

Wellington type motions seeking to order a CGL insurer to take up the defence of its insured

■ MARIE-CLAUDE CANTIN and JEAN HÉBERT

Recent case law which confirms the criteria applicable to Wellington motions and specifies the guidelines for the duty of an insurer to defend its insured. Admissibility or not of a Wellington motion against exclusions pertaining to the insured's "products" and "work", depending on the nature of the damages sought through the proceedings.

Last July, two judgments were rendered by the Superior Court of Québec on Wellington motions against Commercial General Liability (CGL) insurers. Elsewhere in Canada and in the U.S., a Wellington motion is a motion for a declaratory judgment aiming to force an insurer to take up the defence of its insured.

The first judgment¹, rendered by the honourable Michel Déziel (the "Déziel judgment") dismissed a Wellington motion made by Couverture Montréal-Nord Ltée against its insurer, AIG Insurance Company of Canada. The second judgment², rendered by the honourable André Wery (the "Wery judgment") allowed a Wellington motion of Les tuyaux Logard Inc. against Northbridge.

The judges in these two cases agree on the principles discussed in case law, where the criteria applicable to a Wellington motion are clear and the state of the law concerning the duty to defend is now well defined. These two judgments provide a very precise conclusion as to the admissibility of a Wellington motion against exclusions pertaining to the insured's "products" and "work" depending on the nature of the damages sought through the judicial proceedings.

Dismissed Wellington motions

When the proceedings describe damages that only represent the cost of the redoing the insured's faulty work or that of correcting defective products he delivered, the courts dismiss a Wellington motion on the ground that the "damages to your products" and/or the "damages to your work" are standard exclusions which must be applied, even by applying all the principles developed by case law whereby the duty to defend is separate and broader than the duty to indemnify and is triggered as soon as the insured is in a position where he may possibly end up being held liable for something covered by the insurance.

In *Couverture Montréal-Nord Ltée* against its insurer, *AIG Insurance Company of Canada*, the proceedings were aimed at having a roof redone due to the defects of the tiles. However, no property damage or bodily harm caused by such defective tiles detaching was alleged, which may have been covered under the policy.

Here are some relevant excerpts from the Déziel judgment:

[OUR TRANSLATION]

[33] What is sought through these proceedings is only to have the roof redone due to the defects of the tiles.

[34] There is no allegation of property damage or bodily harm caused by the defective tiles detaching, which may be covered under the policy.

[35] Redoing the work and replacing the tiles, in the absence of other damage, is not covered under the policy.

[36] The claims respecting the costs related to the warranty of quality do not constitute damages covered under general liability policies as in the present case³.

[37] Such damages are excluded from the policy at section 2 of the exclusions referred to above.



The following judgments also discuss these principles:

- ▶ *Les Prêtres de Saint-Sulpice de Montréal c. Couverture Montréal-Nord Ltée et al.* [2016] QCCS 3221
- ▶ *Aviva Compagnie d'assurance du Canada c. Construction et pavage Dujour Ltée et RSA* [2015] QCCS 4173
- ▶ *Université de Montréal c. Desnoyers Mercure et Ass.* [2013] QCCS 481
- ▶ *Vélan Inc. et Vélan Proquit Inc. c. G-Can Insurance Company* [2010] QCCS 4060, judgment affirmed by the Court of Appeal [2012] QCCA 1490
- ▶ *GCU, Compagnie d'assurances du Canada c. Soprema Inc.* [2007] QCCA 113 (with nuance since rendered before *Progressive*)

Wellington motions allowed

Wellington motions are allowed when the damages claimed also include items other than "damages to your products" or "damages to your work".

Here are some excerpts of the Wery judgment in the case of *Tuyaux Logard Inc.* against *Northbridge*:

[OUR TRANSLATION]

[87] On balance, as we have seen, one must always keep in mind that the issue to resolve at a stage such as ours is not to determine what is covered or not but simply to decide whether something may be covered.

[88] The Court is of the view that such a possibility exists in the present case.

[89] Even putting aside for a moment the issue of whether the replacement cost of the drains constitutes "property damage", the file reveals that some of the damages claimed do not only relate to their replacement cost.

[...]

[95] In short, is there a possibility that the judge on the merits of *Logard* would reach the conclusion that the absence of collar clamps on the drains at appropriate locations constitutes in itself property damage to the building in the sense that the *Syndicate* cannot enjoy it without the risk of causing damages to it like those which occurred on May 29? Is there a possibility that the withdrawal of insurance coverage for water damages by the *Syndicate's* insurer constitutes a loss of "peaceful enjoyment" of the building? Is it possible for the work for replacing the drains to cause damages to the buildings and constitute "property damage" within the meaning of the policy? [...]

[144] In the opinion of the Court, the portion of the damages claimed which have nothing to do with the insured's products, such as the demolition and rebuilding of the walls to access the drains, and sprinklers, do not seem to be covered by this exclusion. [...]

[147] In the case of *Université de Montréal* (reference see decision to read), Justice Payette, relying on the *Carwald* case, dealt with an argument similar to that of *Northbridge* by writing the following:

[OUR TRANSLATION]

"The Court of Appeal of Ontario, faced with the same argument, concluded that if that clause may exclude the initial protection in favour of the insured for the replacement of his product, it does not exclude the protection for damages related to other items of property."

[152] The Court of Appeal of British Columbia goes as far as saying that to conclude in the same way as *Northbridge* would constitute a perversion of the teachings of the *Progressive Homes* case:

"I find that the clause operates to exclude claims for damages to *Bulldog Bag* (the insured), including loss of use thereof, but cannot be extended to compensation for *Sure-Gro's* costs (the claimant) separating those bags from its products, repackaging in different bags, and salvaging the "old" product some months later. To deny coverage would, as Mr. Ward suggested, be a "perversion" of *Progressive Homes*. Furthermore, even before *Progressive Homes*, cases such as *Carwald* and *Gulf Plastics* had established that the "own product" exclusion did not apply to loss incurred by the insured's customer as a result of defects in the insured's own product.⁴"

The following judgments also discuss these principles:

- ▶ *Syndicat des copropriétaires le Crystal de la Montagne c. Le Crystal de la Montagne S.E.C.* [2016] QCCS 3218
- ▶ *Axor Construction Canada Inc. c. Carrelages SerCo Inc.* [2015] QCCS 480
- ▶ *Université de Montréal c. Desnoyers Mercure & Associés* [2011] QCCS 3564
- ▶ *Bulldog Bag Ltd. c. Axa Pacific Insurance* [2011] BCCA 178
- ▶ *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada* [2010] S.C.R. 245 par 41

MARIE-CLAUDE CANTIN

514 877-3006

mccantin@lavery.ca**JEAN HÉBERT**

514 877-2926

jhebert@lavery.ca**YOU CAN CONTACT THE MEMBERS OF THE INSURANCE GROUP WITH ANY QUESTIONS CONCERNING THIS NEWSLETTER.**

ANNE BÉLANGER	abelanger@lavery.ca	514 877-3091
FRÉDÉRIC BÉLANGER	fredbelanger@lavery.ca	418 266-3096
JÉRÔME BÉLANGER	jebelanger@lavery.ca	514 877-3012
CLAUDIA BÉRUBÉ	cberube@lavery.ca	819 346-3661
DOMINIC BOISVERT	dboisvert@lavery.ca	514 878-5493
FRÉDÉRIC BRETON	fbreton@lavery.ca	819 346-7506
MYRIAM BRIXI	mbrixi@lavery.ca	514 878-5449
MARIE-CLAUDE CANTIN	mccantin@lavery.ca	514 877-3006
GENEVIÈVE CHAMBERLAND	gchamberland@lavery.ca	819 346-2562
LOUIS CHARETTE	lcharette@lavery.ca	514 877-2946
MARIKA COUTURE-HOULE	mcouturehoule@lavery.ca	819 346-0340
ALEXANDRA DUBÉ-LORRAIN	adube-lorrain@lavery.ca	514 877-3063
LÉONIE GAGNÉ	lgagne@lavery.ca	514 878-5409
CHERYL GILBERT	cgilbert@lavery.ca	819 346-2207
JULIE GRONDIN	jgrondin@lavery.ca	514 877-2957
JEAN HÉBERT	jhebert@lavery.ca	514 877-2926
JONATHAN LACOSTE-JOBIN	jlacostejobin@lavery.ca	514 877-3042
MAUDE LAFORTUNE-BÉLAIR	mlafortunebelair@lavery.ca	514 877-3077
BERNARD LAROCQUE	blarocque@lavery.ca	514 877-3043
CLAUDE LAROSE	clarose@lavery.ca	418 266-3062
MARTIN PICHETTE	mpichette@lavery.ca	514 877-3032
BENJAMIN POIRIER	bpoirier@lavery.ca	514 877-2989
MARIE-HÉLÈNE RIVERIN	mhriverin@lavery.ca	418 266-3082
IAN ROSE	irose@lavery.ca	514 877-2947
JEAN SAINT-ONGE, Ad. E.	jsaintonge@lavery.ca	514 877-2938
MAUDE ST-GEORGES	mstgeorges@lavery.ca	514 878-5642
VIRGINIE SIMARD	vsimard@lavery.ca	514 877-2931
EVELYNE VERRIER	everrier@lavery.ca	514 877-3075

¹ *Les Prêtres de Saint-Sulpice de Montréal c. Couverture Montréal-Nord Ltée et al.* [2016] QCCS 3221.

² *Syndicat des copropriétaires Le Crystal de la Montagne c. Le Crystal de la Montagne S.E.C. et al.* [2016] QCCS 3218.

³ *CGU, Compagnie d'assurances du Canada c. Soprema inc.*, 2007 QCCA 113; *Velan inc. et Velan-Proquip inc. c. GCAN Insurance Company*, 2010 QCCS 4060.

⁴ *Bulldog Bag Ltd v. Axa Pacific Insurance Company*, 2011 BCCA 178, par 33. LDB:8431299v1.