



LAPOINTE ROSENSTEIN
MARCHAND MELANÇON

L.L.P. Attorneys

Newsletter

Insurance Law

June 2016



M^{re} Meïssa Ngarane

Representations and tests regarding the quality of a product are inextricably linked to the product itself

The Court of Appeal recently came to this conclusion following a debate on the “Products / Completed Operation Hazard Exclusion” in the *GCAN Insurance Company v. Univar Canada Ltd.*¹ case.

The facts

Univar Canada Ltd. (hereinafter “**Univar**”) distributes chemical products which it notably buys from Aslchem international inc. (hereinafter “**Aslchem**”). Univar provided feed grade copper sulfate bought from Aslchem to its client Alltech inc. (hereinafter “**Alltech**”), a world leader in the animal feed additive industry. The product had to be in compliance with the applicable standards and regulations, notably that it had to be free of dioxins and furan contaminants.

In two instances, in May 2004 and in November 2006, at Univar’s request, Aslchem provided Univar with a letter confirming that its product was free of the aforementioned contaminants. In support of these representations, Aslchem also provided Univar with test results, which were conducted by an independent laboratory.

However, in March 2007, the Canadian Food Inspection Agency carried out an inspection on Alltech’s premises and discovered that the product sold by Univar and initially supplied by Aslchem was severely contaminated. Tests on

the samples of the product stored on Univar’s premises also revealed that they were contaminated. It was later proven that the wrong samples had been given for examination to the independent laboratory.

A worldwide recall of the products was initiated by Alltech following this discovery.

Alltech put Univar on notice for all the costs and damages that it could suffer following the contamination of its products. Univar and its insurers paid more than \$2.3M in exchange for the assignment and transfer of Alltech’s rights and recourses.

Univar and its insurers sued Aslchem, its subsidiaries and insurer for \$2.3M on top of claiming Univar’s personal claim for \$482,805.13. Following an out-of-court settlement with Aslchem and its subsidiaries, Univar and its insurers pursued proceedings against *GCAN Insurance Company* (hereinafter “**GCAN**”) for the difference between the damages claimed and the monies received from Aslchem.

Superior Court

Three exclusions were raised by GCAN: “product exclusion”, “work exclusion” and “products / completed operations hazard exclusion”.

From the onset, the Superior Court had rejected GCAN’s arguments regarding “product exclusion” and “work exclusion”. After analyzing several of the definitions in the insurance policy, the tribunal of first instance found that the “products / completed operations hazard exclusion” did not apply in this case.

The Court concluded that Aslchem committed the two following faults, which contributed to causing damages:

- 1) Negligent representations as to the quality of the copper sulfate; and
- 2) Negligence related to the tests performed on the sulfate samples.

Basing itself on several American decisions regarding the “products / completed operations hazard exclusion”, the Superior Court concluded that this last exclusion did not oust coverage since the damages were caused by these two concurrent faults.

Court of Appeal

In appeal, the Court had to render a decision on the application of the “products / completed operations hazard exclusion” as well as on the existence or not of concurrent causes of damages, of which at least one would not be excluded.

Following its analysis of the definitions of “products hazard” and “completed operations hazard”, the Court of Appeal reversed the Superior Court’s judgment. It concluded that the coverage provided by GCAN under the insurance policy was excluded because the damages resulted from the products being manufactured, sold, handled or distributed by Aslchem.

With regards to the trial judge’s conclusion on the existence of two sources of negligence on Aslchem’s part, different and separate from the manufacture, sale, handling and distribution of the contaminated product, the Court of Appeal found that the negligent representations as to the quality of the copper sulfate, and the failure to ensure that the proper samples were provided for testing in connection with Univar’s request for certification, are inextricably linked to the quality of the product and cannot be conceptually distinguished from it.

Without being essential elements of his conclusions, Justice Chamberland, who wrote the decision of the Court of Appeal, mentions that in 2006 Aslchem requested a quote for coverage for “products / completed operations hazard” but that such a policy was only issued in 2009. The premium for the standard policy with the exclusion was \$15,000 in 2006. In 2009, the premium for the new policy providing “products / completed operations hazard” coverage was \$177,430.

1. 2016 QCCA 500. For the first instance decision, see *Univar Canada Ltd. v. Aslchem international inc.*, 2014 QCCS 401.

Editor’s Comments

We wish to bring to your attention the Court of appeal judgment delivered May 2, 2016, which granted respondents Zaccardo et al’s motion to summarily dismiss the appeal lodged by Chartis against Justice Daniel W. Payette’s judgment which M^{re} Daniel Radulescu commented in the last issue of this Newsletter (*Chartis Insurance Company of Canada (Aig Insurance Company of Canada) c. Zaccardo*, 2016 QCCA 787).

The content of this newsletter is intended to provide general commentary only and should not be relied upon as legal advice.

For more information, contact one of the team members:

Louis P. Brien

514 925-6348
louis.brien@lrmm.com

Julia De Rose

514 925-6408
julia.derose@lrmm.com

Julien Grenier

514 925-6302
julien.grenier@lrmm.com

François Haché

514 925-6327
francois.hache@lrmm.com

Sarah Laplante Bazzi

514 925-6416
sarah.laplantebazzi@lrmm.com

Francis C. Meagher

514 925-6320
francis.meagher@lrmm.com

Antoine Melançon

514 925-6381
antoine.melancon@lrmm.com

Paul A. Melançon

514 925-6308
paul.melancon@lrmm.com

Peter Moraitis

514 925-6312
peter.moraitis@lrmm.com

Meïssa Ngarane

514 925-6321
meïssa.ngarane@lrmm.com

Bertrand Paiement

514 925-6309
bertrand.paiement@lrmm.com

Daniel Radulescu

514 925-6403
daniel.radulescu@lrmm.com

Hélène B. Tessier

514 925-6359
helene.tessier@lrmm.com

Ruth Veilleux

514 925-6329
ruth.veilleux@lrmm.com