Citation: *Crandall University v AIG Insurance Company of Canada*, 2024 NBKB 151

Court File No. MM-75-2024

IN THE COURT OF KING'S BENCH OF NEW BRUNSWICK

TRIAL DIVISION

JUDICIAL DISTRICT OF MONCTON

BETWEEN:

CRANDALL UNIVERSITY

APPLICANT

-and-

AIG INSURANCE COMPANY OF CANADA

RESPONDENT

DECISION

BEFORE:	Justice Maya Hamou
DATE OF HEARING:	July 12, 2024
DATE OF DECISION:	July 29, 2024
APPEARANCES:	Katherine Toner and Kristen Fulton, counsel on behalf of Crandall University Jean-Simon Schoenholz, counsel on behalf of AIG Insurance Company of Canada

OVERVIEW

1. This case is about the interpretation of an exclusion clause in an Insurance Policy purchased by Crandall University ("Crandall") from AIG Insurance Company of Canada ("AIG"); the facts are not disputed by the parties.

2. Crandall launched an internal investigation after posts on a social media account titled @DoBetterCrandall, made anonymous allegations of harassment at the hands of Crandall employees.

3. The Michaud Report documented the findings of the internal investigation by Joël Michaud, K.C., and resulted in Crandall terminating one of its employees, Dr. Stackhouse, for sexual harassment of a student.

4. Dr. Stackhouse and his partner, Ms. Britton, filed a civil claim for wrongful termination, defamation, false light in public eye, intrusion upon seclusion, public disclosure, and breach of confidence ("Stackhouse Action").

5. In this Application, Crandall seeks a declaration that AIG must indemnify Crandall for losses (including defence costs) in relation to the Stackhouse Action. In addition, Crandall seeks a declaration of entitlement to its counsel of choice in the defence of the Stackhouse Action, the payment of costs and expenses incurred to date by Crandall in its defence of the Stackhouse Action, and solicitor-client costs and disbursements on the Application.

6. AIG acknowledges that the Stackhouse Action raises wrongful acts identified in the Directors, Officers, and Non-For-Profit Organization Liability section ("D&O Coverage") and the Employment Practices Liability section ("EPL Coverage") of the Insurance Policy. However, AIG asserts that Endorsement #18 – Sexual Misconduct and Child Abuse Exclusion ("Sexual Misconduct Exclusion") in the Insurance Policy excludes coverage for losses associated with the Stackhouse Action.

7. The legal dispute in this matter comes down to the interpretation of the Sexual Misconduct Exclusion and whether the Claim filed by Crandall for losses associated with the Stackhouse Action constitutes a Claim arising out of, based upon or attributable to, or in any way involving directly or indirectly "Sexual Misconduct" and whether "Sexual Misconduct" includes "sexual harassment". The Sexual Misconduct Exclusion reads as follows.

Sexual Misconduct and Child Abuse Exclusion
(D&O and EPL Coverage Sections)

> In consideration of the premium charged, it is hereby understood and agreed that solely with respect to Loss as may otherwise have been covered under the D&O Coverage Section and/or the EPL Coverage Section, the Insurer shall not be liable to make any payment for Loss in connection with any Claim(s) (including but not limited to any derivative or representative class actions) made against any Insured(s) alleging, arising out of, based upon or attributable to, or in any way involving, directly or indirectly any Sexual Misconduct, child abuse or neglect, including but not limited to the employment, supervision, reporting to the proper authorities, failure to so report or retention of any person.
>
> "Sexual Misconduct" means any licentious, immoral or sexual behavior, sexual abuse, sexual assault, or molestation intended to lead to or culminating in any sexual act against individual(s).

8. On the plain reading of the Sexual Misconduct Exclusion in the Insurance Policy, the Court finds that the Stackhouse Action and Crandall's losses (including its legal costs) associated with the Stackhouse Action "arose indirectly out of Sexual Misconduct" and finds that "Sexual Misconduct" includes "sexual harassment". The Claim is excluded from coverage.

9. The Application is dismissed, and Crandall shall pay $3,000 in costs plus disbursements to AIG.

ISSUES

10. Does the Sexual Misconduct Exclusion bar coverage for losses (including legal costs) from defending Stackhouse Action?

    - Does the Stackhouse Action brought against Crandall, for which Crandall seek coverage, constitute a Claim arising out of, based upon or attributable to, or in any way involving directly or indirectly "Sexual Misconduct"?
    - Does "Sexual Misconduct" include "sexual harassment"?

11. Is Crandall entitled to retain counsel of choice in the defence of the Stackhouse Action?

12. Is Crandall entitled to recover the payment of costs and expenses incurred by Crandall in its defence of the Stackhouse Action?

13. What costs is the successful party entitled to recover on the Application?

ANALYSIS

Coverage for the Stackhouse Action – Sexual Misconduct Exclusion

Insurance Contract Interpretation Principles

14. Borrowing from AIG's brief and references in support, the principles of insurance policy interpretation can be summarised as follows.

    - First, effect should be given to clear language if the language in the insurance policy is unambiguous.

      > *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.,* 2016 SCC 37 at para 49 [*Ledcor*]; *Progressive Homes Ltd. v Lombard General Insurance Co. of Canada*, 2010 SCC 33 at para 22 [*Progressive Homes*]; *Non-Marine Underwriters, Lloyd's of London v Scalera*, 2000 SCC 24 at para 71 [*Scalera*].

    - Second, where insurance policy language is ambiguous, general rules of contract construction must be used to resolve the ambiguity supported by the language of the policy and consistent with the interpretation of similar insurance policies.

      > *Ledcor*, at para 50 citing *Progressive Homes*, at para 23; *Scalera*, at para 71; *Co-operators Life Insurance Co. v Gibbens*, 2009 SCC 59 at paras 26-27 [*Gibbens*]; *Consolidated-Bathurst v Mutual Boiler*, 1979 CanLII 10 at pp 900-902 (SCC) [*Consolidated-Bathurst*].

    - Third, if the rules of construction fail to resolve the ambiguity, the courts are called to construe the policy *contra proferentem* – against the insurer. Insofar as they are ambiguous, the coverage provisions are interpreted broadly while exclusion clauses are to be interpreted narrowly.

      > *Ledcor*, at para 51 citing *Progressive Homes*, at para 24; *Scalera*, at para 70; *Gibbens*, at para 25; *Consolidated-Bathurst*, at pp 899-901 and *Jesuit Fathers of Upper Canada v Guardian Insurance Co. of Canada*, 2006 SCC 21 at paras 27-28 [*Jesuit Fathers*].

15. These principles of insurance policy interpretation were applied by the New Brunswick Court of Appeal (*Arch Insurance Canada Ltd. v Financial and Consumer Services Commission and Encon Group Inc. et al*, 2016 NBCA 53 at para 25; *Guardian Insurance Co. v Beaudin*, 2000 NBCA 4, paras 9-10).

16. Despite Crandall's suggestion that the language in the Sexual Misconduct Exclusion is ambiguous, the Court disagrees and finds that the plain language of the Sexual Misconduct Exclusion is unambiguous.

17. On a plain language reading of the Sexual Misconduct Exclusion, removing the language inapplicable to the current dispute, the Court is left with the following relevant language.

> […] the Insurer shall not be liable to make any payment for Loss in connection with any Claim(s) […] made against any Insured(s) […], arising out of, based upon or attributable to, or in any way involving, directly or indirectly any Sexual Misconduct, […].

18. The plain language reading of the Sexual Misconduct Exclusion provides that coverage is not available where the Claim is indirectly related to Sexual Misconduct, even if coverage was provided for in another section of the Insurance Policy.

19. Several of the points raised in Crandall's brief, such as the reasonable expectations of the parties, interpretation based on other policies (including references to 28 cases with fact specific analysis), and *contra proferentum*, would only come into play where the plain language reading results in an ambiguity. The Court identified no such ambiguity. Plain language interpretation governs in this case.

Claim arises indirectly from Sexual Misconduct

20. The parties agree the "Claim" in this case references the Claim made by Crandall for indemnification of losses (including legal fees) arising out of the Stackhouse Action. In addition, AIG acknowledges the Stackhouse Action raises wrongful acts identified in the D&O Coverage and EPL Coverage of the Insurance Policy.

21. Crandall maintains the Stackhouse Action arises from an alleged wrongful termination. AIG on the other hand maintains the Stackhouse Action arises from sexual harassment which, it claims, falls within the definition of Sexual Misconduct and consequently subject to the Sexual Misconduct Exclusion.

22. In determining whether the Stackhouse Action is subject to the Sexual Misconduct Exclusion, the first question is whether the Stackhouse Action brought against Crandall constitutes a Claim "arising out of, based upon or attributable to, or in any way involving directly or indirectly any Sexual Misconduct".

23. AIG relies upon the British Columbia Court of Appeal decision in *Coast Capital Savings Credit Union v Liberty International Underwriters*, 2017 BCCA 362 and the Ontario Superior Court decision in *Juroviesky v Lawyers Professional Indemnity Company*, 2014 ONSC 43 for the judicial interpretation of language such as "in any way involving, directly or indirectly" or "based upon or arising from". Although the contextual analysis of the language within the Sexual Misconduct Exclusion is the most important, the guidance from other Courts supports the broad and inclusive interpretation of the terms "arising directly or indirectly from"

24. Crandall is correct that the Claim arises directly from the alleged wrongful termination of Dr. Stackhouse. However, AIG is also correct in stating the Claim arises indirectly from the sexual harassment of a student by Dr. Stackhouse. The Court finds the indirect context giving rise to the termination of Dr. Stackhouse and consequently giving rise to the Claim is relevant given the following words in the Sexual Misconduct Exclusion: "arising out of, based upon or attributable to, or in any way involving directly or indirectly any Sexual Misconduct". The context of the Stackhouse Action is as follows.

    - Dr. Stackhouse was hired on July 1, 2015, and was a tenured professor at Crandall until his termination on November 22, 2023.
    - In March of 2023, Crandall became aware of anonymous allegations involving employees of Crandall on a social media account titled @DoBetterCrandall and using #DoBetterCrandall.
    - In April of 2023, students, staff and alumni and former staff were encouraged to report incidents of harassment to the investigator, Joël Michaud, K.C..
    - During the investigation, the mandate of the investigator was broadened to investigate allegations into Dr. Stackhouse's alleged behaviour.
    - On July 31, 2023, Dr. Stackhouse was placed on a leave of absence – given the serious allegations of misconduct raised in the investigation.
    - On November 15, 2023, the investigator released its report with four sections pertaining to Dr. Stackhouse:

        (1) Instagram – The investigator reviewed allegations posted on Instagram concerning Dr. Stackhouse. The investigation concluded that Dr. Stackhouse's demeanor in class, particularly with female students, created an unwelcoming

environment and for some anxiety, and his behaviour constituted sexual harassment, and that the conduct was unwelcomed and of a sexual nature.

(2) Alleged termination for similar behaviour – The investigator concluded it was more likely than not that Dr. Stackhouse faced complaints of misconduct at a previous institution and deliberately misled the Crandall hiring committee.

(3) Dating a student - The investigator was unable to conclude if Dr. Stackhouse was in a relationship with a former student.

(4) Inappropriate communication with a student – In reviewing over 100 pages of correspondence between Dr. Stackhouse and a student over a 7-month period, and interviewing the parties, the investigator concluded this was a classic case of grooming and constituted sexual harassment.

- The termination letter prepared by Crandall specified that the reasons for the termination were the findings outlined in the Michaud Report, where it was determined amongst other things that Dr. Stackhouse engaged in behaviour constituting sexual harassment of a student.
- The press release prepared by Crandall referenced the findings of the Michaud Report which "focused on what has been referred to as inappropriate or sexually oriented statements or conversations, whether spoken or written, over a period of nine months in 2020 and 2021".

25. The Claim in this case is the fruit of the investigation launched by Crandall in which it was determined that Dr. Stackhouse sexually harassed a student. This formed the basis for Dr. Stackhouse's termination and gave rise to the Stackhouse Action. Given the broad language in the Sexual Misconduct Exclusion, these foundational elements cannot be divorced from the Claim.

26. The Court concludes the Claim arises indirectly from the sexual harassment of a student by Dr. Stackhouse and is captured by the Sexual Misconduct Exclusion (subject to determination by the Court that Sexual Misconduct includes sexual harassment, see next section).

Sexual Misconduct includes Sexual Harassment

27. In determining whether the Stackhouse Action is subject to the Sexual Misconduct Exclusion, the second question to address is whether sexual harassment falls within the definition of

Sexual Misconduct. Sexual Misconduct is defined in the Sexual Misconduct Exclusion as follows.

> "Sexual Misconduct" means any licentious, immoral or sexual behavior, sexual abuse, sexual assault, or molestation intended to lead to or culminating in any sexual act against individual(s).

28. Sexual harassment is not defined in the EPL Coverage or in the Sexual Misconduct Exclusion of the Insurance Policy.

29. The generally accepted definition of sexual harassment arises from the 1989 decision of the Supreme Court of Canada in *Janzen v Platy Enterprises Ltd.*, [1989] 1 SCR 1252, at paragraph 56.

> Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is, as Adjudicator Shime observed in *Bell v. Ladas*, supra, and as has been widely accepted by other adjudicators and academic commentators, an **abuse of power**. **When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being**.

30. The plain and ordinary meaning of sexual harassment is a form of sexual violence, a form of sexual behaviour. The definition of Sexual Misconduct in the Sexual Misconduct Exclusion includes "immoral and sexual behaviour" and therefore includes sexual harassment. Crandall's suggestion that sexual harassment should have been spelled out in the definition of Sexual Misconduct is misguided. The term sexual behaviour is sufficiently broad to include sexual harassment.

31. The Court concludes the definition of Sexual Misconduct in the Sexual Misconduct Exclusion, includes sexual harassment.

Additional Arguments of Crandall

32. Crandall argues the inclusion of "sexual harassment" in the EPL Coverage of the Insurance Policy means the Claim is covered by the Insurance Policy. AIG does not dispute the inclusion of "sexual harassment" in the EPL Coverage of the Insurance Policy. However, as AIG

asserts the inclusion of the Claim in the EPL Coverage does not preclude the operation of a specific endorsement such as the Sexual Misconduct Exclusion. Exclusions are added to insurance policies to calibrate risk and reduce costs. It does not, as suggested by Crandall, create an ambiguity.

33. Crandall suggests the Sexual Misconduct Exclusion should be given no force or effect as it virtually nullifies the coverage available under the EPL Coverage and the D&O Coverage. However, this argument fails to acknowledge the broad scope of the remaining EPL Coverage.

34. Crandall also argues Dr. Stackhouse and Crandall are separate insureds for the purpose of the Sexual Misconduct Exclusion. The cases, cited in support of this point, do not address the notion that Dr. Stackhouse and Crandall are separate insureds, rather the cases address coverage for intentional torts of employees in the absence of specific insurance policy language. This argument does not survive the Sexual Misconduct Exclusion in the Insurance Policy, whether in reference to Dr. Stackhouse or Crandall.

35. Finally, Crandall also suggests Dr. Stackhouse was terminated for other reasons than sexual harassment and therefore the coverage from the Insurance Policy should apply. However, the termination letter sent by Crandall only addresses the sexual harassment and the press release issued by Crandall following the termination included a reference to findings of inappropriate or sexually oriented statements or conversations. Further, even if the Claim included other reasons for termination in addition to Sexual Misconduct, the language of the Sexual Misconduct Exclusion specifically excludes direct or indirect claims.

Defence Costs to Date and Choice of Counsel

36. In the event the Court erred in determining that the Insurance Policy excluded coverage for losses arising from the Stackhouse Action, the additional legal questions raised by Crandall must be resolved: (1) the payment of legal defence costs and disbursements incurred to date and (2) the choice of defence counsel.

37. If successful in establishing insurance coverage for the losses arising from the Stackhouse Action, Crandall sought a declaration that AIG is obligated to indemnify Crandall for all legal defence costs and disbursements incurred to date in defending the Stackhouse Action. Crandall relied on the legal principles arising from *Hanis v Teevan*, 2008 ONCA 678 at para 41 stating that reasonable costs falling under the terms of the policy and incurred in defending

a case will be paid by the insurance company where coverage is initially denied but subsequently established by the Court.

38. AIG concedes that if the Court concludes Crandall is entitled to coverage for the losses arising from the Stackhouse Action, AIG will cover the legal defence costs and disbursements incurred to date in defending the Stackhouse Action provided these were reasonable and fell within the terms of the Insurance Policy.

39. In addition, if successful in establishing insurance coverage for the losses arising from the Stackhouse Action, Crandall sought a declaration of its entitlement to choose legal counsel and continue its retainer of current legal counsel to defend the Stackhouse Action.

40. On this point, I accept the submissions of counsel for AIG that other provisions in the Insurance Policy outline the selection of choice of counsel. Crandall cited *Conservation Council of NB v Encon Group*, 2005 NBQB 105 to argue its entitlement to counsel of choice – however, there is no reference in that decision to insurance policy provisions addressing the choice of counsel.

41. In the absence of a legal basis to oust the application of provisions in the Insurance Policy addressing the choice of counsel, AIG has the choice to select a counsel to proceed with the defence of the Stackhouse Action as provided in the terms of the Insurance Policy or the choice to continue with the legal services of the current law firm defending the Stackhouse Action. While retaining new counsel at this stage of the Stackhouse Action may significantly increase legal costs – that is a cost AIG would bear and a business decision that belongs to AIG.

Application Costs

42. With respect to costs of the Application, AIG concedes that if Crandall were successful in establishing that AIG has a duty to defend, full solicitor-client costs would be payable to Crandall in accordance with recent New Brunswick Court of Appeal decisions (*Co-operators General Insurance Co. v Richard*, 2002 NBCA 98 and *Lloyd's Underwriters v Jagoe*, 2022 NBCA 7).

43. However, in this case, where Crandall was unsuccessful in establishing that AIG has a duty to defend, regular costs rules prevail. As the successful party in the Application, AIG is entitled to costs.

44. The Court must fix costs upon rendering a decision disposing of a proceeding commenced by Notice of Application (Rule 59.08(1)(c) of the *Rules of Court*). The award of costs is a discretionary decision, and the Court may fix costs without reference to a tariff (Rule 59.01 of the *Rules of Court*). In fixing costs, the Court may account for several considerations (Rule 59.02 of the *Rules of Court*)

> (a) the amount claimed and the amount recovered,
> […]
> (c) the complexity of the proceeding,
> (d) the importance of the issues,
> (e) the conduct of any party which tended to shorten or unnecessarily lengthen the duration of the proceeding,
> […]
> (g) any step in the proceeding which was improper, vexatious, prolix or unnecessary,
> […]
> (i) the neglect or refusal of any party to make an admission which should have been made,
> […]
> (l) any other matter relevant to the question of costs.

45. Crandall suggested AIG fundamentally mischaracterized the Stackhouse Action. In support of its contention, Crandall addressed 10 points in paragraphs 28 to 105 of its brief. These points, reproduced below, are not reconcilable with the issues identified by Crandall at paragraph 25 of its brief.

> 1. Coverage is provided for the claim by Dr. Stackhouse under the EPL Policy.
>
> 2. Coverage is provided for the claim by Sarah-Jane Britton under the D&O Policy.
>
> 3. The “Sexual Misconduct” Exclusion does not apply.
>
> 4. Even if the reasons for termination are relevant, Dr. Stackhouse was terminated for sexual harassment, for which coverage is provided.
>
> 5. If AIG intended to exclude sexual harassment pursuant to Endorsement 18, it should have done so with clear wording.
>
> 6. Endorsement 18 is ambiguous.
>
> 7. AIG’s interpretation does not align with the reasonable expectations of the parties.
>
> 8. AIG’s interpretation of Endorsement 18 would nullify coverage.

9. Crandall University and Dr. Stackhouse are separate insureds for the purpose of Endorsement 18.

10. Dr. Stackhouse was terminated for several reasons.

46. Considering the number of arguments raised by Crandall which detracted from the issues to be determined in the Application and AIG's approach conceding legal points and focusing the discussion before the Court, the Court orders Crandall to pay $3,000 in costs to AIG.

47. Crandall University shall pay $3,000 in costs plus disbursements to AIG Insurance Company of Canada.

DISPOSITION

48. The Application of Crandall University is dismissed with $3000 in costs plus disbursements payable by Crandall University to AIG Insurance Company of Canada.

DATED at Moncton, New Brunswick, this 29 day of July 2024.

Justice Maya Hamou
Court of King's Bench of New Brunswick