

## Assumption of Defence Agreement; Is It Enforceable?

The Court of Appeal on April 26th, 2016, dealt with the enforceability of an Assumption of Defence of Agreement in *Seidel v. Town of Markham et al.*. The facts of the case are as follows:

The Plaintiff sustained a slip and fell and commenced an action against the Town of Markham (hereinafter "Markham") and indicated that the incident occurred on March 6th, 2011. Markham had retained V.T.A. Construction LTD as the winter maintenance contractor. A statement of defence and Third party Claim was issued as against V.T.A. and its insurer Intact. The contract between V.T.A. and Markham had Markham added as an additional insured to its policy with Intact "but only with respect to the legal liability arising out of the operations of [V.T.A.]". In the third party claim, Markham sought a declaration from Intact that it owed a duty to defend and indemnify Markham.

The Plaintiff added V.T.A. as a defendant to the action.

Counsel for Markham prepared an Assumption of Defence Agreement that provided that Intact would assume the defence of Markham and indemnify Markham with respect to any damages in the action. Counsel

for V.T.A. advised that Intact would not be executing the agreement but that his office would serve a Notice of Change of Lawyers. Counsel for Markham advised that the agreement did not have to be signed as long as Markham was **covered for any amounts arising from a finding of liability against it**. Counsel for V.T.A. delivered a Notice of Change of Lawyers, which indicated that he was now counsel for both V.T.A. and Markham. For 16.5 months, counsel represented both, including at examinations for discovery.

In December 2013, counsel brought a motion to remove itself as solicitor of record and new counsel was appointed for V.T.A. but not for Markham. Markham brought a motion under *Rule 49* to enforce the settlement agreement.

The appeal was allowed and it was found that the motion judge erred in finding that there was no agreement. The Court of Appeal found that the question was not whether there was an agreement, but its interpretation.

Secondly, the motion judge erred in concluding that Intact "could not have agreed to indemnify Markham for liability in the action, except as resulted from V.T.A.'s negligence".



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Although the maintenance contract indicated this, the agreement between counsel was different. Furthermore, the actions of Intact indicated the latter agreement.

By having one counsel act for both Markham and V.T.A. meant that their interests were the same and aligned and not adverse in interest. This was found to be an important determinative fact. Intact had agreed to **both defend and indemnify** Markham, including in respect of its own negligence, unrelated to V.T.A.'s actions, or lack thereof.

The Court of Appeal found that this was an agreement to indemnify and therefore found that Intact had to defend Markham at its sole expense and indemnify it for any damages and costs awarded.

What other alternatives did Intact have?

1. It could have denied both the duty to defend and indemnification obligations leaving Markham on its own, and indicating that V.T.A. and Markham were adverse ;

2. It could have resisted the claim for indemnification but accepted the obligation to defend, assuming the cost of Markham's defence, and indicating adversity between V.T.A. and Markham. Another counsel would have had to be appointed for Markham;

However, by choosing to have the same counsel defend both V.T.A. and Markham, demonstrated alignment in interest, and it was too late now for Intact, to indicate otherwise.