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Carfra Lawton LLP is a Victoria-based law firm specializing in the insurance industry. It works closely with insurers, brokers and institutional risk managers. The firm has a wide variety of insurance professionals with differing backgrounds, bringing a unique perspective to its practice. Among them are partners Giles Deshon and Aron Bookman, who recently spoke with Insurance People *about the differences between Canada's legal system and other jurisdictions which impact the insurance industry. Deshon's background is insurance litigation in Ontario and commercial and contractual litigation in Australia and England. Bookman is a native Californian who began his career in corporate civil litigation with a full-service international firm. He now practises in B.C. and the Yukon.*

IP: You've both practised in jurisdictions that have different systems for examinations for discovery. What's the difference when compared to our system?

Deshon: This is a pivotal part of the process in North America. In England, Australia and New Zealand there are no examinations for discovery, so the whole system is turned on its ear. Many clients from other jurisdictions find examinations for discovery foreign. In Australia, litigation is more paper-driven. Often affidavits of expected evidence are not exchanged until shortly before trial. The assessment of the case can therefore be based on an entirely different set of facts. It is only when a trial occurs that lawyers get to assess the credibility of opposing parties face to face.

Deshon

IP: In the U.S., the legal process includes wide-ranging discovery rights. How does that impact your experience in litigation.

Bookman: In the U.S., interrogatories, notices to admit and procedural applications are commonplace and are an effective means of isolating evidentiary issues before depositions, which are equivalent to examinations for discovery. Also, lawyers have the power to depose anybody within reason – even non-party witnesses. Accordingly, the process can be quite time-consuming and expensive. But the positive aspect is that you can uncover whatever information you're trying to uncover and tend to move the cases along much more swiftly to either resolution or to trial because there are fewer procedural hurdles.

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Deshon: Examinations for discovery in Canada is the most important pre-trial step. Many cases can be properly assessed and resolved earlier. Without that step – in Australia, for instance – it is more common to be in court fighting for production of documents. Here, a lot of important facts are provided through examinations for discovery. Meeting face to face provides a chance for much more efficiency in the litigation process.

IP: Let's turn to the issue of experts. There's quite a difference here compared to Australia. Can you elaborate?

Deshon: In Australia, a procedure known as "hot-tubbing" of experts has become more common. Under court order, experts confer without lawyers to prepare a joint report highlighting areas of agreement and areas of differing opinion, stating why those differences exist. At trial the experts can give evidence at the same time and cross examinations occur in relation to each issue in dispute. This idea might help B.C. courts.

IP: How does summary trial differ in B.C. compared to other jurisdictions?

Bookman: In my opinion, Canadian courts are in the process of establishing differing views as to the concept of "litigation in slices." The Supreme Court of Canada recently emphasized the positive aspects of employing summary trial-like processes in *Hryniak v. Mauldin*. The Court referred to a need for a "cultural shift" in this regard. However, this decision has been distinguished as not being applicable in B.C. Accordingly, B.C. judges still appear to be reluctant to rule on one issue that might not resolve the case as a whole. For example, it's difficult to convince the Court to resolve liability alone by way of summary trial, particularly where the case involves multiple defendants. This reluctance to use a summary trial process or something similar to resolve issues is completely contrary to my experience in the U.S., where legal and factual issues are often isolated and dealt with individually. Many cases end on applications akin to a summary trial application which our courts in B.C. might not rule on. Even if the case is not resolved based on a judgment on an issue, the end result is winnowing down the issues that need to be tried. Or it signals the need for the parties to seriously reconsider their settlement position. In my opinion, this process is effective and more efficient.

Bookman

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