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This article was originally published on the Toronto Lawyers Association website, on April 30, 2025

Drawing a Line on the Duty to Defend: When are Insurers Required to Contribute

In 2024, Ontario's top court revisited an insurer's duty to defend its insured when multiple policies are available to respond. The Ontario Court of Appeal ("ONCA") reviewed the role of non-concurrent insurers and pushed back on coverage overreach. Two recent decisions – *Loblaw Companies Limited v. Royal & Sun Alliance Insurance Company of Canada*[1] and *Live Nation Ontario Concerts GP, Inc. v. Aviva Insurance Company of Canada*[2] – were released within months of each other and, although factually distinct, share some common themes.[3] The two cases emphasize the primacy of pleadings, the inviolability of policy structures (such as self-insured retentions), and the limits on equitable contribution among insurers.

At their core, both cases tackle two insurance law questions: who actually has to defend, and what are the defending insurer's obligations?

I. Tightening the Duty to Defend

(i) The Pleadings Rule

In *Live Nation*, a concertgoer sued Live Nation Ontario Concerts GP, Inc. ("Live Nation") after being injured by security staff employed by NorthWest Protection Services Ltd. ("NorthWest"), a contract security company retained by Live Nation.[4]

NorthWest's security services agreement required it to procure and maintain Commercial General Liability ("CGL") insurance coverage, naming Live Nation as additional insured on the certificate of insurance under a policy with Aviva Insurance Company of Canada ("Aviva") (the "Aviva Policy").[5] Although Live Nation had a policy with Starr Indemnity & Liability Company ("Starr"), it had a self-insured retention of

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[1] *Loblaw Companies Limited v. Royal & Sun Alliance Insurance Company of Canada,* 2024 ONCA 145 [*Loblaw*], leave to appeal to SCC refused May 6, 2024, 2024 CarswellOnt 12763
[2] *Live Nation Ontario Concerts GP, Inc. v. Aviva Insurance Company of Canada*, 2024 ONCA 634 [*Live Nation*]
[3] *Live Nation* followed the decision in *Loblaw*.
[4] *Live Nation*, at 10.
[5] *Live Nation*, at 14-15.

one million dollars that had to be exhausted before Starr's duty to defend and pay defence costs was triggered.[6]

The ONCA determined that not all claims in the concertgoer's pleadings amounted to negligence claims as against NorthWest.[7] The concertgoer's claims were a mix of covered and uncovered allegations, with negligence allegations that fell both within and outside the scope of the Aviva Policy.[8] Specifically, "the claims alleging that [Live Nation] failed to properly carry out their statutory obligations are not derivative in nature from the pleading of negligently executed security services against both NorthWest and [Live Nation].[9]

Despite this mixed claim distinction, the ONCA upheld the application judge's order that Aviva must fund 100% of the Live Nation's defence costs, subject to reallocation at the end of trial.[10] The ONCA affirmed that equitable contribution can only be sought from a concurrent insurer, not from Live Nation directly as an insured.[11] Specifically, the ONCA stated that the existence of Live Nation's self-insured retention does not turn Live Nation into an insurer; "[rather, the self-insured retention] is a contractual provision that affects the timing of the triggering of Starr's duty to defend and pay defence costs…".[12] This meant that Starr is not on risk until the self-insured retention has been exhausted. However, despite this finding, Aviva was still required to defend both covered and uncovered claims under the Aviva Policy, and seek reallocation of costs at the end of trial or upon settlement.[13]

Live Nation reinforces the importance of precise policy wording in insurance contracts and highlights the need for insurance providers to clearly delineate the scope of coverage. Furthermore, it underscores the crucial role that pleadings play in determining coverage, an insurer's duty to defend, and the scope of an insurer's responsibility – whether implicit or explicit – in defending an insured. The ONCA reaffirmed that the duty to defend is triggered by the pleadings and, even if only *some*

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[6] *Live Nation*, at 16.
[7] *Live Nation*, at 30.
[8] *Live Nation*, at 1.
[9] *Live Nation,* at 34.
[10] *Live Nation,* at 44.
[11] *Live Nation*, at 50.
[12] *Live Nation*, at 51.
[13] *Live Nation,* at 60.

of the allegations fall within the scope of coverage, the insurer may be required to defend the entire action.[14]

(ii) Respecting Policy Periods and Self-Insured Retentions

In *Loblaw*, the ONCA considered the issue of apportionment of defence costs amongst multiple consecutive insurers that owed a duty to defend, none of whom were concurrent insurers.[15] In contrast to mixed claims and multiple theories of liability, the ONCA was tasked with evaluating liability that spanned multiple policy periods.

The Respondents – Loblaw Companies Limited, Shoppers Drug Mart Inc. and Sanis Health Inc. (the "Respondents") – sought a declaration that the primary insurers had a duty to defend the claims and that the insureds were entitled to select any single policy under which there was a duty to defend.[16] The application judge allowed the insureds to each choose one insurer to cover the full defence costs across all time periods – even if that insurer's policy only covered a sliver of the 20-year class action timeline. This selection was justified because it remained subject to those selected insurers' right to seek equitable contribution from other insurers on risk.

By permitting each insured to select one policy each for their defence, the application judge effectively adopted an "all sums" approach to defence costs,[17] allowing the insured to compel an insurer with the most favourable terms to defend the entirety of the claim. Under an "all sums" approach, an insurer may be liable for the full cost of defending and indemnifying a loss, even if only part of the loss occurred during its policy period. Certain insurers argued that this approached contravened the contractual framework of the insurance policies that were designed to cover risks within defined temporal parameters (i.e., the policy period).[18]

The ONCA rejected the "all sums" approach to defence costs, and endorsed a pro-rata time-on-risk approach, consistent with policy language that contractually

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[14] In addition to *Live Nation*, in a recent ONCA case, the application judge found the mere possibility that a claim is covered under an insurance policy is sufficient to trigger the duty to defend. See *Thunder Bay (City) v. Great American Insurance Company*, 2024 ONCA 837, aff'g 2024 ONSC 1085, at 34 & 75.
[15] *Loblaw*, at 1.
[16] *Loblaw,* at 5 & 46.
[17] *Loblaw*, at 95.
[18] *Loblaw*, at 73.

prescribes a time-limited duty to defend "during the policy period".[19] The ONCA stated it "makes no sense for an insurer with minimal exposure to be tasked with controlling the defence and the defence costs [in an 'all sums' model, and] participation of all insurers at an early stage is conducive to the conduct of the best defence possible and also serves to promote settlement".[20]

The time-on-risk approach results in a fair allocation of defence costs among insurers and accords with policy language that limits the duty to defend to risks during the policy period. The ONCA emphasized that each CGL policy was a time-limited bargain, and the insurers agreed to defend only those occurrences that happened during their policy period.[21] Unless insurers covered the same risk at the same time, they were not concurrent insurers, and therefore equitable contribution does not apply. Flowing from the ONCA's conclusion that a pro-rata time-on-risk formula is the appropriate way to allocate defence costs among insurers, it followed that the self-insured retention or deductible of each policy must be exhausted before the duty to defend is triggered

II. Equitable Contribution has Boundaries

In both *Live Nation* and *Loblaw*, the ONCA expressed caution toward expansive theories of equitable contribution and reaffirmed the importance of respecting contractual risk allocation, including the structure of self-insured retentions. In *Live Nation*, the ONCA clarified that an insurer's duty to defend is not triggered until the self-insured retention has been exhausted. In *Loblaw,* the application judge initially allowed the insured to "exhaust" multiple self-insured retentions by applying payments from one insurer. That, the ONCA said, undermines the very purpose of self-insured retentions – which are designed place initial risk on the insured (and thus paid for by the insured), not on other insurers.

The ONCA also rejected the "all sums" approach to defence obligations, under which a single insurer could be forced to fund all defence costs and later seek contribution, even where the insurers' coverage periods did not overlap. While the "all sums" approach has found support in some U.S. jurisdictions, Ontario courts prefer a pro-

[19] *Loblaw,* at 97 & 115.
[20] *Loblaw*, at 114.
[21] *Loblaw*, at 69, 71 & 78.

rata, time-on-risk allocation, particularly in complex, long-tail claims such as class actions.

Finally, the ONCA highlighted the conflict of interest risks inherent in the "all sums" model. If an insurer is required to defend claims outside its policy period or coverage scope, it may be forced to advocate against its own insured's interest – supporting liability theories not covered by its policy, to limit its own exposure.[22] The pro-rata, time-on-risk approach promotes fairness, ensures the early and equal participation of all insurers, strengthens the insured's defence, and mitigates the potential for conflicts to arise.[23]

III. Key Takeaways

As detailed in both *Live Nation* and *Loblaw*, it appears Ontario courts are growing wary of insurers' attempts to seek contribution from other insurance policies – but they're equally skeptical of insureds who try to make one policy respond to all claims.

These two decisions explore the limitations of an insurer's "duty to defend" when other policies are available and may respond to a plaintiff's claim. Ontario's appellate courts are reminding us that coverage is contractual, and that creative workarounds will not fly when they conflict with the basic terms of an insurance policy.

Coverage counsel should push back against vague or speculative pleadings that do not clearly engage the policy. If the Statement of Claim does not clearly implicate the insured or the relevant policy period, coverage should be challenged at the outset — or insurers risk defending under protest with limited avenues for recovery. Where multiple insurers and consecutive coverage periods are involved, a pro-rata, time-on-risk allocation remains the proper method for distributing defence costs. However, *Loblaw* signals that insureds now bear the primary responsibility to ensure all potentially responsive insurers are engaged and contributing from the start.

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[22] *Loblaw,* at 113.
[23] *Loblaw*, at 114.