

FILE NAME: Insurance Industry (INS)

DATE: 1988

DOC#: INS070

DOCUMENT DESCRIPTION: Legal - Quebec Court of Appeals Case; Mealy's Litigation Reports, Asbestos - Canadian Appellate Court Reactivates Manville Policies

MEALEY'S LITIGATION REPORTS

ASBESTOS

The ruling of Judge Brown referred to by Fibreboard held in part that Continental would have to provide "per person" coverage without aggregate limits rather than providing a total of only \$2 million for all claims. The judge also rejected the application of the pollution exclusion and held that Fibreboard could obtain complete coverage from a carrier despite "other insurance" clauses.

Fibreboard explained that it needed to come up with the Structured Settlement Program because, in light of the mounting claims against it, the alternative could be bankruptcy. Instead the company proposed a plan to settle claims but defer full payment until insurance coverage can be obtained.

CANADIAN APPELLATE COURT REACTIVATES MANVILLE POLICIES

MONTREAL -- A Canadian appellate court overturned on Oct. 25 a lower court's ruling which had voided \$5 million of Canadian Johns-Manville Co., Ltd.'s asbestos personal injury and property damage coverage for the period 1970-1975 (Canadian Johns-Manville Co., Ltd. v. The Canadian Indemnity Co., Nos. 500-09-000780-858, 500-05-013130-792, Canada, Province of Quebec, Dist. of Montreal, Ct. of App.; Text in Section B).

Disagreeing with the Montreal Superior Court, the Quebec Court of Appeal said Canadian Indemnity Co. could not rescind coverage due to Canadian Johns-Manville's failure to disclose certain asbestos disease reports. The appellate court said the health hazards associated with asbestos were publicly known at the time the insurance was approved and the "blindness" of the carrier's underwriters does not excuse it from coverage.

Canadian Indemnity moved to have its policies nullified in 1979, saying Canadian JM failed to tell the carrier about the high frequency of disease associated with its asbestos products. Specifically, the carrier cited the reports of Dr. Irving Selikoff of the Mount Sinai School of Medicine in New York.

In issuing its ruling back in 1985, the Montreal Superior Court said the producer knew about these studies and that they were material to the risk. The court also held that although Canadian JM was negligent in not making inquiries into asbestos risks, it did not have such knowledge and could not be presumed to have known about the risks.

MEALEY'S LITIGATION REPORTS

ASBESTOS

While Canadian Indemnity's underwriters testified that they knew nothing about the asbestos industry, the appellate court noted that many newspaper reports on asbestos-related diseases circulated in Canada before 1970. Some of those even referenced the Selikoff studies.

After noting some of these reports the appellate court determined that insurance underwriters ought to have been alerted to the health risks posed by asbestos when Canadian JM's policies were sold. The court also noted that the asbestos industry was a prominent one in Quebec, and that the health risks were common knowledge within that industry. "An insurance underwriter may not be presumed to know all of the technical intricacies of all of the trades and industries he insures, but surely he ought to know something of a serious health risk that was common knowledge in a major industry and was widely reported in the public media as well," the court wrote.

Seriousness and Frequency

Nor was the appellate panel persuaded by counsel for Canadian Indemnity who argued that, while asbestos risks may have been commonly known, the "seriousness" of the risk and the "frequency" of asbestos diseases were not. But with all of the published material on asbestos, the court said, the carrier should have been tipped off to the risk. It said any inquiry on the carrier's part would have uncovered the Selikoff studies.

Writing for the court, appellate Judge J. Melvin L. Rothman concluded: ". . . I do not believe the insured should be reproached for failing to disclose the kind of detail contained in the Selikoff reports. The insured was entitled to presume, in my view, that the insurer had a basic professional knowledge of the risks of asbestosis and that if more detail was required, the underwriters would ask for it.

"That the risk was assessed by inexperienced or negligent underwriters in this case is not really the issue here. That may explain why the underwriters were unaware of the nature or extent of the risk. But if the facts were public and notorious, the insurer is presumed to have known them however inexperienced or negligent the underwriters were An insurer cannot repudiate his obligation under an insurance policy by invoking the negligence, lack of experience, or the involuntary or wilful blindness of his own underwriters."

The court therefore reversed the lower court, and reinstated Canadian JM's policies.

The attorneys in this case are: Graham Nesbitt and Thomas Davis of Clarkson, Tetrault for Canadian Johns-Manville and J. Vincent O'Donnell and Odette Jobin-Laberge of Lavery, O'Brien for Canadian Indemnity.