

Is There A Duty to Defend?

The issue of whether there is a duty to defend is often a point of friction between contractors and owners in actions involving the *Occupiers' Liability Act*¹.

A determination of whether there is a duty to defend requires a look at the pleadings, the contract and the policy of insurance. Any review of those documents in the context of the case law starts with the Supreme Court of Canada decision of *Nichols v. American Home Assurance Co*²:

... [T]he practice is for the insurer to defend only those claims which potentially fall under the policy, while calling upon the insured to obtain independent counsel with respect to those which clearly fall outside of its terms.

I conclude that considerations related to insurance law and practice, as well as the authorities, overwhelmingly support the view that the duty to defend should, unless the contract of insurance indicates otherwise, be confined to the defence of claims which may be argued to fall under the policy. That said, the widest latitude should be given to the allegations in the pleadings in determining whether they raise a claim within the policy.

I conclude that the policy by its wording confines the duty to defend to claims which potentially fall within the indemnity coverage of the policy...

In recent years the Superior Court of Justice has approached duty to defend cases between contractors and owners in different ways. Some, such as *D'Cruz v. BP Landscaping*³ and *Tinkess v. N.M. Davis Corp*⁴, have held that where there are independent allegations of negligence, the owner is required to defend those claims. Other decisions, such as in *RioCan v. Lombard*⁵, have held that the contractor must defend all claims where the essence of the action is “snow and ice”. More recent cases, such as *Atlific Hotels and Resorts Ltd. v. Aviva Insurance Co. of Canada*⁶ and *Cadillac Fairview Corporation v. Olympia Sanitation Products Inc.*⁷, have seemingly found some middle ground by “categorizing” the various allegations.

The difficulty is in identifying the essence of the action as being “snow and ice” as opposed to “maintenance” which imposes extra-contractual duties on an owner pursuant to sections 3 and 6 of the *Occupiers' Liability Act*.

Until further clarification is received from the Court of Appeal, determining which party has the duty to defend will require a careful examination of the specifics of the relevant service contract, the allegations in the pleadings, as well as the insurance policy in place.

¹ R.S.O. 1990, c. O.2.

² [1990] 1 S.C.R. 801, [1990] 1 L.R. 1-2583, 45 C.C.L.I. 153, 68 D.L.R. (4th) 321.

³ [2007] O.J. No. 2704.

⁴ [2007] O.J. No. 1026.

⁵ (2008), 91 O.R. (3d) 63 (S.C.).

⁶ [2009] O.J. No. 2005.

⁷ [2010] ONSC 4309.