Limitation Period for Duty to Defend Applications

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A recent Court of Appeal decision, *Reeb v. The Guarantee Company of North America* ("***Reeb***"),[1] has clarified the limitation period for commencing duty to defend applications.

Previously, it was commonly thought that the limitation period for these applications was two years from an insurer's refusal to defend. Indeed, in 2015, Justice Belobaba stated in *Zochowski v. Security National Insurance*[2]: "[t]he law is clear that a clear and unequivocal denial of coverage triggers the two-year limitation period."

In *Reeb*, however, the Court of Appeal recently stated that the duty to defend is an ongoing obligation to be applied on a "rolling" basis. In other words, even more than two years following a denial of coverage, a duty to defend application can be brought.

RSA had brought an application for declarations that Guarantee and Co-operators respectively had a duty to defend Mr. Reeb, and for a declaration that they were obligated to pay to RSA an equal one-third share of ongoing defence costs and disbursements incurred in Mr. Reeb's defence going forward.

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

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

Guarantee and Co-operators appealed the application judge's decision. On appeal, they argued 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, because RSA's application was brought over two years after Guarantee and Co-operators refused to defend Mr. Reeb.

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

Notably, 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.

RSA relied on a 2016 Court of Appeal decision, *Pickering Square Inc. v. Trillium College Inc.*[3] In that case, the tenant failed to comply with a covenant in the lease to operate its business continuously.

Upon discovering this breach, the landlord elected not to cancel the lease. Rather, it affirmed the lease, which required both parties 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, and that there was thus a "rolling" limitation period.

The *Pickering Square* decision dealt specifically with when claims are discovered for limitations purposes *in the context of a continuing breach of contract.*

Rolling limitation periods are logical where ongoing contracts are concerned, as a breach of the contract could occur at any point.

However, in the context of duty to defend applications, an insurer either has a duty to defend or it does not. If that insurer opts to not defend, that decision can then be challenged. It is unclear why a rolling limitation period should apply in these cases.

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[1] 2019 ONCA 862.
[2] 2015 ONSC 7881.
[3] 2016 ONCA 179.