

Insurer's Right to Control Defence

In its decision in *BROCKTON v FRANK COWAN COMPANY*, the Ontario Court of Appeal has provided a useful illustration of the circumstances which must be shown before a liability insurer will be required to surrender its right to control the defence of an insured. The Court acknowledged that control of the steps taken to defend an insured is an important contract right for an insurer faced with making payment of any liability found against the insured, and the Court emphasized that the insurer's interest in limiting this payment obligation does not in itself create a conflict of interest with the insured. Writing for the Court, Justice Goudge notes:

"The issue is the degree of divergence of interest that must exist before the insurer can be required to surrender control of the defence and pay for counsel retained by the insured. The balance is between the insured's right to a full and fair defence of the civil action against it and the insurer's right to control that defence because of its potential ultimate obligation to indemnify. In my view, that balance is appropriately struck by requiring that there be, in the circumstances of the particular case, a reasonable apprehension of conflict of interest on the part of counsel appointed by the insurer before the insured is entitled to independent counsel at the insurer's expense. The question is whether counsel's mandate from the insurer can reasonably be said to conflict with his mandate to defend the insured in the civil action. Until that point is reached, the insured's right to a defence and the insurer's right to control that defence can satisfactorily co-exist."

Text of [BROCKTON](#) decision, from Court's website

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