Civil law interpretation : Does coverage under a builder's risk insurance policy extend to an existing structure?

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On February 19, 2015, the Court of Appeal of Quebec[1] overturned a judgment rendered by the Superior Court[2], on July 12, 2013, which granted the defendants' motion to dismiss.

Essentially, the Court had to determine whether coverage under a builder's risk insurance policy extends to damage caused by the work to an existing structure, or whether it is limited to the site on which the work is being done.

THE FACTS

The facts of this case were discussed in further detail in a newsletter published in October 2014.[3] However, for ease of reference, we have summarized the main facts of the case.

Quebec City ("the City") intended to convert the Palais Montcalm from an entertainment venue into a concert hall. On December 1, 2004, it retained the services of Génitech as a general contractor to carry out work on the existing structure of the Palais Montcalm. CFG Construction was retained as a subcontractor to perform the required demolition work.

The City required the contractor to obtain builder's risk insurance. The policy, obtained from Promutuel, named Génitech and the City as co-insured, and the protection was also extended to subcontractors.

On February 26, 2005, following the faulty performance of the demolition work, a fire caused significant damage to parts of the existing structure which were not included in the transformation work.

On February 22, 2008, the City instituted two actions. The first against Promutuel, for compensation under the builder's risk insurance policy, and the second against Génitech and CFG, based on their

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contractual and extracontractual liability.

On November 5, 2008, the City withdrew its first action and signed a settlement declaration.

SUPERIOR COURT

The defendants asked for the dismissal of the action on a preliminary basis on three grounds:

1. the builder's risk insurance policy applies not only to the items that are the subject of the transformation work, but to all property damaged in relation to the transformation work, including damage to the existing structure of the Palais Montcalm;
2. the City no longer has a recourse against the defendants, because it had withdrawn and filed a declaration of settlement in the first action relating to the same facts and claiming almost identical damages; and
3. since the City was a co-insured under the terms of the builder's risk insurance policy, it cannot sue the defendants.

Applying the same reasoning as the Alberta Court of Appeal in *Medicine Hat College ("Medicine Hat")*,[4] the Court held that the subcontractors have an insurable interest on the construction project in its entirety, and that, consequently, the builder's risk policy covers the entire structure of the Palais Montcalm.

In addition, the Court held that the settlement in the first action had the effect of *res judicata*, because the builder's risk insurance covers all the damage claimed by the City and the City could not commence a second action based on the same facts.

Lastly, the Court added that the City could not sue the defendants due to its status of co-insured. The Court therefore granted the motion to dismiss the City's action.

COURT OF APPEAL

The Court confirms that the decision in *Medicine Hat* is the only Canadian decision on this issue.

It reiterates that, in matters of insurance, decisions from other jurisdictions can be considered when they are consistent with the general scheme of civil law.[5] However, the Court found that since the *Civil Code of Québec* contains provisions specific to insurable interests,[6] distinctions are likely to be made between civil law and common law.

Consequently, the question whether builder's risk insurance applies to an existing structure must be analysed in light of Quebec civil law. Therefore, the Court held that it is premature to dismiss the action at this stage.

As for the other grounds for dismissal, the Court of Appeal held that the first action did not disqualify the second on the basis of *res judicata*, because the two actions are based on distinct contracts. More specifically, the first action, which was withdrawn, was based on the builder's risk insurance policy, whereas the second action was based on the contractual liability of Génitech and the extracontractual liability of CFG. Furthermore, the Court found that evidence regarding the circumstances surrounding the settlement declaration may be relevant to the outcome of the dispute, noting, in passing, that the grounds for dismissal are surprising. Indeed, if, as the defendants argue, the builder's risk insurance covered all the damages caused to the Palais Montcalm, why had the City still not been compensated?

In light of the foregoing, and given that motions to dismiss must be considered with caution, the Court of Appeal overturned the decision of the Superior Court, and dismissed the defendants' motion to dismiss.

CONCLUSION

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Since the motion to dismiss has been set aside, the case continues to follow its course.

The interpretation of a builder's risk insurance policy is especially important for the parties to the contract who must determine which property is truly covered.

It will therefore be interesting to see whether Quebec courts will adopt the same reasoning as the common law provinces, or whether civil law principles will influence how the question of insurable interest is addressed in relation to whether builder's risk insurance extends to an existing structure.

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[1] *Québec (Ville de)* v. *CFG Construction inc.*, 2015 QCCA 362.

[2] *Ville de Québec* v. *Génitech Entrepreneur général inc. et al.*, 2013 QCCS 5042.

[3] See the Need to Know newsletter published in October 2014 by Louise Cérat and Odette Jobin-Laberge with the collaboration of Alexandra Dubé-Lorrain in respect to the Superior Court's decision: "Builder's risk insurance: Insurable interest and subrogation rights": https://www.lavery.ca/en/publications/our-publications/1834-builders-risk-insurance-insurable-interest-and-subrogation-rights.html.

[4] *Medicine Hat College* v. *Starks Plumbing & Heating Ltd*, 2007 ABQB 691.

[5] *Optimum, société d'assurances inc.* v. *Plomberie Raymond Lemelin inc.*, 2009 QCCA 416, para. 41.

[6] Articles 2481 and 2484 C.C.Q.

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