THE NEW INSURANCE ACT

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INTRODUCTION

Significant amendments to the *Insurance Act*, and new regulations necessary to fully implement the reforms, will come into force on July 1, 2012.

The British Columbia legislature passed the *Insurance Amendment Act 2009* in October 2009; however, these changes are only now coming into force. Some of the changes to the *Act* are considered to be long overdue.

In 2003 the Supreme Court of Canada stated that British Columbia's *Insurance Act* and other similar legislation in other Provinces was "outmoded", "incapable of coherently addressing the modern multi-peril policy" and resulted in "unproductive, wasteful litigation about technicalities". The Court strongly suggested that the legislatures "rectify this situation by amending the Insurance Acts" (see *KP Pacific Holdings Ltd. v. Guardian Insurance* [2003] 1 S.C.R. 433).

The government outlined its goals in make changes to the *Insurance Act* in its Insurance Act Review Discussion Paper as follows:

- Consumer Protection/Clarity of Contractual Provisions – to maintain and enhance consumer protection and to ensure that the rights and obligations of the parties to the contract are well-understood and clear;
- Harmonization – to harmonize insurance contract provisions with other provinces; and
- Justifiable Intervention – to minimize unnecessary government intervention in private contracts and avoid over-regulation.

The Legislature has advertised that these legislative changes will "enhance consumer protection by modernizing the legal framework which regulates contracts of insurance (other than vehicle insurance)" and that these "improvements … respond to industry needs by reducing red tape and supporting new ways of doing business". It is described as a "comprehensive rewrite of legislation governing BC insurance contracts".

Highlights of the new Act include measures to protect insurance consumers with reforms to:

- Lengthen the limitation period in which legal claims against insurance companies must be made to two years from one.

- Strengthen the language to clarify that fire coverage includes fires resulting from any cause, except those that are specifically excluded under the regulations.
- Allow for a 30 day "grace period" in which to pay overdue premiums for life and health insurance contracts.
- Provide consumers of group insurance products a right to obtain a copy of the key parts of those insurance policies.
- Improve dispute resolution mechanisms through a new requirement for insurers to put in place internal complaint resolution procedures.
- Require insurers to become members of an "ombudservice" organization for the purpose of resolving insurance disputes.

Other substantive changes to update the Act include:

- Mandating coverage for all fire losses except those permitted to be excluded by regulations;
- Fire coverage is mandatory for any fire loss occurring while the insured property is vacant for up to thirty (30) days;
- Exclusions for fire following earthquake are not permitted;
- Eliminating the "Fire Part" of the Act and expanding the "General Provisions" part of the Act so as to apply to virtually all types of property and liability insurance;
- Importing Statutory Conditions for both property and liability policies;
- Importing "proportionate contributions" as between overlapping policies;
- Enacting an "unjust contract" provision to allow a basis for coverage where a denial would be unjust or unreasonable;
- Limiting the scope of the "criminal or intentional act" exclusions to allow an "innocent" insured to recover their "proportionate interest" in lost or damaged property; and
- Allowing electronic delivery of certain insurance records or documents.

Regulations necessary to fully implement the legislation will also come into force at the same time as the statutory changes. These regulations will:

- Define classes of insurance for the purposes of the Insurance Act. The current 50 separate classes are being reduced to 20 classes.
- Contain substantive provisions that:
    - require insurers to notify claimants of limitation periods and dispute resolution processes
    - prohibit the use of e-mail for contract terminations
    - provide a 10-day cooling off period for life and accident and sickness insurance contracts

    - set out specific permitted exclusions from mandatory fire coverage
- Apply appropriate provisions of the Act to specialty insurance products/providers, such as home warranty insurance and captive insurers.
- Contain transition rules to clarify that certain new provisions do not apply retroactively to insurance contracts and claims.

The purpose of this paper is to outline some of the proposed changes and discuss the potential impact on consumers, insurers and insurance providers. This review is not intended to exhaustive and a more detailed review should be undertaken by a review of the Act and Regulation and consultation with legal counsel.

STRUCTURAL REFORM

Under the new *Insurance Act* those portions previously governed by Part 5 relating to Fire Insurance is eliminated resulting in most forms of property and liability policies now being governed by the General Insurance Provisions in Part 2 of the Act.

Many of the former Part 5 provisions, which related solely to property insurance, have been amended slightly and are now incorporated into the new Part 2 of the Act. However, the wording of the Act appears to extend what were traditionally property insurance conditions to liability insurance policies. For example, Part 2 of the Act retains the traditional "Statutory Conditions" but then states that Statutory Conditions 1 and 6-13 apply only to property insurance, resulting in the remaining Statutory Condition 2 (property of others), 3 (change of interest), 4 (material change and risk) and 5 (termination of insurance) applying not only to property policies but to liability policies. The result being that it may now be possible for a liability insurer to void coverage because there has been a "material change to the risk" of which the insurer has not been promptly notified.

Part 2 of the new Act will not apply to life insurance or accident and sickness insurance which continues to be governed by Parts 3 and 4 of the Act respectively.

The following classes of insurance are excluded from the application of the Statutory Conditions: aircraft insurance, boiler and machinery insurance, credit insurance, credit protection insurance, hail insurance, mortgage insurance, product warranty insurance, title insurance and travel insurance or vehicle warranty insurance.

LIMITATION PERIODS

The government has attempted to streamline the limitation periods so as to "reduce confusion for consumers, advisors and insurers all of whom need certainty in order to appropriately deal with insurance claims" (see March 2007 Discussion Paper).

Under Section 22 of the new Act the limitation period for property policies will be two years after the insured knew or ought to have known the loss or damage occurred and, in any other case, two years after the cause of action against the insurer arose.

Under Section 65 of the new Act the limitation period under life insurance policies will be two years after proof of claim is furnished or six years from the date of death or in the case of insurance money payable on a periodic basis, the date the insurer fails to make a periodic payment.

The new Act also provides that section 7 of the *Limitation Act* will have effect thus extending limitation periods for persons under a legal disability, such as a minor. In such cases, the limitation period does not begin to run until such a person is no longer under a legal disability. In the case of a minor this would mean that the limitation period would not begin to run until the minor reached 19 years of age.

Under the new Act, insurers must also provide written notification to a claimant of the applicable limitation period. Such notification may be required as little as five business days from the date the claim was denied. Failure to provide such notice could operate to suspend the applicable limitation period.

SUBROGATION

At common law an insurer was obliged to fully indemnify an insured for the loss before it was entitled to have full subrogation rights, including the exclusive control of any recovery litigation. While many insurance policies provided for the insurer to exercise the right of subrogation as soon as any payment was made under the policy, the legislation had only modified such a right of subrogation with respect to fire insurance.

Under the new Act the right of subrogation without full indemnity applies to almost all types of insurance policies.

Section 28.7 of New Act provides that:

> **Subrogation**
> 28.7 (1) The insurer, on making a payment or assuming liability under a contract, is subrogated to all rights of recovery of the insured against any person, and may bring an action in the name of the insured to enforce those rights.
> (2) If the net amount recovered after deducting the costs of recovery is not sufficient to provide a complete indemnity for the loss or damage suffered, that amount must be divided between the insurer and the insured in the proportions in which the loss or damage has been borne by them respectively.

UNJUST CONTRACTS

Section 28.3 of the new Act provides as follows:

> **Unjust Contract Provisions**
> 28.3 If a contract contains any term or condition . . . that is or may be material to the risk, including, but not restricted to, a provision in respect to the use, condition, location or maintenance of the insured property, the term or condition is not binding on the insured if it is held to be unjust or unreasonable by the court before which a question relating to it is tried.

This new provision raises some interesting questions about what "may be material to the risk" and what is "unjust or unreasonable". Arguably, any policy exclusion is "material to the risk" and therefore is "not binding" on the insured should it be "unjust or unreasonable". Also, the Supreme Court of Canada has stated that the "unjust or unreasonable" relief provision in the *Act* apply not only to make unenforceable policy conditions that are unreasonable on their face but also to relieve against the results of applying policy conditions that, in the particular circumstances of the case, are "unreasonable in their application or draconian in their consequences". The result may be that in just about any denial of coverage based upon any exclusion it is open for the denial to be challenged on the basis that it is "unjust or unreasonable".

INNOCENT CO-INSURED

The new Act will provide "proportionate coverage" for "innocent persons" who might otherwise be excluded from coverage for loss or damage to property caused by a criminal or intentional act or omission of another insured or person. Section 28.5 of the new Act reads as follows:

> **Recovery by innocent persons**
> 28.5 (1) Despite section 2.3, if a contract contains a term or condition excluding coverage for loss or damage to property caused by a criminal or intentional act or omission of an insured or any other person, the exclusion applies only to the claim of a person
> (a) whose act or omission caused the loss or damage,
> (b) who abetted or colluded in the act or omission,
> (c) who
> (i) consented to the act or omission, and
> (ii) knew or ought to have known that the act or omission would cause the loss or damage, or
> (d) who is in a class prescribed by regulation.

(2) Nothing in subsection (1) allows a person whose property is insured under the contract to recover more than their proportionate interest in the lost or damaged property.
(3) A person whose coverage under a contract would be excluded but for subsection (1) must comply with any requirements prescribed by regulation.

The objective of this "innocent persons" provision is to avoid those situations where an "innocent" insured is denied coverage due to a criminal or intentional act of a co-insured. For example, in arson cases coverage has been denied to the "innocent" co-insured who was not in any way implicated in the arson: see *Scott v. Wawanesa Mutual Insurance Co.* [1989] 1 S.C.R. 1445; *Riordan v. Lombard Insurance Co.* 2003 BCCA 267; *Torchia v. RSA Insurance* [2004] O.J. No. 2316 (CA). Similarly, the intentional assault by one insured may affect coverage for all insureds: see *Bluebird v. Guardian Insurance* 1999 BCCA 0195.

While the objective of this provision is a good one there will no doubt be litigation on what is meant by "abetted or colluded" or "consented to the act" and "proportionate interest". With respect to "proportionate interest" alone questions arise as to whether an innocent spouse is entitled to only 50% of the matrimonial home damaged by the criminal act of the co-insured spouse or to some greater or lesser proportion. Similarly, what percentage of personal property such as clothing, jewelry, tools, etc. should the innocent co-insured spouse or children receive?

Only "natural persons" (not corporations) will have the benefit of the "innocent co-insured" provision in the Act and in order to obtain such protection, such insured must cooperate with the loss investigation, submit to examinations under oath and produce requested documents.

FIRE LOSS COVERAGE

The new Act now requires coverage for fire loss "however the fire is caused and in whatever circumstances". This effectively eliminates any exclusion with respect to fire insurance unless the exclusion is "prescribed by regulation". Section 28.4 provides as follows:

Exclusions from coverage
28.4 (1) An insurer must not provide in a contract that includes coverage for loss or damage by fire, or another peril prescribed by regulation, an exclusion relating to the cause of the fire or peril other than an exclusion prescribed by regulation.
(2) An insurer must not provide in a contract that includes coverage for loss or damage by fire or another peril prescribed by regulation an exclusion relating to the circumstances of the fire or peril if those circumstances are prescribed by regulation.
(3) An exclusion contrary to subsection (1) or (2) is invalid.

(4) For greater certainty, subsections (1) and (2) apply in relation to loss or damage by fire, however the fire is caused and in whatever circumstances and whether the coverage is under a part of the contract specifically covering loss or damage by fire or under another part.

The *Regulations* set out the permissible fire exclusions as:

(a) Generally those related to an intentional criminal act or omission of an insured; and,

(b) Riot, civil commotion, war, invasion, act of a foreign enemy, hostilities, civil war, rebellion, revolution, insurrection or military power.

The permitted exclusions do not include fire following earthquake. However, they do include terrorism, although only for policies applicable to property that is not used for a residential purpose, i.e. commercial policies.

The *Regulations* also provide that a policy must not contain an exclusion for loss or damage by fire that occurs when the insured property is vacant for a period of less than 30 days.

POLICY ACCORDANCE

The government indicated one of its "primary objectives" was the principle of "transparency", stating that "Insurance policies should be clear, so that consumers are aware of the key policy terms, conditions and exclusions before entering into an insurance contract." (see March 2007 Discussion Paper).

In the new Part 2 of the Act there is provision deeming coverage to accord with any application or proposal for insurance that may have been made.

Section 11.1 which provides:

Policy in accordance with terms of application
11.1 After an application or proposal for insurance is made by an insured, any policy issued or coverage provided by the insurer is deemed, for the benefit of the insured, to be in accordance with the terms of the application or proposal, unless the insurer immediately gives notice to the insured in writing of the particulars in which the policy or coverage differs from the application or proposal, in which case the insured, within 2 weeks after receiving the notice, may reject the policy.

Of significance is that this new provision appears broader than the former requirement of a written application and, therefore, would now apply to oral transactions as well.

The section deems coverage to be in accordance with the application or proposal unless the insurer "immediately gives notice to the insured in writing of the particulars in which the policy or coverage differs" from the application.

Again, this is a provision that would apply equally to both property and liability coverage and may present a problem for excess insurers who may be deemed to provided terms unless the appropriate "immediate" notice is given.

RELEIF FROM FORFEITURE

The new Act also provides relief from forfeiture and termination provisions; however, with the inclusion of the words "without limiting section 24 of the *Law and Equity Act*" it appears that the legislature intended to broaden the scope of relief to that provided in the *Law and Equity Act*.

Section 10 of the new Act provides as follows:

> 10 Without limiting section 24 of the Law and Equity Act, if
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> (a) there has been
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> (i) imperfect compliance with a statutory condition as to the proof of loss to be given by the insured or another matter or thing required to be done or omitted by the insured with respect to the loss, and
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> (ii) a consequent forfeiture or avoidance of the insurance in whole or in part, or
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> (b) there has been a termination of the policy by a notice that was not received by the insured because of the insured's absence from the address to which the notice was addressed, and the court considers it inequitable that the insurance should be forfeited or avoided on that ground or terminated, the court, on terms it considers just, may
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> (c) relieve against the forfeiture or avoidance, or
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> (d) if the application for relief is made within 90 days of the date of the mailing of the notice of termination, relieve against the termination.

Section 24 of the *Law and Equity Act* provides as follows:

> 24 The court may relieve against all penalties and forfeitures, and in granting the relief may impose any terms as to costs, expenses,

> damages, compensations and all other matters that the court thinks fit.

As can be seen the relief under Section 24 is “against all penalties and forfeitures” and in granting relief the court “may impose any terms as to costs, expenses, damages, compensations and all other matters that the court thinks fit”.

In cases in which relief has been granted and an insurer’s actions have been highhanded and inappropriate it is anticipated that Section 24 will be relied upon for a court to impose terms which could not be awarded under Section 10.

ELECTRONIC COMMUNICATIONS

Under s. 2.5 of the new Act an insurer may provide any record or document by electronic means (i.e. e-mail or scanned) in accordance with the *Electronic Transactions Act* S.B.C. 2001 c. 10 unless the regulations provide otherwise:

Electronic communications

> 2.5 (1) If under this Act a record is required or permitted to be provided to a person personally, by mail or by any other means, unless regulations referred to in subsection (4) of this section or under section 192 (2) (e.2) provide otherwise, the record may be provided to the person in electronic form in accordance with the *Electronic Transactions Act*.
> (2) Despite section 2 (4) (a) and (b) of the *Electronic Transactions Act*, in this section, "record" includes a contract or declaration that designates the insured, the insured's personal representative or a beneficiary as a person to whom or for whose benefit insurance
> (3) If a record is provided in electronic form under this section,
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> > (a) the record is deemed to have been provided by registered mail, and
> > (b) a period of time that, under this Act, starts to run when that record, or notification of it, is delivered to the addressee's postal address starts to run when the record is deemed received in accordance with the Electronic Transactions Act.
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> (4) The Electronic Transactions Act and subsection (1) of this section do not apply to a record, or in relation to a provision, under this Act that is excluded from their application by regulation.

The *Electronic Transactions Act* provides generally that:

> 6 A requirement under law that a person provide information or a record in writing to another person is satisfied if the person provides the information or record in electronic form and the information or record is
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> (a) accessible by the other person in a manner usable for subsequent reference, and
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> (b) capable of being retained by the other person in a manner usable for subsequent reference.
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> 7 A requirement under law that a person provide information or a record organized in a specified non-electronic form to another person is satisfied if the person provides the information or record electronically and the information or record is
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> (a) organized in the same or substantially the same manner as the specified non-electronic form,
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> (b) accessible by the other person in a manner usable for subsequent reference, and
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> (c) capable of being retained by the other person in a manner usable for subsequent reference.

The specifics of sending or receiving information under the *Electronic Transactions Act* are found at section 18 which provides that:

Sending or receiving information and records

> **18** (1) Unless the originator and addressee agree otherwise, information or a record in electronic form is sent when it enters an information system outside the control of the originator or, if the originator and the addressee are in the same information system, if the information or record becomes capable of being retrieved and processed by the addressee.
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> (2) If information or a record is capable of being retrieved and processed by an addressee, the information or record in electronic form is deemed, unless the contrary is proven, to be received by the addressee (a) when it enters an information system designated or used by the addressee for the purpose of receiving information or records in electronic form of the type sent, or
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> (b) if the addressee has not designated or does not use an information system for the purpose of receiving information or records in electronic form of the type sent, on the addressee becoming aware of the information or record in the addressee's information system.
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> (3) Unless the originator and the addressee agree otherwise, information or a record in electronic form is deemed to be sent

from the originator's place of business and is deemed to be received at the addressee's place of business.
(4) For the purposes of subsection (3), if the originator or the addressee has more than one place of business, the place of business is that which has the closest relationship to the underlying transaction to which the information or record in electronic form relates or, if there is no underlying transaction, the principal place of business of the originator or the addressee.
(5) For the purposes of subsection (3), if the originator or the addressee does not have a place of business, the references to "place of business" in subsection (3) are to be read as references to "habitual residence".

The *Regulations* confirm that notice of termination of a contract pursuant to a statutory condition or for non-payment of premium cannot be delivered electronically.

DISPUTE RESOLUTION

The new Act provides for a process similar to the former appraisal process but is now called "Dispute Resolution" and is expanded to include disputes about "the nature and extent of the repairs or replacements required and their adequacy". Also, this mandatory dispute resolution process is not limited to property policies but applies to any "dispute between an insurer and an insured about a matter that under [any] condition of the contract must be determined using this dispute resolution process". Arguably, a coverage dispute under a liability policy could be resolved by this process.

The mechanics of the dispute resolution process are essentially the same as the appraisal process as set out in the former Act. Each side appoints a representative and if they are unable to reach an agreement they appoint an umpire to determine the issue.

However, under the *Regulations* the insurers must provide the insured with written notice of the dispute resolution process within ten (10) days after a dispute has arisen or within seventy (70) days after submission of a Proof of Loss if no coverage/payment determination has been made.

These new provisions will not apply if not apply if the insurer gave notice to the insured of the availability of the appraisal process before July 1, 2012.

INSURER COMPLAINTS

Also notable is that, with only some limited exceptions such as insurers strictly engaging in the business of reinsurance, all insurers who are authorized to conduct business in British Columbia must be a member of the General Insurance OmbudService for the purpose of addressing "insurer complaints."

TRANSITIONAL PROVISIONS

The following new provisions will not apply to contracts of insurance in existence as of July 1, 2012 until the contract is renewed or replaced including:

- statement of the new limitation period;
- application of the statutory conditions;
- limitation of liability clause;
- exclusions from coverage and fire perils insured against.

Also, the following new provisions will not apply if the loss or damage occurred prior to July 1, 2012:

- application of the limitation act;
- limitation period;
- recovery by innocent persons.

CONCLUSION

The new *Insurance Act* will introduce a number of significant changes to the insurance industry. There will no doubt be challenges and follow up litigation upon the implementing of these changes. It will be interesting to see if these changes will meet the goals intended by the legislature.