ONCA confirms that a self-insured retention is not akin to a policy when considering whether a concurrent policy exists for coverage

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The Court of Appeal's recent decision in ***Live Nation Ontario Concerts GP, Inc. v. Aviva Insurance Company of Canada,*** **2024 ONCA 634** provides clarity on the extent of an insurer's duty to defend in relation to covered and uncovered claims brought against an insured in an underlying action.

What you need to know

This decision is significant for litigants with large, self-insured retentions, such as municipalities, who may frequently seek a defence from insurers where they have been added as additional insureds.

Previous Court of Appeal jurisprudence has held that multiple insurers may need to respond to an insured's request for a defence if there are multiple responding policies. In seeking contribution from a co-insurer, an insurer can rely on the doctrine of equitable contribution. However, equitable contribution can only be sought from a concurrent insurer, not from an insured. The existence of an insured's self-insured retention under a policy does not turn them into an insurer.

The Court held that Aviva Insurance (the Appellant) was required to fund 100 per cent of the defence costs for the claims brought in an underlying action against Live Nation and Ontario Place Corporation (the Respondents), subject to the Appellant's right to seek allocation following trial or settlement. The Court made this decision despite the fact that some of the claims were not covered under the applicable insurance policy.

Background

The underlying proceeding involves a personal injury action brought by a concertgoer against Northwest Protection Services (Northwest) and the Respondents, after she was injured in the course of security guards trying to remove another patron. The action plead negligence against the security guards (the Security Negligence Claims) and that the Respondents breached their statutory obligations under the *Liquor License Act* and

the *Occupiers' Liability Act* by serving excess alcohol and failing to provide a safe premise (the Statutory Negligence Claims).

Northwest held a policy with the Appellant, which provided coverage for bodily injury resulting from Northwest's failure to provide their services to the required standard. The Respondents were an "additional insured" under this Aviva Policy.

The Respondents also held a policy with another insurer, Starr Indemnity & Liability Company (Starr). The Starr Policy included coverage for bodily injury and imposed a self-insured retention of $1,000,000. However, Starr was not a party to this application for coverage, and there was no evidence before the court as to whether or not the Respondents had made a claim under the Starr Policy or if Starr had accepted coverage.

Lower Court's decision

The Respondents brought the underlying application against the Appellant for declaratory relief, including declaring that the Appellants had an obligation to defend and indemnify the Respondents and were required to reimburse the Respondents for all past and future defence costs on a full indemnity basis. The application judge found that:

a. the pleaded claims all amounted to Security Negligence Claims and therefore were covered under the Aviva Policy;
b. the Appellant was responsible for paying 100 per cent of the past and future defence costs for the underlying personal injury action, subject to the Appellant's right to reapportion these costs at the end of trial or settlement; and
c. the principles of equitable contribution did not apply between the Appellants and the Respondents as the Respondents were insureds, not co-insurers.

Court of Appeal's decision

The Court of Appeal agreed that the Appellant was required to fund 100 per cent of the defence costs for the claims brought in the underlying action, subject to the Appellant's right to seek allocation following trial or settlement. The Court made this decision despite the fact that some of the claims were not covered under the applicable insurance policy.

The Court found that the application judge erred in concluding that all of the claims were Security Negligence Claims. Rather, the Court held that there were two separate types of claims, the Security Negligence Claims and the Statutory Negligence Claims. Each claim stood on its own and formed a basis for liability against the Respondents.

The Court further confirmed that the Appellants are not required to pay defence costs for claims that are clearly not covered under the policy, namely, the Statutory Negligence Claims.

However, despite this ruling, the Court found that *practically,* the Appellant is still required to fund, "at present", 100 per cent of the Respondents' defence costs, subject to reallocation at the end of trial or settlement, when there is the benefit of a clear record

as to how defence costs were expended. At the time of the decision, the Court found that there was no clear evidence as to how defence costs have been expended and therefore impossible to determine the extent of the Appellant's obligations with respect to only the covered Security Negligence Claims.

Lastly, the Court upheld the finding that the principles of equitable contribution did not apply between the Appellants and the Respondents. This doctrine applies when an insured holds more than one insurance policy that could apply to a claim. In this scenario, an insurer may claim contribution from the co-insurers who have a concurrent duty to defend on the same or other pleaded claims. The Court held that the Appellants could not seek equitable contribution against the Respondents, who are insureds. Rather, they would be required to do so against Starr, assuming that they could be found to be a concurrent insurer. The Court also held that the fact that the Respondents' Starr Policy had a self-insured retention of $1,000,000 did not make the Respondents an "insurer" under the Starr Policy.

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