

July 16, 2009

Ex-Nortel CEO Fights his Insurer > Pay My Lawyer's Fees!

A rather frequent issue is whether an insurance policy will apply to a lawsuit brought against the insured. That is, insurance premiums were paid at some point in time and now a lawsuit is brought against the insured and the question often is whether the insurance policy is required to "defend" the insured and/or provide "coverage" to the insured. See our blog for details - <http://www.bcbarristers.com/en-US/blog.aspx>

If the insurance company limits the scope of the policy's response to the lawsuit, then the insured may choose to go to Court to determine how involved the insurance policy must become in relation to the outstanding lawsuit.

As background, you can review our previous blogs for familiar scenarios, including:

- asking your home insurance to defend you in a lawsuit arising from a physical fight – [June 17 blog](#) and [May 15 blog](#);
- asking your cottage insurance to defend you when your child's friend hurts himself while visiting your cottage – [March 9 blog](#).

In [Dunn v. Chubb Insurance](#) (2009 Ontario Court of Appeal), appealing the 2009 Ontario Superior Court of Justice [decision](#), two former high level executives (Frank Dunn, former CEO – Chief Executive Office; Doug Beatty, former CFO – Chief Financial Officer) of Nortel Networks are seeking protection of Nortel's insurance policy with Chubb. They are seeking to have Chubb defend them completely against a myriad of civil lawsuits and also regulatory actions by the SEC (Security and Exchange Commission of the U.S.) and the OSC (Ontario Securities Commission). The 2008 Ontario super

Chubb has defended Dunn and Beatty for only some proceedings, leaving Dunn and Beatty to pay their defence costs for the remaining proceedings. The problem is that Chubb provided insurance coverage to Nortel Networks from 1999 to 2001; there was then a gap and Chubb resumed covered for one year in 2003/2004. Some of the proceedings deal with alleged misconduct of Dunn and Beatty (and others) during time periods outside of the policy periods and some of the allegations of misconduct are said to be outside the scope of coverage.

As is well known to Canadians, once proud Nortel Networks suffered an utter collapse over several years, along with significant accounting and financial reporting irregularities; these proceedings against Dunn and Beatty relate in part to those same accounting issues. They are seeking protection of Nortel's directors and officers liability insurance policy.

Given the various proceedings and the nature of the issues against Dunn and Beatty, the issue of defence costs is significant – millions of dollars potentially payable for lawyers fees to deal with all claims.

In [Dunn v. Chubb Insurance](#), the Superior Court held that the decision of Chubb Insurance to partially defend was correct. Dunn and Beatty appealed to the Court of Appeal, seeking greater protection and their argument lives to be heard on another day – the Court of Appeal found that the insurance policy was ambiguous and ordered that the matter be re-heard at first instance, with the parties to address certain facts and issues not addressed in this appeal. Specifically, the funding formula for defence costs within the insurance policy was apparently the issue of some negotiation (at the time of the policy renewal) and on appeal, there was insufficient evidence to assist the Court to deal with this ambiguity.

As a result, a further round of hearings will be required to determine the extent of the insurance policy's response to the proceedings against the Nortel CEO and CFO.

As an illustration of the high defence costs involved with complex litigation, the defence bill was approximately \$2 million in the recent decision of [Hanis v. Teevan](#) (2008 Ontario Court of Appeal). A former University of Western Ontario professor / laboratory director was criminally charged with misconduct relating to the school's computer system but subsequently was acquitted. That professor then sued the university for wrongful dismissal and also because the university had originally started the investigation into the alleged misconduct regarding the computers, prior to the police commencing their criminal investigation. The university's defence bill was approximately \$2 million and their insurer was found, at Trial after lengthy litigation, to be responsible for funding 95% of those defence costs incurred by the university.

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