Court Finds Agreement to Defend and Indemnify Where Insurer Appointed One Counsel to Represent Both City and Winter Maintenance Contractor

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The recent Court of Appeal decision of *Seidel v. Markham*[1] involved a claim where the plaintiff alleged that he had slipped and fallen on an icy sidewalk in the City of Markham (the "City"). The subject sidewalk was ploughed and salted by V.T.A. Construction ("V.T.A.") pursuant to their contract with the City.

Pursuant to the winter maintenance contract, V.T.A.'s insurance policy with Intact Insurance ("Intact") named the City as an additional insured, "but only with respect to the legal liability arising out of the operations of V.T.A."

The City issued a third party claim against Intact seeking a declaration from the Court that Intact owed the City a defence.

An Assumption of Defence agreement was subsequently drafted by the City but never signed; however, counsel for V.T.A. delivered a Notice of Change of Lawyer confirming that it would represent both the City and V.T.A. in the action.

Sixteen months later, counsel for V.T.A. brought a motion to remove itself as counsel of record for both V.T.A. and the City. New counsel was subsequently appointed for V.T.A. but not the City.

In response, the City brought a motion seeking to enforce its “settlement agreement” and Intact's obligation to defend and indemnify the City. The motion was dismissed by Glass J. on the grounds that there had been no "meeting of the minds" in relation to indemnification of the City.

The Court of Appeal reversed the motions judge's decision, holding that the appointment of one counsel to represent both the City and V.T.A. was sufficient to demonstrate that an agreement was in place. The Court found that:

Intact's appointment of a single firm to represent both Markham and V.T.A. could not have occurred if V.T.A. and Markham continued to be adverse in interest... The fact that BPB was appointed to represent both defendants and in fact did represent them in litigation until discoveries had been completed was only consistent with one meaning, namely, that Intact had agreed to both defend and indemnify Markham, including in respect of its own negligence unrelated to V.T.A.'s acts or omissions.[2]

In sum, Intact's appointment of a single firm to represent both defendants demonstrated support for the fact that it had agreed to defend and indemnify the City. If it had been Intact's intention to deny indemnification, two counsel would be required to represent each of the City and V.T.A. since there would have been an "obvious and untenable" conflict of interest. Intact was therefore ordered by the Court to appoint counsel to defend the City at its expense and indemnify the City with respect to any damages awarded against it in the main action.

[1]*Seidel v. Markham (Town)*, 2016 ONCA 306 (CanLII)

[2]*Ibid* at para. 12.

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