

Evidence Used in Deciding Duty to Defend

In its decision in *MONENCO v COMMONWEALTH INSURANCE*, the Supreme Court of Canada has confirmed that, apart from the relevant insurance policy and the pleading containing the claim made, other "extrinsic" evidence may sometimes be referred to when evaluating whether an insurer has a duty to defend its insured. Although the full potential scope for use of extrinsic evidence was not explored, the judgment does confirm that documents referred to in the pleading may be considered in evaluating the true nature of the claim, using the approach described in the Court's earlier decision in *SCALERA*. However, in the judgment written for the Court, Mr. Justice Iacobucci has noted several principles restricting the use of such evidence:

"It should be recalled that the question whether an insurer is bound to provide defence coverage in an action taken against the insured arises as a preliminary matter. Of course, after trial, it may turn out that there is no liability on the insurer, and thus, no indemnity triggered. But that is not the issue when deciding the duty to defend. Consequently, we cannot advocate an approach that will cause the duty to defend application to become 'a trial within a trial'. In that connection, a court considering such an application may not look to 'premature' evidence, that is, evidence which, if considered, would require findings to be made before trial that would affect the underlying litigation.

"In the present case, I affirm Southin J.A.'s holding that the contract between Suncor and the joint venture, having been referred to in the Amended Statement of Claim, could be reviewed to determine the substance and true nature of Suncor's claims. In a similar vein, I agree with Southin J.A. that, because Suncor had pleaded that the joint venture had carried on business under the name 'ABM-1978', this enabled the court to review the joint venture agreement as well.

"In endorsing Southin J.A.'s rulings on this extrinsic evidence, I must emphasize that it was not considered for the purpose of examining the contentious points in issue in the underlying litigation between Suncor and the appellants. Reference to these documents did not require factual findings to be made that would impact this litigation which, in this particular case, had been settled by the time the duty to defend application was brought before the courts. A review of the extrinsic evidence simply illuminates the substance of the pleadings and as such, is consistent with the reasoning in *SCALERA*."

Text of [MONENCO](#) decision, courtesy of LexUM

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