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Indemnity Recovery Actions:
Use of Summary Trials and Document Production Obligations

In October, the Ontario Superior Court of Justice released reasons for judgment in *Intact Insurance Company v. Meyknecht-Lischer* 2019 ONSC 5998. This judgment is relevant to any Canadian surety provider, and professionals in any other business or industry that use indemnity agreements. In this case, the defendant construction companies and personal indemnitors entered into indemnity agreements with Intact, and Intact delivered performance bonds and labour and material payment bonds for various projects. The contractors defaulted on some of the bonded contracts, so Intact stepped in to satisfy bond obligations. Having incurred losses, Intact then sought indemnification, and pursued their recovery in court by seeking summary judgment.

The defendants resisted Intact's summary judgment motion, arguing that Intact had unjustifiably refused to produce documents that the defendants needed in order to assess the reasonableness of Intact's conduct in the surety claims process. The defendants disputed amounts that Intact had spent on legal, consultant, and external adjusting expenses. The court noted that sureties have an obligation to exercise good faith when they are making payments on behalf of an indemnitor to bond claimants, and that this duty to exercise good faith includes prudent expenditures. In other words, when a surety expects to recover payments from indemnitors, the surety is effectively spending the indemnitors' money and therefore must ensure that no more money is spent than the surety honestly believes is required to respond to the claim. The court found that it was reasonable and relevant for the defendants to make inquiries into Intact's internal process about expenditure decisions, and therefore the defendants were entitled to documents related to Intact's processes. Intact's summary trial application for indemnity recovery was dismissed in light of the incomplete document record.

When acting for clients seeking indemnification, counsel will often have to gauge litigation strategy between a quick, concise recovery application versus the onerous demands of complete document production and comprehensive witness discovery. The essence of an indemnity case is "we spent money, you owe us money". Despite the simplicity of the concept, the legal defences available to indemnitors open up the door to document production obligations comparable to more complex commercial litigation. An indemnitor defendant has the right to run their suspicions to ground by discovery.

In British Columbia, parties face a major scheduling headache for any application set for over two hours. The above-noted legal strategy of "we spent money, you owe us money" sounds like a two-hour ordeal at the most! But if a surety is pushed

on any of the issues that arise in the *Intact* case, a two-hour regular chambers application will not suffice. Going forward, the savvy defence counsel resisting an indemnity action will push for complete discovery and procedural compliance. Sureties then must come to terms with a more invasive production requirement from their claims handlers, and the legal expense of a longer legal procedure. Parties should expect a longer trial hearing, even if the parties proceed by way of summary trial.

It is worth noting that in the *Intact* case, Intact's right to indemnity is not gone, but they face a much tougher path to recovery.

A practice that sureties can implement to streamline the litigation process and alleviate the headache of document disclosure is to establish and diligently maintain separate or sub files for underwriting, claims, claims litigation, indemnity demands, and indemnity lawsuits. This may feel like overkill for the vast majority of files that do not become contentious, but best practices prove worthwhile when faced with litigation disclosure demands.

Authored by Christopher Schuld and Gina Addario-Berry on 02 January 2020