Don't Be Scared!

Navigating Subrogation in Canada *Part II*

A LOOK AT SUBROGATION RIGHTS FOR VEHICLE DAMAGE OF OUT-OF-PROVINCE INSURERS ARISING FROM MOTOR VEHICLE ACCIDENTS

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INTRODUCTION

Building on our last article *Navigating Subrogation in Canada,* this effort will explore the subrogation rights of out-of-province insurers arising from motor vehicle accidents which occur in either the province of Ontario, Alberta, or British Columbia, as it relates to damage to vehicles or their contents.

As we reviewed last time, in Canada subrogation is overseen by the common law, with limited modifications made by statutes and contracts. Canada also adheres largely to a "no-fault" insurance scheme, which imposes limitations on the nature of claims that can be advanced arising from motor vehicle accidents.

This article will attempt to answer the following: 1) what property damage subrogation rights do individuals who carry out-of-province insurance have when involved in a motor vehicle accident in Canada; and, 2) whether non-resident drivers are owed the same property damage recovery rights as an insured of that province.

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ONTARIO

Section 263 of Ontario's Insurance Act ("OIA") narrows an insurer's ability to recover amounts paid to its insureds relating to damage to vehicles or their contents. Specifically, paragraph 5(b) dictates that:

> "An insurer, except as permitted by the regulations, has no right of indemnification from or subrogation against any person for payments made to its insured under this section."[1]

This paragraph was added to the OIA in the 1990s, as part of the introduction of a direct compensation scheme, in order to offer additional rights to insureds while limiting common law causes of action for personal injury and property damage resulting from motor vehicle collisions.[2] Prior to this time, an insured sought damages in a tort-based system, initiating a (protracted and costly) chain reaction where an insured claimed against his/her insurer, who then asserted a subrogated claim against the insurer of the other driver to the extent of that driver's fault.[3] Under the current system, each of the drivers' insurers absorbs the cost of the property damage claims, thus avoiding several claims.[4]

Under the current system in Ontario, where damage occurs to a vehicle or its contents, the vehicle is insured by a motor vehicle liability policy issued by an insurer who is licensed in Ontario (or agrees to be bound by Ontario rules), and the damage is the result of an accident involving at least one other similarly insured vehicle, then such damage falls within the direct compensation scheme.[5] In such a case, the vehicle owner can only claim as against his own insurer for the damages suffered. He has no right of action as against anyone involved in the accident, and his insurer has no right of subrogation.[6]

Interestingly, there are a number of exceptions to this scheme. Not surprisingly, the scheme does not apply to damage to cargo carried for reward, which is the subject of

ONTARIO *CONT.*

a very different statutory scheme. The jurisprudence has also indicated that paragraph 263(5)(b) does not apply to actions in breach of contract, including contracts between leasing companies and drivers that agreed to return a car undamaged.[7] Further, property covered by insurance other than through direct compensation in a motor vehicle policy (such as damage to a trailer covered by a holiday trailer policy)[8] may also be exempt from section 263.

Finally, the section does not apply when both vehicles involved in an accident are owned by the same person, or where the owner of one involved vehicle is driving another of the insured vehicles.[9]

EACH OF THE DRIVERS' INSURERS ABSORBS THE COST OF THE PROPERTY DAMAGE CLAIMS, THUS AVOIDING SEVERAL CLAIMS.

BRITISH COLUMBIA

British Columbia has taken a rather different approach to compulsory automobile insurance than Ontario, and has mandated that such insurance be provided by a Crown Corporation, the Insurance Corporation of British Columbia ("ICBC").

Although the bulk of vehicle insurance in British Columbia is provided through ICBC, there are, nevertheless, many instances where other insurers are engaged, such as through optional insurance contracts[10] (e.g. excess insurance coverage), or where an accident involves an out-of-province driver/insurer. In those instances, insurers are afforded the right of subrogation in connection with property loss or damage.

However, it should be noted that the statutory regime in British Columbia establishes a priority scheme when insurance limits are at issue. Claims arising out of injury or death have priority over claims arising from property loss or damage to the extent of 90% of the applicable insurance limit. This means that in situations where there is a significant claim for injury or death likely to exceed policy limits, subrogating insurers may only be able to recover up to 10% of the policy limits. Finally, although there may be uninsured motorist coverage afforded to victims of an accident involving an uninsured motorist, this coverage does not extend to property loss or damage.[11]

ALBERTA

Section 18 of the *Alberta Insurance Act* (the "AIA")[12] provides that no insurer may insure a risk in Alberta unless the insurer holds a valid and subsisting license for a class of insurance that covers that risk. In order to be granted a license, the out-of-province company must file an application with the Minister. It is only when the Minister is satisfied that the requirements of the *AIA* are being met that a license will be granted. These requirements include providing the basic benefits that are required under the *AIA*.

In general, section 546 of the *AIA* establishes a statutory right of subrogation for any amounts paid or liability assumed under a contract as against any person and its right to bring an action in the name of the insured to enforce those rights. This applies to all insurance contracts, and is not specific to automobile insurance.

As such, Alberta has set up a system similar to British Columbia, which allows for subrogated claims to be advanced for damage to vehicles. Unlike British Columbia, however, it relies on the private insurance market to provide the policies.

Under the standard automobile insurance policy in Alberta, the insurer is not liable for any more than the actual cash value of the vehicle.[13] Any additional coverage must be expressly sought for a vehicle.

CONCLUSION

The regimes present in the various Canadian provinces differ widely as to whether subrogation is available for damage to vehicles or their contents. As such, out-of-province and foreign subrogation professionals must be vigilant in determining subrogation rights in the context of the location where accident took place.

Using this article as a starting point, subrogation professionals in North America would be well advised to educate themselves on the rights and limitations to subrogating for a motor vehicle accident that occurs in a Canadian province.

Endnotes:

[1] *Insurance Act,* RSO 1990, c I-8, s 263(5)(b).
[2] *McCourt Cartage Ltd v.Fleming Estate* (1997), 35 OR (3d) 795 at para 2.
[3] *Supra* note 2 at para 3.
[4] *Ibid.*
[5] *Insurance Act,* RSO 1990, c I-8, s 263(1)
[6] *Insurance Act,* RSO 1990, c I-8, s 263(5).
[7] *583809 Ontario Ltd v Kay* (1995), 24 OR (3d) 445 at para 17.
[8] *Lange v 882819* (2006), 85 OR (3d) 395 at para 11.
[9] *Insurance Act,* RSO 1990, c I-8, s 263(9)-(10).
[10] *Insurance (Vehicle) Act,* RSBC 1996, c. 231, at s. 61
[11] *Insurance (Vehicle) Regulation,* BC Reg. 447/83, at s.49.2
[12] *Insurance Act,* RSA 2000, c. I-3.
[13] *Insurance Act,* RSA 2000, c. I-3, at s. 556

ADAM GRANT has acted on a range of civil motions, trials, appeals, and mediations for a broad range of clients involving many aspects of business and insurance litigation including construction liens, corporate oppression, and breach of trust. His practice at McCague Borlack is primarily focused on subrogation matters, involving all types of losses including fires, floods, theft, negligent construction, product and equipment defects. He is the chair of McCague Borlack's Subrogation practice group.

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CLAIMS ARISING OUT OF INJURY OR DEATH HAVE PRIORITY OVER CLAIMS ARISING FROM PROPERTY LOSS OR DAMAGE TO THE EXTENT OF 90% OF THE APPLICABLE INSURANCE LIMIT.