The Court holds that the duty to defend is not a bridge too far

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The Ontario Superior Court of Justice recently released its decision in *His Majesty the King v RSA*, confirming a duty to defend on the part of two insurers that provided historical comprehensive general liability (CGL) coverage to the Province of Ontario from 1975 to 1984, notwithstanding that the bridge collapse at issue did not occur until 2018. The allocation of defence costs was based on time on risk, thereby limiting the insurer's exposure to those periods of time in which they had insured the Province.

Summary of facts

This case arose from the collapse of a bridge over Catfish Creek in Elgin County on February 23, 2018, which led to two actions: (1) by Elgin County against the Province of Ontario and others for costs of replacing the bridge and related losses, and (2) by Ron Jones Construction for damages to its dump truck, with Elgin County issuing a third-party claim against the Province of Ontario. The claims against the Province centred on allegations that the bridge had been designed improperly and/or not maintained properly over the period of time the Province had jurisdiction over the bridge, from 1964 until 1997.

The Province sought a declaration from the Ontario Superior Court that two of the Province's historical CGL insurers (for the period of 1975–1984) were obliged to defend the actions and share defence costs. The insurers disputed the duty to defend, arguing that the alleged property damage occurred in 2018, outside their respective policy periods, and that various exclusions applied.

The Court's analysis on duty to defend

The court applied established policy interpretation principles from *Progressive Homes* and *Nichols*, noting that the duty to defend arises where there is a mere possibility of coverage based on the pleadings. The court found that the claims alleged progressive corrosion of anchor rods from 1964 to 2018, including during insurers' policy periods, and that the policies covered property damage caused by accident, including "loss of use at any time resulting therefrom".

Exclusion clauses pertaining to ownership, care/custody/control, and work exclusions were interpreted narrowly and found not to clearly bar coverage at this stage.

In particular, while there was uncertainty as to whether the Province *owned* the bridge prior to 1997 –casting doubt on the availability of the exclusion for property owned by the Insured– it was clear that the Province had *jurisdiction* over the bridge prior to 1997. For this reason, the exclusion for property in the *care, custody, or control* of the insured was contentious. The Province characterized the claims against it as referring to the 1964 to 1997 period in order to come within the coverage grant of the policies, but took the position that the care, custody, and control, exclusion did not apply because the Province did not have jurisdiction over the bridge in 2018 when it collapsed.

The insurers argued that it was improper to read the claim one way for purposes of analyzing the coverage grant and another way for analyzing the exclusions. The court agreed but nevertheless found that the exclusion did not clearly and unambiguously exclude coverage. The court interpreted the pleadings as alleging that the corrosion of the anchor rods happened over the lifespan of the bridge, from 1964 to 2018. While there was damage allegedly occurring when the insurers were on risk, the loss of use did not occur until 2018, when the Province no longer had jurisdiction over the bridge. Further, the claim was distinguished from that in *Mori-Vines, a* 2017 decision that one of the insurers sought to rely on, because the subject policy provided a trigger for loss of use "at any time" from damage that occurred during the policy period.

Consequently, both insurers were found to owe the Province a duty to defend in both actions.

Allocation of defence costs

The key dispute on allocation was whether costs should be shared equally or based on "time on risk". Relying on *Loblaw v RSA* and *Tedford*, the court held that time on risk is the appropriate method for long-tail claims spanning multiple policy periods. The court stated that equal sharing would be "grossly disproportionate and arbitrary". Based on the insurers' coverage periods relative to the bridge's 54.2-year lifespan, one of the insurers was allocated 5.5% and the other 11.1% of defence costs. The Province's argument for equal sharing, subject to later reallocation, was rejected by the court as being inconsistent with contractual risk allocation.

Key takeaways

The Province's application succeeded in part: the insurers were required to defend both actions but proportionate to their time on risk.

The court found that there were allegations of property damage taking place during the policy periods at issue – when the Province had care, custody, and control of the bridge. When the bridge collapsed, however, the Province did not have care, custody or control. The issue was whether the policy language that covered the "loss of use" of the bridge "at any time" – being in 2018 when the bridge collapsed – was broad enough to trigger the duty to defend. The court determined it was. The court went on to find that the exclusion relating to property within the care, custody and control of the Province did not clearly and unambiguously exclude coverage, stating:

> The loss of use as a result of, in part, the property damage that occurred during each respondent's policy period, is alleged to have occurred at a time when Ontario no longer had care, custody, or control of the bridge (and certainly when it no longer owned the bridge, if indeed it owned the bridge pre-1997). The care, custody, and control exclusion therefore does not clearly and unambiguously exclude coverage.

The decision is not easily reconciled with the general principles that: (1) CGL policies provide coverage for third party property damage (*i.e.* they are not intended to cover damage to the insured's own property), and (2) exclusions relating to property under the care, custody and control of the insured are typically intended to apply to personal property (*i.e.* a contractor damaging a client's personal property while renovating a home).

The result may prove to be an outlier given the unique facts – namely that the property changed hands between the time of the underlying damage and the loss of use, but the policy provided coverage for loss of use "at any time".

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