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Insurance Binder

[LEGAL ISSUES OF INTEREST TO THE INSURANCE INDUSTRY]

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The objective of this quarterly newsletter is to offer the insurance industry a defence counsel perspective on claims management, from the initial investigation through to trial, with reference to relevant court decisions.

Given that our Insurance Defence Group practises in both official languages, we have included articles in both French and English.

In this issue, we focus on upcoming changes to Ontario's Rules of Civil Procedure and on the controlling of the defence of an action in claims where insurance coverage is an issue.

Articles

Sweeping Changes to Rules of Civil Procedure

In June 2006, Ontario's Attorney General requested The Honourable Justice Coulter Osborne to review and make recommendations for reforms to the manner in which civil court proceedings are procedurally handled in the province. The purpose behind that request was to find ways to improve access to justice and to speed up the processing of civil matters for both represented and unrepresented litigants.

In November 2007, Justice Osborne delivered his recommendations in a lengthy report entitled *Civil Justice Reform Project*[1]. Many of the recommendations set out in that report are set to come into practice on January 1, 2010. Once implemented, these changes will represent the most sweeping reform of the Rules of Civil Procedure in a quarter century.

Although the changes in the new Rules of Civil Procedure are extensive, some of the major highlights are as follows:

[1] A PDF version of Justice Osbourne's report is available on Nelligan O'Brien Payne's website at www.nelligan.ca

- an increase in the monetary jurisdiction of the Small Claims Court from $10,000 to $25,000
- an increase in the Simplified Procedure monetary limits from $50,000 to $100,000
- the ability to conduct limited examination for discovery in Simplified Procedure actions
- limitations on the length of examinations for discovery in regular procedure actions
- extensive changes to the Rules regarding summary judgment
- extensive changes to the Rules regarding documentary production
- a requirement of mandatory mediation in all civil actions commenced in Windsor, Toronto and Ottawa

The sweeping changes that are about to come into effect will have a tremendous impact on the management and direction of all civil proceedings, not just for lawyers and law firms, but for all participants in the civil justice system, including insurers, claims examiners and claims handlers.

In this issue of *Insurance Binder*, we focus on the monetary jurisdiction and Rule changes with respect to actions brought in the Small Claims Court and those brought pursuant to the Simplified Procedure.

Small Claims Court Monetary Jurisdiction Increasing to $25,000

The Small Claims Court is referred to by many as "The People's Court"; that is to say, its procedures have been generally established so as to allow unrepresented litigants to navigate through the court rules, ostensibly without the need for legal representation.

In 2005 - 2006, in excess of 75,000 claims were initiated in Ontario's Small Claims Court. By comparison, during the same period, about 63,000 claims were brought in the Superior Court of Justice. Of those 63,000 claims, over 6,500 were for monetary claims of less than $25,000. These figures clearly demonstrate that the vast majority of civil actions in the province of Ontario are in respect of claims for less than $25,000. On this basis and, presumably with a view to making the civil justice system more "accessible", the monetary jurisdiction of the Small Claims Court will be increasing on January 1, 2010 from its current amount of $10,000 to $25,000. In addition to that monetary increase, judges and deputy judges in the Small Claims Court will also be permitted to grant certain forms of equitable relief. Types of equitable relief include the granting of mandatory or injunctive orders and the ability of the court to declare the rights and duties of parties under the law or contract.

Anticipated Impact of the Changes to Insurers

We anticipate that there will be an increase in the number of claims that will be brought in Small Claims Court. This will obviously increase the burden on Small Claims Court resources that are already stretched. Unless steps are taken to increase the number of court staff and deputy judges, the Small Claims Court may become bogged down under its anticipated heavier case load.

One of the practical realities of increasing the monetary jurisdiction of the Small Claims Court is that there will likely be a sizable increase in the number of unrepresented litigants bringing claims for monetary amounts between $10,001 and $25,000. While this may be seen as an attractive change for persons who have (or believe they have) legitimate claims and are either unable or unwilling to obtain legal representation, the unfortunate flipside is that insurers and their counsel participating in the system on behalf

of defendants will likely be faced with a higher number of claims, with greater monetary value, being advanced by unrepresented litigants who have little or no experience in the civil justice system. In some situations, this inexperience may be accompanied by a lack of objectivity that may often preclude unrepresented plaintiffs from assessing the merits of their claims, compelling these unrepresented persons to push their cases forward in an effort to "have their day in court".

Insurers, will be left with two options in handling the increased litigation claims being advanced by unrepresented litigants in the small Claims Court:

(i) Require their own claims handlers and adjusters to "stick handle" the claim through the Small Claims Court processes, including preparation of pleadings, documentary productions, attending at motions, pre-trials, etc.. Given that most claims handlers and adjusters are already at (or in many cases, over) their reasonable file handling capacity, this is likely not a particularly attractive option to insurers, claims handlers and adjusters.

(ii) Retain law firms to handle the anticipated increase in the defense of unrepresented claims, with such claims being handled by articling students and junior lawyers at those firms.

Regardless of which option insurers ultimately choose, it is anticipated that once the new changes with respect to the monetary jurisdiction of the Small Claims Court are up and running, insurers will see an increase in the number of claims being brought against their insureds for amounts of $25,000 or less.

Key Changes to the Simplified Procedure

In 1996, the Simplified Procedure Rule was established as a pilot project in respect of monetary claims for $25,000 or less. That pilot project was initiated in response to concerns being raised about litigants being limited from pursuing relatively small, yet meritorious, claims because of the disproportional cost of litigating those claims.

With a view to limiting the costs associated with relatively smaller claims, the original Simplified Procedure established a mechanism whereby those smaller claims of between $10,001 and $25,000 could be litigated through a streamlined process. The key component of that streamlined process was that the Simplified Procedure precluded any examination for discovery. The rule also provided cost consequences for actions not commenced or continued in the Simplified Procedure where the judgment ultimately obtained was within the monetary jurisdiction of the Simplified Procedure.

In 2000, Simplified Procedure moved from the pilot project stage to a permanent fixture in Ontario's civil justice system. By 2002, the key components of Simplified Procedure remained intact, while the monetary jurisdiction of the process was increased to $50,000.

On January 1, 2010, the Simplified Procedure Rule will undergo its most extensive changes since its introduction. We will address only the two main changes to the rule in this article.

The first key change to Simplified Procedure is the increase in the monetary jurisdiction from $50,000 to $100,000. This change is intended to mesh with the increase of the monetary jurisdiction of the Small Claims Court to $25,000. It is also in line with the overriding ideal of Justice Osbourne's

proposed reforms to the civil justice system to make the whole system less costly, and presumably therefore, more accessible to ordinary people.

The second key change to Simplified Procedure is the introduction of limited examination for discovery. This change will allow up to a maximum of two hours of examination for discovery by each party (i.e. if three plaintiffs are named, then arguably, all plaintiffs are entitled to a total of 6 hours discovery time for all defendants). That two-hour time limit is fixed, regardless of the number of parties to be examined.

Anticipated Impact of the Changes to Insurers

For insurers, claims handlers and adjusters, it is anticipated that the key changes to Simplified Procedure will have fairly significant impact.

First of all, the fact that claims of between $25,000 and $100,000 will only have limited examination for discovery may have a significant impact on the ability of insurers and their counsel to assess the strengths and weaknesses of a plaintiff's case. This may be particularly problematic in cases where there are a multitude of issues in dispute, so that two hours of examination time may be insufficient to obtain a complete picture of the opponent's case with respect to those issues. By way of example, while two hours may be more than sufficient time for plaintiff's counsel to examine an insured defendant with respect to liability issues in a motor vehicle accident claim, that same period may be insufficient for the insurer's counsel to examine the plaintiff on liability, damages, preaccident health history, causation, etc.

It is reasonable to expect that plaintiffs and their counsel may make tactical decisions to bring claims under the Simplified Procedure so as to preclude defendants and their counsel from engaging in significant fact-finding examination for discovery. Plaintiffs and their counsel may also make tactical decisions with respect to naming multiple plaintiffs (i.e numerous family members advancing *Family Law Act* claims) so as to potentially increase the amount of time available to conduct examination for discovery of the defendant(s). Claims may also be tactically limited to naming fewer defendants so as to restrict the number of defendants who would arguably each have two hours of examination time of the plaintiff(s). These tactics may be particularly attractive to plaintiffs in personal injury or similar claims where liability, causation and damages issues are present and where the plaintiff has a significant medical or other history that may be detrimental to their claim. By limiting the amount of discovery time available to defendant(s), those plaintiffs may be able to shield themselves, to some extent, from having to undergo significantly probative examination for discovery.

Because the Simplified Procedure Rule allows, under certain circumstances, a plaintiff to continue an action under Simplified Procedure even where the action was not originally commenced under the rule, there is a likelihood that actions commenced under the ordinary procedure prior to January 2010 [where damages have a reasonable assessed value of $100,00 or less] will be switched into Simplified Procedure after January 1, 2010. Under the circumstances, insurers must be aware of the cost consequences of refusing to consent to a plaintiff's proposal to switch the action into the Simplified Procedure stream.

Beyond the tactical considerations of plaintiffs and their counsel in the commencing or continuing actions under Simplified Procedure, a number of other key questions with respect to the limited examination for

discovery to be permitted under the Simplified Procedure will likely arise early in 2010. For instance, it remains to be seen how the court will deal with situations where a party being examined under the limited discovery provisions of the Simplified Procedure makes inappropriate use of the discovery time [i.e. being unresponsive, pausing inappropriately before giving answers, claiming an inability to understand a particular question, etc.]. It also remains to be seen how the courts will deal with the two-hour time limit for discovery in actions where the party being questioned requires time-intensive language interpretation in order to give evidence on examination for discovery.

Conclusion

Although this article has only addressed some of the key forthcoming changes with respect to the Small Claims Court and the Simplified Procedure, it appears clear that these changes will have a profound effect on the handling of claims for insurers, claims examiners, legal counsel and other players in the civil justice system.

Stay tuned for our follow-up reports and articles on the Court's interpretation of the Rules and how those interpretations impact on all participants in the litigation system.

Colin Dubeau
Lawyer, Insurance Defence Group
613-231-8367
colin.dubeau@nelligan.ca

Controlling the Defence of Claims Involving Coverage Disputes

In recent years, Canadian jurisprudence has witnessed a large number of disputes concerning the duty to defend in cases where alternative theories of liability are advanced, some of which fall within the coverage provided under the liability policy, and others for which coverage is not provided. While these cases have reviewed and expanded some of the existing jurisprudence surrounding the nature and extent of the duty to defend, they also serve as a reminder of some of the practical issues that arise where a claim triggers a duty to defend, but not all of the allegations will necessarily trigger a duty to indemnify. From a practical perspective, one of the key issues is these situations is the appointment and instruction of defence counsel.

Most liability policies will specifically confer the right to select and instruct defence counsel to the insurer. However, where claims involve allegations that fall both within and outside of coverage, both the insurer and the insured may have fears of a conflict of interest. If the insurer were allowed to control the defence, it could direct the defence towards a finding of liability on the allegations that fall outside of coverage so as to avoid indemnity, albeit at the risk of a claim for bad faith. Alternatively, if the insured were allowed to control the defence, he or she could direct the defence of the claim towards findings that would fall within coverage, thereby ensuring indemnity.

In some of the cases, insurers have argued that this conflict of interest should actually relieve them from the duty to defend, thereby reducing the duty to one of merely indemnifying defence costs. These arguments, however, have been firmly rejected. As pointed out in the initial decision of ***SREIT (Park West Centre) Ltd. v. ING Insurance Co. of Canada***,[2] a conflict of interest with respect to coverage does not relieve the insurer of its duty to defend.[3]

[2] [2008] N.S.J. No. 247 (S.C.), aff'd [2009] N.S.J. No. 158 (C.A.).
[3] *Ibid*, at para. 33.

Although the insurer typically has the right to control the defence, that right is not absolute. As was pointed out in the decision of ***Coakley v. Allstate Insurance Co. of Canada***,[4] where the circumstances suggest that there is a "*reasonable apprehension of a conflict of interest*", the court may impose limitations on the insurer's ability to control the defence of the action, or even remove that control altogether.[5]

However, it must be stressed that the mere existence of a dispute over coverage does not, in and of itself, create a reasonable apprehension of a conflict of interest. As was explained in the decision of ***PCL Constructors Canada v. Lumbermens Casualty Co. Kemper Canada***,[6] the mere fact that the insurer has questioned coverage or defended under a reservation of rights is not sufficient to deny the insurer its contractual right to control the defence. Instead, there needs to be some further circumstances that suggest, not only the possibility of a conflict of interest, but also a potential risk that the insured's defence will actually be jeopardized.[7]

Where a "*reasonable apprehension of a conflict of interest*" does arise, however, the court has the ability to impose procedural safeguards on the defence of the action to ensure fair representation to both parties. In most cases, this will be sufficient to resolve any disputes. For example, in the decision of ***PCL Constructors***, Justice Thorburn imposed stipulations that: (a) defence counsel be different from the counsel that argued coverage; (b) defence counsel must not have acted for either party within the preceding five year period; (c) defence counsel have no communications with coverage counsel; (d) defence counsel provide both the insurer and insured with identical concurrent reports concerning the litigation; (e) the insurer's claim be transferred to new staff with no prior involvement with the claim; (f) the insurer's file only be transferred after all material concerning coverage was purged; and (g) the new staff have no communication with any staff who had previous dealings with the file. Justice Thornburn also specified that the parties could seek further directions from the court if needed.

Where procedural safeguards cannot practically be imposed, then the court may simply grant the insured control over the selection of counsel and the defence of the claim, at the insurer's cost, as was done in ***Appin Realty Corp. v. Economical Mutual Insurance Co.***[8]

As result, an insurer should not take its ability to control the defence for granted. Where alternative theories are advanced against an insured, only some of which are covered under the policy, the insurer needs to be diligent in taking steps to minimize any possible risk of a "*reasonable apprehension of a conflict of interest*" at the outset. Should control of the defence be disputed, the insurer should also be quick to suggest procedural safeguards to minimize any potential conflict in the control of the defence, such as the safeguards that were imposed in the ***PCL Constructors*** case. This way the insurer should be able to retain its control of the defence of the litigation.

James Brown
Lawyer, Insurance Defence Group
613-231-8345
james.brown@nelligan.ca

[4] [2009] O.J. No. 1832 (S.C.J.).
[5] *Ibid*, para. 27.
[6] [2009] O.J. No. 2664 (S.C.J.).
[7] *Ibid*, paras. 75 to 83.
[8] [2008] O.J. No. 436 (C.A.). Leave to appeal to S.C.C. dismissed, [2008] S.C.C.A. No. 145.

Nouvelles règles de procédure civile

Introduction

Au mois de novembre 2007, le juge Coulter Osborne a fait des recommandations concernant les changements à apporter aux Règles de procédure civile de l'Ontario. Plusieurs de ces recommandations ont été acceptées par la législature et entreront en vigueur le 1er janvier 2010. Avec ces recommandations, le juge Osborne projette que les frais juridiques seront réduits et les causes entendues de façon plus efficace en cour civile.

Les changements les plus importants sont les suivants :

- Une augmentation de la juridiction monétaire de la Cour des petites créances de 10 000,00$ à 25 000,00$;
- Une augmentation du montant maximum pouvant être réclamée en vertu des Règles simplifiées de procédure civile de 50 000,00$ à 100 000,00$;
- Le droit de procéder à des interrogatoires restreints dans les actions de procédure simplifiée;
- Des limites sur la durée des interrogatoires dans les actions de procédure normale;
- Des changements importants aux règles concernant les motions à fin de jugement sommaire;
- Des changements importants aux règles concernant la production de documents;
- Le devoir de tenir des séances de médiation dans toutes les actions civiles intentées à Windsor, Toronto et Ottawa.

Dans cet article, nous traiterons des changements aux Règles de procédure pour les motions à fin de jugement sommaire.

Règle actuelle

Les Règles de procédure civile en vigueur depuis 1990 permettent à une partie de demander, par voie de motion appuyée d'un affidavit ou d'autres éléments de preuve, un jugement sommaire sur la totalité ou une partie de la demande formulée dans la déclaration. Le tribunal rend un jugement sommaire s'il est convaincu qu'une demande ou une défense ne soulève pas de questions litigieuses. C'est la partie requérant le jugement sommaire qui a le fardeau de convaincre la cour qu'il n'existe pas de questions litigieuses. Le tribunal fixe les dépens de la motion que peut recouvrir la partie adverse sur une base d'indemnité substantielle et ordonne l'auteur de la motion de les payer sans délai, à moins que le tribunal ne soit convaincu que la motion était légitime malgré son rejet.

L'une des critiques de cette règle étant que la partie qui répondait à une motion pour jugement sommaire pouvait mettre en preuve des faits dans l'unique but de mettre en question la crédibilité d'un témoin, parce que la cour qui entendait une telle motion pour jugement sommaire ne pouvait pas prendre de décision sur la crédibilité d'un témoignage. En cas de question de crédibilité, l'action ne pouvait alors être décidée que lors d'un procès. Donc, plusieurs affirmaient que la règle était trop limitée et pas assez efficace. En pratique, les motions pour jugement sommaire étaient déposées dans seulement 1% des causes entamées en Ontario en 2005-2006.

Une deuxième critique de la règle pour jugement sommaire qui existe actuellement était qu'il n'y avait normalement que deux issues possibles : Soit la motion est accordée et l'action est terminée, ou soit la motion est rejetée et l'action poursuit son cours.

Une troisième critique de la règle actuelle concernait les dépens de la motion, accordés sur une base d'indemnisation substantielle à la partie gagnante et à payer sans délai.

Nouvelle règle – jugement sommaire

La législature a amendé la règle de façon substantielle pour que la cour dispose de plus de pouvoirs pour déterminer les questions qui étaient auparavant décidées par un juge au procès ou autrement. Avec la nouvelle règle, la cour a désormais le pouvoir de :

- Peser la preuve;
- Évaluer la crédibilité d'un témoin; et
- Tirer des conclusions raisonnables de la preuve soumise.

En exerçant ces pouvoirs, la cour peut ordonner un « mini procès » dans lequel la preuve sera présentée par une ou plusieurs parties. De plus, quand le jugement sommaire est refusé ou accordé en partie seulement, les nouvelles règles permettent à la cour de donner des directives ou d'imposer des conditions qui sont justes dans les circonstances de la cause, y compris des ordonnances relatives à la nature et l'étendue de la preuve qui peut être soumise lors du procès, l'établissement d'un échéancier pour la signification des rapports d'experts, etc.

Impact anticipé des changements des règles sur le jugement sommaire pour les assureurs

Les changements à la règle sur le jugement sommaire peuvent avoir un impact substantiel sur le traitement des réclamations par les avocats, assureurs et experts en sinistres. En vertu des règles de 1990, les motions pour jugement sommaire étaient relativement rares et souvent servaient comme un outil pour traiter les actions faibles ou qui n'avaient pas été plaidées de façon convenable.

Avec les nouvelles règles, nous anticipons que les parties auront un outil avec lequel des réclamations faibles ou sans fondement pourront être rejetées tôt dans les procédures avec des dépens relativement minimes. De plus, le fait que la nouvelle règle permette un « mini procès » et la détermination de questions de crédibilité tôt dans une action va inciter les parties et leurs avocats à étudier très attentivement leur réclamation ou défense dès le début du litige.

Finalement, le fait que les conséquences négatives de dépens ne soient plus présumées peut avoir l'effet que les parties et leurs avocats auront tendance à faire plus souvent des motions pour jugement sommaire, d'autant plus vu que la possibilité d'un « mini procès » permettra de mettre en cause des questions de crédibilité dès le début d'un litige civil. Désormais, l'article 20.06 prévoit :

> « Le tribunal peut fixer des dépens d'une motion visant à obtenir un jugement sommaire sur une base d'indemnisation substantielle et en ordonner le paiement par une partie si, selon le Code :
>
> (a) La partie a agit déraisonnablement en présentant la motion ou en y répondant;
>
> (b) La partie a agit de mauvaise foi dans l'intention de causer des retards.

Voir le règlement de l'Ontario 438/08, article 14 et paragraphe 68(1).

Nous anticipons qu'il sera possible de résoudre un nombre important de questions en litige avec ces nouvelles règles sur le jugement sommaire, particulièrement si la cour accepte de traiter des questions de crédibilité par le biais de « mini procès ». La façon dont les cours mettront en pratique leurs nouveaux pouvoirs reste à découvrir, et tous les participants au litige civil y garderont un œil attentif.

Fabrice Gouriou
613-231-8310
fabrice.gouriou@nelligan.ca

Our Insurance Defence Practice Group

Lawyers

Susan Bromley	613-231-8355
James Brown	613-231-8345
Peter Cronyn	613-231-8213
Stacey Cronyn	613-231-8272
Colin Dubeau	613-231-8367
Practice Group Leader	
Jessica Fullerton	613-231-8366
Fabrice Gouriou	613-231-8310
Joseph Griffiths	613-231-8369
Patricia Lawson	613-231-8290
John Lundrigan	613-231-8325
Raymond Murray	613-231-8305
Al O'Brien	613-231-8224
Craig O'Brien	613-231-8331
Mark Seebaran	613-231-8352
Tom Yen	613-231-8281

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