

The Right of an Excess Insurer to Intervene in Litigation

By Odette Jobin-Laberge



On February 20, 2002, Mr. Justice Richard Mongeau denied Zurich's motion for permission to intervene in the matter of *Boiler Inspection and Insurance of Canada and Prima-Viande Limited v. Corporation Municipale de la Paroisse de St-Louis de France and Manac Inc.*, 500-05-012751-903.

Prima-Viande and Boiler (in subrogation) sued Manac for \$13 million following a fire which occurred on May 20, 1990.

At the outset, Royale, Manac's principal insurer (for \$5 million), filed an appearance and assumed the defence.

Zurich retained attorneys as of June 1991, when an amendment to the original action increased the claim from \$5 million to \$13 million and thereby brought its coverage into play. No motion to intervene was made at that time. A motion for a conservatory intervention was filed in February 2002, namely, 11 years later.

Zurich claimed that it had a pecuniary interest to intervene and sought the authorization to submit its objections and to cross-examine the parties, if necessary, as well as file pleadings. However, Zurich declared that it had no specific expert evidence to present.

The motion was dismissed on the grounds that no legal interest had been shown and that the motion had been filed too late.

Moreover, the application had been filed too late because the introduction of a new party into the dispute 11 years later could upset the balance and modify the legal contract already established between the parties, and this would not serve the ends of justice.

The delay for filing an appeal has not yet expired.

It should be noted that the statements regarding the absence of a legal interest could apply irrespective of the late filing of the motion in this case. Thus, it would seem that the role of the excess insurer is limited to retaining counsel. What will be the outcome of this case? Stay tuned...

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As regards the issue of interest, the court held that the interest could not be solely pecuniary. Zurich did not have an obligation to defend under its contract and Royale had assumed the defence of the insured in a faithful and competent manner. Given that a party cannot be represented by more than one law firm, the court was of the opinion that the only role that an attorney for an excess insurer is to appear as counsel.



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