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The Bad News: The SCC Won't Hear *Constructions GSS Gauthier* The Good News: CGL Insurers Can Reasonably Challenge the Precedential Effect of *Gauthier* re the Standard "Work" Exclusion

On January 29, 2015 the Supreme Court of Canada refused to grant leave to appeal the Quebec Court of Appeal ruling rendered in ***Intact, compagnie d'assurances c. Constructions GSS Gauthier 2000 inc.***, 2014 QCCA 991 ("***Gauthier***"), which was the object of a prior RSS newsletter.

The facts of ***Gauthier*** are straightforward. The insured roofer was hired to assemble and install the roof of a cottage which it completed in December 2005. The roof was both improperly designed and faultily built, and in March 2008 the cottage began to experience significance water infiltration.

The owners sued the insured which tendered the defence of the action to its CGL carrier (Intact). The insurer agreed to defend the resulting leak damage, but denied coverage for the cost of repairing the roof itself.

The insurer took the position that the defects in the roof constituted neither an "occurrence" nor "property damage" under the CGL policy. Alternatively, it invoked the CGL policy's "work" exclusion.

Citing ***Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada***, [2010] 2 S.C.R. 245, both Tessier J. of the Quebec Superior Court (the "trial judge") and the Quebec Court of Appeal (the "Appeal Court") concluded that the damages claimed for the defective roof were in respect of "property damage" arising out of an "occurrence". When considered in the context of a water-infiltration scenario, this aspect of the rulings is not controversial.

By contrast, the trial judge's analysis of the exclusion clauses is far more

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problematic. She first acknowledged that, in principle, the claim for the cost of re-doing the roof was captured by the policy's "Work" exclusion, which read as follows:

> *This insurance does not apply to: […]*
>
> *Property damage to that particular part of your work arising out of it or any part of it and included in the products-completed operations hazard provided the cause of the property damage is a defect in your work.*

However, the trial judge noted that the policy's declarations page indicated that an aggregate limit of $2M of coverage was provided for the products/completed-operations hazard ("PCOH"). She therefore held that the insured's claim also had to be considered in light of the PCOH exception to sub-section 2.7.6 of the policy's "Property" exclusion which read as follows:

> *This insurance does not apply to: […]*
>
> *Damage to Property*
>
> *"Property damage" to:*
>
> *[…]*
>
> *2.7.6. That particular part of any property that must be restored, repaired or replaced because your work was incorrectly performed on it.*
>
> *[…]*
>
> *Paragraph 2.7.6. of this exclusion does not apply to "property damage" included in the "products-completed operations hazard.*

Although the "Work" exclusion has been routinely applied by Quebec Courts addressing closely analogous circumstances (see, e.g., ***Université de Montréal c. Desnoyers Mercure & Associés***, 2013 QCCS 481), the trial judge concluded that it was nullified by the PCOH exception to sub-section 2.7.6 of the "Property" exclusion.

In a particularly summary analysis, the trial judge first held that it was within the reasonable expectations of an insured who subscribed to an occurrence-based CGL policy to assume that the PCOH exception to sub-section 2.7.6 of the "Property" exclusion meant that the policy provided $2M of coverage for PCOH loss. She then stated that in the event of ambiguity the policy was to be interpreted in favor of the insured.

The trial judge concluded that the insurer had not met its burden of establishing that the "Work" exclusion applied, and held it liable for the totality of the defence costs and all damages net of the deductible.

With respect, we believe that insurers have a sound argument available based on a comprehensive analysis of the origins and purpose of the relevant policy language which establishes the shortcomings of the trial judge's ruling.

We further believe that insurers can reasonably argue that the Appeal Court ruling did not settle the interpretation issue because that Court neither considered, nor ruled upon, comprehensive arguments relevant to the exclusionary language.

The Appeal Court noted that the "property damage" and

"occurrence" issues had been the principal focus of the insurer's appeal, and the bulk of the ruling is comprised of the Appeal Court's rejection of these arguments.

In the closing paragraphs of its ruling, the Appeal Court very briefly summarized the trial judge's reasons for judgment on the exclusion clause. Then, without engaging in an analysis of the exclusionary wording, and without considering any doctrine or case-law, the Appeal Court dismissed the appeal in perfunctory manner on the ground that the insurer had not established palpable and overriding error, which is the significant burden generally applicable to appeals of questions of contractual interpretation.

Since the Appeal Court ruling did not consider, far less reject, a comprehensive exclusionary clause analysis setting out why the trial judge erred, we believe that it is open to insurers to present precisely such an analysis in future cases.

Finally, we believe that insurers can reasonably assert that the fact that the Supreme Court of Canada declined to grant leave to appeal is not a significant obstacle to challenging ***Gauthier*** in the future. The Supreme Court of Canada's refusal to grant the insurer's motion for leave is consistent with the fact that it very rarely grants leave to review issues that were not the object of lower Court rulings.

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