Duty to Defend: the True Nature of the Action

April 9, 2026

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In a recent decision[1], the Quebec Court of Appeal examined an insurer's duty to defend under a directors and officers errors and omissions insurance policy in a dispute involving non-competition obligations.

FACTS

From 2016 to 2020, the appellant, Alain Déry ("***Déry***"), held the position of Vice President of Sales and Marketing for a U.S. company operating in the field of magnesium recycling, Advanced Magnesium Alloys Corporation ("***Armacor***"). He was bound by non-competition and confidentiality agreements.

Starting in 2018, while still employed, he nevertheless collaborated with a competing Canadian company, Alliance Magnésium Inc. ("***Alliance***"), by providing it with confidential business information.

In October 2019, talks began between Alliance and Déry regarding the latter's potential position within the company. These discussions came to fruition in March 2020, when Déry and Alliance agreed that he would take on the role of Vice President of Business Development starting in January 2021.

In June 2020, however, Déry was immediately dismissed by Armacor when his practices were finally revealed. Armacor promptly filed injunctive proceedings in U.S. courts against both Alliance and Déry.

In the fall of 2020, the parties reached an agreement whereby Déry undertook not to work for Alliance and disclose sensitive information about Armacor to it. This agreement was not honoured.

Alliance's insurers assumed its defence, but not Déry's, a right he claimed, suggesting that given his significant contribution to Alliance's activities and the nature of the tasks he performed for it, he was a *de facto* officer. According to this proposition, he qualified as an officer under Alliance's directors and officers errors and omissions policy.

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Dissatisfied with the denial of coverage, Déry brought the matter before the Quebec courts by means of a Wellington-type application to force the insurers' hand.

FIRST INSTANCE

The trial judge dismissed Déry's application. The allegations rather indicate that at the time of the alleged events, Déry was an officer of Armacor, not Alliance. Déry had also formally committed to no longer work for Alliance in 2020. The fact that he shared sensitive business information with Armacor and then used it at Alliance to the latter's advantage did not make him a *de facto* officer, however beneficial that sharing of information may have been.

Still dissatisfied, Déry appealed the decision.

APPEAL

The appeal panel first reiterated the well-known principles of the duty to defend, which, as a reminder, apply regardless of the type of policy involved. Following the analysis of the trial judge, this duty was examined in light of the allegations in the proceedings and the supporting evidence, keeping in mind the true purpose of the claim.

The Court then concluded that both his obligations as an employee of Armacor and his subsequent commitments in connection with the U.S. legal proceedings precluded Déry from working for Alliance. Moreover, none of the allegations suggested that he was an officer of the Canadian company. Incidentally, the Court noted that Déry's claims contradicted those set out in the affidavit filed in support of his Wellington-type application. While he claimed to have made a major contribution to Alliance's business, he stated under oath that he did not have full knowledge of how it was used.

CONCLUSION

Although at first glance this decision appears to be a simple application of facts—albeit unusual ones—to recognized and well-established legal principles, it certainly serves as a reminder of the framework for analyzing the duty to defend: the question is whether the action, **by its true nature reflected by the allegations**, falls within the scope of the coverage offered. This true nature remains the key criterion. Potential defences should not be used to divert or complicate the analysis; resorting to them may even play against the person claiming coverage, as in this case.

This decision highlights the increasingly creative claims that insurers are facing. In an era of costly justice, whether to assert or defend rights, the significant financial risks associated with claims invariably lead to a proliferation of such claims and debates. Keeping the analytical framework in mind allows us to better understand the scope of the coverage and make more informed decisions.

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1. *Déry* c. *Arch assurances Canada ltée*, 2025 QCCA 179

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