraudulently" connotes actual fraud –deliberately withholding information with intent to deceive the insurer.

Accordingly, due to the wording of the statute, there is a distinction between misrepresentations and omissions. In order to void an insurance policy for a material misrepresentation on an application for insurance, there is no need for an insurer to show fraud. An innocent misrepresentation has the same effect as a fraudulent misrepresentation. Both void the insurance policy. As to material omissions, before the policy will be voided, these must be shown to be fraudulent. "Innocent" omissions have no effect on coverage.

III. ***Nagy v. BCAA***

A. Background

In ***Nagy***, the insureds owned three properties: (i) a home in Coquitlam, B.C.; (ii) a property on Mayne Island, which was sometimes rented out; and (iii) a home in Point Roberts, Washington State.

Guild Yule LLP
BARRISTERS AND SOLICITORS
2100 – 1075 Georgia Street
Vancouver, BC V6E 3C9
www.guildyule.com
P 604 688 1221
F 604 688 1315
E feedback@guildyule.com

The insureds had made prior insurance claims, including: a total fire loss at the Point Roberts property in March 2008; a claim for damage to the roof of the Mayne Island property in January 2013; and a claim for theft at the Point Roberts property in December 2014.

In March 2016, their broker wrote them to advise that their insurer, Wawanesa, would not underwrite any further policies. Despite the broker's efforts, no insurer would give them coverage. Thus, the insureds applied to BCAA, of which they were members.

On their initial application for insurance, the insureds failed to provide complete and accurate information:

a. In both the telephone conversation and on the application form, the Nagys were asked for a list of previous losses within the past 10 years. In both cases, only one loss was disclosed: the theft in December 2014.

b. And again, both by telephone and on the application form, in answer to the question "Has any insurer cancelled, declined, refused or imposed any special conditions on habitational insurance for the applicant in the past 10 years?" the Nagys answered "No". This answer was clearly false. This was precisely the reason why they were applying for coverage from BCAA in the first instance.

The policy was issued on the date of application.

Key to the Court of Appeal's review of the case, the insureds further contested that they mailed an addendum to BCAA the next day, after the policy was issued, which corrected the information provided on their initial application. Mr. Nagy also deposed he confirmed BCAA's receipt of those documents by telephone thereafter. BCAA denied ever receiving any of this information or receiving a telephone call to confirm receipt of this information.

In December 2016, the Mayne property burned down. BCAA denied coverage, on the basis the policy was void due to misrepresentations and omissions by the insureds at the time coverage was placed. The insureds sued for coverage. The matter proceeded to a summary trial. The chambers judge found the insureds' incorrect responses were omissions – *not* misrepresentations – and that they were not fraudulent. BCAA was ordered to respond under the policy.

B. On Appeal

The first issue on appeal was whether the incomplete and inaccurate answers to the questions raised by BCAA in its telephone discussion with Mr. Nagy and on its application form constituted misrepresentations or omissions. As explained by the Court, this determination was first in the overall analysis of whether the policy was voided:

> [34] What follows from whether the statement is characterized as an omission or a misrepresentation, then, comes down to this. If

Guild Yule LLP
BARRISTERS AND SOLICITORS
2100 – 1075 Georgia Street
Vancouver, BC V6E 3C9
www.guildyule.com
P 604 688 1221
F 604 688 1315
E feedback@guildyule.com

> an applicant misrepresents circumstances material to the contract, it matters not whether that misrepresentation is innocent, negligent, or fraudulent. This is because it concerns a matter exclusively within the knowledge of the applicant that is, in the words of Statutory Condition 1, "material to be made known to the insurer in order to enable it to judge the risk to be undertaken", and the applicant will have provided information of that nature that simply was not true.
>
> [35] If the insured omits to communicate a material circumstance (an omission), however, that omission must not only be material, but also fraudulently made if it is to void the contract.

To make this first determination of whether the responses were misrepresentations or omissions, the Court set out the following framework:

1. What are misrepresentations?

A misrepresentation is: (i) a false representation of fact; (ii) an assertion that something is so when it is not; or (iii) an assertion that something is not so when it is. Misrepresentations can be objectively judged and compared against the truth. They are active, whereas omissions are passive.

2. But how do you characterize half-truths, where something is left out?

On reviewing the Supreme Court of Canada's decision in ***Taylor***, the Court concluded that a partial statement of the facts will generally be considered an omission. Thus, half-truths are omissions, generally speaking, *not* misrepresentations.

3. Whose state of mind is relevant when assessing an alleged omission or misrepresentation?

For omissions, because they need to be fraudulent, one must look at the insured's state of mind. The question is: was the omission calculated to mislead the insurer?

It is different for misrepresentations. There, one must look at the insurer's state of mind, to determine if that representation would have affected the insurer's actions – either by refusing to write the policy or by increasing the premium.

In the context of half-truths, while the Court noted that a half-truth could be a misrepresentation if the response was intended to mislead the insurer, this appears to be an academic point. It is academic because if the Court found that the half-truth was intended to mislead, then it would also satisfy the statutory requirement of being a fraudulent omission in any event, and would in turn void the policy. Thus, in those circumstances, nothing turns on characterizing it either as a fraudulent omission or a fraudulent misrepresentation. The Court appears to have reached the same conclusion, stating at para. 53:

> [53] But if a true but incomplete statement is made (a "half-

Guild Yule LLP
BARRISTERS AND SOLICITORS
2100 – 1075 Georgia Street
Vancouver, BC V6E 3C9
www.guildyule.com
P 604 688 1221
F 604 688 1315
E feedback@guildyule.com

truth"), then, at least *prima facie*, it will amount to an omission within the meaning of Statutory Condition 1. To characterize such a half-truth as a misrepresentation where it is "calculated to mislead" does not advance the analysis in the context of how Statutory Condition 1 treats an omission. As Professor Billingsley noted, in relation to omissions but not misrepresentations, the statutory condition makes the insured's intention relevant: Billingsley at 104. It thus focuses on the intention of the applicant, not the state of knowledge of the insurer, presumably because what was communicated was true, albeit incomplete. Any "omission" that was calculated to mislead would presumably satisfy the requirement of fraud, and would void the policy. Characterizing it as a misrepresentation adds nothing. If it was a true misrepresentation, in the sense of a positive statement that was untrue, then whether it was calculated to mislead is irrelevant. The statutory condition does not require any examination of intent when it comes to misrepresentation.

4. What is the standard of proof for establishing fraud, when assessing whether an omission was fraudulent?

The chambers judge proceeded on the basis that she was to apply a "heightened scrutiny" to the evidence in order to determine whether BCAA had proved fraud on a balance of probabilities. The Court of Appeal rejected this approach, stating that the phrase "heightened scrutiny" should "be locked away in the vault of discarded phrases": para. 42.

Rather, where fraud is alleged, the standard of proof remains the civil standard of a balance of probabilities, and in that regard, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test.

5. When can a misrepresentation be cured or otherwise rebutted?

The Court noted that a misrepresentation *can* be "cured", but only if the insurer is provided with the correct information prior to putting the policy into place.

Otherwise, a misrepresentation will allow the insurer to void the policy, *unless* the insurer is provided with the correct information prior to the loss and the insurer does nothing with that information, including cancelling or revising the coverage. In those circumstances, the insurer is taken to not have considered the misrepresentation to be material to the risk. The insurer has waived its right to rely on the misrepresentation in voiding the policy.

C. Court of Appeal's Determination

Applying this framework, the Court determined that the chambers judge had made several reversible errors, requiring a new trial.

For one, the chamber's judge failed to properly characterize the answer to the question about a denial of coverage as a misrepresentation ("no", when it should

Guild Yule LLP
BARRISTERS AND SOLICITORS
2100 – 1075 Georgia Street
Vancouver, BC V6E 3C9
www.guildyule.com
P 604 688 1221
F 604 688 1315
E feedback@guildyule.com

have been "yes"). That was a positive representation that no insurer had cancelled, declined, refused or imposed any special conditions on habitation or insurance in the last 10 years.

As to whether the misrepresentation was cured or rebutted, the Court of Appeal determined the chambers judge had also failed to determine whether BCAA received the addendum material. If BCAA *did* receive the material and yet maintained the coverage, then it could no longer be said that the initial inaccuracies were material to BCAA, even if they constituted misrepresentations or omissions at the time they were made; if BCAA *did not* receive the material, then it could properly deny coverage.

The Court also provided a helpful discussion of the application of the *Browne v. Dunn* rule in the context of summary trials, although that discussion is outside the scope of this paper.

IV. Conclusion

This case provides helpful guidance as to how to characterize and assess misrepresentations and omissions, particularly where part-truths are provided by insureds on applications for coverage.

Apart from clarifying this area of law, the case also highlights two key points for insurers who are considering a denial on the basis of misrepresentation or fraudulent omission:

a. **Message and record-keeping systems must be accurate and reliable.** For misrepresentations, as in ***Nagy***, it may be that the insurer needs to prove a negative (i.e., that it did *not* receive an addendum to the application, correcting the misinformation received previously). If it can be shown that *had* the addendum been sent and *had* it been received, it would somehow show in the record-keeping systems, then the insurer will be better placed to rebut any suggestion that it waived its rights to rely on a misrepresentation in voiding the policy.

b. **Where there are half-truths or omissions, the insurer will face an uphill battle in any attempt to void the policy based on same.** While there is no "heightened scrutiny" of evidence of fraud, as a general proposition, fraud can be hard to prove in insurance, as in other cases. As such, an insurer will face a difficult task to prove fraud.

Jordan Bank

Guild Yule LLP
BARRISTERS AND SOLICITORS
2100 – 1075 Georgia Street
Vancouver, BC V6E 3C9
www.guildyule.com
P 604 688 1221
F 604 688 1315
E feedback@guildyule.com