



**Scott Hamilton**, Partner  
Insurance Defence  
416.748.4753  
[shamilton@loonix.com](mailto:shamilton@loonix.com)

---

**Charles M. Loopstra**  
416.748.4755  
[cloopstra@loonix.com](mailto:cloopstra@loonix.com)

**Malcolm J. MacLeod**  
416.748.4765  
[mmcleod@loonix.com](mailto:mmcleod@loonix.com)

**Michael Calich**  
416.748.4762  
[mcalich@loonix.com](mailto:mcalich@loonix.com)

**Andy Jairam**  
416.748.4770  
[ajairam@loonix.com](mailto:ajairam@loonix.com)

**Danette Cashman**  
416.748.4768  
[ajairam@loonix.com](mailto:ajairam@loonix.com)

**Valerie Stiso**  
416.748.5118  
[vstiso@loonix.com](mailto:vstiso@loonix.com)

**Cesare Plastina**  
416.748.5125  
[cplastina@loonix.com](mailto:cplastina@loonix.com)

---

Loopstra Nixon LLP  
Woodbine Place  
135 Queen's Plate Drive Suite  
600, Toronto, Ontario M9W 6V7  
[www.loopstranixon.com](http://www.loopstranixon.com)

## DUTY TO DEFEND UPDATE:

**Breach of Contract Claim for Failure to Add as "Additional Insured" Dismissed Due to Missed Limitation**

**By Scott Hamilton**

The Ontario Superior Court recently released *Brookstreet, v. Economical*, 2018 ONSC 80 ("*Economical Decision*") which is of significant interest to municipalities and their insurers in relation to the importance of exercising due diligence in ensuring a party has met its contractual obligation to add an additional insured to its policy.

The underlying claim in the *Economical Decision* involved a slip and fall that occurred at the Brookstreet Hotel ("Brookstreet"). Brookstreet entered into an agreement with Thunderbolt Contracting Limited ("Thunderbolt") for snow and ice removal. Pursuant to the agreement, Thunderbolt was required to add Brookstreet as an additional insured to its insurance policy. The agreement also required Thunderbolt to provide proof that it had added Brookstreet as an additional insured, which Thunderbolt failed to do. Brookstreet never requested confirmation from Thunderbolt, that in fact it was an additional insured under Thunderbolt's policy of insurance with Economical.

In its application against Thunderbolt, Brookstreet was seeking a declaration that it was entitled to future defence costs, including the costs related to retaining independent counsel, based on Thunderbolt's breach of contract.

The key dates in the action were found to be as follows:

- Thunderbolt was to provide proof that Brookstreet was included as an additional insured by October 31, 2012 but did not do so.
- Slip and fall occurred on December 29, 2012.
- On January 15, 2013 Brookstreet's insurance provider contacted Thunderbolt and suggested that it report the claim to its insurer.
- A Statement of Claim was served on November 20, 2014 naming Brookstreet as a Defendant.
- At Examinations for Discovery held on March 9, 2016, Brookstreet's lawyer asked whether Brookstreet was added as an Additional Insured pursuant to its winter maintenance contract with Thunderbolt. No representation was made either way by the lawyer for Thunderbolt.

- On November 22, 2016 Brookstreet made its first demand that Thunderbolt indemnify and defend it in relation to the action.
- On January 9/10, 2017, the lawyer for Thunderbolt advised Brookstreet that it had not added Brookstreet as an additional insured to its policy.
- On February 2, 2017 Brookstreet filed an Amended Statement of Defence and Crossclaim, raising for the first time a claim of breach of contract against Thunderbolt.

Justice Di Luca found there was no question that Thunderbolt was in breach of its contract, however the preliminary issue was whether the *Limitations Act*, barred Brookstreet from claiming damages that flowed from this breach.

Brookstreet argued a number of points in response to Thunderbolt's limitation position, the one most vigorously pressed being that the claim was not discoverable at any time prior to January 9, 2017, the date on which Thunderbolt's counsel advised that Brookstreet had not been added as an Additional Insured.

In denying the application, Justice Di Luca held as follows:

"I conclude that any reasonable party, standing in Brookstreet's position, would have made an inquiry into its status as an Additional Insured under Thunderbolt's insurance policy on or about January 15 or 16, 2013, or soon thereafter. Had such inquiry been made, Brookstreet would have learned of Thunderbolt's failure to add it as an Additional Insured at that time."

Ultimately, the case serves as a reminder why parties should exercise due diligence in ensuring contractual obligations are complied with at the beginning of the contract period. For municipalities and their insurers, the issue of whether a Certificate of Insurance clearly indicates a municipality is included as an Additional Insured prior to the commencement of work is tantamount with whether the municipal contractor, agent, etcetera, is insured themselves.

---

#### About Loopstra Nixon LLP

Loopstra Nixon is a full-service Canadian business and public law firm dedicated to serving clients involved in business and finance, litigation and dispute resolution, municipal, land use planning and development, and commercial real estate. Major financial institutions, insurance companies, municipal governments, and real estate developers along with corporate organizations and individuals are among the wide range of clients we are proud to serve.

---

The foregoing has been prepared for clients of Loopstra Nixon LLP. While every effort has been made to ensure accuracy, the information contained herein should not be relied on as legal advice; specific advice should be obtained in each individual case. No responsibility for any loss occasioned to any person acting or refraining from action as a result of material herein is accepted by the authors or Loopstra Nixon LLP. If advice concerning specific circumstances is required, we would be pleased to be of assistance.

©2018 Loopstra Nixon LLP. All rights reserved.

This may qualify as "Attorney Advertising" requiring notice in some jurisdictions. Prior results do not guarantee a similar outcome.