CANADIAN UNDERWRITER

APRIL 2015

PM40069240

1/0/22B 3086 117(L)

4156746311020415 CAN01NOV2015
PAMELA BAKKER
MCMILLAN LLP
4400-181 BAY ST
TORONTO ON M5J 2T3

In the Works

Carol Lyons
Partner and Co-chair, Insurance, Financial Services Regulatory, McMillan LLP

Ke-Jia Chong
Student-at-Law, McMillan LLP

Saskatchewan's first proposed overhaul of its insurance legislation in decades seeks to modernize requirements and harmonize provisions with those in Alberta and British Columbia. Changes revolve around, among other issues, fair and unfair practices, insurance intermediaries and self-evaluative audits.

Saskatchewan is the latest province to introduce comprehensive changes to its insurance legislation, the first major overhaul in decades. In December 2014, the Minister of Justice and Attorney General, Gordon Wyant, first introduced Bill 177, *The Insurance Act*, reforming the insurance law in Saskatchewan. If passed, the proposed act will replace the current statute, *The Saskatchewan Insurance Act*.

Part of the background review and preparation for the development of the new Saskatchewan statute included a comparison of the insurance legislation of other Canadian jurisdictions, with Alberta's *Insurance Act* considered the most appropriate model. The Alberta statute is, in turn, similar to the insurance legislation in British Columbia.

One of the achievements of the new Saskatchewan legislation is a "move toward harmonizing insurance legislation with Alberta and B.C.," Wyant has said.

This is timely in light of the New West Partnership Trade Agreement among the governments of Saskatchewan, Alberta and British Columbia, creating Canada's largest, barrier-free, interprovincial market.

Under the accord, the three Western provinces have agreed to mutually recognize or reconcile their rules affecting trade. It is, therefore, logical and appropriate for these provinces to align their laws.

Nevertheless, the proposed Saskatchewan legislation is not identical to Alberta's legislation, so the goal of harmonization will not be completely realized.

Aside from the attempt at harmonization, the substantive impetus behind Bill 177 is modernization, including strengthening consumer protection provisions.

NEW "UNFAIR" AND "FAIR" PRACTICES

Other provinces have outlawed specific activities by insurers, agents, brokers and/or adjusters on the basis that they are potentially unfair to consumers in the context of purchasing insurance.

Saskatchewan is catching up in Bill 177 by including a section on unfair practices (Section 7-12). This section will specifically prohibit the following:

- false or misleading statements, representations or advertisements;
- tied selling practices;
- unfair, misleading, deceptive, fraudulent or coercive acts or practices; and
- other matters to be prohibited by regulation.

These provisions are similar to the prohibitions in Alberta's statute and *Fair Practices Regulation*.

Bill 177 also includes an out-and-out prohibition on "inducements" (activities involving payments or gifts designed to induce customers to purchase insurance), except as permitted by regulation. Although the inducements prohibition is akin to the broadly drafted wording in the counterpart Ontario regulations, the proposed Saskatchewan provision only applies to acts and practices on the part of "insurance intermediaries."

Historically, the provinces have treated the issue of inducements in disparate ways, varying in approach not only from province to province, but also from decade to decade, depending on prevailing market practices and tone of regulatory intervention. Read literally, many well-established marketing practices and loyalty programs could be seen to offend the inducement prohibitions. The regulations, once drafted, will reveal the practices that will be permissible in Saskatchewan.

Bill 177 also contains a division on fair practices (Part VII, Division 2) that includes a number of consumer-friendly provisions, as follows:

- insurers, insurance intermediaries and adjusters must advise policyholders suffering a loss that they have the right to choose a service provider to make repairs;
- a 10-day right of rescission in favour of the consumer in the case of life, accident and sickness or specific travel insurance, and the corresponding right to return of premiums paid;
- insurers in receipt of a notice of claim must notify the claimant of the applicable limitation period; and
- insurers must advise policyholders of the options available to them in the event a dispute occurs regarding payment of a claim or loss, or the insurer denies the insured's claim. Historically, the provinces have treated the issue of inducements in disparate ways, varying in approach not only from province to province, but also from decade to decade, depending on prevailing market practices and tone of regulatory intervention.

Historically, the provinces have treated the issue of inducements in disparate ways, varying in approach not only from province to province, but also from decade to decade, depending on prevailing market practices and tone of regulatory intervention.

INSURANCE INTERMEDIARIES

Part V, Division 1 of Bill 177 contains several distinct categories of individuals and entities that are subject to the licensing regime for an "insurance intermediary," including "insurance agent," "insurer's representative," "managing general agent" and "third-party administrator."

Part V, Division 4 of the bill contains a whole separate regime for "restricted insurance agents." The provisions are comprehensive, potentially difficult to navigate and further-reaching than the Alberta legislation. As such, Bill 177 has created a fair bit of controversy.

Managing general agent

Bill 177 creates a new licensing category for "managing general agent" (MGA). Not only must MGAs be licensed as such, they also will have authority to sponsor selling agents, and will be obligated to perform ongoing monitoring of the persons they sponsor.

The regulations will determine which persons and classes of persons will not be eligible for an MGA's licence.

The books and records of MGAs will be subject to audit by the Superintendent of Insurance, and a copy of the contract between the MGA and the insurer must be filed as part of the licensing application. Employees licensed to act for an MGA may only act for that one MGA.

In a letter dated February 17, 2015 (providing comments on Bill 177), the Financial Advisors Association of Canada (Advocis) strongly questioned the creation of a distinct licensing regime for MGAs. Advocis noted that this approach came as a surprise given the position paper, *Strengthening the Life MGA Distribution Channel*, adopted in September 2012 by the Canadian Council of Insurance Regulators (CCIR), which concluded that no specific consumer protection goals would be advanced through a discrete licensing regime for MGAs.

Advocis requests a full public consultation on the whole MGA issue, arguing that matters such as the new sponsorship and monitoring duties blur the lines of responsibility between life insurers and life agencies, as delineated by the Canadian Life and Health Insurance Association (CLHIA) in its Guidelines G8, *Screening Agents for Suitability and Reporting Unsuitable Agents*, and G18, *Insurer-MGA Relationships*.

These comments are relegated to MGA operations in the life sector, but MGA-style operations are also prevalent on the non-life side.

The proposed requirement to file the contract between the insurer and the MGA understandably raises concerns given the strategic confidentiality attaching to those documents.

Bringing MGAs and TPAs under the jurisdiction of the insurance regulator would add a new level of complexity to commonplace industry relationships. There is some logic, however, to making MGAs ultimately responsible for monitoring of licensed agents where the MGA, and not the insurer, appoints the agents.

Third-party administrator

The term, "third-party administrator" (TPA), is not defined in Bill 177, which of itself creates an area of uncertainty.

The licensing requirements for this category are similar to, but less extensive than, those relating to MGAs. For example, TPAs must be licensed, and a copy of the contract between the TPA and the insurer must be filed. An employee may only be licensed to represent one TPA.

In its comment letter on Bill 177, the Canadian Association of Financial Institutions in Insurance (CAFII) recommended that the provisions relating to TPAs be removed entirely on the basis that institutions engaging TPAs, i.e. banks acting as "restricted insurance agents" and insurance companies bear the risks associated with outsourcing administrative activities and, in any event, are required by the Office of the Superintendent of Financial Institutions (OSFI) Guideline B-10, *Outsourcing of Business Activities, Functions and Processes*, to manage those risks prudentially.

CAFII cautions that additional requirements with respect to these activities are unlikely to improve consumer protection and may actually add cost and complexity to doing business in Saskatchewan, ultimately leading to increased pricing to consumers.

If licensing for TPAs survives the legislative process, CAFII objects to the requirement to file a copy of the TPA agreement with the regulator on the basis that it contains proprietary and confidential information.

It will be interesting to see how the Government of Saskatchewan responds to these comments. Bringing MGAs and TPAs under the jurisdiction of the insurance regulator would add a new level of complexity to commonplace industry relationships. There is some logic, however, to making MGAs ultimately responsible for monitoring of licensed agents where the MGA, and not the insurer, appoints the agents.

SELF-EVALUATIVE AUDITS

Section 9-5 of Bill 177 includes provisions based on model wording for privilege contained in CCIR's *Final Report on Privilege Model and Whistle-Blower Protection*, released in May 2008.

The issue of whether or not privilege should attach to certain information gathered by regulators surfaced in 2004 and 2005 after CCIR established a committee to co-ordinate a national approach to market conduct reviews.

Although most provincial and territorial insurance statutes contained broad provisions allowing the regulator to collect any kind of information it wanted, some statutes were clearer than others. CCIR took on the role of requesting detailed information from insurers on behalf of all provincial and territorial regulators.

The approach generally sent a shockwave throughout the industry and a number of insurers balked at providing information that might not be protected from discovery by potential third-party litigants. Privilege became a new hot topic and took on a larger life given the regulatory requirement that insurers must adopt their own internal practices involving self-monitoring of their compliance management.

The issue of protection of information gathered through a regulator-initiated process applies equally in the case of internal compliance assessments.

CCIR ultimately endorsed and published model wording with respect to "insurance compliance self-evaluative audits."

Alberta and Manitoba are the only other provinces that, to date, have enacted provisions relating to privilege of self-evaluative audits based on the CCIR model language. Bill 177 goes further and includes a positive obligation on the part of insurers to conduct the audit (when requested by the Superintendent of Insurance) and contains other wording differences. Whether or not the differences in wording mean these audits apply only to Superintendent-mandated audits (and not also to internal compliance management systems) is not overtly clear at the present time.

In keeping with the CCIR model language and the language adopted by both Alberta and Manitoba, privilege as set out in the section does not apply in a proceeding commenced against an insurer by the regulator.

Similarly, "documents kept or prepared in the ordinary course of business" are carved out of the definition of "insurance compliance self-evaluative audit document" in Bill 177, as they are in the Alberta and Manitoba legislation.

The bill also carves out "documents kept or prepared for the purpose of responding to a consumer complaint."

It appears the latter two categories of documents are outside of the scope of privilege afforded by these provisions.

Bill 177 received second reading in the Legislative Assembly of Saskatchewan on March 16, 2015 and currently appears to be in committee (Intergovernmental Affairs and Justice). The committee process may involve public hearings and may involve amendment to the bill's provisions.

Bill 177 must pass third reading and receive Royal Assent before it is proclaimed in force.