

## Limitation Periods

# Limitation period for duty to defend applications

By Carol-Anne Wyseman



Carol-Anne Wyseman

(January 10, 2020, 10:59 AM EST) -- The limitation period for commencing duty to defend applications was recently clarified by the Ontario Court of Appeal in *Reeb v. Guarantee Co. of North America* 2019 ONCA 862 (*Reeb*).

Until *Reeb*, it was often thought that the limitation period for duty to defend applications was two years from an insurer's refusal to defend. For instance, in 2015, Justice Edward Belobaba stated in *Zochowski v. Security National Insurance* 2015 ONSC 7881: "The law is clear that a clear and unequivocal denial of coverage triggers the two-year limitation period."

However, in *Reeb*, the Court of Appeal stated that the duty to defend is an ongoing obligation to be applied on a "rolling" basis. That means that a duty to defend application can be brought more than two years following a denial of coverage.

Royal & Sun Alliance Company of North America (RSA) had brought an application for declarations that the Guarantee Company of North America and The Co-operators General Insurance Company had a duty to defend Ryan Reeb. RSA also sought a declaration that Guarantee and Co-operators were obligated to pay to RSA an equal one-third share of ongoing defence costs and disbursements incurred in Reeb's defence going forward.

Notably, RSA did not seek contribution towards any potential indemnity and did not seek contribution for past payments.

The application judge found that Guarantee and Co-operators had a duty to defend Reeb and ordered that Guarantee, Co-operators and RSA share the defence costs equally going forward.

Guarantee and Co-operators appealed the application judge's decision, arguing that RSA's application for contribution to the defence costs was statute-barred under the *Limitations Act, 2002, S.O. 2002, c. 24, Sched. B*. More specifically, RSA's application was brought over two years after Guarantee and Co-operators refused to defend Reeb.

RSA argued that the duty to defend is an ongoing obligation and is therefore to be applied on a rolling basis. It further argued that no limitation period attached, since RSA only sought contribution on a going forward basis. The Court of Appeal agreed.

It is important to note that the *Reeb* decision indicates that, while the limitation period for commencing a duty to defend application is rolling, the insurer's obligation to pay defence costs is only on a going forward basis.

This decision is a surprising one and the rationale is problematic. When arguing that the duty of defend should be applied on a rolling basis, RSA relied on *Pickering Square Inc. v. Trillium College Inc.* 2016 ONCA 179 (*Pickering Square*), a 2016 Court of Appeal decision. In that case, the tenant failed to comply with a covenant in the lease to operate its business continuously.

Upon discovering the tenant's breach, the landlord elected not to cancel the lease, but rather affirmed the lease. This required both the landlord and the tenant to perform their obligations under

the lease. The tenant did not perform its obligations. The Court of Appeal found that the tenant was in breach of the lease each day that it did not perform its obligations and that there was thus a rolling limitation period.

However, the issue in *Reeb* is different from the one in *Pickering Square*, as *Pickering Square* dealt specifically with when claims are discovered for limitations purposes in the context of a continuing breach of contract.

Where ongoing contracts are concerned, a breach of contract could occur at any point. For that reason, the application of rolling limitation periods is understandable in the context of ongoing contracts.

Rolling limitation periods are less logical in the context of duty to defend applications, where an insurer either has a duty to defend or it does not. If an insurer opts to not defend, that insurer's decision can then be challenged.

Given the distinction between *Reeb* and *Pickering Square*, it is unclear why a rolling limitation period should apply to duty to defend applications.

*Carol-Anne Wyseman is a lawyer with Rogers Partners LLP, practising primarily in the area of insurance defence litigation.*

*Photo credit / z\_wei ISTOCKPHOTO.COM*

*Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Yvette Trancoso-Barrett at [Yvette.Trancoso-barrett@lexisnexis.ca](mailto:Yvette.Trancoso-barrett@lexisnexis.ca) or call 905-415-5811.*