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READ THIS BEFORE LITIGATING IN CANADA:

Salient Differences between Civil Litigation in the United States and Canada

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Civil litigation in Canada has similarities to civil litigation in the United States. However, the differences can be significant. This paper provides a general overview of the Canadian legal system, followed by a high level look at those salient differences.

The Canadian Legal System

The Canadian legal system is rooted in two legal traditions: The English common law inherited by each common law province and territory when they were created, and the French Civil Law that was inherited by the Province of Québec".

As in the United States, all provinces and territories follow the principle of *stare decisis* under which provincial and territorial trial courts are bound to follow the decisions of their respective higher courts, usually the provincial or territorial courts of appeal. The decisions of other Canadian courts of appeal are persuasive, but not binding on the courts of another province. In Québec, common law precedents from the other Canadian provinces are not usually invoked in private law matters, although for matters within federal jurisdiction like bankruptcy, precedents from the other Canadian provinces are persuasive in Québec as well.

Each ruling of the Supreme Court of Canada binds all courts, at all levels, in all provinces and territories. However, in Québec, on issues of private law, the ruling will only apply to the extent that the legal principle in issue is applicable to the civil law system.

The Courts having general jurisdiction in Canada are the Superior Courts regulated by each province's laws. The judges that sit in those courts are appointed by the Canadian Federal Cabinet. In addition, each province has a system of statutory Courts hearing civil disputes whose jurisdiction is limited by the monetary amount and the subject matter in issue. The judges who sit in those courts are appointed by the provinces and territories.

Canada has a federal court system known as the Federal Court of Canada. Unlike the superior courts of the provinces and territories, this court was created by federal statute and therefore it does not have inherent jurisdiction. That court is national and bilingual and hears matters that are within federal jurisdiction under the common law and Québec civil law such as intellectual property rights, immigration, indigenous rights and specific matters specified by statute. It is rare for the Federal Court of Canada to hear a civil litigation dispute between corporations and individuals. For that reason, the jurisdictional disputes that are common in American civil litigation between federal and state courts do not have any parallel in Canada.

Consequently, civil litigation in Canada is conducted almost exclusively in the superior courts of each province and territory. From west to east those courts are: The British Columbia Supreme Court; The Alberta Court of King's Bench; The Saskatchewan Court of King's Bench; The Manitoba Court of King's Bench; The Ontario Superior Court; The Québec Superior Court; The New Brunswick Court of King's Bench; The Supreme Court

of Nova Scotia; The Supreme Court of Prince Edward Island and The Supreme Court of Newfoundland and Labrador. The three Canadian territories have their own courts known as The Supreme Court of the Yukon; The Supreme Court of the Northwest Territories; and The Nunavut Court of Justice. The judgments of these courts can be appealed to the Courts of Appeal in each province or territory. Depending upon the subject matter, appeals are either heard automatically, or only when leave is granted. Any further appeal in a civil matter is only with leave to the Supreme Court of Canada.

In the common law provinces and territories where there is little or no existing Canadian case law on a particular legal issue and it becomes necessary to look to a non-Canadian legal authority for reference, decisions of English courts, other Commonwealth courts, such as Australia, and American courts are often utilized. In the area of insurance, Canadian courts will, more often than not, consider American decisions, in view of the commonality of policies and a need to promote certainty in trade and finance in North America. See, *Zurich Insurance Co. v. 686234 Ontario Ltd*. (2002), 62 O.R. (3d) 447 (Ont. C.A) at para. 34. The key word is "consider;" American decisions can be used to sway a court to a party's point of view, but they will not be adopted without much thought and analysis: *Goodyear Canada Inc. v. American International Cos*. 2011 ONSC 5422, at para. 100–101.

Comparative law is also used in Québec, with France being sometimes used as a source in private law matters, although precedents from common law jurisdictions are also frequently cited. For instance, in class actions, Canadian common law and American law has been the source of the criterium adopted by Québec private law to evaluate whether to approve a settlement: *A.B.* v. *Clercs de Saint-Viateur du Canada*, 2023 QCCA 527 at para. 34. In insurance law, French but also English and American sources may be referred to: *Allstate, cie d'assurances* v. *Général Accident, cie d'assurances*, 2000 CanLII 11380 (QC CA) at para. 16.

The Regulation of Insurance in Canada

The Canadian constitution divided up legislative powers between the Parliament of Canada and the provinces. As a result, some industries such as banking and aviation are federally regulated. Some industries are regulated both federally and provincially. Insurance is one of those industries

Common Law Provinces and Territories

Most insurance companies are federally regulated. Federal oversight ensures that the insurance companies doing business in Canada are financially sound. The provincial/territorial Insurance Acts (and associated regulations) issue licenses for insurers to issue insurance in a given province or territory; the licensing and regulation of insurance agents, brokers and adjusters; regulate the business of insurance (i.e., the minimum requirements for certain classes of insurance); and how insurance products are marketed and, in the case of auto insurance, priced.

All federally regulated insurance companies must follow the rules and regulations of the province or territory where they carry on business. The provincial and territorial Insurance Acts modify the Common and Civil Law that applies to the business of insurance.

Québec

Québec is a civil law jurisdiction, and the insurance laws are found mainly in the Québec Civil Code ("CCQ"), at Chapter XV (Insurance) of Title Two (Nominate Contracts) in Book Five (Obligations). The provisions peculiar to liability insurance are arts. 2498–2503 CCQ, as part of the section on Damage Insurance (the other sections being Insurance of Persons and Marine Insurance, with a general section applying to the other sections). In the section on Damage Insurance, the CCQ provides for two types of damage insurance: Property Insurance and Liability Insurance.

Regarding liability insurance, Québec is a direct-action jurisdiction, meaning that a claimant in a liability matter can file proceedings directly against the insurer without having to involve the insured (art. 2501 CCQ). Moreover, the proceeds of the liability insurance must be applied exclusively to the payment of the claim (art. 2500 CCQ), and not to the payment of legal fees and costs incurred by the insurer to defend against the claim (art. 2503 CCQ). Those provisions are of public order and cannot be varied by an insurance contract when Québec law applies (art. 2414 CCQ). Québec law applies to an insurance contract when it is subscribed by a person residing in Québec, if the policyholder applies for the insurance in Québec, or if the insurer delivers the policy in Québec (art. 3119 CCQ). In other words, liability insurance policies are governed by Québec law. Claim expenses and legal fees are not permitted to erode the limit of the policy.

There is an important exception: Liability insurance policies can derogate from art. 2503 CCQ and provide that claim expenses and legal fees *can* erode coverage when the policy limits are at least $5 million and: 1) the insured is a large business for tax purposes, 2) the insured is a foreign business for tax purposes, or 3) the insured is a reporting issuer for securities purposes.

Costs Recovery

In all common law provinces and territories, legal court costs are paid by the unsuccessful party, in addition to what they have paid their own counsel to run the litigation. This is a key difference between civil litigation in Canada and the United States, where, for the most part, the parties bear their own costs. In short, in common law Canada, "the loser pays".

The loser does not pay all costs, however. In some circumstances the legal costs payable are quite low. In others, the legal costs that have been incurred and are likely to be payable can be a deterrent to continuing with litigation.

In rare circumstances, at the costs phase of a trial (after argument and after judgment is rendered), the trial judge may order that the unsuccessful party must pay the full legal

bill that the successful party has incurred. Those costs are called solicitor client costs or full indemnity costs.

In the majority of circumstances, the costs payable are less than the full legal bill of the successful party. In all cases, the amount payable is in the discretion of the trial judge. The starting point in all cases are the rules of court of the province or territory in which the litigation is conducted which will include any local costs tariff. The trial judge can adjust the tariff total up or down according to several factors set out in the provincial or territorial rules of court. In some jurisdictions, the tariff total is about 25-30% of the actual costs. In others it may be 60-70% of the actual costs.

In some common law provinces and territories parties, such as Alberta, the tariff amount is quite low compared with the actual costs. The successful party involved in complex litigation in Alberta can apply for a multiplier of between two- and five-times tariff.

Further, in all common law provinces and territories, the parties may exchange formal offers that can double the amount of court costs otherwise payable. In all cases, a party's actual legal bill will be the ceiling for the court costs that are awarded in each case.

Costs are assessed following motions, court applications, the trial and any appeal. For example, a party that is unsuccessful in an application that does not dispose of the action can be held liable to pay costs to the successful party regardless of the outcome of the litigation. In one province, such costs are usually payable "forthwith".

Costs liability is a deterrent in some cases to a 'deny everything' defence. If the trial judge determines that one or more issues that prolonged the litigation ought to have been conceded early in the litigation, then the defendant can be held liable for substantial costs, as the litigation tactic prolonged and unnecessarily complicated the litigation.

The 'loser pays' cost recovery rules of the common law provinces and territories do not apply in Québec. In Québec, the reimbursement of legal fees by the losing party is the exception and not the rule. To obtain an order that the losing party must pay legal costs, the successful party must demonstrate that, on the balance of probabilities, the losing party abused its right to institute legal or civil proceedings. Abuse of process is established by proving unnecessary legal action or that the losing party acted recklessly. That standard is met by proving that a "reasonable and prudent person" in the same circumstances would have concluded that there is no valid basis for litigation, whether as a plaintiff or a defendant: *Turcotte v. Turcotte*, 2021 QCCA 567, par. 81

Consequently, for the most part in Québec, each party bears their own costs of civil litigation. However, some litigation disbursements such as bailiffs' fees and costs, court office costs, and witness indemnities can usually be recovered from the losing party, unless the Court decides otherwise (art. 339 and ss C.C.P.).

The Relative Absence of Dispositive Motion Practise

In the United States, defendants will commonly apply to the court having jurisdiction at an early stage in the litigation to have the action dismissed. These applications are called dispositive motions.

Those applications are seldom filed in Canada. Canadian Courts will not grant those applications where the facts are in dispute, or where credibility is in issue. If such an application is brought and refused in a common law province or territory, then the party that filed the application will be liable for court costs payable to the opposing party. Further the party that is applying for the motion will sometimes turn a weak case into a stronger case by pointing out fatal flaws that can be cured though an amendment to the pleadings and or obtaining additional evidence.

All provinces and territories have summary trial and summary judgment procedures that are often employed following oral discovery. Further, notices to admit facts can sometimes accelerate and simplify the litigation.

Pre-Trial Discovery

Document discovery in Canada is similar to, but generally not nearly as broad as in the United States. Solicitor client privilege (known as attorney client privilege in the United Sates) is considered a central tenet of the legal system and is vigorously protected by Canadian courts. Unless waived by the client, that form of privilege is permanent. Litigation privilege is similarly protected in Canada as in the United States. That form of privilege typically lasts only through to the conclusion of the litigation in which it arose.

There are significant differences in the scope of oral discovery. In Canada, oral discovery is typically limited to a single representative of each party. Oral discovery of a non-party witness, or of more than one representative of each party, is not a general right and must be granted by court order. In some provinces and territories, there is a right to examine employees and former employees, but the number of examinations conducted is controlled.

Further, oral discovery is almost never videotaped. The oral discovery is simply transcribed by a court reporter.

Since there is typically only one representative of a corporate party, the issue of who is put forward can be contentious. The rules in the Canadian provinces and territories provide that it be someone like an employee, director or officer. The party being discovered can decide who to put forward, but if challenged, that party will have to establish that the representative is someone with sufficient knowledge of the matter in issue. Sometimes the most appropriate person may be a former employee (for example) in which case a motion would be necessary unless there is agreement. And if the former employee is outside the jurisdiction of the court, then the party that wishes to conduct the examination must obtain an order not only to examine that former employee, but they will also have to apply to a court having jurisdiction in the place where the former employee is resident to enforce that order. In that event, the oral

discovery will place in the location of the witness under the civil court rules of the jurisdiction where the action is taking place.

Most provinces will allow oral expert discovery on application, but that is seldom exercised.

Trials

For the most part, and with some regional exceptions, civil trials in the common law provinces and territories are judge alone trials; however, one or both parties can apply to the court to have the matter tried by a civil jury. With exceptions, those applications are seldom granted. When they are granted, the party applying for a civil jury trial in some provinces and territories must post a bond with the court to cover the costs associated with running a jury trial.

In other jurisdictions in common law Canada, jury trials remain a right of civil litigants upon the filing of a jury notice at the outset of pleading, but that right is not absolute. If court resources or other factors suggest a jury trial is inappropriate or impractical for speedy and efficient justice, including if the matter is considered too complicated for a jury, a judge can strike the jury notice. Cases involving public bodies are not tried by jury.

Civil bodily injury trials in British Columbia are an exception to those statements. In British Columbia there is a presumptive right to a jury trial in cases of bodily injury. However, the costs of exercising that right are significant as the applicant must pay the costs of securing the jury pool and post a bond for the daily jury fees through to the end of the trial.

Civil juries were abolished in Québec many years ago.

Judges at all levels of the superior courts are appointed by the Canadian Federal Cabinet. Judges are not elected anywhere in Canada. This gives the governing party of Canada a significant hand in shaping the judiciary.

A lawyer admitted to and in good standing at the bar of a common law province or territory may exercise temporary mobility rights on behalf of a client to appear in any other court in any other common law province. This is not the case in the Territories. To appear in the courts of the Yukon, the Northwest Territory or Nunavut, one must be a member of the Law Society for that territory. As a practical matter, it is not advisable to appear in the courts of another province or territory without the assistance of local counsel, due to local rule and practice differences.

At this time, only lawyers who are admitted to the Barreau du Québec may appear in the Courts of Québec.

Gowning

Lawyers who appear in the superior and appellate courts of all provinces and territories before a judge of those superior or appellate courts in proceedings in which witnesses are examined must be gowned. This is the case whether the proceedings are in person or virtual. In some provinces, such as Ontario, lawyers must be gowned for all motions and court applications in the Ontario Superior Court, even if witnesses are not involved. In all provinces and territories gowning is not required for case conferences, settlement conferences, trial management conferences, trial scheduling court, or pre-trial conferences.

Canadian legal court attire or gowning (and which lawyers also call legal robes) emulates what is worn in the UK and consists of a wool/cotton robe with bell sleeves; a waistcoat; a white wing collared court shirt with tabs. Both men and women can wear charcoal or black pants although it is customary to wear pants made with the traditional barristers' morning stripe fabric. Shoes are to be black. Women can also wear a black, grey or morning cloth striped skirt with nylons.

King's Counsel (K.C.'s) wear a silk robe and a waistcoat with a pronounced cuff.

Judges wear similar attire to the K.C.'s but they have a coloured sash corresponding to their level of court. In Alberta, the Judges of the Alberta Court of King's Bench wear red sashes and those who sit on the Alberta Court of Appeal wear black sashes.

Barristers house their gowns in a blue velour bag. K.C.'s use a red velour bag and Judges, a green velour bag.

The gown is not to be worn outside the court room. In some provinces and territories, one must use the court provided locker room to change into and out of court attire before leaving the courthouse building. In others, one can wear court attire minus the robe outside the courthouse building.

As the English legal wigs were deemed to be too expensive and hot, they were abolished in British Columbia in 1905 and soon after in all other provinces and territories (although the Admiralty Court sitting in British Columbia continued to wear them until 1940). It is interesting that wigs are still required of King's Counsel in Australia (except in the States of 'Victoria and Western Australia) and by all lawyers appearing in the superior courts of New Zealand.

Structure of a Damage Award

Nonpecuniary general damages for bodily injury (pain and suffering, loss of amenities and loss of expectation of life) were capped in 1978 by the Supreme Court of Canada at $100,000. Today that amount is about $450,000. That award is for the very worst of injuries. Damages for lesser injuries are scaled downwards in relation to the cap.

Fatal accident bereavement damages are set by statute in all common law provinces and territories. For example, in Alberta, the award is $82,000.00 for a spouse or

interdependent partner of the deceased; $82,000.00 for a parent or parents of the deceased (divided equally if the action is brought for both parents) $49,000.00 for each child of the deceased.

In Québec, a claim may be brought by the heirs of the deceased between the time of the incident and the time of death. Indemnity for pain and suffering of the deceased can be awarded. Direct actions post death are also possible. A claim may be made by a person (directly related to the victim or indirectly related) who has suffered a significant loss from the victim's death. Substantial evidence must be provided to make a claim.

Pecuniary awards in injury and fatal accident claims are not capped in either common law Canada or Québec. In a bodily injury lawsuit, the injured party may recover past loss of income, future income loss, out-of-pocket expenses, cost of care to the date of trial and the anticipated future cost of care. In Québec, pecuniary compensation can include a sum for temporary or permanent physical incapacity.

There have been some very significant Canadian awards for bodily injury claims. In the 2009 decision, *MacNeil (litigation Guardian of) v. Bryan*, [2009] O.J. No. 2344 Katherine-Paige MacNeil, aged 15, was riding in the backseat of a car driven by 16-year-old Trevor Bryan. MacNeil was the only passenger who wore her seatbelt. The driver ran past a stop sign, hit a ditch, and landed in a field off a highway. The accident caused MacNeil several injuries, such as a fractured skull and permanent brain injuries. The court awarded her $18.4 million. Of that amount, $15 million was for her future care consisting of the care of a future support worker for 16 hours a day for the remainder of her statistical life span. There are others where the damage award has surpassed $20 million. The cost of future care and income loss are almost always the drivers of substantial awards.

For the most part, contract and non-injury tort damages are recoverable in the normal course and are not capped (unlike injury damages). There are statutory and some common law exceptions.

Pre-Judgment Interest

An unsuccessful party must pay pre-judgment interest from the date that the loss was incurred to the date of judgment (in addition to the indemnity award and court costs).

In some common-law provinces and territories, pre-judgment interest is awarded on non-pecuniary general damages from the date the injury occurred. The rate for such damages is set by statute in those jurisdictions. For example, in Alberta the rate is 4%. In other provinces, there is no ability to claim pre-judgment interest on non-pecuniary, general damages.

Pre-judgment interest is claimable on all pecuniary damages in all provinces and territories. The rate applicable to pecuniary loss (such as an income claim) is set by the provincial and territorial governments through regulations passed on an annual basis. For example, the current pre-judgment interest rate on pecuniary loss in Alberta is 5.15% and most other Canadian jurisdictions are in the same range.

Substantive Law Differences

Provincial and Territorial Health Care

Canadian residents are entitled to health care at no cost to themselves. Prescription and non-prescription drugs, medical appliances, ambulance charges and dental work are not covered under the provincial and territorial regimes. However, if the injury or illness arises from a tort or breach of contract, the common law provincial or territorial government that has incurred the costs can subrogate against the at-fault party to recover the costs incurred and the anticipated future cost of care.

Workers Compensation Legislation

A significant difference between civil litigation in the United States and Canada is the general absence of general tort and contractual liability of most employers for occupational workplace injuries. All Canadian provinces and territories have provincial and territorially managed worker compensation programs or schemes that largely prevent injured workers from suing employers. These worker compensation schemes have been in place for many decades.

Under these schemes, certain industries are required to carry workers' compensation coverage. Notably, this includes the construction industry. Under these schemes, an employer cannot be sued for the workplace injuries sustained by their employees. The injured employee's injury is assessed, and the cost of care is covered by benefits payable under the applicable scheme (including those costs that would be otherwise payable under the provincial health care system). The injured employee is also entitled to apply for disability benefits payable under the scheme.

In most provinces and territories and in most industries, entities that meet the definition of an employer under the scheme are protected against workplace injuries by *any* person who meets the definition of a worker. That means that the scheme prevents lawsuits by *any* worker against *any* employer – not just that worker's employer.

Several provinces (and notably Ontario) have an important exception to "any employer and any worker" immunity. Certain industry categories such as shipping, railway and related operations, airlines offering international passenger services, cross-border bridge building/maintenance, telecommunications have limited immunity where employers in those industries are only immune to civil lawsuits filed by their own employees.

In the case of a workplace fatality, the schemes pay pensions to spouses and dependent adults and children.

If the workplace injury is jointly caused by entities that are not employers under the scheme and an employer recognized by the scheme, then the injured worker can sue the non-protected entities. In that case, the liability is assessed severally against all entities but there is no recovery against the exempt employer.

All provincial and territorial worker compensation schemes can subrogate against non-protected entities for the costs incurred by the scheme to the date of trial as well as future costs of care and disability payments.

Requests can be made to the provincial and territorial workers' compensation scheme at the adjusting stage to determine if the entities involved in a claim are workers or employers under the applicable provincial or territorial scheme.

When Will Canadian Courts Assume Jurisdiction Over a Claim?

Canadian common law courts will assume jurisdiction over a claim if the tort occurs in a Canadian province or territory. In the case of a contractual claim, Canadian common law courts will assume jurisdiction if the contract is shown to have been made in a Canadian province or territory.

In Québec, private international law provides for jurisdiction in civil and commercial claims if Québec is the place where:

1) the defendant has an establishment;

2) the fault was committed, or the injury suffered; or

3) at least one of the obligations arising out of the contract was to be performed (art. 3148 CCQ).

Canadian common law courts will also tend to assume jurisdiction over an insurance coverage dispute, even if the contract was made elsewhere, provided a sufficient connection is shown to an interest impacted in the province or territory and provided no other, more appropriate forum, is proven. Canadian conflict of laws rules begin by assuming the foreign law of the contract is the same as local law, applying the local provincial or territorial law to interpret the contract. This can be rebutted with proof offered that the foreign law is different from the local law. Such proof must also meet certain evidentiary requirements.

Québec Courts will also have jurisdiction over an insurance coverage dispute where Québec is the place where: 1) the policy holder (the insured) or the policy's beneficiary is domiciled or resides, 2) the insurable interest is situated, or 3) the loss occurred (art. 3150 CCQ).

Canadian courts will also assume jurisdiction over insurance claims where coverage is in dispute if the insurer is (or was) licensed in Canada, or if not licensed, where there is a sufficient nexus with performance under the policy in a Canadian province or territory. This can in some instances set up cross-border parallel proceedings which are not easily resolved. Any substantive assertions favouring a party to the foreign contract which are only available under foreign law therefore require careful review.

A pre-litigation settlement of a cross-border coverage claim also requires close attention particularly when there are other potential non-settling interests involved. This includes knowing whether the settlement must be disclosed in any later litigation, and forecasting what steps might be required to extricate the settling party from such litigation.

Insurance Considerations

Motor Vehicle Liability & Insurance

For the most part, Canadian individuals and corporations carry higher insurance limits than their American counterparts.

Both motor vehicle liability and motor vehicle liability insurance are highly regulated by the Canadian provinces and territories. British Columbia, Saskatchewan, Manitoba and Québec are no-fault jurisdictions meaning that injured parties are not entitled to sue for non-pecuniary or pecuniary damages arising from a motor vehicle accident. British Columbia became a no-fault jurisdiction on May 1, 2021, meaning that injury lawsuits from collisions occurring before that date remain subject to the former tort regime.

Bodily injury lawsuits arising from motor vehicle collisions in Alberta, Ontario, Atlantic Canada and the territories are tried under a tort regime, however, several of those provinces and territories have restrictions on the damages available for injuries that meet statutory definitions of “minor injury”. Advice of counsel in the province where the accident occurred is essential to determine the scope of liability for a potential at-fault party arising from the use and operation of a vehicle.

Third party motor vehicle liability insurance is mandatory in all provinces and territories that are not no-fault. The insurance follows the vehicle, not the insured. Similarly, motor vehicle liability insurance is required for all vehicles registered in a no-fault province that are driven outside that province.

Most individual motor vehicle liability insurance policies bear policy limits significantly in excess of the provincial and territorial statutory minimum of C$200,000. Although there are a few motor vehicle liability policies with limits of C$500,000, most are C$1 million.

American insurers are exposed to Canadian motor vehicle liability claims if their insureds are involved in collisions in a Canadian province or territory. The American insured must be defended against such claims in the province or territory where the collision occurred.

Most American insurers have filed an undertaking with the provincial and territorial superintendents of insurance under which they agree to reform their policies to match or exceed the minimum third-party liability limits in the province or territory where the collision occurred. As stated above, for the most part that minimum limit is C$200,000. If the policy in issue carries third party liability limits in excess of the minimum limits, then those limits will be available to resolve the civil claim or claims arising from the

collision. For the most part, the undertaking does not require American insurers to reform the first party accident benefits available under the American policy to match those available to residents in the province or territory where the collision occurred which would be available to the American insured.

In all Canadian provinces and territories that are not no-fault jurisdictions, insureds are able to obtain family protection coverage and uninsured / underinsured motor vehicle liability coverage.

Other Liability and Property Insurance

With few exceptions, the general liability insurance market is still “occurrence” based. Thus, the “long tail” trigger and allocation issues which U.S. practitioners deal with are still very much alive in Canada. There is little or no demand in the Canadian market, or any real underwriting incentive, for a shift to a “claims made” form for general liability coverage, except in certain higher risk categories where “occurrence” coverage is otherwise too expensive or hard to place.

Underwriting is more likely to be done on a “claims made” or “claims made and reported” basis for specialty liability coverages including E&O/professional liability, D&O, Environmental and Media coverages. Underwriting of these risks is also more likely to be built on paper issued by U.S., London and other international markets, some operating through licensed Canadian branches or managing general agents.

Unlike motor vehicle insurance, the general liability market is not regulated, in the sense that there are no prescribed general liability wordings. Most CGL policies are like those issued in the United States, but they are not identical. Some insurers tailor their policies to specific economic sectors.

About 5% of Canadian corporations are multi-nationals with head offices in Canada. As one would expect, these entities are most often insured under custom manuscript primary policies that are excess to significant self-insured retentions. The retentions and primary layer coverages are often managed through fronted programs reinsured back to captive insurers. A tower of excess coverage will sit excess to the primary policy and as noted, for specialty coverages, this will tend to include international market participants. Depending on the scope of operations, this program may include what is sometimes referred to as Master Coverage intended to respond for the parent company or any foreign affiliate as excess to a non-domestic local policy. This master coverage can apply to a loss anywhere in the world that engages the liability of the Canadian subsidiary or affiliate.

The remaining 95% of Canadian corporations (both privately and publicly held) will usually have a bundled commercial insurance package policy that will contain liability, first party property coverage and fleet motor vehicle coverage. For the most part those policies carry general liability limits of about $5 million or more. Some of these corporations will have excess or umbrella coverage. Such programs may include a “North America” clause to cover exposures in the United States as well.

Insurer Bad Faith & Extra-Contractual Liability Exposure

Compared to the United States, there is a relative absence of bad faith litigation against insurers in common law Canada. There are many reasons for this absence: non-pecuniary general damages for pain and suffering are capped under the common law; fatality awards are statutorily capped; entities that are liable for civil judgments carry higher liability limits than their American counterparts; there is a loser-pays court costs recovery system in all common law provinces and territories; the losing party must pay pre-judgment interest on amounts owing including, in some provinces and territories non-pecuniary awards.

In Québec, bad faith liability is seldom found - there are only a few reported cases that have found an insurer liable due to bad faith in the resolution of an insurance claim.

In view of this relative absence of bad faith liability, the instances of bad faith "set up" steps in common law jurisdictions are also rare. Courts have recognized that an insurer may well be "wrong in good faith". The issue which occasionally attracts a punitive damages award is whether the insurer is handling the claim unreasonably and therefore in bad faith.

There is precedent in Canada for that type of bad faith liability. For the most part, that precedent is relegated to first party property claims and disability claims. The leading case allowing bad faith damages is the Supreme Court of Canada decision, *Whiten v. Pilot Insurance Co*., [2002] 1 S.C.R. 595. That decision arose from a first party property claim under a homeowner' policy arising from a house fire. The insurer denied coverage claiming that the insureds had deliberately set fire to their house. The insurer was sued based on its conduct in the adjusting of the claim. The arson defence was discredited at trial. An Ontario jury (a rare instance of a civil jury trial) held that the insurer must pay its insured $1 million in bad faith damages. The Ontario Court of Appeal reduced the award to $100,000. The Supreme Court of Canada reversed the Court of Appeal and upheld the jury award stating that the arson defence was contrived and unsustainable. This is the current 'high water mark' of bad faith liability in Canada. It will likely hold for many years to come.

Bad faith liability is still often pled (even though seldom proven). Where the insurer's absence of good faith in the handling of a claim is truly in issue, then the legal opinions that the insurer relied upon during the handling of the claim, including those of coverage counsel, are producible, together with the adjusters' entire file.

There is no reason in principle why a Canadian court would refuse enforcement of an American bad faith award against a Canadian insurer even if the amount in issue is greater than C$1 million.

Claims Handling Considerations

In Canadian property claims, contractors write the estimates, not the independent adjusters. Unless specifically restricted by the insurer to a “task-based” assignment, Canadian independent adjusters tend to handle and investigate the claim for the insurer from beginning to end.

In Canada the role of the independent adjuster paid for by the insurer is not intended to be adversarial. The adjuster is expected to adjust the claim in good faith, looking for coverage, rather than exclusion, in keeping with principles of fair dealing. In this context, it is not unheard of to see an independent adjuster modestly assisting the policyholder by advising what information the insurer requires for considering a proof of loss. The insurer and not the adjuster is tasked with decision-making once the proof of loss and supporting documents are received.

Staff adjusters are also held to the same standard of fair dealing with the insured despite the potential conflict of interest between that adjuster and the adjuster’s employer.

American insurers cannot adjust a property or a liability claim arising in Canada through a third-party adjuster that is only licensed in the United States. There are regulatory requirements in all provinces and territories for third party adjusters to be licensed in the jurisdiction where the claim occurred. This is particularly true for Québec claims. For the most part, these licensing requirements do not apply to staff claims handlers and adjusters employed by the insurer.

In the event of a Canadian “CAT claim’ insurers doing business in Canada that have American operations routinely send teams of adjusters from the United States to Canada. In those instances, in addition to obtaining Canadian work permits, the insurer must contact the provincial regulatory adjuster licensing body that has jurisdiction in the area impacted by the claim and apply for temporary licenses for these adjusters. Those licenses are in place for the duration of the exigent circumstance. An American adjuster operating in Canada without either a work permit, or a temporary adjusting license, is liable to be deported.

Conclusion

This paper sets out a few salient differences between civil litigation in the United States and Canada. These differences impact strategy and litigation tactics meaning that litigation practice is different in Canada than in the United States. Hopefully the differences that are highlighted will act as a caution against the belief that because it is done in the United States, it must be the done the same way in Canada.