

**IMPACT OF *MDS INC. V. FACTORY MUTUAL INSURANCE COMPANY (FM GLOBAL)*
ON THE HANDLING OF COVID-19 CLAIMS**

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On March 30, 2020, The Honourable Madam Justice Janet Wilson released her 111 page Reasons for Judgment in *MDS Inc. v. Factory Mutual Insurance Company (FM Global)*, 2020 ONSC 1924 (hereinafter, “*MDS*”). What does *MDS* tell us about the handling of COVID-19 claims?

As a starting point, *MDS* is not a case dealing with COVID-19. Briefly, in *MDS*, a leak occurred at the Nuclear Research Universal Reactor (“NRU”) located in Chalk River, Ontario. At that facility, Atomic Energy of Canada Limited (“AECL”), conducted research and produced radioisotopes. The Plaintiffs, MDS Inc. and MDS (Canada) Inc. c.o.b. MDS Nordion (“MDS Inc.”), purchased the radioisotopes that were produced at NRU and processed them for sale worldwide. As a result of the leak, NRU was shut down for 15 months by the Canadian Nuclear Safety Commission, as opposed to the initial expected shutdown of only 36 hours. According to Justice Janet Wilson, the cause of the corrosion leading to the leak was an important issue in determining whether the Policy engaged and whether the exclusions applied. In this case, the said policy was an All-Risks Policy and the insurer was Factory Mutual Insurance Company (FM Global) (hereinafter, “FM Global”).

In regards to the coverage issues, three questions had to be answered: (1) were the losses of MDS Inc. recoverable or did the corrosion or nuclear radiation exclusions in the Policy apply; (2) if the corrosion exclusion applied, did the “resulting damage” exemption apply allowing recovery by MDS Inc.?; and (3) if there was resulting physical damage, did the “idle period” exclusion limit the period of time for the recovery of the resulting damage? In addition to these three questions, Justice Janet Wilson had to determine that, if the radiation exemption applied, whether nullity of contract was applicable.

Justice Janet Wilson found that there were aggressive agents or corrodents in the reflector light water leaking into the J-rod annulus. In her view, the aggressive agent was probably chlorine, which was at levels sufficient to precipitate corrosion. As such, pitting corrosion precipitated by chlorine, caused the unanticipated, unexpected and unique corrosion that penetrated the said wall in this case. She found that the fortuitous, unanticipated and unpredicted corrosion causing the leak was covered by the All-Risks Policy unless an exclusion applied.

As for the exclusions, Justice Janet Wilson found that the corrosion exclusion did not apply and, even if it did, MDS Inc. was entitled to recover pursuant to the exception for “resulting physical damage.” She further found that the “idle period” exclusion did not assist FM Global to limit the period of recovery for the “resulting physical damage.” Moreover, she found that the “nuclear” exclusion did not apply. Finally, in her view, even if the radiation exemption applied, nullity of contract was applicable in this case.

For the purposes of this article, what is most important is not Justice Janet Wilson's conclusions. Rather, it is the manner in which Justice Janet Wilson came to her conclusions. In other words, in handling COVID-19 claims, understanding how Justice Janet Wilson came to her findings is critical.

In this regard, Justice Janet Wilson performed a detailed and thorough analysis which was similar to that seen in other cases involving coverage. As such, not only did she review the principles guiding the interpretation of insurance policies and the structure of this Policy as a whole, she marshalled the evidence of various experts and lay witnesses, and she specifically considered the factual context. Of note, she reviewed the relationship between the parties prior to the shutdown, she reviewed the communications between the parties from the date of the shutdown to the date of the denial, she considered the information available to FM Global up to the date of the denial and she also made reference to the actual denial letter.

In fact, throughout her Reasons, Justice Janet Wilson is clear that her findings are in the context of this case. For instance, in finding that coverage was available for losses caused by the leak, she considered the reasonable objective expectation of the parties in light of the factual context of this case. And in determining the applicability of the corrosion exclusion for example, she stated that this can only be determined in light of the case law, the terms of the Policy considered as a whole, the factual context and the party's reasonable expectations considered objectively. In defining corrosion in this Policy, Justice Janet Wilson stated that she did so having regard to the Policy considered as a whole, the factual context and the reasonable expectation of the parties. Moreover, given that the said policy did not define "physical damage," nor "resulting physical damage," Justice Janet Wilson defined "resulting physical damage" in the event that this was considered an ambiguous term. She did so by considering the factual context of this case. Similarly, she considered the factual context of this case in coming to her finding regarding the "nuclear radiation" exclusion and the "anti-concurrent causation" exclusion, as well as the applicability of the nullity of contract principle.

This, therefore, turns us to the handling of COVID-19 first party claims. What we see from Justice Janet Wilson's analysis in *MDS*, is that an insured's ability to prove coverage on a balance of probabilities will depend on the interpretation of the specific words or phrases when considered in the factual context of the particular claim. For instance, even if a term is defined, coverage will still be determined based on the meaning of particular words within the definition when considered in the context of case law and, specifically, the factual context of a particular COVID-19 claim. If, on the other hand, a term is not defined and/or is a term that may be applicable due to the common law, such terms will need to be determined in accordance with, amongst other things, the factual context of the particular COVID-19 claim. For instance, words such as "property damage" and "physical damage," and what these words entail, may need to be examined closely.

It may also be that the applicability of certain other clauses will need to be determined. For example, certain policies have coverage for "Civil Authority" or have a "Civil Authority" extension to coverage which is otherwise excluded. This provision may have many specific words

or phrases that would need to be considered in the context of a particular COVID-19 claim. Moreover, if the said provision applies, an assessment of damages may be required, which may include, for instance, determining the period for which damages may be recovered and the amount of damages recoverable in the context of the law generally.

Similarly, any exclusions that may be applicable would need to be considered in the context of a particular claim. For instance, it may need to be determined whether an exclusion is broad or narrow, whether an exclusion specifically includes a pandemic and whether such specificity is required in the context of a particular specific COVID-19 claim.

And so, what is the impact of *MDS* on COVID-19 claims? The timely release of *MDS* reminds us that COVID-19 claims will be determined based on the factual matrix of each particular, individual, COVID-19 claim. It reminds us, that the handling of such claims from the outset to the date of denial – and the denial letter itself – may be critical in the outcome, and that all internal and external communications (subject to solicitor and client communications) may be considered in determining whether a particular COVID-19 claim is covered. As such, it is imperative that each claim is assessed individually and properly from the outset, and to appreciate that the handling of such claims is likely not as simple as reading the words in the given policy.

We would be happy to assist with the coverage, investigation and defending of any such claims. For further information and assistance, please do not hesitate to contact us at Zuber & Company LLP, Litigation Counsel.