April 5, 2006

The Honourable Mr. Justice MacAulay
Chair, Rules Revision Committee
Supreme Court of British Columbia
850 Burdett Avenue
Victoria, BC V8W 1B4

Dear Sirs/Mesdames:

Re: Proposed Amendment to Rule 26: Disclosure of Insurance Policies

We write to provide Submissions on behalf of the CBA Insurance Subsection of British Columbia in relation to the proposed amendment to Rule 26 which would compel disclosure of documents evidencing the existence and terms of contracts of insurance. For the reasons more fully set out below, the Membership is opposed to the proposed amendment.

Rationale for Proposed Amendment

The first question for the Committee to ask itself is "What is the perceived problem that currently exists that needs to be addressed by the proposed change?"

Proponents of disclosure of insurance policy information submit that disclosure may aid in making informed decisions with respect to settlement or in determining whether litigation should be pursued and, indeed, how the litigation is to be conducted. We understand that this was, at least in part, the rationale behind the Rule changes that have occurred in other Provinces in Canada, including Manitoba, New Brunswick and Prince Edward Island.

There is no evidence to suggest that the disclosure of insurance policy information will assist in the administration of justice or assist in achieving resolution or early disposition of litigation matters. Further, there is no evidence to support a contention that voluntary disclosure of insurance policy information is not occurring when insurance related issues arise during the course of negotiations. In the Members' view, unless there is an identifiable and real problem with respect to the disclosure of insurance policy information, the Rules Committee should not be contemplating a change, particularly when considering some of the disadvantages of the proposed amendment.

Privacy Concerns

Information contained in insurance policies is otherwise personal and confidential. In addition, many insurance policies will name additional Insureds, or jointly named Insureds. Conceivably, information of persons or entities not part of any litigation will be disclosed. The Membership

Serving the Lawyers of British Columbia
10th Floor, 845 Cambie Street, Vancouver, British Columbia, V6B 5T3
604-687-3404 Toll Free: 1-888-687-3404 Fax: 604-669-9601
Toll Free Fax: 877-669-9601 Email: cba@bccba.org Web: www.bccba.org

suggests that, prior to any decision on this issue, the Rules Revision Committee consult with the Privacy Commissioner as disclosure of insurance policies will raise issues under the *Privacy Act.*

Relevance

Traditionally, policies of insurance are not disclosed in third party litigation as they are not considered to be relevant to the issues framed in the action. Insurance policies may be relevant depending on the action, or after judgment against the Insured occurs. However, for the vast majority of cases, they would not be relevant to matters at issue. The only purpose for the disclosure of insurance policies would be to determine, pre-judgment, the amount of money potentially available to a Defendant or litigant to settle the matter or pay a judgment. We say potentially, because there are many times in a third party claim where an Insurer will agree to defend an action but will reserve its right to indemnify a Defendant until all of the facts are determined at trial. A Defendant may have an insurance policy with a $1 million limit but the availability of that insurance money may or may not be realized pending the outcome of facts determined by the Judge or Jury.

Fairness

It is difficult to envision how the proposed Rule will encourage and promote justice and fairness between the parties. In the Membership's view, the proposed amendments will create an unfair tactical advantage to the party seeking insurance information. Providing insurance policy information will not simply provide a party with knowledge of another party's ability to pay. Information will become available to a litigant that could be used for tactical advantage. For example, an entity may be "self insured" for a certain amount of money and have a layer of excess coverage beyond that amount. The litigant will then know how much money a corporate entity will have to incur themselves, before they can tap into an insurance resource.

Learning the limits of insurance will encourage settlement offers and formal Offers to Settle for those limits. The consequences of that will be significant to both the Insurer and the Insured. The Insurer will be put in a position that it will face a bad faith claim from its Insured if it does not settle within those limits. The Insured will be required to seek independent legal advice which will be costly and potentially unnecessary. In the Members' view, the result of the proposed Rule change will be increased offers for limits which will lead to potentially undue economic pressure on Insurer and Insured, despite the fact the offers are not commensurate with the exposure to damages. Issues surrounding bad faith claims will become a regular concern.

A Directors and Officers' Policy for example, has diminishing limits. This means that defence costs for defending a Director will eat away at the ultimate limits of the policy. It may be a tactical advantage for Plaintiff's counsel to name a host of Defendant Directors which will put a tremendous amount of pressure on the Insurer to settle. The pressure will be not just economic but will come from the various Defendants who will be faced with personal exposure once the limits have been eroded.

Relationship between Insured, Insurer and Defence Lawyer

The Membership is concerned about the delicate balance in the tripartite relationship that governs the insurance defence lawyer. The disclosure of insurance policies and claims other than in a first party claim ignores the intricacies of the tripartite relationship shared by the Insured, Insurer and insurance defence counsel. In that relationship, defence counsel does not involve itself in any way with issues of coverage. Many defence counsel refuse to keep a copy of the insurance policy at their office and will not review the policy at any time thereby decreasing the likelihood that any allegation of conflict of interest may arise. Disclosures of insurance information may result in issues of coverage being raised by the Plaintiff during settlement discussions. Defence counsel will not be in a position to discuss anything in relation to those issues. If issues of coverage are raised, both Insured and Insurer will be compelled to retain separate independent counsel during settlement discussions or at mediation. This again will increase the costs to those involved.

Scope of Disclosure

If disclosure of insurance information is compellable, then a question arises as to the scope of such disclosure. Will coverage counsel's file also be opened for disclosure, including reservation of rights letters, Non-Waiver Agreements, applications for insurance? This will be a significant concern to an Insurer. Should counsel in an underlying action be entitled to information relating to a contractual coverage dispute between an insured and insurer? What about the vast majority of claims where insurance limits or issues of insurance never arise. Should insurance information be compellable in every case, even when it is not an issue?

Conclusion

In summary, it is the Membership's position that the disclosure of insurance policies will not assist the administration of justice or in the more efficient resolution of litigation matters. On the contrary, disclosure of policies will likely result in litigants being dragged through litigation because of the **existence** of insurance, rather than the existence of liability. There will be an invasion into otherwise personal and confidential information, and disclosure will provide unfair tactical advantages to a party seeking such information. The production of documents in litigation matters should require parties to produce documents that advance issues in the action and assist in proving or disproving facts. The production of insurance policies will not assist in that fundamental aspect of document disclosure.

Sincerely,

Stacey L. Boothman
Vice-Chair, CBA Insurance Subsection of BC
William S. Dick
Legislative Liaison, CBA Insurance Subsection of BC

CANADIAN BAR ASSOCIATION OF BRITISH COLUMBIA