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INSURANCE LAW NEWSLETTER

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Editor's Comments

It is our pleasure to send you the 6th edition of our Insurance law Newsletter.

It features an analysis of a recent Court of Appeal judgement reminding us that exclusion clauses are to be strictly construed.

We would also like to take this opportunity to inform you that, this fall, we are offering educational seminars that are recognized by the Chambre de l'assurance de dommages and the Quebec Bar on "Insurance claims resulting from latent defects" as well as a conference entitled "Statutes of limitations, notice requirements and recourses against cities and municipalities: a practical guide".

Moreover, following the adoption of a new regulation by the Régie du bâtiment du Québec, we are offering a conference on prevention plans for cooling towers in commercial buildings with the purpose of preventing the spread of Legionella bacteria as well as a presentation on the scope of applicable contamination exclusion clauses.

Please let us know if you are interested in attending any of these conferences.

We would like to take this opportunity to wish you an excellent summer.

Mtre Paul A. Melançon

Lombard General Insurance of Canada v. *Factory Mutual Insurance Company* 2013 QCCA 446:

INVOKING EXCLUSIONS HAS ITS LIMITS

Mtre Frédéric Blanchette, partner and Oscar Miklos, articling student

In 1999, IKEA Properties Ltd. ("IKEA") hired the services of Gérin-Lajoie Experts-conseils ("GLEC") inc. to develop a construction plan for the enlargement of their distribution centre in Brossard, Quebec. IKEA entered into a separate agreement with Richelieu Métal Québec inc. ("Richelieu") for the construction of this project. In turn, Richelieu hired its own engineer, Pierre Clouâtre, to review the construction plan and to oversee the work to be done. The enlargement project was completed in 2000.

In March of 2001, a part of the roof of the newly-renovated building caved in following a heavy snowfall. IKEA was compensated in large part for this loss by its insurer, Factory Mutual Insurance Company ("Factory Mutual"). Consequently, IKEA and the subrogated Factory Mutual instituted proceedings for their respective claims against Richelieu, Pierre Clouâtre, GLEC and GLEC's sole shareholder, Bernard Gérin-Lajoie. The court of first instance held the defendants solidarily liable for IKEA's losses and the Court of Appeal upheld the decision, specifying that the defendants' obligation was in solidum. Liability was apportioned as follows: 66.67% to GLEC and to Gérin-Lajoie, 22.22% to Richelieu and 11.11% to Clouâtre. Notably, Richelieu was found at fault for supplying the wrong type of part and for committing a soldering error.

When seeking to collect its 4.3 million dollar judgment, Factory Mutual faced Richelieu's insurer, Lombard General Insurance Company of Canada's ("Lombard") refusal to pay more than $901,509.

Lombard argued it did not have to fully satisfy the judgment because the imperfect solidarity between the defendants pronounced in the Court of Appeal`s earlier judgement was not opposable to it as a result of exclusions found in Richelieu's insurance policy.

Lombard also invoked exclusions listed in three endorsements supplementing the insurance agreement. However, applying section 2405 of the Quebec Civil Code, the Court of Appeal ruled that these additional exclusions were not applicable, as there was no proof of Richelieu's express written acceptance of same or that they were

indicated clearly in a separate document at renewal. As a result, the Court was left to review the exclusions debated at trial.

Consequently, while Lombard readily admitted that Richelieu was ordered to pay the entirety of the losses as in solidum debtor, it submitted that, as Richelieu's insurer, it should not have to pay for the professional faults committed by the other in solidum debtors. Rather, it should only be held liable for the 22.22% apportioned specifically against Richelieu.

The Court of Appeal agreed with the court of first instance in discarding this argument, pointing out that Richelieu was ordered to pay 100% of the losses as a result of the faults Richelieu itself committed. Furthermore, these faults had nothing to do with the rendering of professional services, since Richelieu had supplied the wrong type of parts for the construction and had committed a soldering error. Finally, upon compensating IKEA and Factory Mutual, Lombard would still have the right to recover from the other in solidum debtors their respective shares.

In a second string of arguments, Lombard admitted that while it was contractually obligated to compensate Richelieu for the losses that were a consequence of the caving in of the roof, it argued that it should not have to indemnify it for the costs of rebuilding the work that was built by Richelieu, nor the costs of correcting building-errors and faulty parts installed, citing the "your-work" exclusion along with an exclusion pertaining to any defects in the parts supplied by the contractor or in the work done by it. The Court of Appeal, like the court of first instance, quickly discarded these arguments, ruling that the fundamental purpose of reconstruction was not to correct building-errors stemming from inadequacy or non-conformity to the building plans, but rather to replace the part of the building that had been destroyed by the roof succumbing to the snow. Naturally, this would also involve rebuilding the work that Richelieu previously undertook. Otherwise, accepting Lombard's "unreasonable interpretation" of the insurance contract would have the effect of removing the coverage for civil liability, the essential purpose for which insurance coverage was contracted for in the first place.

In reaching its decision, the Court of Appeal repeated the well known rule that exclusion clauses in insurance contracts are to be interpreted narrowly.

Finally, it added that an insurer should not expect a court to easily accept an argument based on an exclusion if same is raised for the first time after many years of litigation on the same issues. Like the trial judge, it expressed its dismay at the tardy invocation of exclusions by the insurer.

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