# Wellington-Type Motion And Reserve Of Rights Letter

September 26, 2018

On July 9, 2018, the Superior Court once again examined the principles applicable to Wellington-type motions in connection with a matter opposing two contractors against their liability insurers in a legal proceeding initiated by the *Société des traversiers du Québec* (hereafter "***STQ***"). The contractors were, among other things challenging the application of some exclusions, alleging that the denunciation of said exclusions as ground to deny coverage were raised too late.

## The Facts

During a storm, an STQ platform on which the contractors were working was damaged. The sheet pilings provided by the STQ and installed by the contractors detached from the platform and fell into the river. Initially, the adjusters mandated by the insurers denied coverage by referring to the exclusions concerning damage to the property owned, leased or occupied by the contractors. In its proceedings, STQ was summarily alleging the contractors' faulty work and non-compliance of the work with the welding plans and specifications.

The contractors filed a Wellington-type motion in order to force their insurers to take up their defence. A few days afterwards, the STQ modified its proceedings to specify the defects that were affecting the contractors' work. It also filed two expert reports in support of its allegations. It was only during the contestation of the Wellington-type motion that the insurers finally raised the application of the exclusions concerning the damages to a part of the building on which the contractors were called to work on because of faulty work.

## The decision

From the outset, the Court reiterates that an insurer owes a defense to an insured when the allegations of the proceedings entail a mere possibility of coverage under the policy. At this stage, the judge does not have to inquire as to whether the insured's responsibility will be merited, but must simply determine whether there is a possibility of coverage.

In light of the allegations of STQ's *Amended application*, the Court concludes that the exclusions initially raised by the insurance adjusters did not apply, since the contractors were never the owners, lessees or even borrowers of the sheet pilings. As for the exclusions concerning the contractors' faulty work, the Court concludes to their application to the extent that the STQ allegations are considered as proven. The contactors also argued that these exclusions were submitted late. Indeed, it is acknowledged that an insurer cannot invoke an exclusion which is submitted late or kept

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in reserve in the event of the failure of another means of defence.[1]

According to the contractors, the insurers should not have been allowed to invoke the exclusions relating to faulty work at the stage when the Wellington-type motion was already filed, without having previously raised the application of said exclusions. In response, the insurers argued that, while the STQ's initial Application included general allegations regarding the contractors' faulty work, they were justified in raising these new exclusions after the modification made by STQ which crystallized and clarified the complaints made against the contractors. Incidentally, the insurers emphasized that they had also reserved their rights to invoke any other exception of the insurance policy in their initial coverage letter.

In the end, the Court sided with the insurers and rejected the Wellington-type motion filed by the contractors. The Court, "*considering the development of the allegations in the Application*" and the recent addition of the allegations clarifying and crystallizing the complaints, concluded that the insurers were not in default of having raised in a timely manner the exclusions on which the denial was now based.

## Conclusion

Wellington-type motions continue to be a hot topic. The importance of the reservation of rights and denial letters should also be reiterated. As indicated by the Court, there may be instances where developments in the allegations made against an insured will allow for the application of exclusions heretofore not invoked. Nevertheless, it remains that any potentially applicable exclusion must be invoked as soon as possible and it is also suitable to include, in the reservation of rights letters and the coverage letters, the right to invoke any other condition, limitation and exclusions set out in the policy should new developments or facts be brought to the attention of the insurer.

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1. *The Continental Insurance Company v. Tracy Plate Shop Inc.,* 1987 CanLII 211 (QCCA)

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