

# IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Diehl v. Canada Life Casualty  
Insurance Company*, 2003 YKSC 34

Date: 20030626  
Docket: 00-A0283  
00-A0285  
Registry: Whitehorse

Between:

GEORGE DIEHL

Plaintiff

And:

CANADA LIFE CASUALTY INSURANCE COMPANY

Defendant

Appearances:

Debra L. Fendrick  
Ray G. Baril, Q.C.

Counsel for the Plaintiff  
Counsel for the Defendant

Before: Mr. Justice Veale

## REASONS FOR JUDGMENT

[1] This is an application by Canada Life Casualty Insurance Company (Canada Life) to consolidate, or try at the same time, two court actions. The application is brought pursuant to Rules 5(1), (2) and (6), each of which has nothing to do with consolidating or trying actions at the same time. Rule 5(8) is the proper Rule to proceed under, and I will treat this as such an application, as Mr. Diehl's counsel has not been taken by surprise.

[2] There are two actions. In the first, Mr. Diehl has sued Bette Boyd, the driver, and Clifford Boyd, the owner, as a result of a motor vehicle accident on April 5, 1999 (the negligence action). He alleges that an unidentified driver turned left suddenly, causing

Mr. Diehl to slow down and be hit from behind by Bette Boyd. Mr. Diehl started this action on March 16, 2001 and the writ was served on March 24, 2001. Documents have been exchanged and discoveries were completed on November 21, 2002. Counsel will be setting a trial date.

[3] The second action was also commenced on March 16, 2001. The writ was not served until April 8, 2002. Mr. Diehl sues Canada Life in contract under the Uninsured/Underinsured term of the motor vehicle insurance policy with Canada Life (the contract action).

[4] No documents have been exchanged and no discoveries have been held.

[5] Canada Life submits the following:

[6] It says it is not in conflict with its insured, Mr. Diehl, in defending the unidentified driver as to liability and damage. It submits that Mr. Diehl has commenced the action and it should have the right to make full defence on the issue of liability and damage of the unidentified driver.

[7] It submits the actions should be consolidated because to not consolidate would prejudice Canada Life by having a liability and damage decision against the unidentified driver made in the first action without representation by Canada Life.

[8] It says that the actions should be consolidated to avoid two trials and potentially inconsistent results.

[9] Canada Life says the plaintiff, Mr. Diehl, is the same in both actions. Further, the issue of liability is the same, in that the unidentified driver may be found at fault and damages awarded. Canada Life says the same issue will be heard

again in the second action. Canada Life provided no authorities in support of its application, saying that this is a novel situation.

[10] The second court action is framed in contract based upon the provisions of the Yukon standard automobile policy of insurance. The following provisions are relevant:

### **SECTION B – ACCIDENT BENEFITS**

The Insurer agrees to pay to or with respect to each insured person as defined in this section who sustains bodily injury or death directly and independently of all other causes by an accident arising out of the use or operation of an automobile.

...

### **SUBSECTION 3 – UNINSURED MOTORIST COVER**

All sums which every insured person shall be legally entitled to recover as damages for bodily injury, and all sums which any other person shall be legally entitled to recover as damages because of the death of any insured person, from the owner or driver of an uninsured or unidentified automobile as defined herein.

...

#### **(5) Determination of legal liability and amount of damages**

The determination as to whether the insured person shall be legally entitled to recover damages and if so entitled, the amount thereof, shall be made by agreement between the insured person and the insurer.

If any difference arises between the insured person and the insurer as to whether the insured person is legally entitled to recover damages and, if so entitled, as to the amount thereof these questions shall be submitted to arbitration of some person to be chosen by both parties, or if they cannot agree on one person, then by two persons, one to be chosen by the insured person and the other by the insurer, and a third person to be appointed by the persons so chosen. The submission shall be subject to the provisions of the Arbitration Act and the award shall be binding upon the parties.

...

SPECIAL PROVISIONS, DEFINITIONS AND EXCLUSIONS OF SECTION B

...

(6) When Money Payable –

...

(c) Every action or proceeding against the Insurer for the recovery of a claim under this section shall be commenced within two years from the date on which the cause of action arose and not afterwards.

[11] The law is clear. Rule 5(8) is discretionary. It states as follows:

*Consolidation*

5(8) Proceedings may be consolidated at any time by order of the court or may be ordered to be tried at the same time or on the same day.

The purpose is to avoid a multiplicity of proceedings and save time and expense. Other factors to be considered are whether one action is more advanced and whether a consolidation will delay the trial of the first action (see *Shah v. Bakken*, [1996] B.C.J. No. 2836).

[12] A further factor is whether consolidation would place Canada Life in a conflict position with its insured, Mr. Diehl (see *Re Waterloo Insurance Co. and Zurbrigg et al.* (1983), 43 O.R. (2d) 219 (Ont. C.A.)).

[13] I will deal with the conflict issue first. To permit consolidation would effectively allow the insurer to be a party defendant in the negligence action and choose between its own interests and that of its insured. This is an impossible situation, in that it permits the insurer to take an adverse position to its insured. Counsel for Canada Life did not provide any authority, statutory or contractual, to permit that.

[14] Canada Life is not without a remedy if it does not participate in the negligence action. It is entitled by the contract with the insured to pursue binding arbitration.

[15] Secondly, the negligence action is ready for trial, whereas the contract action against Canada Life is nowhere near ready. Neither Mr. Diehl nor Canada Life have moved that action along for over a year.

[16] I conclude that there should be no consolidation, or trial at the same time, for the above reasons.

[17] Mr. Diehl shall have his costs on scale 4 against Canada Life in any event of the cause as the second action against Canada Life may never proceed once the first action is decided.

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VEALE J.