Letter of the Law

Supreme Court of Canada Expands Coverage Under Builder's Risk Policy

In September, the Supreme Court of Canada released reasons in a much-anticipated decision called *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* In this important decision for both the insurance and construction industries, Canada's highest court ruled on the meaning of an exclusion clause for "faulty workmanship" in a builder's risk insurance policy.

The result expands the types of claims that will be covered in such policies, which are common in the construction industry. The Supreme Court also confirmed the appropriate standard of review when considering decisions regarding the interpretation of standard form insurance contracts.

Background Facts

The underlying dispute arose during the construction cleanup phase of the EPCOR office tower in Edmonton, Alberta, in 2001. At that time, a subcontractor who had been hired to clean the windows of the building caused extensive damage, requiring the windows to be replaced at a cost of $2.5 million.

Both the owner and the general contractor (Ledcor) claimed the cost of the window replacement under the builder's risk insurance policy, which provided coverage to the owner, the general contractor and all subcontractors working on the project. The policy covered all "direct physical loss or damage" to the building. As is common, the policy contained an exclusion for "the cost of making good faulty workmanship". As is also common, there was an exception to the exclusion clause for "resultant damage" so that physical damage not otherwise excluded was covered.

Both the owner and Ledcor sued when the insurers denied coverage on the basis of the exclusion.

Trial & Appellate Decisions

The trial court considered the issue of whether the cost of replacing the damaged windows was excluded from coverage under the "faulty workmanship" exclusion or it was included due to the resultant damage exception. The trial judge found that the exclusion clause was ambiguous and

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SINGLETON LEGAL COUNSEL URQUHART

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applied the *contra proferentum* rule, which requires ambiguity to be decided against the insurer, to find in favour of the insured parties thereby allowing coverage.

The Court of Appeal later overturned the decision of the trial judge after finding that the language of the policy excluded coverage for the damage.

The Court reasoned that because the base coverage was for "physical loss or damage", the exclusion clause needed to exclude some physical loss, otherwise it would be redundant. The key was determining the dividing line between physical damage excluded as "faulty workmanship" and that covered as "resulting damage". The Court found that the exclusion could not just be limited to the cost of redoing the faulty work (in this case, window cleaning), but must also include repairing the damage caused by faulty work, so the exclusion applied. This would seem to ignore the exception for resultant damage.

Supreme Court of Canada Decision

In a unanimous decision, the Supreme Court of Canada agreed with the trial judge that the damage to the windows was covered by the policy and overturned the appeal. The Court agreed that the wording of the exclusion clause was ambiguous but found that the general rules of contractual interpretation resolved the ambiguity.

In its plain, ordinary meaning, the exclusion for "the cost of making good faulty workmanship" means "the cost of redoing the work", however the resultant damage exception includes the cost of repairing the damage caused by the faulty workmanship.

Importantly, the Court noted that if one interprets the exclusion clause to exclude coverage for all damage resulting from faulty workmanship just because that damage results to that part of the project on which the contractor worked, the purpose of builder's risk insurance is undermined. Finally, the Court noted that its decision matched the parties' reasonable expectations, based on the purpose of builder's risk policies, and aligned with commercial reality.

On the question of the appropriate standard of review, the Court confirmed that the standard was "correctness". This was because the policy here was a standard form contract.

Conclusion

The implications of this decision for the insurance and construction industries are still significant despite the fact that the language in the policy at issue was rather old. Canada's highest court has now clarified that the "faulty workmanship" exclusion in applicable builder's risk policies will only exclude the cost of redoing the faulty work, not the damage that results.

This decision continues the point made in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, namely that where policy wording is unambiguous, the courts should give effect to clear language and read the policy as a whole. As such, this decision ultimately expands the scope of coverage available in builder's risk policies. Insurers and other interested parties may therefore want to revisit their policy wording to determine the significance of any ambiguities.

In addition, the Court's finding that the interpretation of standard form contracts is a pure question of law is also a significant consequence for all industries that use standard form contracts.

Because appellate courts are more likely to overturn questions of law—rather than questions of mixed fact and law, or questions of fact—parties unhappy with a trial judge's decision now have added incentive to try their luck on an appeal. The unintended result of this decision could therefore actually be an increase in litigation.

For more information on builder's risk policies, please contact

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The electronic version of this article at ***www.singleton.com*** contains links to the cases mentioned above.

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EDITOR'S NOTE

By the time you read this we will all be immersed in the busy hustle and bustle of year-end commitments, both those at work and those associated with the festive season. At this hectic time it is nonetheless useful to pause and reflect on the past year.

Here at SU, we've enjoyed another year that saw new faces added to the firm as we continue to grow to meet our clients' needs. Our ongoing success would not be possible without the support of our loyal client base, so we thank you for the opportunity to provide you with the very best in legal service.

As you sit down with family and friends in the coming weeks, take a moment to consider all that you've accomplished this year. More importantly, take time to cherish those most dear to you.

From all of US@SU we wish each of you all the best in 2017!

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When Parties "May" Arbitrate: Interpreting Ambiguous Agreements

DISPUTE RESOLUTION

What makes arbitration attractive as a dispute resolution mechanism is that parties to an agreement can design their own dispute resolution process—one suitable to their relationship and industry requirements—and potentially avoid some of the drawbacks of litigation.

However, in doing so you must be careful to ensure that the agreement is clear enough that intentions will be honoured if a court is called upon to interpret the agreement. The following examples illustrate potential pitfalls when things are ambiguous.

A 2016 decision of the U.K. Privy Council in *Anzen v. Hermes One Ltd.* considered an unusual arbitration clause in a shareholders' agreement that provided if a "dispute cannot be settled within twenty (20) business days through negotiation, any Party *may* submit the dispute to binding arbitration" [emphasis added]. While most arbitration clauses use language that is clearly mandatory, the use of "may" in this clause left the meaning ambiguous.

The underlying action was for a stay of proceedings since there was a valid and binding arbitration provision. The issue in *Anzen* was whether a defendant was required to actually start arbitration in order for the court to stay the proceedings, or whether it was enough for the defendant to give notice invoking the arbitration clause. Without the litigation, the defendant would apparently have had no need to start arbitration since they had no claim against the plaintiff.

In deciding the issue, the Privy Council first had to consider whether this clause should be interpreted as making arbitration mandatory, or if it required the consent of both parties to arbitrate. Some U.S. decisions previously interpreted clauses providing that parties "may" submit disputes to arbitration as mandatory, requiring the use of arbitration even if neither party elects it. The Privy Council rejected this approach citing, among other things, a 1999 decision of the Ontario Court of Appeal in *Canadian National Railway Company v. Lovat Tunnel Equipment Inc.*

The relevant clause in the contract in *Canadian National Railway* provided that "[t]he parties may refer any dispute under this Agreement to arbitration." Justice Finlayson rejected the contention that this clause required the agreement of both parties to use arbitration. The Privy Council, relying on this decision among others, came to the same conclusion with respect to *Anzen*.

The Privy Council also noted it made little commercial sense for a court to require a defendant that may never have otherwise needed to start arbitration to do so for no other purpose than to apply for a stay of proceedings.

Parties who have a right to invoke an arbitration clause like this one, or who are party to any arbitration agreement, must be cautious in that taking certain steps in litigation started by the other party may negate their ability to apply for a stay of proceedings on the basis of an existing agreement to arbitrate. Section 15(1) of the B.C. *Arbitration Act* provides that "a party may apply for a stay before filing a response to civil claim... or taking any other step in the proceedings."

Though Canadian courts will generally interpret arbitration clauses and legislation to make arbitration viable, an ambiguously drafted clause may leave the parties stuck with an ill-suited and expensive procedure, since they will likely be unable to come to a further agreement on the arbitration process once a dispute has arisen.

A court in a less arbitration-friendly jurisdiction could even have decided not to give binding effect to an arbitration agreement drafted using permissive language like that in *Anzen*. Those seeking to ensure arbitration will be enforced as a dispute resolution mechanism in a commercial agreement should consult experienced counsel before the agreement is drafted.

For more information on incorporating arbitration clauses into agreements and avoiding related pitfalls, please contact

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ALLISON MORRELL, Articled Student, assisted with the research and writing of this article.

The electronic version of this article at **www.singleton.com** contains links to the cases and act mentioned above.

The Autonomous Car: Self-Driving, but Not Self-Regulating

In 1962 the creators of The Jetsons imagined the car of the future: it could fly, change shape and even fold into a briefcase. But it didn't drive itself. Now, in 2016, self-driving cars—and trucks—have arrived.

The Uber-owned start-up company, Otto, has just made its first run with a driverless truck delivering Budweiser beer. Google, General Motors, Tesla, Ford, BMW and others are all looking at ways to reduce or eliminate the input of human drivers.

The president of Lyft, another San Francisco-based rideshare company, has predicted, perhaps optimistically, that in five years the majority of rides using its on-demand network will be via autonomous cars. At first autonomous cars will have restricted use and require human monitoring and intervention, but as the technology improves they will be available in more and more situations. For example, Uber has started testing its self-driving cars in Pittsburgh.

While autonomous cars will simplify public life, the regulation of them is likely to be challenging and complex, in part because the technology is evolving so quickly. Some regulation already exists. From 2011 to 2016 several U.S. states, including California, passed legislation related to autonomous cars. In September, 2014, California's regulations for testing autonomous vehicles came into effect. Just over a year later, in December, 2015, California's Department of Motor Vehicles released draft regulations for the deployment of autonomous vehicles for public use and operation.

In September, 2015, Ontario was the first Canadian jurisdiction to follow California and produce regulations for the testing of autonomous vehicles. We understand that the British Columbia government is monitoring developments and tests being carried out in other jurisdictions. However, B.C. appears to be in a regulatory "wait and see" mode: the *Motor Vehicle Act* remains silent on the subject of self-driving cars, perhaps to see how effective different regulatory models have been in other jurisdictions.

Ontario provides an example of a regulatory model for the introduction of these vehicles. The Ontario regulation, Pilot Project – Automated Vehicles (306/15), created under the Ontario *Highway Traffic Act*, came into force as of January 1, 2016, and expires on January 1, 2026. It is intended to apply only for the purpose of testing autonomous cars on Ontario roads and so, like California's 2014 regulations, can only be used for those limited purposes.

The Ontario regulation applies to cars equipped with an automated driving system that operates with conditional, high or full autonomy. The regulation excludes car that are equipped with "driver's assistance" and are only partially autonomous. These cars have an automated driving assistant that warns drivers of approaching pedestrians, and the car may even automatically break in an emergency. The driving assistant also detects lane markings and issues a warning to the driver by vibrating the steering wheel whenever there is a threat of leaving the lane unintentionally at speeds above approximately 70 km/h. Cars that do these limited driving tasks but are not fully automated will be governed by the same legislation as any other vehicle in Ontario.

In contrast, the 2015 California draft regulations anticipate public use of autonomous cars and do not attempt to classify cars by the level of autonomy of the operating system. They define autonomous cars as "any vehicle equipped with technology that has the capability of operating or driving without the active physical control or monitoring of a natural person, whether or not the technology is engaged".

Both the Ontario and California regulations have very restrictive provisions. The individual who sits in the driver's seat is considered to be the driver of the vehicle, even if the autonomous driving system is engaged. That driver must still hold a valid driver's licence, and is required to remain in the driver's seat at all times and monitor the vehicle's operation. In the early stages of implementation of self-driving technology, this might be characterized more as "mutual cooperation" than autonomous control. In Ontario, these regulations also require that if the autonomous system fails and the driver is unable to take over, then the vehicle must be capable of removing itself safely from traffic.

Drivers will be very interested in the question of who will be responsible for traffic violations when the driver is merely monitoring an autonomous car. Ontario's regulations do not explicitly state that the driver of the vehicle will be responsible for all traffic violations. They require only that in the event of a collision or traffic stop, the driver of the automated vehicle shall advise the attending police officer that he or she is operating an automated vehicle and it is being tested under the pilot project. In contrast, California's draft regulations for the public use of autonomous cars provide that the driver of an autonomous car is responsible for all traffic violations, as it is anticipated that autonomous

cars will make mistakes and the drivers must take responsibility.

Lawyers, in turn, will be very interested in the liability issues that will arise if and when the autonomous technology fails.

It is expected that the use of autonomous cars will significantly reduce motor vehicle accidents. There are an estimated 30,000 deaths in motor vehicle accidents in the U.S. every year, and a significantly higher number of injuries. Studies indicate that more than 90% of motor vehicle crashes are caused at least in part by human error. Significantly reducing those numbers may result in substantial savings in both health care and legal costs to governments and insurers such that governments may eventually deem it worthwhile to support autonomous car technology.

In the aftermath of a fatal crash in Germany which involved an autonomous car, German lawmakers proposed mandatory "black boxes" for self-driving cars to record data regarding how they are being controlled in the moments before an accident. Black boxes are already being installed in most new vehicles, and they record data including information about the speed of the car and who was or was not wearing their seatbelt.

A reliable source of such information may transform the way our justice system resolves issues of liability after a motor vehicle accident. It may also allow companies that create autonomous driving technologies to mount a proper defence in the event of an accident involving their products. As well, the data will likely be able to indicate to regulators and manufactures what "mistakes" autonomous vehicles continue to make. This will help manufacturers improve their products and assist regulators in setting safety standards for the vehicles.

Fully driverless cars remain "the car of the future" and, perhaps, a solution for other problems. They may eventually offer new-found autonomy and flexibility to those who, due to age, disability or other reasons, are restricted from driving. But for the immediately foreseeable future, they will remain strictly regulated.

For more information on self-driving vehicles and their legal implications, please contact

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RACHYL MYARA, Articled Student, assisted with the research and writing of this article.

The electronic version of this article at ***www.singleton.com*** contains links to the acts and regulation mentioned above.

Non-Competition Clauses in the Age of E-Commerce

CONTRACT LAW

In today's highly competitive "e-economy" the internet has created unprecedented access to global markets. It has also created unprecedented challenges in protecting a successful business's position in the marketplace.

One way for employers and business owners to mitigate risk and protect their business interests is through non-competition clauses whereby a co-owner, business partner or employee agrees not to compete with the business once their employment or involvement ends. These clauses are also used in agreements for the purchase and sale of businesses to protect purchasers by limiting the ability of sellers to compete with their former business.

However, divergent trends regarding the enforceability of non-competition clauses in some common law and U.S. jurisdictions suggest that the realities of e-commerce will force the evolution of Canadian law in this area as businesses and employers seek to broaden the geographical scope of such clauses. The argument: global commercial interests cannot be adequately protected otherwise.

The Canadian approach to non-competition clauses stems from the leading English case of 1894, *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd.* Courts in Canada have been historically reluctant to enforce covenants that restrict the ability of a party to carry on his or her trade or earn a living, and will only enforce a non-competition clause if it is reasonable in that it goes no further than necessary to protect legitimate proprietary interests. Reasonableness continues to be measured in Canada by assessing:

1. the activity the clause is restricting,
2. the duration of the restriction, and
3. its geographic scope.

Canadian courts have consistently held that an overly broad geographical scope will render a non-competition clause unreasonable and unenforceable, and that the non-competition obligation must have geographical limits. But with the reality of global commerce, is this adequate to protect the interests of Canadian businesses using e-trade to access global markets?

Courts in certain U.S. states and other countries have been receptive to upholding non-competition clauses with broad, national, international or no geographical limits. The U.S. approach varies among states. For example, in California employment non-competition clauses are outright unenforceable. However, many U.S. jurisdictions also recognize that the widespread use of the internet means the geographic scope of restrictive covenants must also expand.

The trend in American law has been to place less emphasis on geographical limits and accept that modern technology allows even a small company to reach global markets; thus broader or, indeed, global geographic restrictions may be justified. This raises the possibility that contracting parties may use "choice of law" clauses [see the Spring 2017 issue of *Letter of the Law* for a review of these] to agree on a venue sympathetic to the intentions of the contracting parties.

Other jurisdictions, such as the Netherlands and Australia, have moved away from the traditional focus on geographical limits. In

the Netherlands, the Dutch Civil Code sets out the conditions regarding the enforceability of restrictive covenants. Significantly, no restrictions exist in the Civil Code as to the duration or geographical scope of non-competition clauses.

Similarly, recent case law in Australia indicates courts there have accepted that a global competition restraint may be reasonable in certain industries and circumstances. For instance, in *Pearson v. HRX Holdings Pty Ltd*, the Federal Court upheld the enforceability of a two-year global non-competition clause for a senior employee who left the company, finding that the lack of geographical limitation was not unreasonable due to the competitive nature of the human resources recruitment industry.

Reflecting these developments, momentum may now be building to adapt the Canadian approach to non-competition clauses to reflect modern realities. In *Globex Foreign Exchange Corp. v. Kelcher*, the dissenting opinion acknowledged that if an employer is involved in a virtual business the geographic location of that business is of very little importance.

Businesses wishing to operate in international and/or e-commerce markets should be aware of these limitations in assessing the protections available to them, and seek advice as to practical options open to them to limit such exposure.

For more information on effective non-competition clauses, please contact

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SU The electronic version of this article at **www.singleton.com** contains links to the cases mentioned above.

Many SU female clients had fun under "The Big Top" while helping The Lipstick Brigade provide much-appreciated services to women in shelters. Part of the excitement was a karate demonstration with Rita Ngo [right], the current Canadian champion in Women's Kata who recently returned from the World Karate Federation Championships in Austria.

NEWS BEYOND THE OFFICE

In September, **BARBARA CORNISH** and **JEFFREY HAND** presented a one-day seminar designed to introduce young litigators to alternate dispute resolution. Over 25 lawyers from across the province attended the session — "Negotiation Skills and Mediation Advocacy for Young Lawyers".

November proved to be a busy month. **VERONICA ROSSOS** welcomed clients to a seminar on "Employee Privacy, Bullying and New Technology — An Employer's Quagmire". Given our changing world, the topic was timely and very well received. As well, the seminar was accredited by the Human Resources Management Association.

Veronica and her SU colleagues, **SCOTT BREARLEY** and **KELLY ANN MAW**, also made a presentation to the B.C. Society of Fellows of the Insurance Institute of Canada on another timely topic — the "Attack of the Drones", namely the emerging insurance and privacy law implications of commercial and recreational drone technology in B.C. and Canada.

Scott along with **STEVE VORBRODT** also led a discussion for Insurance Brokers Association of British Columbia members on claims and coverage issues in commercial general litigation policies and beyond, including wrap-up policies, builder's risk and professional liability insurance.

COME ONE, COME ALL!

SU held a vintage, circus-themed event in November honoring our amazing female clients. A major highlight was an exciting karate demo for our guests by **MARK STACEY**, a 6th degree black belt in karate and an instructor at the Kingsway Odokan karate dojo in Vancouver, and one of his students, Rita Ngo, a 1st degree black belt who has been training at the Odokan dojo for 11 years. At the same time, many toiletries were gathered for The Lipstick Brigade, a local organization co-founded by **MELANIE SAMUELS** that provides services to women in shelters throughout the Lower Mainland.

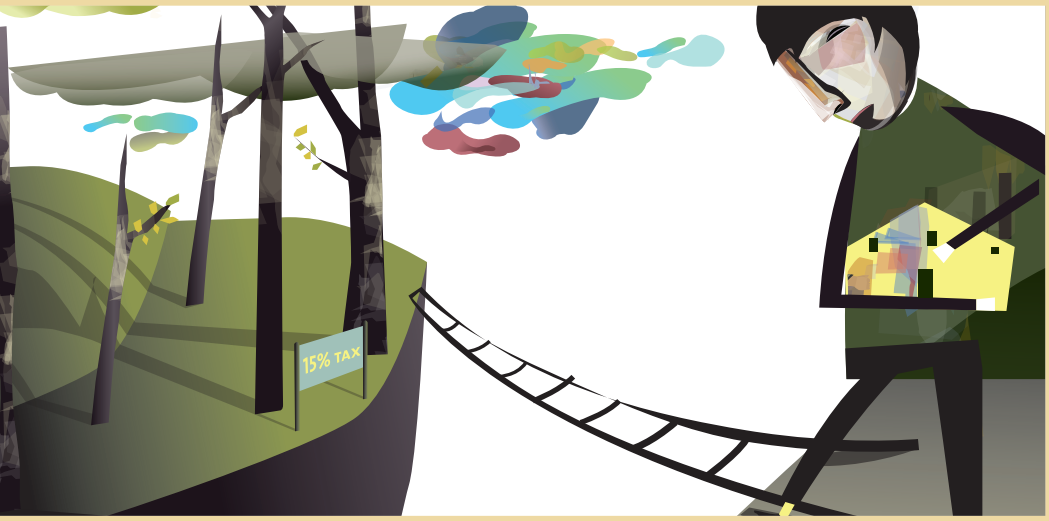
ADDENDUM

Last issue of *Letter of the Law* we neglected to mention that **AVON MERSEY Q.C.** joined **DEREK BRINDLE Q.C.** at the Straus Institute for Dispute Resolution at Pepperdine School of Law in Malibu, California, where they both recently completed advanced mediation training.

New Tax: Unintended Consequences or Government Initiative?

REAL ESTATE LAW

Earlier this summer, B.C. introduced an amendment to the *Property Transfer Tax Act* that applies an additional tax of 15% to taxable transactions involving residential real estate within the Greater Vancouver Regional District (GVRD) and foreign buyers.



A "taxable transaction" includes any transfer of title to property and, unless there is a specific exemption, requires payment of the property transfer tax. The new 15% tax is in addition to the usual property transfer tax (see the Spring 2016 issue of *Letter of the Law* regarding transfer tax details).

One of the concepts this amendment affects is joint tenancy, which has a right of survivorship attached. For example, if Madonna and Lady Gaga own residential property in Vancouver as joint tenants, and Madonna dies*, Lady Gaga would have a right to all interest the property. To effect this, a transfer must be filed in the Land Title Office establishing Lady Gaga as the sole registered owner.

A transfer to a surviving joint tenant is exempt from the property transfer tax. However, because Lady Gaga is a foreign national she must pay the additional 15% tax on half of the fair market value of the jointly owned property.

This consequence seems contrary to the principles of joint tenancy, but is in fact intended by the new legislation. Furthermore, if Madonna and Lady Gaga had paid the additional tax at the time of purchase and Madonna subsequently died, Lady Gaga would have to pay again. Given real estate values in Vancouver, that tax amount could be significant.

In B.C., jointly held property is not subject to provincial probate fees and, consequently, is an often-used, useful estate-planning tool. However, as the above example shows, it is imperative that your estate plan considers your current and intended ownership of any residential real estate within the GVRD where a foreign buyer is involved. You can no longer rely on the principles of joint tenancy to avoid property transfer tax consequences.

**To the best of the knowledge of the writer, Madonna was alive and well at the time of publication.*

For more information on estate planning, please contact

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The electronic version of this article at ***www.singleton.com*** contains links to the *Act* and amendment mentioned above.

ALL OF US AT SINGLETON URQUHART WISH YOU A HAPPY HOLIDAY AND PROSPEROUS NEW YEAR