

Insurance & Reinsurance - Canada

Ontario courts interpret insurers' 'duty to defend'

Contributed by [Lang Michener LLP](#)

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Many insurers offer policies that provide coverage for the cost of legal defence when an insured is sued in a civil court. This type of insurance is important to insureds because defending a lawsuit can be both unpredictable and expensive. However, even with such a policy, an insurer will not necessarily be required to fund the defence of an insured against all possible actions. It is important for insureds seeking coverage for certain litigation risks to ensure that their insurance policy actually provides coverage for those specific risks. Two recent cases help to clarify when an insurer's duty to defend an insured will not be engaged under an insurance policy.

Case one

In *Aviva Insurance Company of Canada v Regional Hose Toronto Ltd* Regional Hose Toronto Ltd was sued by a former customer. Regional Hose had delivered certain manufactured components to the customer, which claimed that the components were faulty and in breach of the terms of the sale agreement. Regional Hose denied the allegations and blamed the customer's use of the components for their failure. Aviva Insurance Company of Canada had provided Regional Hose with a commercial general liability policy and Regional Hose claimed against Aviva under this policy for the cost of its defence. Aviva argued that it was not required to fund the defence.

The court noted that an insurer's duty to defend arises if, based on the allegations in the statement of claim, it is "arguable" or "possible" that a claim within the insurance policy might reasonably be expected to succeed. However, on reviewing the Aviva policy, the court found that Regional Hose's claim could be covered only if the damage was the result of an 'occurrence' or 'accident' within the meaning of the Aviva policy. Since the former customer alleged losses resulting from the defective design or manufacture of the components by Regional Hose, the court ruled that Aviva did not have a duty to defend Regional Hose against the claim. These types of loss were specifically excluded from the Aviva policy and Regional Hose was therefore prevented from seeking shelter under it.

Case two

In *1604945 Ontario Inc v Lloyd's Underwriters*, 1604945 Ontario Inc was sued by two separate parties in two separate actions. Each party alleged that 1604945 was a landlord of a building that contained asbestos, and that some of this asbestos had come into contact with the plaintiffs or their property, resulting in physical and/or property damage.

To defend against these lawsuits, 1604945 sought coverage from Lloyd's Underwriters under an insurance policy that it had purchased from Lloyd's. Under this policy, the owners, landlords and tenants liability coverage rider required Lloyd's to defend 1604945 in any civil action brought against it on account of 'bodily injury' and/or 'property damage' (each defined terms under the policy).

The problem for 1604945 was that the Lloyd's policy contained an explicit exclusion called the absolute asbestos exclusion endorsement. The asbestos exclusion provided that "[t]his insurance shall not apply to... 'bodily injury', 'property damage'...in any way involving asbestos".

In its reasoning the court differentiated between the plaintiffs' particular claims based solely on asbestos contamination and claims based on lawsuits alleging more than one cause for the injury. For example, if the plaintiffs' claims against 1604945 alleged injuries from a possible alternative cause, then Lloyd's duty to defend may have been

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triggered. However, because asbestos contamination was at the foundation of the plaintiffs' claims and no other causes were alleged, the asbestos exclusion applied and Lloyd's had no duty to defend 1604945 against the plaintiffs' claims.

Comment

Insureds are advised to:

- review the terms of their insurance policy, particularly exclusions contained within it, to ensure that it reflects the risks that they face and want to insure;
- discuss business risks with their brokers and legal advisers and ways of mitigating these risks and insuring against them;
- consider the importance of an insurer-funded defence and whether the premium cost is justified; and
- meet with legal counsel if in doubt about any of the above or any of their rights or responsibilities.

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