

Recent Changes to Insurance Litigation Practice

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A. Introduction

Insurance litigation in British Columbia most commonly takes place in the B.C. Supreme Court. The B.C. Rules of Court govern the procedure for civil litigation in the province. New Rules are changing the way insurance and other litigation is conducted, and even bigger changes may be coming.

The goal of this paper is to describe three of the more significant new developments: the increased costs available to successful litigants, which are usually paid by insurers; the requirement to disclose insurance policies to claimants; and the proposed new Rules of Court, which may radically change the civil litigation system in B.C.

B. Increased Compensation for Legal Costs

Civil litigation in British Columbia is expensive. The biggest costs are for lawyers and experts. Other expenses include things like filing fees, obtaining and copying records from doctors, employers, or others, and travel.

The Rules of Court for the British Columbia Supreme Court contain a mechanism (Rules 37, 57, and "Appendix B" to the Rules) to provide successful parties with some compensation for the expenses of litigation. It has never been the goal of this mechanism to fully compensate parties for the costs of litigation. Instead, successful litigants are entitled to full reimbursement of disbursements (out-of-pocket expenses) and to a certain amount for "costs" meant to partially compensate them for legal fees.

On January 1, 2007 significant changes to Appendix B took effect. The most significant result of the changes is that successful litigants now receive a lot more money to compensate for legal fees. For example, under the old system, a typical motor vehicle accident case settled at mediation might result in a costs assessment of \$2,480. The same case under the new system could easily result in costs of \$5,500.

Some of the details of the important changes are as follows:

Scale of Costs

Under the old Rules, the court could fix costs at one of five scales (the aptly-named Scales 1 through 5). This five-scale system has been replaced by the following three-scale system:

Scale A is for matters of little or less than ordinary difficulty;

Scale B is for matters of ordinary difficulty;

Scale C is for matters of more than ordinary difficulty.

It is expected that the vast majority of cases will fall under the new Scale B. If no scale is fixed by order or agreement, or if the matter settled by acceptance of a Rule 37 Formal Offer, Scale B is deemed to apply.

Unit Value

Under the old Rules, the unit values for the five scales range from \$40 (Scale 1) to \$120 (Scale 5). The unit values have increased significantly:

Scale A - \$60 per unit

Scale B - \$110 per unit

Scale C - \$170 per unit

The Tariff

The Tariff is a schedule of tasks or steps in litigation for each of which a different number of units can be awarded. There were major changes to the Tariff, many of which were aimed at plugging gaps in the old Rules:

Item 1 (correspondence, conferences, instructions, investigations or negotiations by a party relating to a proceeding, whether before or after commencement, for which provision is not made elsewhere in this tariff), which used to allow between 1-20 units, was split into three sub-items, and a total of up to 50 units can be allowed.

The old Tariff did not allow units for obtaining and supplying particulars. New Tariff Items 6A and 6B allow 1-3 units each for obtaining and supplying particulars.

Items 7 and 8 (obtaining and giving discovery and inspection of documents) were re-worked so that the number of units allowed depends on the number of documents involved. For example, if there are between 1-999 documents, between 1-10 units are allowed; if there are 1000 to 5000 documents, between 10-20 units are allowed.

The old Tariff did not allow units for retaining and consulting with experts. New Tariff Item 13A allows 1-10 units for retaining and consulting with experts.

The old Tariff did not allow units for contacting, interviewing, and subpoenaing witnesses. New Tariff Item 13B allows 1-10 units.

The old Tariff did not allow units for opposed interlocutory application or assessments for which materials were prepared and delivered but which did not proceed due to

agreement on the subject of the application or assessment. New item 19A allows either 2 or 4 units depending on the nature of the application or assessment.

The present Tariff did not allow units for dealing with the Public Guardian and Trustee. The new Item 23A allows 1-10 units.

Item 34 allows 5 units for successful settlement negotiations (including settlement at mediation). Three new items allow additional units for preparation and attendance at mediation.

The result of the new Appendix B has been increased costs paid to successful claimants at the expense of insurers.

C. Disclosure of Insurance Policies

Beginning on July 1, 2007, the Rules of Court were amended to require parties to disclose and answer questions on examination for discovery concerning "any insurance policy ... under which an insurer may be liable to satisfy the whole or any part of a judgment obtained in the action or to indemnify or reimburse any party for any money paid by that party in satisfaction of the whole or part of any judgment."

As a result, defence counsel in any litigation involving insurance have to enquire of their clients (insurers and insureds) regarding the existence of any insurance policies, and if policies are in place, they must be obtained and disclosed.

In a typical motor vehicle case, disclosure will include the vehicle owner's Certificate of Insurance, any Special Coverage Certificates, and any ICBC Autoplan Optional Policy that contains third party liability coverage.

ICBC takes the position that the only purpose of this forced disclosure is to facilitate informed decision-making in litigation by allowing plaintiffs to know what recourse to insurance money is available. The purpose is not to open up the whole file between insurer and insured. Disclosure of the terms of any agreement, understanding, notice or position taken that may affect the availability of the insurance proceeds are required but the factual basis for the position need not be disclosed. Information obtained by an insurer as a result of its own investigation or provided by the insured is not required to be disclosed.

Any information about insurance obtained or disclosed as a result of the new rules is not allowed to be disclosed to the court at trial unless relevant for some other reason.

This new development is not likely to result in any radical change to practice; however, it will require lawyers to obtain information they are not used to obtaining, and insurers to disclose information they are not used to disclosing, and may take some time to get used to.

D. Proposed New Rules of Civil Procedure

The rules of civil procedure (the Rules of Court) which currently govern the processing of cases in British Columbia are based on the English rules of 1883. Not surprisingly, there is and has been for some time a movement to significantly change the way civil cases are dealt with.

In March 2002 the BC Justice Review Task Force was established on the initiative of the Law Society of BC. The objective of the Task Force is to identify a wide range of reform ideas and initiatives to make the justice system more responsive, accessible, and cost-effective. The Task Force is a joint project of the Law Society, the Attorney General, the BC Supreme Court, the BC Provincial Court, and the BC Branch of the Canadian Bar Association.

In late 2006 the Civil Justice Reform Working Group, a committee of the Task Force, released a report, "Effective and Affordable Civil Justice." The report contained a number of recommendations aimed at streamlining the civil justice system. The key recommendation was to replace the current Rules of Court with new rules "based on an explicit overriding objective that all proceedings are dealt with justly and pursuant to the principles of proportionality."

From an insurance law perspective, the recommendations of the Working Group were a concern because the principle of proportionality results in a system where less information has to be disclosed to insurers by claimants. The discovery process (document production, examinations for discovery, court applications) is limited depending on the size of the claim. Since the defence of insurance claims largely depends upon obtaining information, such as medical and other records, from and about claimants, a system where insurers are unable to obtain all relevant information is likely to be a system where claimants have the advantage. Thus, the form of new Rules of Court is of great concern.

In July 2007 the Working Group released its "concept draft" of the new Rules. The highlights are as follows:

Object of the Rules

The object of the proposed new rule is to ensure that each proceeding is dealt with justly, and the amount of time and process involved in resolving the proceeding and the expense incurred by the parties in resolving the proceeding are proportionate to the amount involved in the proceeding, the importance of the issues in dispute to the jurisprudence of British Columbia and to the public interest, and the complexity of the proceeding.

As noted above, there is a tension between "justice" and "proportionality" in that proportionality necessarily makes it harder to achieve justice, especially if proportionality simply means reducing the amount of information that has to be disclosed by claimants.

Case Initiation / Response Process

The proposed rules change the way in which proceedings are commenced and responses are made. The Writ and Statement of Claim are replaced by a single

document, the "Dispute Summary," and the initiating party is called the "Claimant" rather than "Plaintiff." The Dispute Summary contains all of the items previously required in the Statement of Claim, but must separately set out a concise summary of the facts giving rise to the claim, the relief sought by the claimant and a maximum one page summary of the legal basis for the relief sought.

The Claimant must personally sign a statement in the Dispute Summary indicating that the Claimant believes the facts set out in the Dispute Summary are true.

The party being sued is called the "Respondent" instead of "Defendant" and, to avoid default judgment, must file a page-limited Response. The Response must indicate, for each fact set out in the Dispute Summary, whether that fact is admitted, denied or outside of the Respondent's knowledge. For any fact denied, the Response must set out the Respondent's version of that fact and a concise summary of any additional relevant facts. Respondents must also certify their belief in the truth of the facts stated. If the Respondent denies the Claimant's right to relief, the Response must set out a concise summary of the legal basis for the denials.

The obvious difficulty with this process, apart from the somewhat pointless renaming of the documents and parties, is that often in insurance claims the insureds are named as parties but there is no need for them to actually participate in the litigation. To require insureds to sign documents and certify that certain things are true when they have no reason to be involved and no particular knowledge of many of the defences that are typically involved in defending claims, is unnecessary and inefficient.

Case Planning and Trial Management

The proposed rules provide that, after the exchange of the initiating documents, the parties must not take any further steps in the proceeding until a Case Plan Order is made.

A Case Plan Order may be made by consent or in a Case Planning Conference ("CPC"). Parties are free to negotiate the terms of a Consent Case Plan that is entered as a consent order. The Consent Case Plan Order includes the parameters for document production, oral examinations for discovery, expert witnesses, lay witnesses, and trial.

A trial management conference (TMC) is to be held between 15 and 30 days before the day set for the start of the trial. Each party attending a trial management conference must file a trial brief. These include, for example, a one page summary setting out the issues in dispute and the party's position on those issues, the evidence summaries provided for witnesses, time estimates, a list of the expert reports, etc. Parties must personally attend the TMC.

The judge hearing a TMC may make orders respecting trial scheduling, juries, amendment of case records, admissions of facts or documents, time limits, and other matters.

If reasonably practicable, the judge who presided at a trial management conference is to preside at the trial of the action.

The new case management systems created by the new rules may improve the current system and move cases to resolution sooner, which would clearly be a benefit to all involved.

Document Discovery

After delivery of the Response, the Claimant must deliver a list of all documents referred to in the Dispute Summary. Copies must be provided upon request. The new rules modify the present wide scope of document discovery. The initial list of documents must be supplemented later with a list of all documents which the party intends to refer at trial or that are or have been in the party's control and that could, if available, be used by any party at trial to prove or disprove a material fact.

The court has the power to require more limited or more extensive document production.

Depending on how the courts interpret the new rules, document discovery may be more restrictive than at present, thus limiting insurer's access to information about claimants.

Oral Discovery, Interrogatories, and Witness Statements

The proposed rules on conducting oral examination for discovery set limits on the amount of time that parties may be examined. Unless the court otherwise orders or the person to be examined consents, examinations for discovery of a person, by all parties who are adverse in interest, must not, in total, exceed two hours. Parties may consent to extend this limit to ten hours.

There are several problems with this proposed change. There are many cases where two hours is simply insufficient to cover all issues. Where interpreters are used, two hours will rarely be sufficient. Where there are multiple parties, for example, two or more defendants, it seems unfair to restrict all examination for discovery of a claimant by all defendants to two hours, where each defendant may be concerned with different aspects of the claimant's claim (such as where an action concerns more than one motor vehicle accident).

Interrogatories (written questions requiring sworn responses) are not allowed under the new rules. Under the current rules, interrogatories are seldom used and even less frequently useful.

The proposed rules require each party, within the time set out in the Case Plan Order, to deliver a list of the witnesses the party intends to call at trial and an evidence summary for each witness that includes, the name and address of the witness, a brief point-form summary of the evidence expected to be provided at trial by the witness, and the identity and substance of any document, not previously disclosed, to which the witness may refer to at trial.

The requirement for early exchange of witness information will likely contribute to earlier resolution of claims, as it forces all parties to prepare their cases sooner.

Experts

Under the proposed rules, the parameters for the use of experts will be set out in the Case Plan Order (whether by consent or through a CPC). The parameters will include

the number and type of experts that may be called by each party and whether joint experts may be required. If the parties each call their own experts, those experts must confer and produce a report outlining the points of disagreement between them.

The requirement for experts to confer and produce a joint report on their differences is an interesting idea, but it may be difficult to implement, not to mention expensive.

Expert reports are categorized in the Concept Draft as either assertive or responsive, rather than as Claimant's or Respondent's reports. "Assertive report" means a report of an expert's opinion as to the liability of, or the amount of damages payable by, a party other than the party tendering the report. "Responsive report" means a report of an expert's opinion as to the liability of, or the amount of damages payable by, the party tendering the report. While Claimant's reports will normally be "assertive" and Respondent's reports will normally be "responsive" there may be situations where the respondent is seeking to submit expert evidence establishing liability of another party (including the Claimant).

The timing for the exchange of expert reports will be set out in the Case Plan Order, subject to the dates mandated in the rules. Reports of joint or court appointed experts must be filed no later than 12 weeks before trial. When parties appoint their own experts, assertive reports must be delivered no later than 12 weeks before the date scheduled for trial. Responsive reports must be delivered no later than 7 weeks before the date scheduled for trial. Reports not delivered within the time limits are not admissible and the testimony of the expert is also inadmissible, unless the court orders otherwise.

The report of an expert may be tendered as evidence without the expert appearing at trial (unless demand is made for cross-examination). Experts may give direct oral evidence at trial only if direct examination of the expert is necessary to clarify terminology in the report or to otherwise make the report more understandable.

One of the Working Group's concerns was that experts are too often acting as advocates for whichever side hired them. To deal with this concern, the proposed rules set out that an expert appointed under the rules has a duty to assist the court and that duty overrides any obligation the expert may have to any party or to any person who is liable for the expert's fee or expenses. The party appointing the expert must advise the expert of this duty and the expert must, in any report he or she prepares, certify that he or she is aware of that duty, has made the report in conformity with that duty, and will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

Notices to Mediate

All three of the existing regulations on the Notice to Mediate process (General, Motor Vehicle and Residential Construction) have been consolidated into one rule.

Implementation

According to the Task Force's website, consultation on the concept draft will be held until early 2008. The Ministry of Attorney General will then create new rules, new court forms, educational materials, etc. necessary for final implementation in 2009 or early 2010.

E. Conclusion

Insurance litigation is a big part of what the courts in BC deal with. The recent and proposed changes to the Rules of Court have changed and may further radically change how all litigation, including insurance litigation, is conducted.

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