Deciphering a Seminal Insurance Coverage Decision

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Every decade or so, a decision of monumental importance to the coverage bar gets handed to us. In 2010, the Supreme Court of Canada gave us *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*. 2010 SCC 33. Before that? We had *Alie v. Bertrand & Frère Construction Co.* (2002), 222 D.L.R. (4th) 687 in 2002 from Ontario's Court of Appeal.

Today, we were given a gift: *Loblaw Companies Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2024 ONCA 145. Here, the Court of Appeal for Ontario addressed complex issues regarding the allocation of defence costs among serial insurers, questions regarding time-on-risk in contract and equity, questions regarding relief from forfeiture and pre-tender defence costs, and conflicts of interest and defence reporting agreements. The decision – a whopping 121 pages and nearly 300 paragraphs – has an incredible amount of nuance that will likely fill a chapter in an insurance treatise and form the subject of industry-focused seminars for the next several years.

This article highlights the crucial takeaways most critical to the insurance bar moving forward.

A. Take-Aways

The Court was very clear that many of the issues engaged rose and fell on the specific wording at issue; it could not be said that there is a "one size fits all". No insurer should take it for granted that their circumstances automatically fall into the below. Consultation with coverage counsel is critical to tailoring the facts of Loblaw to your specific case.

Here are four significant points to consider from Loblaw:

- **The pro rata time-on-risk allocation method is the appropriate method to apply for long-tail property damage or bodily injury claims**: The Court of Appeal rejected the ability

of the insured to “select” a single policy, opting for a pro-rata "time-on-risk" allocation method for defence costs among insurers. This means each insurer pays defence costs proportionately based on their time on risk, subject to their retentions.

- **Relief from forfeiture should be rarely granted and is not available for pre-tender costs**: The Court reaffirmed that relief from forfeiture should be seldom granted, placing the burden of proof on the insured. Voluntary payments before notice to the insurer are not reimbursable, presuming policy language to that effect, and relief from forfeiture is not applicable in such cases.
- **Conflicts only arise in specific circumstances**: Specific types of reservations of rights, such as those about intentional act exclusions, create a reasonable apprehension of conflict (reiterating Brockton). Ordinary reservations of rights do not necessarily make such conflicts.
- **Access to privileged information when conflicts have arisen is possible but circumspect: Insurers may gain access to privileged defence** information under certain circumstances, either through agreement or court order. However, the scope of information that can be disclosed remains uncertain and subject to case-specific considerations.

The case arises from multiple class action claims spanning lengthy time frames, mainly focusing on the opioid crisis in Canada that was created by OxyContin’s introduction to the market in 1996. Loblaw Companies Limited (**“Loblaw”**), Shoppers Drug Mart Inc. (**“SDM”**), and Sanis Health Inc. (**“Sanis”**) are defendants in some or all of these class actions.

Loblaw, SDM and Sanis sought coverage from their commercial general liability carriers. The insurers involved include Royal & Sun Alliance Insurance Company of Canada (**“RSA”**), AIG Insurance Company of Canada **(“AIG”**), Aviva Insurance Company of Canada (**“Aviva”**), Liberty Mutual Insurance Company (**“Liberty”**), and Zurich Insurance Company Ltd. (**“Zurich”**) as primary insurers. Chubb Insurance Company of Canada, Markel, and QBE Syndicate 1886 were excess carriers.

Our office was proud to represent QBE Syndicate 1886 in this matter both before Justice Vermette at the Superior Court of Justice and before the panel of the Court of Appeal.

B. Analysis

The critical issue addressed was whether an insured, in triggering multiple commercial general liability policies over time, is entitled to “select” a single policy and “tag” it for 100% of the defence costs.

The application judge allowed the insureds to choose a single policy. The corollary to this was that the single policy was then saddled with 100% of the defence costs even though any one policy may have only been on risk for 8 out of 200+ months, and other insurers had more significant retentions. The application judge focused on specific passages from Court of Appeal decisions in distinguishable circumstances to reach that conclusion, which the insurers argued were inherently unfair and exposed them to costs for which a premium was never charged.

The Court of Appeal declined to endorse this approach (rightfully so, in our view). The Court favoured a non-selection policy and a pro-rata "time-on-risk" allocation method. This means that:

(i) All policies issued by each insurer are triggered; and
(ii) Each liability insurer only pays defence costs on a pro-rata basis subject to their retentions.

An insured being sued for ten years' worth of property damage exposure is a simple example.

The insured has ten CGL policies triggered. Let's say that five of the policies issued by Insurer ABC are each subject to a $25,000 retention. The remaining five policies issued by Insurer XYZ are each subject to a $50,000 retention.

This means that, if the total defence spend is $500,000, that amount will be allocated across all ten terms (i.e. $50,000 per term), subject to a reallocation after the trial.

In total, in this example, the insured will fund $125,000, the total of retentions that apply to the five policies issued by ABC, plus another $250,000 for the total of the retentions applicable to the five policies issued by XYZ. The insured's total obligation would, therefore, be $375,000 - which is the 5 retentions of $25,000 (totalling $125,000) and the 5 retentions of $50,000 (totalling $250,000).

Regarding relief from forfeiture, the Court reiterated that it is a type of relief that should be rarely granted, and the burden is on the insured to prove it. In short, the voluntary payments clause – which requires an insured to only incur costs at its own expense before giving notice to the insurer – is not reimbursable. Relief from forfeiture is unavailable because the defence obligation is only triggered on giving notice; there is nothing to "relieve" from.

Lastly, regarding conflicts, the Court of Appeal confirmed that only specific types of reservations of rights – such as reserving on intentional act exclusions – create a reasonable apprehension of a conflict. Ordinary reservations of rights do not create such a conflict. The insurer can control the litigation and appoint and instruct defence counsel.

Where there is conflict, the coverage side of the file and the defence side of the file should be separated. Control is not necessarily lost if an appropriate screen is put in place. However, the coverage side of the file can only receive "public-facing" documents such as "pleadings, productions, transcripts of examinations, expert reports served on other parties, motion records and decisions and orders of the court," as well as all material facts. The material facts would include "information that might void coverage."

Insurers can access privileged defence information under an agreement or court order, but the circumstances that would guide that are unclear. The Court held that "disclosure of particular documents is inevitably a fact-specific exercise" and that "an attempt to define the scope of information that can be disclosed is premature at this juncture." The ultimate answer must be left to another day.

Ultimately, the appeals were (mostly) allowed, meaning the lower court's decision was (mostly) overturned.

In our view, the Loblaw decision will be cited not just for its conclusions (of which there are many) but for its insight into many fundamental insurance law issues. For example, what is the right to associate? We now have the answer in paragraphs 252 through 253. What is the distinction in law between a deductible and a retention? We now have the answer in paragraphs 130 through 133. In a liability policy, are defence costs an “insured peril” or a result of the insured peril? We have the answer in paragraphs 111 and 112.

On the whole, the decision is a promising one which – along with other significant insurance cases, such as *Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2022 ONCA 862 (a matter in which our office was involved for other UK-based insurers) – which will further prove Ontario as a robust jurisdiction in the field of insurance law.

The insurance coverage team at Blaney McMurtry LLP always remains available to assist and consult, whether on these issues or others.