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Insurance Journal

May 1, 2013

Volume 1, Issue 3
Editor Keoni Norgren

In this Issue…

By Vista Trethewey

Defending Until the End – When Does the Duty to Defend End?

The Ontario Superior Court of Justice recently released the decision in *Jevco Insurance Company v. Malaviya* that deals with an insurer's duty to defend once the policy limits have been extinguished.

Background

Vishal Malaviya was covered under Ontario's Standard Automobile Policy ("SAP") for $200,000 of motor vehicle insurance coverage through Jevco Insurance Company ("Jevco"). Malaviya was sued for substantially more than the policy limits and Jevco offered to pay the Plaintiffs $200,000 plus their legal costs. Jevco then brought an application for a declaration that they did not have a duty to defend once the liability limits were exhausted. The issue the court was left to determine was whether the policy obligated Jevco to provide an ongoing defence to Malaviya. Jevco took the position that since it had no further liability to pay damages it also had no further duty to defend Malaviya. Malaviya argued that the policy required a full defence until a final settlement or decision on the merits of the case is reached.

Policy Language

The SAP policy language was scrutinized by the court as it provides that the insurer will cover the costs of defending a claim but then also says: "*if you are sued for more than the limits of your policy you may*

wish to hire, at your own cost, your own lawyer to protect against the additional risk". The policy did not clearly say that the insurer will not continue to provide a defence once policy limits are extinguished.

The court expressed frustration at the confusing SAP policy language and applied s. 245 of the Insurance Act RSO 1990, c. I.8 (the "Act"). Section 245 states that the insurer will "defend...on behalf of the insured and at the cost of the insurer any civil action that is at any time brought against the insured on account of loss or damage to persons or property". Section 245 does not have any limiting language that states when/if this duty to defend ceases. Specifically the court found that the Act does not say or suggest that the insurer must bear the cost of defending the insured only up to the coverage limits.

The Ontario Superior Court dismissed the application for a declaration that it has no continuing duty to indemnify or defend having exhausted the liability limits. The court found that the policy wording was not clear enough to terminate the duty to defend on exhaustion of the limits.

The court distinguished its finding from two earlier decisions: *Boreal Insurance Inc. v. Lafarge Canada Inc* [2004] OJ No 1571 (*Boreal*) and *Dominion of Canada General Insurance Co. v. Kingsway General Insurance Co.* [2011], OJ No. 811 (*Dominion).* In *Boreal* the court found that the duty to defend does not continue when policy limits are exhausted because "*it does not make logical sense that a duty to defend would arise when there is no possibility of indemnification*". The court in the *Jevco v. Malaviya* case however found that the *Boreal* decision was distinguishable because the commercial insurance policy in *Boreal* clearly stated the circumstances when the duty to defend would not continue. Furthermore, a commercial insurance policy drafted by an insurer is interpreted quite differently

than the SAP policy that is legislatively drafted.

The court also distinguished this case from the auto insurance case of *Dominion* that said "*case law...is clear that if there is no possibility of a duty to indemnity then there is no duty to defend*" on the basis that *Dominion* involved an excess insurer attempting to get a "free ride" by bringing an application to have the primary insurer pay defence costs after they had extinguished the primary policy limits.

The issue with the SAP policy was that it did not clearly define when the duty to defend was no longer applicable.

Implications to the Industry

The decision in Malaviya impacts all insurers who provide policies that do not contain clear language stating that the duty to defend does not continue once the policy limits are extinguished. It is not clear however whether this case will be applied to private insurance policies that use ambiguous language with respect to the scope of the duty to defend. Arguably the Boreal decision will continue to apply to private insurance contracts.

Insurers would also be well advised to examine their policy language with respect to the duty to defend and ensure that it has clear language stating that the insurer will not provide defence once the policy limits are extinguished. The one thing this case makes clear is that the courts are not inclined to deny an insured a right under the policy if the policy language is ambiguous.

Cyber Liability Laws in Canada

By Shelley Armstrong

Cyber liability insurance addresses first and third-party risks associated with e-business, the Internet, networks and informational assets. In Canada, the extent to which such risks are regulated and the manner in which privacy is protected has undergone dramatic transformation within the past two years. This article provides an overview of the key provincial and federal information protection and privacy laws in Canada and highlights some of the significant court cases in this rapidly evolving area of law.

The laws applicable to information protection and privacy in Canada vary across the provinces and territories; further, a combination of provincial and federal laws apply. These laws may be subdivided into four main types: (a) Provincial privacy laws; (b) Personal information protection laws applicable to private sector organizations; (c) Provincial personal health information laws; and (d) Personal information protection laws applicable to government and public bodies.

Provincial Laws

British Columbia, Manitoba, Newfoundland and Saskatchewan have enacted Privacy Acts which create a statutory cause of action for breach of privacy. Damages may be awarded, but breach of privacy is actionable without proof of damages. Moreover, in January 2012, the Ontario Court of Appeal confirmed that a cause of action for breach of privacy may be found absent a statutory cause of action (*Jones v. Tsige*, 2012 ONCA 32).

Laws that Apply to Private Sector Organizations

The Personal Information Protection and Electronic Documents Act, S.C. 2000 c. 5 ("PIPEDA") applies to all personal information held by all private sector organizations in federally regulated industries, and to

other private sector organizations in some, but not all provinces. It does not apply to private organizations in provincially regulated industries in the provinces of Alberta, British Columbia, Ontario (for health care providers) or Quebec, which jurisdictions have their own personal information protection laws applicable to provincially regulated private sector organizations.

In those provinces which have not enacted their own legislation, PIPEDA applies to every "organization" in respect of "personal information" that the organization collects, uses or discloses in the course of "commercial activities" and to "personal information" about an employee of an organization, which the organization collects, uses or discloses in connection with the operation of a federally regulated entity ("FRE"). The provincial personal information protection Acts govern the collection, use and disclosure of personal information by private organizations in provincially regulated industries within the enacting province. These Acts typically do not apply to the collection, use or disclosure of personal information for personal or domestic purposes.

The Alberta statute contains a notification requirement in the event of a security breach that poses a real risk of significant harm. Neither PIPEDA nor the other provincial statutes of general application contain breach notification requirements. However, Bill C-12, which was introduced into First Reading on September 29, 2011, once passed, will require organizations governed by PIPEDA to notify the Commissioner when there has been a "material breach" of the security of their holdings of personal information. Bill C-12 will also require that organizations notify the individuals involved (unless there is any other law that prohibits it) if it is "reasonable" in the circumstances to "believe that the breach creates a real risk

of significant harm to the individual". The term "significant harm" is broadly defined in the Bill.

Like the personal information protection Acts that apply to the public sector, the personal information protection Acts which govern the private sector establish a Commissioner with powers to hear and investigate complaints, initiate their own complaints and audits and write reports of their conclusions. The provincial Commissioners may issue binding orders and fines. Dealing with the Privacy Commissioner under the federal or provincial legislation can be expensive: in a recent case, $435,000 in legal costs was incurred.

In 2012, there were nine investigations made by the federal Privacy Commissioner under PIPEDA. In one of these investigations, three complainants received an email invitation with "friend suggestions" to join the social networking site, Facebook. The accuracy of the "friend suggestions" lead the complainants to believe Facebook had inappropriately accessed their email addresses. The Commissioner did not find any evidence of this, but did find that Facebook had failed to meet the knowledge and consent requirements under PIPEDA. As such, it found the complaints well-founded and made recommendations for change, which Facebook subsequently implemented.

PIPEDA authorizes a complainant to bring action in court following a report of the Commissioner, and authorizes the court to order organizations to comply with the Act, and to award damages for breach of privacy. In a recent decision, a Canadian bank was assessed damages of $2,500 for disclosing a wife's credit card statements in a legal proceeding involving her husband and the husband's former wife (*Biron v. RBC Royal Bank*, 2012 FC 1095). In another, a Canadian credit bureau was assessed

damages of $5,000 for disclosing inaccurate personal information to a bank in connection with a loan application, which resulted in the credit history of another individual being attributed to the loan applicant (*Nammo v. TransUnion of Canada Inc.*, 2010 FC 1284).

The BC and Alberta acts create a statutory cause of action for damages resulting from a breach of the Act found by the Commissioner, or resulting from an offence committed under the Act if an individual has suffered loss or injury as a result of the breach or offence. These Acts do not provide for a right of appeal of a Commissioner's decision, but judicial review is available to the local courts.

Provincial Personal Health Information Laws

Seven of the Canadian provinces have enacted provincial statutes to protect health information. These Acts apply to the collection, use and disclosure of personal health information held by "health information custodians" within the enacting provinces. Health information custodians are typically defined to include health care practitioners, home care service providers, hospitals, independent health facilities, retirement and long term care homes, pharmacies, and ambulance services. With the exception of British Columbia, all of these Acts impose on custodians a duty to protect against unauthorized use or disclosure of personal health information in its possession or control. (British Columbia's Act protects and regulates the disclosure of personal health information collected in designated "Health Information Banks"). Most of the Acts empower the provincial Privacy Commissioner to hear complaints, make investigations, conduct inquiries and issue orders to the courts. These Acts also create offences for certain breaches of the Acts, which are punishable by monetary penalties.

Laws that Apply to Government and Public Bodies

Both the federal and provincial/territorial governments have legislative power over personal information in the possession or control of federal government entities. The federal government has legislative power over personal information in the possession or control of federal government entities, as well as FREs located anywhere in Canada. Provincial governments, on the other hand, have legislative power over personal information in the possession or control of provincial government entities and over provincial public bodies.

"Personal information" is typically defined as "information about an identifiable individual that is recorded in any form". Federal and provincial personal information protection Acts applicable to government and public bodies prohibit the collection, use and disclosure of personal information without consent, except as authorized by the Acts. The Acts impose on the government and public bodies a duty to protect personal information in their custody or control. None of them specifically provide for a duty to notify affected individuals in the event of a breach of privacy, but such an order would likely fall within the general jurisdiction of the Privacy Commissioners (established under the respective Acts), who have powers to both receive and investigate complaints from individuals relating to breaches of the Acts and to initiate their own investigations and audits. The Acts typically do not create a statutory cause of action giving rise to damages for breach of privacy. Instead, they give the Commissioners various powers, which vary in degree among the jurisdictions. Most of the Acts provide for a right of judicial review by or appeal to the local courts as well.

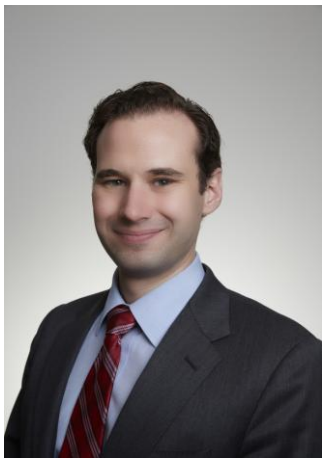
Future Developments

In addition to the foregoing legislation, there are new cyber liability laws coming into place in Canada all the time which cyber liability insurers should be aware of. For example, the federal *Fighting Internet and Wireless Spam Act* Bill, Bill C-28, was passed in 2010 and is expected to come into force this year. This Act will regulate, *inter alia*, spam, identity theft, "phishing", spyware and viruses. In short, we can expect to see ever-increasing numbers of cyber liability claims in Canada in the near future.

Dolden Wallace Folick Welcomes New Associates to its Vancouver, Kelowna, and Toronto Offices

Scott Baldwin

Brent Rentiers



Matthew Miller

Dolden Wallace Folick is happy to announce that Scott Baldwin, Brent Rentiers, and Matthew Miller have joined its Vancouver, Kelowna, and Toronto Offices, respectively.

Scott joined Dolden Wallace Folick after having gained substantial experience in the area of insurance defence while working as in-house counsel in the Claims Legal Services Department of a large insurance corporation in British Columbia. Scott has appeared at all levels of Court in British Columbia and has extensive trial experience.

Brent joined the firm after practicing civil litigation with a prominent B.C. regional firm and a national law firm in Calgary.
Brent's practice focuses on construction law, property damage, insurance defence litigation, covering a wide variety of matters including complex personal injury, liquor liability, directors and officers liability, professional negligence, as well as subrogated claims. He has also developed an expertise with respect to employment law matters.

Before joining the firm Matthew practiced with one of Canada's top insurance defence litigation boutiques, specializing in tort motor vehicle claims, subrogation, occupiers' liability as well as arguing and assisting with appeals. Matthew has appeared before the Ontario Superior Court of Justice on dozens of occasions and has argued appeals before single judges and panels of the Divisional Court and the Ontario Court of Appeal.

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