



TOP BOUTIQUES

EMBRACING CHANGE

Insurance defence boutiques are increasingly specializing in new emerging areas to stay ahead

By Aidan Macnab

“It’s kind of an exciting time to be a lawyer in insurance defence,” says William Chalmers, managing partner at Hughes Amys LLP.

Privacy in the digital realm, regulated by the Personal Information Protection and Electronic Documents Act, and how the market and legal sphere adapt to and govern legal marijuana, is going to produce compelling work in the future, he says.

“What’s going to happen over the next five or 10 years is really going to be amazing. I think you’re going to see a wholesale, 100-per-cent change in how we do business and what kind of cases we deal with.”

Cyber-insurance is Dolden Wallace Folick LLP’s fastest-growing area, according to founding partner Eric Dolden.

Under PIPEDA, there are mandatory security-breach-notice requirements, which were instituted on Nov. 1, 2018. Insurers are developing products that, when a customer has been the victim of ransomware or a success-

ful phishing operation, pay for restoring lost data or forensics to find out who took the data and help the affected party satisfy the demands of the government’s privacy commissioners, says Dolden.

These types of insurance will also cover giving notice of a breach to customers and clients, as there is a variety of torts for invasion of privacy and a statutory cause of action under PIPEDA, and six provinces have their own privacy legislation, which makes one liable if they store someone’s personal information and it’s accessed by an unauthorized third party, he says.

More than that, since 2012, the Ontario Court of Appeal has had a privacy tort called intrusion upon seclusion, providing a common law remedy when dealing with a province that does not have a privacy act statute, he says. He adds that, in Ontario and Newfoundland, plaintiffs can “stack claims,” suing under different laws for the same violation to increase claimant recovery.

“Developments in this area are happening at warp speed. It’s amazing,” he says.

Dolden recently settled a class action against the city of Calgary, after someone in the city workers compensation department sent a spreadsheet with thousands of names, medical information and salaries and workers compensation benefits to another municipality.

New work for lawyers coming out of the regulations around data security is just one

aspect of the many opportunities in the cyber realm, Dolden says. For example, his firm is involved in an arrangement called breach coaching, where an insured party calls a 1-800 number if they suspect a breach and someone from the firm provides legal advice on how to proceed. Dolden says the firm has roughly five lawyers in both the Toronto and Vancouver offices and one in Calgary spending at least 50 to 60 per cent of their time in that area.

“We triage it in the sense of diagnosing the problem, identifying what their obligations are to the privacy commissioner and making sure that any requisite breach notice is provided. That’s probably one of our fastest-growing areas, right now.”

Also growing is the fault imposed by the courts on licensed liquor sellers for overserving when an impaired driver leaves an establishment intoxicated, he says. In the future, Dolden sees this area branching off into some compelling configurations, as automated vehicles and artificial intelligence proliferate.

Along with Dolden Wallace Folick LLP and Hughes Amys LLP on this year’s top insurance defence boutiques list are Bell Temple LLP, Benson Percival Brown LLP, Chomicki Baril Mah LLP, Dutton Brock LLP, Flaherty McCarthy LLP, Lindsay LLP Whitelaw Twining Law Corp. and Zarek Taylor Grossman Hanrahan LLP.

“The last 28 years, Ontario in terms of insurance, and in particular, automobile insurance, I think can be described as the only thing permanent is change,” says Todd McCarthy, a partner at Flaherty McCarthy LLP.

McCarthy’s firm was established by the late Jim Flaherty, the former federal finance minister.

Every few years, Insurance Act amendments and amendments to regulations under the act have see-sawed between tort and accident benefit rights, says McCarthy.

“The big change in the last two-and-a-half years has been further scaling back of accident-benefit entitlement. Drastically so,” he says.

Along with that decline, since 1996, McCarthy says, he’s seen an expanded right to sue in tort for motor vehicle insurance claims. In 2016, access to courts for accident benefit claims and the Financial Services Commission of Ontario arbitration process was abolished and replaced with the Licence Appeal Tribunal, known as the LAT system, an arbitration process done through the Ministry of the Attorney General.

The monetary jurisdiction of the Ontario

Superior Court, in relation to a simplified procedure action, which provides for a summary trial in the Superior Court, was doubled to claims seeking \$200,000 plus costs from \$100,000 because of a recent rule change, and McCarthy predicts that, in 2019, via amendment to the Courts of Justice Act, jury rights for this type of action will be eliminated. This is significant, he says, because around 70 per cent of motor vehicle personal injury tort claims are assessable under \$200,000, net of deductibles and other benefits.

“I think we’re going to see a very significant change in the election in favour of simplified procedure,” he says.

There may be more trials, but they will be shorter, possibly with more settlements, he says.

With all this change, McCarthy says, the firm’s founder, ironically a Conservative, instilled a tradition of embracing, rather than fighting, change.

“Jim embraced the changes and always taught us to embrace the changes and that’s what we’ve done,” he says. “Everybody is specialized in all aspects of litigation in relation to insurance matters. We don’t have accident benefits specialists and tort specialists; everybody is a specialist in all aspects of personal injury litigation and the defence of that litigation and that is a legacy of Jim Flaherty.”

Embracing change for managing partner of Dutton Brock LLP Paul Tushinski has meant staying away from work specialized by the proliferating in-house legal teams he’s seen sprouting in recent years. While his firm stays away from commodity work, he says, it does a lot of complex construction, engineering, product liability, environmental and class action, for which in-house departments are not structured, he says.

“If you’re trying to maintain a business where you’re competing directly with the work that the insurers are keeping in-house, you’re going to lose,” he says.

“We’ve tried to adapt to the changing market but always staying true to our roots.”

That is why gaining experience in cyber, environmental impairment liability, fiduciary liability, technology, errors and omissions, securities, class actions and directors and officers liability is important for newer lawyers in the field, Dolden says.

“It’s really important to develop expertise in these newly evolving areas. I think that’s the key for a young lawyer’s future if they want to do insurance work,” he says.

How we did it

Canadian Lawyer asked lawyers, in-house counsel and clients from across Canada to vote on the top insurance defence, tax and wills, trusts & estates boutiques. They were asked to rank their top firms from a preliminary list, with a chance to nominate a firm that was not included. To qualify for our list and be voted for in the survey, firms were required to derive a minimum of 80 per cent of their work from as well as self-identify as focusing on insurance defence, tax or wills, trusts & estates law.

**TOP 10 INSURANCE
DEFENCE BOUTIQUE*****Dutton Brock LLP*** Toronto
duttonbrock.com

With more than 35 years as a firm, Dutton Brock LLP has substantial expertise in class proceedings, representing defendants and advising their insurers in many major class actions, product liability and professional negligence cases. Its work crosses the spectrum of insurance litigation. *Lexpert* lists Dutton Brock as the most frequently recommended commercial insurance litigation firm in Canada and *Canadian Lawyer* has consistently named it as one of Canada's top insurance defence law boutiques. Managing partner Paul Tushinski has argued cases at all levels of court on products liability, insurance coverage issues, class proceedings, hospital liability and access to information. Tushinski has frequently lectured for the Law Society of Ontario, the Ontario and Canadian Bar associations, The Advocates' Society, Toronto Lawyers Association and the Canadian Defence Lawyers. Dutton Brock puts on an annual conference on insurance-related topics.
