Ontario Court of Appeal rules on concurrent duties to defend

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In *Markham v. AIG Insurance Company of Canada,* 2020 ONCA 239A, the Ontario Court of Appeal addressed a dispute between two insurers regarding the extent of their respective duties to defend a municipality, including the apportionment of defence costs and their roles in participating and controlling the defence of the claim.

Background

In the underlying action, a young boy was injured when a puck flew into his face while he was at a hockey rink located at a municipal community centre. The rink had been rented by Hockey Canada and two hockey associations (the Hockey Clubs). A claim was commenced naming the municipality and Hockey Canada. In turn, the municipality commenced a third party claim against the Hockey Clubs.

The municipality had a commercial general liability insurance policy with an insurer (the Municipal Insurer and the Municipal Policy), which included an "other insurance" clause that stated:

The Insurer shall not be liable if… there is any other insurance which would have attached if this insurance had not been effected **except that this insurance shall apply only as excess and in no event as contributing insurance** and then only after all such other insurance has been exhausted.

The municipality's rental agreement with the Hockey Clubs required them to obtain insurance for bodily injury arising from their use of the rink and to name the municipality as an additional insured. The Hockey Clubs and Hockey Canada maintained the required insurance (the Hockey Insurer and the Hockey Policy) and added the municipality as an additional insured "**but only with respect to the operations of the named insured** " (*i.e.* Hockey Canada and the Hockey Clubs).

The municipality's position was that it was owed a defence by the Hockey Insurer, but the municipality was entitled to appoint and instruct counsel of its choice without having to report to the Hockey Insurer. The Hockey Insurer admitted it had a duty to defend the municipality, but argued that it was entitled to participate in the municipality's defence.

The Hockey Insurer also took the position that the Municipal Insurer had a concurrent duty to defend and should pay an equitable share of the municipality's defence costs.

The municipality and the Hockey Insurer commenced competing coverage applications. The municipality was successful at first instance, however the decision was overturned on appeal.

Coverage

The Court found the two policies provided different coverage to the municipality. The Municipal Policy provided for broader coverage in respect to all personal injury caused by an "Occurrence", whereas the Hockey Policy only provided coverage for liability in respect of Hockey Canada/Hockey Clubs' operations. The underlying Statement of Claim included both allegations of negligence against the municipality related to the operations of the Hockey Clubs and Hockey Canada as well as allegations against the municipality alone. As such, there were claims which, if proven true, may result in coverage under both policies. There were also claims which may result in coverage under only the broader Municipal Policy.

Accordingly, the Court of Appeal found both insurers had concurrent duties to defend that were triggered by the allegations in the Statement of Claim. With respect to the claims for which the Hockey Policy did not provide coverage, the Municipal Insurer was the primary insurer. Where both polices would respond to the same allegations, however, the Court interpreted the Municipal Policy's "other insurance" clause to apply such that the Hockey Insurer had the primary duty to defend and indemnify the municipality to the limit of the Hockey Policy, after which the Municipal Policy would operate as excess.

Defence costs

With respect to the apportionment of defence costs, the Court acknowledged even though an insured is entitled to choose which responding policy to claim indemnity under, the selected insurer is entitled to seek contribution on a *pro rata* basis from any other insurer that covers the same risk. In this case, the Court found that both insurers were primary in separate aspects of the underlying claim and had exposure, but the level of their respective exposure could not be ascertained given the early stage of proceedings. As such, the Court held an equal share would be the "fairest and most equitable allocation" of defence costs, pending a potential reapportionment following the final disposition of the action.

Instructing defence

With respect to retaining and instructing defence counsel for the municipality, the Court acknowledged that both insurers and the municipality all had perceived or actual conflicting interests. However, the Court also found there was no reason that appropriate counsel honouring their ethical obligations would not conduct the municipality's defence in such a way that would balance the insured's right to a full and fair defence with the insurers' rights to control the defence. The Hockey Insurer also agreed to create an internal protocol whereby the municipality and the Hockey Club's

defences would be handled by separate claims analysts and their respective case file information kept confidential.

“Balanced screen ” approach

In order to further reduce the possible conflicts between the parties, the Court imposed additional obligations in accordance with the “balanced screen” approach set out in a prior Superior Court decision[1]:

- The terms of the proposal to ensure confidentiality between the files must be provided in writing;
- Counsel appointed by the Hockey Insurer must fully and promptly inform the municipality and the Municipal Insurer of all steps taken in defence of litigation, putting them in the situation to monitor the defence effectively and address concerns;
- Defence counsel must not speak with coverage counsel; and
- Counsel must provide identical and concurrent reports to the insured and both insurers regarding the main action.

This approach was intended to balance the Hockey Insurer’s right to participate in the defence and settlement of the claim, while also protecting the interests of the municipality and the Municipal Insurer.

Takeaway

Municipalities and other large organizations typically require their contractors and other partners to obtain insurance in their favor. The purpose of those requirements is not only to ensure there is a responding insurance policy, but also to simplify claims response and avoid the extra costs and complications that can arise when co-defendants are required to retain separate counsel and make the case against each other. Given the broad nature of most pleadings and the difficulty of ascertaining the viability of the allegations at an early stage, however, large organizations may now see their business partners and their respective insurers to more firmly resist requests for defence and indemnity at the outset of an action. They can also expect that even where an insurer acknowledges their duty to defend, they will require information regarding other potential responding policies in order to enter into cost sharing agreements. This will likely result in an increase in the complexity, cost and delay in resolving cases with competing insurance coverage.

[1] *PCL Constructors Canada Inc. v. Lumbermens Mutual Casualty Company Kemper Canada* (2009), 76 C.C.L.I. (4th) 259 (Ont. S.C.)

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