I. Introduction

As a result of our recent affiliation with Perley-Robertson, Hill & McDougall in Ottawa, Canada, Cozen O’Connor is uniquely equipped to handle your subrogation claims in Canada. With over 35 years of extensive experience and unparalleled subrogation expertise, we now can work with our Canadian colleagues in pursuing recovery opportunities in Canada. The unique blend of our resources in conjunction with our Canadian colleagues’ specialized litigation skills and comprehensive knowledge of Canadian law will enable us to effectively and efficiently represent your subrogation interests in Canada.

The Canadian court system, including its common law and statutory framework, is complex. Each of the ten provinces and two territories of Canada has its own set of statutes that may impact on subrogation recoveries. Early and prompt investigation and evaluation of claims is important in order to preserve all viable claims and maximize recoveries. The following discussion is intended to provide a comprehensive overview of the applicable law and procedures in Canada relating to the filing and prosecution of subrogation claims.

II. Canadian Court System

The Canadian court system is quite different from that which exists in the United States. The Canadian system has an abbreviated discovery process, strongly encourages settlement of claims and does not routinely provide for a trial by jury. These differences allow for the prompt and expeditious litigation of subrogation claims with moderate litigation expenses. These procedures also will enhance our ability to settle your subrogation claims productively and promptly.

Each province in Canada has its own provincial court system, in addition to federal courts which are reserved solely for federal issues. The provincial courts consist of a trial court, generally referred to as the
Superior Court of that province, and a Court of Appeals. Appeals from the provincial appellate courts proceed to the Supreme Court of Canada, subject to certain limitations. Property subrogation cases most frequently will proceed in the provincial courts of Canada.

If pre-suit resolution of a claim is not possible, a Statement of Claim must be filed. Within 30 days of the filing of the Statement of Claim, a Statement of Defense is required. The Canadian court system mandates pre-discovery mediation as a means of resolving disputes without prolonged and costly litigation. In most provinces, court mandated mediation must occur within 90 days of the filing of the defendant’s Statement of Defense. The parties are free to select experienced mediators who have an effective track record of resolving disputes. If mediation is unsuccessful, Canada’s civil practice rules provide for the commencement of limited discovery. Typically, Affidavits of Documents are exchanged between the parties which require a detailed identification of all relevant documents. Thereafter, a representative of each party is presented for an Examination of Discovery (a deposition). The Rules of Procedure in Canada do not permit the examination of third-party witnesses without court approval. Most often, statements are obtained from third-party witnesses that are binding upon that witness at trial. Once discovery has been completed, a mandatory settlement conference occurs before either a judge or a settlement master. Canadian courts strongly encourage settlement and work hard to resolve disputes before trial. If settlement is not possible, a trial is typically scheduled within one month. Unlike the American system, a trial by jury is less common in Canada. The provinces in Canada have certain statutory prohibitions against jury trials. In Ontario, for example, a jury is prohibited in any case against a municipality. Nonetheless, absent a statutory prohibition, a plaintiff is entitled to a trial by jury. Practically speaking though, if the damages are quantifiable and the issues are complex, the case typically will be tried before a judge, rather than a jury.

III. The Nature of Subrogation in Canada

Subrogation has its genesis in equity. The payment of indemnity gives rise to the right of subrogation. As in the United States, an insurer steps into the shoes of its insured and has no rights of its own. As such, any defenses which may be raised against the insured may also be raised against the subrogating insurer.

The subrogation rights of an insurer in Canada are dependent upon whether the insured has been completely or only partially indemnified. If the insured is completely indemnified, then the insurer maintains the right to subrogate in the name of the insured. Absent an assignment, most subrogation actions are filed in the name of the insured. When there is complete indemnity, the insurer maintains the right to control the
litigation and the insured is required to cooperate. However, the insurer is only entitled to be made whole -- not more than whole. Therefore, if the recovery from a third party exceeds the amount of indemnity paid by the insurer, the excess must be paid to the insured.

In the context of partial indemnity payments, the insured maintains the right to commence and control the litigation, including the right to settle the case. Nonetheless, the insured is obligated to protect the subrogated rights of the insurer. The common law in Canada provides that there is only one cause of action for one wrong, although certain statutory exceptions may, under some circumstances, allow an insurer and insured to file separate actions. Ordinarily though, Canadian law does not recognize splitting a cause of action. As such, both insureds and insurers must be careful not to prejudice each other’s rights. Any misconduct by either party which impairs the other’s rights, may result in an award of damages.

Under these circumstances, it is important for the insurer to be represented by counsel so that its subrogated interests are properly presented and protected during the litigation process. In the absence of such representation, the insurer may likely be uninformed about the progress of the litigation until such time as an offer of settlement is tendered. Then the insurer is without the benefit of knowing the strengths and weaknesses of the case so as to make an informed decision on settlement and maximize its recovery.

In the absence of a statutory or contractual exception, an insured is entitled to be made whole first before an insurer can share in the recovery proceeds. In addition to policy language which may provide for a proration of recovery proceeds, some provinces have enacted statutes to address the issue. For example, the Ontario Insurance Act’s Fire Insurance subsection specifically provides that where the recovered amount is not sufficient to fully indemnify the insurer and insured, the recovery will be prorated based upon each party’s respective loss. Typically, litigation costs are born by the insured until such time as there is a recovery. Then, the costs are apportioned between the insured and insurer based upon their respective recoveries. If, however, the insurer insists on the insured filing an action despite the insured’s unwillingness to do so, the insurer may be obligated to bear the costs of litigation.

IV. Statutes of Limitations

Each of the ten provinces and two territories in Canada has its own Limitations Act, which affect the time within which a legal action must be filed. Additionally, there are specific statutes in addition to the Limitations Act which may further restrict the time by which suit must be filed.

For example, the Ontario Limitations Act provides that a tort claim for property damage must be filed within 6 years after the claim accrues. Although the accrual date typically will be deemed the date of loss, this is not always the case. The Ontario Professional Engineers Act provides that any action against an engineer must be filed within 12 months from the date that the service was performed. The court has discretionary authority to extend this 12-month period if there are reasonable grounds for the extension, and an apparent basis for proceeding against the engineer. The definition of “reasonable” is not provided, making this a very fact sensitive process. Early investigation of subrogation claims is
of critical importance under these circumstances.

On the other hand, claims against architects are governed by the general Limitations Act. However, even here, the time deadline may be triggered by the date of loss, or the date the architect last performed his or her services, or by other statutorily referenced events. Limitations on the filing of actions in Ontario also may be impacted by the provisions of the Assignments and Preferences Act, the Bulk Sales Act, the Business Corporations Act, the Insurance Act, and other potentially applicable statutes.

V. Limitations on Subrogation

Unlike the United States where only parties to a contract are typically entitled to its protection, recent decisions of the Canadian Supreme Court have effectively abrogated the necessity for privity to claim immunity under a contract. The growing trend to allow third-party enforcement of waivers of subrogation has eroded the doctrine of privity of contract. The Canadian courts have enforced waivers of subrogation against unnamed parties in numerous situations. For example, the Supreme Court of Canada recently upheld a British Columbia Court of Appeals decision enforcing a waiver of subrogation provision in an insurance policy providing that the insurer waived the right of subrogation against any charters, operators and/or lessees of the insured, a dredging company. In enforcing this provision against an insurer seeking to subrogate against a charterer, the Court, recognizing that exceptions to the privity doctrine are rare, nonetheless held that privity of contract was not necessary since the waiver of subrogation specifically referred to an identified class of third-parties entitled to protection.

Also, in builders’ risk and course of construction policies insuring the construction site, waivers of subrogation have been enforced against construction site participants who were not even named in the insurance policy. This is true even where the insuring phrase “as their interests may appear” exists in the policy. Unlike the United States where such language may only provide immunity to a subcontractor for the property of the subcontractor on the project, Canadian courts have taken a broader view providing that all construction site participants, even if unnamed, have an insurable interest in the entire property absent policy language clearly indicating otherwise. Consequently, a careful analysis of the construction documents and insurance policies must be promptly undertaken in order to determine the viability of subrogation where the potential tortfeasor is an entity even remotely involved in the construction project.

The expansive interpretation by the Canadian courts of waivers of subrogation also has been applied in the context of condominium policies. The British Columbia Supreme Court recently enforced a waiver of subrogation provision against all defendants because an individual strata lot owner had been brought in as a third-party defendant. Since the condominium policy waived “all rights of subrogation” against, among others, the individual strata lot owners, the Court precluded subrogation against all of the defendants, including those not encompassed within the waiver language, merely because a strata lot owner had been joined as a third-party defendant.

Similar to the view taken by the Canadian courts on waivers of subrogation, developing law in Canada is extending immunity to third parties in the context of commercial leases. In any lease where the
landlord covenants to insure the property, Canadian courts have found the landlord to have assumed the risk of loss by agreement, thereby precluding subrogation against a negligent tenant. The same is true where the tenant agrees to insure the property and the landlord's negligence causes a loss. Courts have even extended this immunity to strangers to the contract such as employees and affiliated and related companies.

However, in the absence of a covenant to insure, Canadian courts are hesitant to grant immunity. Whereas the implied co-insured doctrine is becoming more readily recognized in the United States, it has not been the basis for immunity in Canada. Similarly, a covenant to pay for insurance is, in and of itself, not sufficient to bar subrogation against a party to a lease.

Given the broad view that the Canadian courts have taken in enforcing contractual limitations as a bar to subrogation, a comprehensive evaluation of all relevant contracts, including the policy of insurance, must be undertaken in the initial stages of the claim process to ensure that subrogation claims are identified and preserved. The analysis is a fact sensitive one focusing largely on the parties’ intent and course of dealings.

VI. Products Liability

The most significant difference in Canadian products liability law is the absence of strict liability. Canada has no statutory provisions which permit the proof of a defect alone to constitute strict liability. Rather, a products liability claim in Canada must be based either upon breach of warranty or negligence.

Warranty claims are based upon either the implied warranty of fitness for a particular purpose or the implied warranty of merchantability. In order to obtain the benefit of the fitness warranty, the buyer must establish that he or she expressly or impliedly made known to the seller the particular purpose for which the goods were bought so as to show reliance upon the seller’s skill or judgment. Total reliance is not necessary; substantial reliance is sufficient. With respect to the warranty of merchantability, there must be a sale by description for the warranty to apply. Merchantability means that the article is of such quality and condition that a reasonable person, acting reasonably, would, after examining the product, accept it in performance of the offer to purchase.

Several provinces in Canada have their equivalent version of the Sale of Goods Act, which may obviate the need for establishing privity in a warranty claim. However, in provinces without such statutory provisions, the general rule in Canada is that only a buyer may raise a breach of warranty claim. There is a paucity of judicial authority permitting warranty claims in the absence of privity.

Unlike warranty claims, most Canadian provinces recognize that all potential users of a product have the right to sue in negligence for product defects which cause injury. As in the United States, product liability claims sounding in negligence may be based upon design defects, manufacturing defects or failure to warn. In all instances, however, a plaintiff must prove negligence in order to meet the burden of proof. Under Canadian law, the duty of care with respect to product defects also extends to retailers, assemblers, installers, repairers and even building contractors.
Manufacturing defect cases tend to be easier to prove because the Rules of Evidence minimize the burden of proof in establishing a breach of the duty of reasonable care. The use of circumstantial evidence, the general inference of negligence and the duty of a manufacturer to ensure that its products are free of defects when placed into the marketplace all help to develop the necessary proof of a manufacturing defect.

On the other hand, the law in Canada makes it more difficult to prove negligent design and failure to warn cases. Canadian courts do not focus upon whether a product meets the reasonable expectations of the consumer but, rather, whether the utility of the product design outweighs its foreseeable risks. As in most jurisdictions in the United States, Canada recognizes not only a manufacturer’s duty to warn but, as well, a manufacturer’s continuing duty to warn of defects discovered after the product is placed into the stream of commerce. A plaintiff must prove that a manufacturer failed to take reasonable steps to warn of dangers associated with the product, and also that if warnings had been provided, the warnings would have been heeded. Canadian law provides that a manufacturer has no duty to warn of obvious dangers or, for that matter, of dangers arising from abuse or misuse of the product absent a manufacturer’s knowledge of a history of abuse or misuse associated with the product.

VII. Apportionment of Fault

Despite the presence of a duty on the part of the defendant and evidence that the duty has been breached with resulting damages, a plaintiff’s claim in Canada still can be defeated or reduced on the basis of contributory negligence. Although at one time Canadian law precluded a plaintiff from recovering any damages if the plaintiff was at fault to any degree, the right to recover damages in tort is now reduced in proportion to the plaintiff’s fault. Unlike the United States, Canada follows a pure comparative negligence standard. For example, if a plaintiff is found to have been 60% contributorily negligent, that plaintiff is nonetheless entitled to recover 40% of its damages from the liable defendant.

The standard of care required of the plaintiff is generally no different than the standard imposed upon a defendant. Both are required to act reasonably to protect their own property and that of others. The onus is upon the defendant to prove contributory negligence by the plaintiff.

Canada’s complex statutory scheme also impacts the manner in which fault is apportioned. Most Canadian provinces have acts similar to the *Ontario Negligence Act*. These acts typically provide that:

1. Where damages are caused by the fault of two or more persons, liability is determined on the proportion or degree of fault;
2. Tortfeasors are jointly and severally liable;
3. Recovery between tortfeasors is based upon their degree of fault;
4. Where it is not possible to apportion liability or degree of fault, equal apportionment will apply; and
5. If plaintiff is found contributorily negligent, then damages shall be apportioned based upon the degree of fault found against the parties respectively.
 Exceptions do exist. For example, the *Nova Scotia Contributory Negligence Act* does not address joint and several liability or recovery between tortfeasors. Rather, judicial authority must be relied on when addressing these issues in Nova Scotia.

**VIII. Spoliation**

Canada is more conservative with respect to its law on spoliation of evidence. Well-established authority in Canada provides that spoliation of evidence is considered a principle of evidence where the remedy is procedural as opposed to substantive. The destruction or suppression of evidence in Canada raises a rebuttable presumption that the evidence, if produced, would be adverse to the position of the party destroying or suppressing it. The party against whom the doctrine of spoliation has been raised may rebut the presumption through the presentation of even slight evidence that the destroyed evidence would not be unfavorable to it. A finding of spoliation typically results in a negative inference or the exclusion of certain evidence or testimony, including expert reports and witnesses. Canadian courts have been flexible with respect to the remedy imposed for spoliation.

Unlike the United States, Canada does not recognize an independent cause of action for intentional or negligent spoliation of evidence. Although recent case law indicates a divergence of opinion on whether some Canadian courts will adopt such a cause of action, most currently have rejected a substantive right of action for spoliation in favor of a procedural one in the form of evidence preclusion. A recent Canadian court enumerated the following sanctions as the remedy available for spoliation of evidence:

1. A rebuttable evidentiary presumption;
2. A procedural sanction such as striking a pleading, preclusion of evidence or shifting the burden of proof;
3. An award of costs against the spoliator; or
4. A motion for contempt of Court;

Preservation of evidence is one of the most important issues to be addressed in the claims process. Since an insurer’s right of subrogation largely will rise or fall based on the conduct of its insured, an insurer must exercise control immediately upon notice of the loss to ensure that all evidence is properly preserved. An inspection of the loss scene should immediately be undertaken. Any potentially relevant documentary and physical evidence should be secured, including that which may disprove other potential theories of liability. It is at this stage of the claims process that the foundation for a successful subrogation claim is built. If a proper scene investigation is not performed, then the viability of subrogation is immediately impacted and spoliation sanctions ultimately may be the deathnail of any recovery.

**IX. Damages**

Unlike the limitations that exist for pain and suffering awards in personal injury actions, Canada does not provide for any limitations or caps on damages to real and personal property. As in the United States, damages are governed by the principles that the plaintiff is entitled to be placed into the same position as it would have occupied but for the defendant’s negligence. Damages awards must be reasonable. Although historically the proper measure of damages in
property subrogation cases was diminution in value, a more modern approach has been adopted which allows a plaintiff to recover the cost of replacement without deduction for depreciation. Specifically, British Columbia and Ontario recognize that the proper measure of damage for destruction to a residential home is replacement cost without deduction for depreciation. There are some exceptions to this general rule with some courts still adhering to the diminution in value standard.

For commercial properties, some courts have recognized the replacement cost measure as the appropriate standard under the theory that the insured is entitled to continue its business and, in order to do so, must replace the destroyed property. As such, it would be unfair and burdensome to the plaintiff to allow for a deduction of depreciation. This rule also has been followed in claims involving industrial facilities. For contents losses, Canada follows the general rule that it is the fair market value or diminution in value of the personal property at the time of the loss that governs the measure of damages.

Finally, although punitive damages are available in Canada, they are infrequently granted and limited in amount, particularly in contrast with recent punitive damage awards in the United States.

X. The Loser Pay Rule

Canada allows for an award of costs to the prevailing party. These costs typically include attorneys’ fees at pre-established rates. Each Canadian province and its appellate courts have their own rules for the awarding of costs. Generally, the award of costs throughout Canada is a common occurrence and can be significant in amount.

For example, in the Province of Ontario, costs are almost always awarded to the successful party. Typically, costs are awarded throughout the course of the litigation upon the disposition of interim proceedings. For example, an award of costs may be entered upon the disposition of a motion and those costs either may be required to be paid promptly or at the conclusion of the case.

In Ontario, an award of costs is based upon a schedule setting forth the rates for partial indemnity or substantial indemnity. The schedule uses maximum hourly rates for lawyers which are established by reference to the year the lawyer was called to the Bar. The rates may not necessarily be reflective of the hourly rate being charged to a party by its lawyer.

Under the Rules of Civil Procedure in Ontario, there are important cost consequences resulting from an unaccepted written offer of settlement which represents a better result than that which the other party achieved at trial. In other words, it is possible for a party, unsuccessful on the merits, to recover costs under either the partial or substantial indemnity rates if its written offer was unaccepted and represented a better result than that awarded by the court.

XI. Conclusion

The law of Canada, as well as Canadian Rules of Procedure, support the pursuit of subrogation recoveries. Early investigations and knowledgeable analysis are necessary to ensure the prompt identification of potentially responsible third parties, and the preservation of valid claims against them. Cozen O'Connor's three decades of experience in handling subrogation claims combined with the Canadian litigation expertise of our colleagues at Perley-
Robertson will enable us to successfully and productively maximize your subrogation recoveries in Canadian losses.

For additional information concerning Cozen O’Connor’s Canadian Subrogation and Recovery Program, please contact:

Elliott R. Feldman, Esquire
Chairman, Subrogation and Recovery Department
(800) 523-2900
(215) 665-2071
efeldman@cozen.com

Vincent R. McGuinness, Esquire
(800) 523-2900
(215) 665-2097
vmcguinness@cozen.com

Elaine M. Rinaldi, Esquire
(800) 523-2900
(215) 665-2096
erinaldi@cozen.com

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