

THE BROADENING OF INSURANCE COVERAGE IN CONSTRUCTION AND ENGINEERING CLAIMS

PREPARED AND PRESENTED BY:

PATRICK J. HEINSEN

PARTNER

BLG
Borden Ladner Gervais

***Canadian National Railway Co.
v. Royal and Sun Alliance Ins. Co.
of Canada***

***Progressive Homes Ltd.
v. Lombard General Ins. Co. of
Canada***

***Canadian National Railway Co.
v. Royal and Sun Alliance
Insurance Co. of Canada***
[2008] S.C.J. No. 67 (S.C.C.)

1. Insuring Agreement:

This Policy, subject to the limitations, exclusions, terms and conditions hereinafter mentioned, insures ... **ALL RISKS** of direct physical loss or damage ... to:

- (a) All real and personal property of every kind and quality including but not limited to the [tunnel boring machine] ...

...

This ... Policy insures against the loss directly resulting from the delay beyond the scheduled startup ... caused by loss or damage by a peril insured against under Section 1 ...

3. Exclusions


This Policy does not insure for:

...

(d) the cost of making good

...

(iii) faulty or improper design



***Foundation Co. of Canada
v. American Home Assurance Co.***
(1995), 25 O.R. (3d) (Gen. Div.), aff'd
[1997] O.J. No. 2332 (Ont. C.A.)

Queensland Government Railways
v. *Manufacturer's Mutual Insurance*
(1968), [1969] 1 Lloyd's L. 214 (H.C.A.)

“... it [is] erroneous to confine faulty design to personal failure or non-compliance with standards which would be expected of designing engineers.”

“The exclusion is not against loss from ‘negligent designing’; it is against loss from ‘faulty design’, and the latter is more comprehensive than the former.”



Binnie, J.:

“The Policy did not exclude all loss attributable to ‘the design’, but only loss attributable to a ‘faulty or improper design’.”



Binnie, J.:

“... in addressing [foreseeable] risks in an innovating project there is inevitably a gap between the then current state of the engineering art and omniscience, i.e. a state of perfect knowledge and technique.”

***Progressive Homes Ltd.
v. Lombard General Insurance Co.
of Canada***

[2010] S.C.J. No. 33 (S.C.C.)

Importance of *Progressive Homes*:

- **Confirms the importance of Policy language;**
- **Clarifies the application of the insuring agreement under a CGL in the context of defective constructions claims; and**
- **Provides guidance on the application of the “work performed/insured’s own work” exclusion.**

“Property damage” means (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed ... caused by an accident occurring during the policy period.

“Accident” includes continuous or repeated exposure to conditions which result in property damage neither expected nor intended from the standpoint of the Insured.

“Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.



Rothstein, J.:

“The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole.”

Rothstein, J.:

“Lombard’s main argument is that ‘property damage’ does not result from damage to one part of a building arising from another part of the same building ... what follows from this argument is that ‘property damage’ is limited to third-party property.”

***Winnipeg Condominium Corp.
No. 36 v. Bird Construction Co.,
[1995] 1 S.C.R. 85 (S.C.C.)***

***Bird Construction Co. v. Allstate
Insurance Co. of Canada,
[1996] 7 W.W.R. 609 (Man. C.A.)***

Rothstein, J.:

“I cannot agree with Lombard’s interpretation of ‘property damage’. The focus of insurance policy interpretation should first and foremost be on the language of the policy at issue ... I see no limitation to third-party property in the definition of ‘property damage’.”



Rothstein, J.:

“Lombard argues that when a building is constructed in a defective manner, the end result is a defective building, not an accident.”



Rothstein, J.:

“Having found that the claims in the pleadings fall within the initial grant of coverage, the onus now shifts to Lombard to show that coverage is precluded by an exclusion clause.”

“Work Performed” Exclusion

Version 1:

“This insurance does not apply to:

...

- (i) Property damage to work performed by or on behalf of the Named Insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith ...”

Broad Form Extension Endorsement replaced clause (i) with:

“(z) With respect to the completed operations hazard to property damage to work performed by the Named Insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.”

“Work Performed” Exclusion

Version 2:

“J. ‘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.’

Post Progressive:

***PCL Constructors Canada Inc.
v. Encon Group,***
(2010) ONSC 5911 (Ont. Sup. Ct. J.)

***California Kitchens & Bath Ltd.
v. AXA Canada Inc.,***
[2010] O.J. No. 4752 (Ont. Sup. Ct. J.)

Bulldog Bag Ltd. v. AXA Pacific Insurance Co.
[2011] B.C.J. No. 654 (B.C.C.A.)

Definitions of “property damage” and “occurrence” similar to *Progressive*:

The “Work Performed” Exclusion:

“This insurance does not apply under Insuring Agreement 1(c) to claims for property damage to:

- (a) goods or products manufactured or sold by the Insured ...”



THE END