IN FACT AND IN LAW

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The duty to defend revisited... and the right of a party to choose its own lawyer

By Odette Jobin-Laberge

In what is probably his last decision before taking up his appointment to the Supreme Court, Mr. Justice LeBel once again ruled on the extent of the duty to defend in *Association des Hôpitaux du Québec* v. *Fondation pour le Cancer de la prostate et Centre hospitalier de l'Université Laval*[1].

In this case, the Association des Hôpitaux du Québec (the A.H.Q.) was the insurer of Centre hospitalier de l'Université Laval (C.H.U.L.) and of one of its affiliated foundations, *La Fondation* pour le cancer de la prostate (the *Fondation*).

A certain Mr. Lessard, now deceased, was involved in a prostate cancer screening program run by Dr. Labrie, a physician employed by the C.H.U.L. The hospital's research program was funded by the *Fondation*. Mr. Lessard's estate alleged that a diagnostic error had been committed and it filed a claim for damages concurrently against the *Fondation*, the C.H.U.L. and its physicians. These physicians were represented by lawyers appointed by their own insurers, while the A.H.Q had appointed a Quebec City firm to represent the C.H.U.L. and the *Fondation*. There was no denial of coverage in the case, and C.H.U.L. had no problem with the services provided by the firm appointed by the A.H.Q.

Unfortunately, a dispute arose regarding the conduct of the *Fondation*'s defence. The *Fondation* wanted a more aggressive defence, and in particular, wanted the defence to allege specifically that the evolution of the disease and the eventual death of Mr. Lessard had not been caused by a screening error but rather by Mr. Lessard's own decision to stop hormonal therapy.

The defense lawyers refused to follow that defence strategy, having decided on a different one which called for the filing of a Motion to Dismiss alleging the lack of any relationship in law between the *Fondation* and the plaintiffs, concluding to the dismissal of the case against the *Fondation*. The *Fondation* totally disagreed with this strategy, and hired its own lawyers who then filed a Motion to be substituted as attorneys of record for the *Fondation*, and a Motion to Disavow the Motion to Dismiss.

The A.H.Q. contested the Motion for Substitution, arguing that as insurer, it had complied fully with its obligations to provide a proper defence, and that its right to control the defence entailed the right to decide on the approach to be taken, as well as the right to retain the services of lawyers in whom it had confidence. The insurer also argued that the *Fondation* was in breach of its obligation to cooperate with the insurer, and that if the situation were to continue, the insurer was entitled to cease providing the defence.

The judgment of the Superior Court noted that the *Fondation* also alleged that it feared the insurer would settle the case without the *Fondation's* consent, thereby compromising its reputation; the *Fondation* added that it wanted to institute a cross claim for damages for defamation.

The Superior Court granted the Motion for Substitution, citing the fundamental principal of law that a party is entitled to choose its own lawyer; but the Court did not rule on whether the duty to defend was an ongoing one, nor did it render a decision regarding the payment of the fees of the *Fondation's* new lawyers, considering that this was a matter to be settled at a later date.

A Motion for Leave to Appeal was granted; the A.H.Q. intervened and substituted itself for the law firm in the appeal from the decision authorizing the substitution of attorneys.

Justice LeBel summarized the applicable principles as follows:

- In consideration for assuming the costs of the defense and of any eventual indemnification, liability insurance contracts give insurers important rights; the most important is the conduct of the defence, which imposes a corollary duty on the insured to collaborate faithfully with the insurer in this defense. (Paragraph 26)
- The insured had nothing to fear given that the contract stipulates that the insurer could not settle a claim resulting from professional negligence without the insured's consent; however, if the insured were to withhold its consent, it would risk being obliged to continue its defense at its own expense. (Paragraph 27)
- The principle of the right to choose ones own lawyer has been qualified in a manner that has been considered consistent with public order when the insured, in return for having the insurer assume the costs of the defense, gives up the right to choose its own attorney and accepts the attorneys appointed by the insurer. (Paragraph 28)

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[1] R.E.J.B. 2000-16361 and JE 2000-433

- The insurer's appointment of an attorney does not relieve this attorney from his or her ethical obligations towards the insured, and the attorney must avoid placing him or herself in a position of conflict of interest. (Paragraph 28)
- An insurer has fulfilled its basic duty to defend its insured if it proposes means of defense that would result in the complete dismissal of the lawsuit. (Paragraph 28)
- The insurer's duty to defend does not require the insurer to prepare the groundwork for a possible cross-claim by the insured or to incorporate the cross-claim in its own proceedings. (Paragraph 28)
- If the proposed defense strategy consists of procedural exceptions which would result in the dismissal of the action against the insured, the duty to defend has been properly fulfilled, but if the insured refuses to cooperate in that defense, then it is in breach of its own contractual obligation to cooperate (Paragraph 29)
- The insurer may in fact be justified in refusing to continue to fulfil its obligations if the insured fails to cooperate, and in such a case, the insurer may be entitled to ask the court to rule that the insurance contract is therefore resiliated. (Paragraph 29)
- The insured is not entitled to seek specific performance from the insurer where the insurer is fulfilling its obligations properly and in good faith, but the insured has refused the services of the attorney appointed by the insurer, (other than in circumstances where this would be necessary to resolve a potential conflict or where the attorney selected is himself in a conflict of interest). The insured cannot impose its own attorneys on the insurer and then insist that this latter pay the cost.

The Court of Appeal thus allowed the appeal in part, upholding the conclusions of the lower court judgment recognizing the insured's right to substitute attorneys of its own choosing for those of the insurer, but it also ruled that if the insured maintained its decision to have these attorneys, the insurer was no longer required to defend or indemnify the insured. The Court granted the *Fondation* insured sixty days to confirm its decision to substitute and to disavow the Motion to Dismiss. In the event that the insured confirms its decision to substitute its own attorneys for those appointed by the insurer, or fails to send a notice of its decision to accept those appointed by the insurer within these sixty days, the insurer will thus be released from its obligations.

In addition to its significance with respect to the issue of the freedom of the insurer and its designated attorneys to conduct the insured's defense, this case is noteworthy in that the Court recognizes that the insurer is not required to prepare the groundwork for a cross-claim, nor is it required to include it in the defense it is presenting. Where an insured contemplates filing a cross-claim, especially one for defamation, it must do so at its own expense, and it would appear that it must also do so in separate proceedings.

Given that Justice LeBel is now sitting on the Supreme Court of Canada and that he was involved in the Court of Appeal's decision in *Boréal Assurance Inc.* v. *Réno Dépôt Inc.*[2] as well as having drafted the majority opinion in *Zurich Canada* v. *Renaud and Jacob*[3], the decision in this case is likely to be regarded as having even greater authority on these issues.

The time limit to file a Motion for Leave to Appeal to the Supreme Court of Canada expires in early April 2000.

This is clearly a case to be followed closely!

Odette Jobin-Laberge

[2] [1996] R.J.Q., 46 (C.A.)
[3] [1996] R.J.Q., 2160 (C.A.)

Odette Jobin-Laberge has been a member of the Bar of Québec since 1981 and specializes in Insurance Law

You can contact any of the following members of the Insurance Law group in relation with this bulletin.

at our Montréal office

Claude Baillargeon
Edouard Baudry
Anne Bélanger
Jean Bélanger
Marie-Claude Cantin
Michel Caron
Paul Cartier
Jean-Pierre Casavant
Louise Cérat
Louis Charette
Daniel Alain Dagenais
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André René
Ian Rose
Jean Saint-Onge
Julie Veilleux
Evelyne Verrier
Dominique Vézina
Richard Wagner

at our Québec City office

Michèle Bernier
Pierre Cantin
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Pierre F. Carter
Pierre Gourdeau
Sylvie Harbour
Claude M. Jarry
Claude Larose
Jean-François Pichette
Marie-Élaine Racine
Judith Rochette

at our Ottawa office

Brian Elkin
Patricia Lawson
Alexandra LeBlanc

Montréal
Suite 4000
1 Place Ville Marie
Montréal, Quebec
H3B 4M4

Telephone:
(514) 871-1522
Fax:
(514) 871-8977

Québec City
Suite 500
925 chemin Saint-Louis
Québec, Quebec
G1S 1C1

Telephone:
(418) 688-5000
Fax:
(418) 688-3458

Laval
Suite 500
3080 boul. Le Carrefour
Laval, Quebec
H7T 2R5

Telephone:
(450) 978-8100
Fax:
(450) 978-8111

Ottawa
Suite 1810
360 Albert Street
Ottawa, Ontario
K1R 7X7

Telephone:
(613) 594-4936
Fax:
(613) 594-8783

Associated Firm
Blake, Cassels & Graydon LLP
Toronto
Calgary
Vancouver
London (England)
Beijing

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