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

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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 judgment[1], 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 judgment[2], 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]
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> [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.
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> [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 case[3].
>
> [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]
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> [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]
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> “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

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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.