

Defending an Additional Insured: The 'Half-a-Loaf Solution'

By Michael Teitelbaum

In *Atlific Hotels and Resorts Ltd. v. Aviva Insurance Co. of Canada*, 2009 CanLII 24634 (Ont. Super. Ct.), another judicial voice has been added to the contentious issue of whether a defence is owed under a snow removal contractor's policy to the owner of the premises named as an additional insured under that policy.

Unlike the earlier decisions of the Ontario Superior Court in *Riocan Real Estate Investment Trust v. Lombard Insurance*, 91 O.R. (3d) 63 (2008), where it was found that the insurer was obliged to fully defend the owner, and *D'Cruz v. B.P. Landscaping Ltd.*, [2007] O.J. No. 2704, where the insurer was not required to defend when it was already defending the contractor, in *Atlific*, Belobaba J. "splits the difference". His Honour finds that the case law does not obligate an insurer to fully defend where one allegation is covered. Accordingly, Aviva did not have to defend all of the allegations made against one of several defendants who were sued as owners, operators, etc. of the Deerhurst Resort because the pleadings alleged negligence in

respect of snow and ice removal but also hotel operations and management. However, given the coverage afforded as an additional insured to one of the defendant applicants, 1279342 Ontario Ltd., c.o.b. as Deerhurst Resort, ("Deerhurst"), was with respect to liability arising out of the contractor's operations, His Honour found that Aviva did have to defend Deerhurst in respect of the snow and ice claims, as well as defending the snow removal contractor, which it was already doing.

In *Atlific*, a Deerhurst hotel guest slipped and fell on an icy pathway. She sued the Deerhurst companies that own, operate and manage the resort hotel and also sued the snow removal contractor. The precise terms of the snow removal contract and the certificate, endorsement or policy wording are not set out in the decision, except to state that the terms of the snow removal contract required Deerhurst to be named as an additional insured under the snow removal contractor's policy "but only with respect to liability arising out of the contractor's operations". Only Deerhurst was named as an additional insured and, ac-

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cordingly, the court held only it was entitled to the defence ordered.

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According to paragraphs 3 and 17 of the court's reasons, the allegations by the plaintiff fell within three categories: (i) negligence in the removal of snow and ice; (ii) negligence in hotel operations and management, including inadequate lighting and the lack of non-slip matting on the walkways, the failure by management to cancel the evening conference program completely so that guests could have stayed in their rooms, the failure to cut the program short so the participants could have returned to their lodgings sooner and more safely, and the failure to offer the plaintiff temporary overnight accommodations in the main lodge until the walkways were cleared of snow and ice and made safe for use; and (iii) more generally, occupier's liability.

Justice Belobaba distinguishes

the Riocan decision by holding that here, unlike what the court found in Riocan, the true nature of the overall claim, or true essence of the entire action, is not simply about clearing snow and ice because of the allegations relating to hotel management and operations. (As an aside, His Honour also notes this "true nature" argument was not advanced by Deerhurst.)

His Honour states that Aviva having to pay for two defence counsel or perhaps a single independent counsel is a necessary consequence of its contractual obligation, (see para. 21). His Honour also states that any issue as to whether Deerhurst has its own insurance coverage to which Aviva's coverage would be excess should be addressed in a separate proceeding.

The court's decision raises some significant concerns.

In our view, the court's opinion that one covered claim does not attract an obligation to defend all claims, whether covered or uncovered, is contrary to a number of decisions, aside from the decision of the Ontario Court of Appeal in *Halifax Insurance v. Innopex*, [2004] O.J. No. 4178, which His Honour finds did not dislodge the established jurisprudence that only covered allegations must be defended. For example, he does not mention the Court of Appeal's decision in *Hanis v. Teevan*, [2008] O.J. No. 3909, which is the latest word on this

point that was made in the context of the issue of allocating defence costs. In *Hanis*, the Court indicated that as long as the facts are sufficiently intertwined, the obligation to defend covered claims may necessarily and incidentally extend to uncovered claims.

In the instant case, we note that it is alleged the slip and fall may have occurred either due to the failure to clear snow and ice, or use non-slip matting, or meet the statutory obligations of an occupier. These allegations require fact-finding in respect of whether the owner and/or the contractor fulfilled their tortious, contractual and/or statutory obligations. It does not appear the allegations can be adequately parsed to say that certain allegations stand sufficiently separate and apart so as not to attract a full defence obligation. Indeed, while this point was not addressed in the court's reasons, His Honour does observe at para. 20 that the "snow and ice" claims were made as against both the owner and the contractor which, arguably, is the foundation for the argument that all of the claims are inextricably intertwined to the extent that they cannot be isolated from one another in terms of the provision of a defence.

Having said that, the fact the allegations are intertwined and the coverage afforded is usually only for liability attributable to the contractor's operations or contractual obligations, (so that no coverage is available for the

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owner's independent liability, but see the caveat below in this respect), create a number of difficult coverage and defence issues that are not easily solved by an order that the contractor's insurer must defend the owner either in respect of only "snow and ice claims" or, indeed, all claims against it.

There is some logic to the portion of the court's analysis that there are often allegations against the owner/additional insured that do not fall within the scope of the coverage afforded to it under, for example, an additional insured endorsement and, therefore, it cannot be said that the true nature of the claim is only about snow and ice removal. In our view, however, this does not automatically lead to an order that the additional insured must be defended in respect of the covered allegations.

We say this because the ramifications of such an order do not appear to have been fully considered. For example, the various allegations made in the action raise whether there should be claims over between the owner and contractor. Moreover, even if a defence were owed at the outset, whether indemnity is ultimately payable may be an open question dependent on the ultimate determination of the action.

Further, if an independent counsel is not selected by Deerhurst, (and really, this means by its own insurer unless it has no in-

surance coverage), and Aviva, and an agreement reached, (or the issues adjudicated), as to the sharing of defence costs, and how instructions will be provided, the parties are at a deadlock. Whether this is feasible at the initial stages of the proceeding is problematic. Even more problematic is the court's suggestion that two defence counsel can be appointed by Aviva to defend the contractor and the owner, but the defence for the latter is only in respect of the covered claims under Aviva's policy. Who is defending the owner for the "hotel operations" claims, and how can there be two counsel on record doing so?

In our view, in cases such as these, the coverage afforded to an additional insured creates unique issues that can draw upon current jurisprudence for guidance, but calls for its own special solution for reasons of both practicality and efficiency. Where insurers are in circumstances such as this, (and there are insurers for each of the owner and contractor), and there are mixed allegations that might be covered under two policies, it seems to us that the most expeditious method of addressing this is for each defendant's insurer to defend their own insureds and leave the issue of which insurer is obliged to defend, and to what extent, (and whether apportionment may be appropriate), to the end of the case, where a settlement or judgment may produce greater clarity in respect of what the true nature of the claim was.

It is also arguable, however, that it is appropriate for the defence obligation under whatever policies might respond to be determined at an early stage, including the issues of who can retain and instruct counsel and whether the payment of defence costs should be shared between the policies that insure the owner as a named insured and an additional insured. Moreover, whenever these issues are addressed, the question of the precise nature of the coverage afforded to the additional insured and whether, depending on the language used,

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the coverage is broad enough to encompass more than simply the contractor's operations or activities should also be considered.¹

All of these questions remain ripe for future review and adjudication.

And, we note that even if one insurer is found obliged to defend, (the Riocan situation), de-

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¹ There is a substantial body of U.S. case law on this point which turns on how the scope of the coverage is framed. For example, if the phrase used is "arising out of", how far does this extend?

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pending on the allegations and the circumstances, there are potential issues of recoupment of defence costs and the payment of indemnity as between the additional insured's own insurer, and the contractor's insurer, which can be incumbent on the outcome, and are matters that must be ad

dressed by the insurers and/or their coverage counsel.

There are also often issues regarding the content of the contractual agreement between the parties, and if or how their terms were translated into the insurance policies. Depending on the mandate given to defence counsel, this is where defence counsel must tread

lightly so as not to become entangled in coverage as opposed to defence issues.

It appears this decision is likely to create more problems in determining how these types of matters should be addressed which may not be resolved until the Court of Appeal and perhaps the Supreme Court of Canada consider the issues.

FIRM NEWS

Ontario Insurance Law & Commentary 2009-10 was recently published by LexisNexis Butterworths. It is the most recent edition of this text of which Michael Teitelbaum is the Consulting Editor, and includes a commentary, authored by Michael on non-automobile insurance law, including the most recent significant case law.

Jamie Trimble will be speaking on the Best Evidence Rule on September 24, 2009 at the 6th Annual Conference on Evidence Law for the Civil Litigator.

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