Canadian College of Construction Lawyers

LEGAL UPDATE

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L.U. #168

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INSIDE THIS ISSUE:

Catriona Otto-Johnston

Editor's Note

This issue marks my second as Co-Chair of the Legal Update Committee. I would like to extend a big thanks to Brendan Bowles for bringing me on board. Being a part of this Committee has been exciting and challenging and has provided me with an excellent opportunity to connect with Fellows across the country on a more regular basis.

On that note, we bring you Legal Update #168, which begins with a commentary from Michael Valo and his colleague Isa Dookie on the Ontario trial decision in *Walsh Construction v. Toronto Transit Commission et al*. While this decision spans 127 pages (849 paragraphs), Michael and Isa focus on the Court's treatment of expert evidence relating to schedule analysis, including issues raised regarding expert independence and bias. Noting the decision has been appealed, it is an interesting read in the interim, particularly because we rarely see construction disputes of this magnitude and nature proceed to trial, resulting in a reported decision. Meanwhile, we await what is sure to be an interesting decision from the Court of Appeal.

Corbin Devlin and summer law student, Jameson Boston, summarize the Supreme Court of Canada's decision in *Earthco Soil Mixtures Inc v Pine Valley Enterprises Inc*, which deals interpretation of exclusion clauses in a contract for the sale of goods. Corbin and Jameson remark upon the Court's continued focus on the parties' objective intentions when entering into a contract as part of the overall contractual interpretation exercise. As Brendan and I discussed when preparing this issue, it is interesting that the Court's interpretation of the Sale of Goods legislation in this instance protected the seller, not the buyer, in terms of the ability to contract out of the legislation. In this respect, the Court overturned the Ontario Court of Appeal's interpretation of the statute, albeit with a dissent from Madam Justice Côté. Perhaps the decision turns on the unique facts at play. In any event, given there are similar exclusion provisions in Sale of Goods legislation across common law provinces and territories, this decision is of interest to counsel practicing in those jurisdictions.

Andrew Wallace and summer law student, Evan Jacka, review a decision of the Saskatchewan Court of Appeal dealing with an insurer's duty to defend in an action arising from collapse of an embankment mid-project. The Court of Appeal upheld the lower court's decision, confirming the insurer had no

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duty to defend since the action fell within the exclusion provisions in the policy. This decision is a helpful reminder of the difference between the insurer's duty to defend and its duty to indemnify. It also highlights the importance of proper risk analysis and management when it comes to insuring construction projects.

Articling student Carter Czaikowski and I discuss a recent decision from the Alberta Court of King's Bench criticizing use of a procedural deadline requiring lien claimants to commence an action when included in a consent order discharging a lien in return for posting of security. This decision is important to anyone involved in removing liens in Alberta, particularly when using the court-approved template form of order, which expressly includes this procedural deadline. In reality, the decision has little practical effect on a party wishing to force a lien claimant to commence an action. However, for the time being, counsel seeking these orders should be aware of the impact of this decision on the template order, as well as on the enforceability of this provision in prior orders where a lien claimant fails to commence an action "on time".

We round out this issue with a two-part series from Stephen Berezowskyj, Matthew Milne and Ramez Gries (articled student) [Part 1] and Stephen Berezowskyj, Matthew Milne and Kassandra Starnes [Part 2] on a decision from the Ontario Court of Appeal involving long-tail claims spanning multiple insurers, insurance policies and policy periods. Steve and his colleagues discuss the Court's treatment of defence cost allocation and self-insured retentions, as well as conflicts of interest as between insurers and insureds. Although not a construction case, this Court's detailed discussion of complex insurance issues will be useful to counsel dealing with construction-related insurance matters.

The practical insight and discussion in this edition are a reminder of our goal to publish interesting and informative content from across the country. To that end, if you have written something that fits this bill, please feel free to send Brendan and me an email. Wishing you all a happy Fall season.

Catriona

Walsh Construction v. TTC & Ors
2024onsc2782

LU #168 [2024]

Topic:
VII. Breach of Terms of Contract
Jurisdiction:
Ontario
Authors:
Michael Valo and Isa Dookie, Glaholt Bowles LLP

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Michael Valo

Isa Dookie

Lessons on Expert Evidence in Defending Construction Delay Claims from *Walsh Construction v. TTC & Ors*

Expert evidence can be the difference between winning or losing millions. In *Walsh Construction Company of Canada (**"Walsh"**) v. the Toronto Transit Commission (**"TTC"**) and Others*, 2024 ONSC 2782, TTC learned that the hard way. Justice Hood's mammoth 849-paragraph judgment was a full construction law syllabus dealing with issues of scope change, subcontractor flowthroughs, delay and more. This article explores the parts of that judgment concerning delay claims, in general, and the necessity for expert evidence on quantum when defending a delay claim, in particular.

Key Takeaways

- Delay claim defendants should obtain their own expert schedule analysis evidence. Mere critique of the plaintiff's expert's findings runs the risk of an all-or-nothing result.
- An expert's involvement in the contractor's prior claims on the same project is not incompatible with that expert's independence before the court. It does not, on its own, give rise to bias.

Experts that display dogmatism or stubbornness risk damaging the court's perception of their credibility and independence.

The case

TTC contracted Walsh to build the Steeles West Subway Station in September 2011. The contract price was $166 million with a scheduled substantial performance date of November 5, 2014, that is, 1,154 days from award.

To say the project was delayed is an understatement. Substantial performance was achieved 953 days late, on June 15, 2018. The revenue service date was also 1,047 days late. Contract completion was 1,372 days late. TTC accepted that it caused 411 days of delay and certified an increase of $57 million to Walsh's Contract Price. However, it refused to accept responsibility for the balance of 636 days of delay.

As is typical, each party blamed the other for the balance of the delay. Walsh claimed the delay was all caused by TTC. They claimed $193 million under 23 heads of damages, with $19 million consisting of direct delay damages. TTC for its part counterclaimed $22 million in liquidated damages against Walsh for missing certain contractual milestones. TTC's argument amounted to saying that delays are to be expected in a project of this size and complexity, and responsibility should be shared between it and Walsh.

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Their stances on how the judge should address the gulf between them was also at odds. Walsh took the position that the court could find the number of days of TTC-caused delay was between the 411 days which TTC admitted and the 1,047 days Walsh claimed. TTC went for all or nothing, arguing that the court could find either it was 1,047 or 411, nothing in between. With both sides pointing fingers, the question of who was truly at fault for the delays came down to each party's expert testimonies.

Walsh's evidence

Walsh relied primarily on the evidence of their delay analyst, Richard Ott. Mr. Ott had a history of being retained by Walsh, including during the project, during which he prepared a time impact analysis used by Walsh in its claims for delay. Notably, there was no question on whether Mr. Ott's fee was contingent upon success. Mr. Ott testified that he investigated over 780 TTC-related change conditions to see how each affected Walsh's work and the critical path using the software, Primavera. He assumed Walsh was responsible for all delay unless the analysis showed that TTC was responsible. He reviewed data from the project documentation including RFIs, RFQs, CDs, NOICs, Walsh's schedules, TTC's schedules, correspondence, daily reports, and meeting minutes. He also testified that he looked for concurrencies. The result of his analysis was that Walsh was entitled to a total of 1,047 days of compensable time extension.

Walsh also retained a second expert who rebutted TTC's criticism of Mr. Ott's methodology.

TTC's evidence

After initially seeking an order for the court to refuse Walsh's expert's qualifications and then backing down from that approach, TTC settled on challenging Mr. Ott's independence. They argued that he was part of Walsh's team, since he had a history of being retained by Walsh.

Importantly, TTC did not retain its own expert to perform a delay analysis. Instead, TTC's expert limited his opinion to critiquing Mr. Ott's methodology, alleging that Mr. Ott's delay analysis was faulty because Walsh's project schedules were erroneous, that Mr. Ott departed from the recommended practice, and that there were logic errors in his analysis.

Justice Hood's decision on delay

Justice Hood accepted Mr. Ott's opinion that Walsh was entitled to 1,047

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compensable days of delay; all the delay was TTC's fault and all of it was compensable. The court awarded Walsh $58 million in damages (the shortfall being largely the result of the court's rejection of flow throughs from subcontractors) and dismissed TTC's counterclaim.

First, the court dealt with TTC's allegations of bias. Justice Hood accepted that an expert's bias could go to the weight of their testimony, but he did not consider the fact that Mr. Ott had been previously retained by Walsh to be determinative of bias. It was not unusual for an expert to analyze work during construction and continue with the analysis if litigation ensued.

Second, the court discussed the substantive issues of liability for the delay and the quantum of the delay. Justice Hood summarized the relevant construction law principles, as follows:

> 1. Delay is categorized as (1) excusable or non-excusable, and (2) compensable or non-compensable. Non-excusable delay is delay for which the Contractor is not entitled to any time extension or compensation because it is a delay within its control. Excusable delay is generally viewed as delay that is beyond the Contractor's control and for which it may be entitled to compensation.
>
> 2. Concurrent delay for which the Contractor is responsible would make excusable delay non-compensable.
>
> 3. It has to be considered whether the delay is on the project's "critical path": the series of connected tasks that define the minimum overall duration for completion of a project, also known as the "longest path".
>
> 4. For the Contractor to be compensated for delay, it must prove on a balance of probabilities the delay was the sole responsibility of the Owner, was on the critical path, and without concurrent delay. Note: this was TTC's argument, apparently undisputed by Walsh or the court.

The court held that the delays were TTC's responsibility because the delays arose out of design issues, and design was TTC's responsibility. Contrary to what TTC said at the time of contract award, the design was not complete. This resulted in a very large number of Requests for Information ("RFIs") and Change Directives as well as excessive delays by TTC in responding to the RFIs. Justice Hood was of the view that the large number of RFIs were a

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telltale sign that the delays originated from TTC, not Walsh. Justice Hood also decided that TTC's position, that it was only responsible for 411 days of delay was based on some faulty analysis as had been acknowledged in cross-examination.

Having accepted that the delay was TTC's fault, Justice Hood turned next to consider the number of compensable days of delay. According to Justice Hood, the Court was in *"no position to determine the amount of compensable delay on its own; it does not have the expertise to do so."* [86] In a massive project like this there were a multitude of moving parts, events might be closely intertwined, overlapping, concurrent or not concurrent, excusable or non-excusable, and on or off the critical path. The court needed the assistance of delay experts to quantify the number of days of delay for which a party might be entitled to compensation.

The decision hinged on whether the court should accept Mr. Ott's evidence or not. Justice Hood stated plainly that, *"I am left with only one expert opinion as to the amount of compensable delay, with two conflicting expert opinions as to whether the methodology used by the first expert was appropriate."* [123] Justice Hood lamented that the differing experts from both sides were eminently qualified and that delay analysis methodology is "completely foreign" to him, yet he was tasked with *"having to conclude whose opinion to accept on matters that these three experts have spent their life studying."* [130]

In deciding which expert's evidence to prefer, he compared each expert's attitude and approach to answers given during cross-examination. He contrasted Walsh's expert's patience and straightforwardness with TTC's expert's dogmatism and resistance to being challenged. He concluded that TTC's expert was more prone to advocacy, and so he preferred Mr. Ott.

Lastly, Justice Hood reiterated that Mr. Ott was the only expert who actually did a delay impact analysis and provided an actual opinion on the compensable time extension. *"If TTC had presented its own delay impact analysis, then I would have been placed in a position of having to choose between the two or arriving at a different number altogether,"* he noted, *"[but] I was given a binary choice between 1,047 days and 411 days."* [132] Faced with that binary choice, and having accepted Mr. Ott's evidence despite TTC's expert's criticisms, he found that the total number of days of compensable delay was 1,047. In his view, he had no basis to find another number of days on the evidence.

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Commentary

First, when it comes to assessing bias, courts are cognizant that the pool of experts is often small. If the fact that a litigation expert was retained to consult during the project were to lead to automatic disqualification of that expert, litigants would encounter difficulties in finding independent and separate experts for claims and for litigation. Indeed, there may be practical advantages to having an expert who provided analysis during the currency of the project also provide evidence before the court. As long as the expert can maintain their independence, their familiarity with the project can be an asset to the court and may be more economical to the parties than retaining a forensic expert who must learn the project and familiarize themself with documents and data from scratch. As Justice Hood opined, the nature of the retainer, in particular if compensation was tied to the success of the claim, is a stronger indicator than the mere fact of a previous retainer.

Second, experts must be independent witnesses, not advocates for their clients' case. Particularly for delay claims, where the requisite technical expertise is so far outside the expertise of the Court, an expert's credibility becomes paramount. That credibility is not just a function of the expert's written report, its readability, and coherence, but also the expert's attitude and demeaner during cross-examination, just like any other witness. In other words, an expert's credibility is not premised exclusively on their background, experience, and academic and professional credentials, but how they present themselves as honest individuals. Thus, an expert's willingness to objectively consider other views and to adjust their own views in the face of contrary evidence is a signal to the court of honesty and integrity that the court will weigh heavily.

Third, Justice Hood's decision is a cautionary tale to delay claim respondents everywhere. In the face of complex disputes and even more complicated delay analyses, a judge's fact-finding role may be reduced to choosing between the opinions of competing experts. Thus, a defence strategy that seeks to play "spoiler" only carries significant risk. Yet, critical path delay analysis for complex projects is typically a very expensive undertaking. Is forcing a respondent to undertake a full-blown delay analysis fair? In a system that places the burden of proof squarely on the claimant, is it fair to require the respondent to prove an alternative quantification? Arguably, that is akin to requiring the respondent to disprove the claimant's case, or at the very least, fix the claimant's mistakes.

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While it has always been the respondent's prerogative to simply cast doubt in its own defence, such an approach may be too simple for complex delay claims. Rarely is delay to large projects black or white. But once the Court is satisfied there is *some* compensable delay, in other words, that liability has been established, it has an obligation to "do its best" to quantify the damages, i.e. the number of days of delay.

The Supreme Court established long ago in *Perini Pacific Ltd. V. Greater Vancouver Sewerage and Drainage District,* [1967] SCR 189, that a judge must make a reasonable effort to quantify damages, even when a precise calculation is hard, holding that damages should not be denied simply because they are difficult to measure. Instead, the judge should use the best available evidence to make an informed estimate. In Justice Hood's defence, Mr. Ott's calculation was not just the best available evidence, it was the only available evidence.

Given the dearth in Canadian jurisprudence on construction delay claims, *Walsh v. TTC* is a welcome contribution, noting that Justice Hood's decision has been appealed. In the meantime, plaintiffs and defendants alike should carefully consider this decision and keep an eye out for any decision by the Ontario Court of Appeal.

Contextual Contract Interpretation – The Latest Word from the Supreme Court of Canada

The decision of the Supreme Court of Canada (SCC) in *Earthco Soil Mixtures Inc v Pine Valley Enterprises Inc*, 2024 SCC 20, promotes a plain language, contextual approach to contract interpretation. On these specific facts, an express exclusion of liability for purchasing topsoil without testing is effective to protect the vendor when the topsoil composition is not as described. The exclusion clause at issue satisfied the principles in *Sattva* and *Tercon* which give priority to the parties' intentions in interpreting contracts generally, and exclusion clauses specifically.

The Facts

Pine Valley Enterprises Inc. ("Pine Valley") was contracted by the City of Toronto ("the City") for a flood remediation project requiring the removal and replacement of topsoil for proper drainage. Pine Valley subcontracted with Earthco Soil Mixtures Inc. ("Earthco") to supply topsoil with the specified composition required by the City. Earthco provided laboratory reports of its topsoil pile from testing done six weeks prior. Earthco warned Pine Valley against purchasing topsoil without further soil testing. Despite the warning, due to time constraints (and potential liquidated damages), Pine Valley requested immediate delivery without further soil testing. Earthco added provisions to the subcontract specifically excluding liability if testing was not completed before Pine Valley took the topsoil.

> *If [customer] waives its right to test and approve the material before it is shipped, Earthco Soils Inc. will not be responsible for the quality of the material once it leaves our facility.*

Following the delivery and placement of the topsoil, water ponding was observed, and subsequent testing revealed substantially higher levels of clay in the topsoil than indicated in the initial reports. Pine Valley sued Earthco for damages claiming it did not receive topsoil consistent with the initial description.

Multiple Appeals

The trial judge determined the contract to be a sale of goods by description, pursuant to s.14 of the Ontario Sale of Goods Act (SOGA).

> *S. 14 Where there is a contract for the sale of goods by description, there is an implied condition that the goods will correspond with the description, and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.*

The trial judge found that the contract specified the composition of the top-

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soil and so the implied condition under s.14 was breached. However, the exclusion of liability provisions constituted an express agreement, and the parties validly contracted out of the implied condition - as permitted by s. 53 of the SOGA.

> *S. 53 Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.*

Pine Valley appealed. The Ontario Court of Appeal reversed the trial decision and held Earthco liable. The Court of Appeal found that the subcontract did not contain sufficiently explicit, clear, and direct language to override the statutory implied condition. An effective exclusion of liability would require express reference to the implied condition in s. 14 of the SOGA. Further, and in any event, the Court of Appeal found that the exclusion of liability provisions expressly referred to "the quality of the material" whereas Earthco had delivered soil of not just a different *quality* but a different *identity* than the soil described in the contract.

On further appeal, the SCC reinstated the original judgment. The Court reasoned that by protecting Earthco from liability, the objective intentions of the parties would be upheld. The word "quality" in the exclusion of liability had to be interpreted in a manner consistent with the surrounding circumstances, despite contrary jurisprudence as to the distinction between "quality" and "identity," because "the meaning of even legal terms may depend on who the contracting parties are, their relationship to each other and whether they are sophisticated at contracting" (at para 84). In the circumstances, "quality" was to be interpreted in its colloquial and commercial context. Therefore, the SCC concluded the exclusion clause is enforceable, and that Pine Valley's losses resulted from their "expensive but calculated mistake" (at para 109). To hold Earthco liable for Pine Valley's mistake would diminish commercial certainty and fairness.

Contracting out of the Sale of Goods Act

The SOGA allows that statutory implied terms may be excluded by express agreement. The SCC decision extends the applicability of common law principles to all sale of goods contracts, thereby recognizing the mutual objective intentions of the parties as a paramount consideration for contractual interpretation. The only instance where common law principles do not apply is where they are "inconsistent with the express provisions of the Act" (at para 58). An "express agreement" to override the statutory implied condition requires that "the parties' joint intention must be declared, and an exclusion clause must unambiguously vary or negative the statutorily implied obligation, based not only from the words of the contract itself, but also from an analysis of the surrounding circumstances" (at para 98).

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There is a distinction between express agreement and express language. While some form of express agreement is required to override the statutory implied condition, there is no magic word, technical term, or "qualitative requirement about the specificity of language" for an exclusion clause to be enforceable. "[C]larity of the language will, however, guide the interpretation of the agreement;" (at para 55) in other words, explicit reference to the statutory provision intended for exclusion is preferred and optimal. But it is not necessarily required.

Identity vs. Quality

The SCC affirmed the legal distinction between identity and quality in sale of goods contracts: "while the quality of the goods amounts to a term of the contract, the identity of the goods connotes something that is an 'essential part' of the goods themselves" (at para 39). But the Court noted that a strict technical interpretation of the term "quality" may be inappropriate; this term is "often used in general parlance" and is "not exhaustively defined in the [SOGA]" (at para 85). Although the law recognizes a technical distinction between the identity and quality of goods, "courts should not impose a very high, and often unrealistic, burden on contracting parties to be aware of and fully understand the legal characterization and consequences of the words they use" (at para 86).

Practical Takeaways

In essence, because the exclusion of liability was drafted by laypersons and not lawyers and arose in the context of Earthco expressly warning Pine Valley to test the topsoil, it didn't matter that the exclusion clause omitted express reference to s. 14 of the SOGA, and the term "quality" was to be given a plain language meaning rather than a technical legal one. The objective intention of the parties was that Pine Valley accepted the risk of purchasing the topsoil without testing it.

This case continues the courts' trend in contractual interpretation of transitioning from a technical approach to a contextual approach focused on the objective intentions of the parties at the time of contract formation. Contracting parties have flexibility to use plain language, provided that their mutual objective intention is clear. Technical legal language may nevertheless provide greater certainty of interpretation, particularly when the contracting parties are sophisticated or legal counsel are involved.

The principles of this case extend to all common law provinces and territories, since as noted at paragraph 40 of the majority decisions they all have equivalent exclusion provisions in their respective Sale of Goods legislation which establish "a framework of rules that in many cases are optional, subject to exclusion by the parties themselves".

You Can't Judge a Book by Its Cover: Looking Past the Labels Chosen for Insurance Policy Titles and Pleadings

You Can't Judge a Book by Its Cover: Looking Past the Labels Chosen for Insurance Policy Titles and Pleadings
2024 SKCA 42

LU #168 [2024]

Primary Topic:
XII. Insurance
Jurisdiction:
Saskatchewan
Authors:
Andrew Wallace, General Counsel, PCL Constructors Inc. and Evan Jacka*

*Summer legal student at PCL Constructors Inc. Evan is a J.D. candidate (U of A – 2025) and will be articling at Miller Thomson in Edmonton.

CanLii Reference:
2024 SKCA 42

SASKATCHEWAN

Andrew Wallace

Evan Jacka

The Saskatchewan Court of Appeal has affirmed the decision of the lower court in its judgment of *Kelly Panteluk Construction Ltd. v. Lloyd's Underwriters*, 2024 SKCA 42. The matter concerned whether an insurer, Lloyd's Underwriters ["**Lloyd's**"], owed a duty to defend the insured, Kelly Panteluk Construction Ltd. ["**KPCL**"], in an underlying action brought against KPCL by Canadian Pacific Railway Company ["**CP Rail**"]. The Court of Appeal upheld the lower court's finding in *Kelly Panteluk Construction Ltd. v. Lloyd's Underwriters*, 2022 SKKB 227, that Lloyd's did not owe a duty to defend KPCL as the underlying action properly fell within exclusion provisions in KPCL's so-called "Course of Construction Wrap-Up Liability" insurance policy ["**Policy**"].

Case commentary of the lower court decision was provided in the Canadian College of Construction Lawyers Legal Update #163 (2023 CanLIIDocs 2360) by Christopher Rusnak, K.C., Adam Way, and Leyla Salmi of Harper Grey LLP, published on October 20, 2023.

Background

Project

KPCL is a heavy civil construction contractor hired by CP Rail to construct subgrade and drainage works for a 31-kilometer railway line called the "Belle Plaine Spur" near Findlater, Saskatchewan, located in the south of the province. KPCL acted as the prime contractor for the project and self-performed the earthworks scopes. Consulting and ground monitoring services for the project were provided by Clifton Associates Ltd. ["**Clifton**"].

The project included construction of earthen embankments stretching for multiple kilometers along a river crossing. Embankment construction is completed by placing a series of lifts of fill on top of foundational soils in a controlled manner. During construction, an embankment collapsed, affecting an area approximately 170 meters wide, 630 meters long, and between 10 and 30 meters deep, displacing approximately 3.2 million cubic meters of material. The embankment failure significantly weakened foundational soils and required the embankment to be redesigned for its reconstruction. As a result, CP Rail brought a $41 million action against KPCL, Clifton, and others.

Insurance Contract

As noted above, KPCL obtained an insurance policy titled as a "Course of Construction Wrap-Up Liability" insurance policy. This is a somewhat confusing title. The term "Course of Construction" is often used synonymously with first-party "Builder's Risk" insurance, which covers damage to work being undertaken in the course of a construction project. Conversely, "Wrap-Up Liability" coverage is often used to describe third-party liability coverage. To

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determine the true meaning of KPCL's Policy, the trial judge looked to the Policy's precise terms and substance rather than its nomenclature.

KPCL's Policy included two exclusions and an endorsement which were contested in their interpretation and critical to the outcome of this matter:

> •A "**Project Damage Exclusion**" excluded from coverage "property either forming part of or to form part of the Project Insured."
>
> •An "**Operations Exclusion**" excluded from coverage "damage to or destruction including loss of use of … that particular part of any property: (i) upon which operations are being performed by or on behalf of the Insured at the time of the damage thereto or destruction thereof, arising out of such operation; OR (ii) out of which any damage or destruction arises; OR (iii) the restoration, repair or replacement of which has been made or is made necessary by reason of faulty workmanship thereon by or on behalf of the Insured."

An exception to the Operations Exclusion called "**Endorsement No. 22**" provided that coverage would apply to "Property Damage to the principal[']s existing surrounding property, not forming part of the project works, but no coverage shall be provided for Property Damage to that part of property being worked upon when such Property Damage arises out of such work that is or would normally be considered as being covered by a Builders Risk/ Course of Construction Insurance Policy."
It is noteworthy that KPCL did not obtain a separate "Builder's Risk/Course of Construction Insurance Policy" referenced in Endorsement No. 22. Such a policy may have covered damage to the project works during construction. As such, KPCL was faced with establishing that the damaged property, or at least a portion of it, was beyond the project's limit.

Lower Court Decision

Determining the existence of a duty to defend requires the consideration of the pleadings in the actions against [the insured] to determine if there is a possibility of the claims falling within the insurance coverage: *Progressive Homes Ltd. v Lombard General Insurance Co. of Canada*, 2010 SCC 33 [*Progressive Homes*], at para 6. The court does not embark on a finding of fact to determine whether pleadings are true. Rather, the facts alleged in the pleadings are taken to be proven, and if there is a possibility of the insured's policy covering the underlying claim, the insurer has a duty to defend the insured. While no finding of fact takes place, the court is to assess the true nature of the claim and look past the specific terms and labels chosen by a plaintiff, if necessary.

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The trial judge, Layh J, found that Lloyd's did not have a duty to defend KPCL based on a key conclusion that the embankment's foundational soils were integral to the embankment and could not be separated as a component part separate from the project. If the foundation could be separated as a standalone component, there would be a possibility that damage to the foundation would be covered under the Policy and Lloyd's duty to defend would be triggered.

This finding was based on the foundational soils reasonably being included in the definition of "Project Insured" and "project works", thus engaging the Project Damage Exclusion and disallowing Endorsement No. 22, respectively. Further, the Operations Exclusion was applicable as the foundation could not be delineated as a "particular part" of the embankment. Additionally, Clifton's performance of foundation monitoring works meant foundation operations were being performed on behalf of KPCL at the time of the damage.

Given that the Project Damage and Operations Exclusions were applicable, and Endorsement No. 22 was not, the trial judge found no possibility that CP Rail's claim was covered by the Policy, thus Lloyd's had no duty to defend KPCL.

Grounds of Appeal

KPCL raised several issues in its appeal. It alleged that the trial judge made an error of law, misapprehended the pleadings in multiple manners, impermissibly placed onus on KPCL, misinterpreted the Policy's exclusions, and failed to consider relevant legal authority. The Court of Appeal addressed and disagreed with KPCL on each front.

Error of Law

CP Rail's claim included language which could be interpreted as identifying the foundation as a separate component of the embankment. KPCL argued that the trial judge erred in law by making findings of fact rather than assuming that the facts alleged in CP Rail's pleadings were true for the purpose of determining whether Lloyd's had a duty to defend. While *Progressive Homes* makes clear that a court is not to make specific findings of fact when determining whether a duty to defend exists, *Monenco Ltd. v Commonwealth Insurance Co.*, 2001 SCC 49 [*Monenco*] clarifies that an assessment of the pleadings to ascertain the "substance" and "true nature" of the claims is required. This assessment falls short of determining whether alleged facts are provable or proven, and the Court of Appeal held that the trial judge made determinations consistent with the standard in *Monenco*.

You Can't Judge a Book by Its Cover: Looking Past the Labels Chosen for Insurance Policy Titles and Pleadings
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LU #168 [2024]

Primary Topic:
XII. Insurance
Jurisdiction:
Saskatchewan
Authors:
Andrew Wallace,
General Counsel,
PCL Constructors Inc.
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*Summer legal student at PCL Constructors Inc. Evan is a J.D. candidate (U of A – 2025) and will be articling at Miller Thomson in Edmonton.

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Misapprehension of Pleadings

Similar to its first argument, KPCL submitted that the trial judge erred by determining that the foundation soils form part of the embankment. The Court of Appeal held that, while it was not a finding of fact, the trial judge's determination was subject to the palpable and overriding error standard of review on appeal, and that his determination was rational and not palpably in error.

In the same vein, KPCL challenged the trial judge's determination that CP Rail's action alleged that KPCL was responsible for monitoring the foundation soils during construction and supervising Clifton in that regard. To support this assertion, KPCL pointed to segments of CP Rail's pleadings which could reasonably be read as indicating that Clifton was primarily responsible for monitoring the foundation soils. Clifton having primary responsibility for monitoring the foundation would result in ambiguity as to whether the Operations Exclusion applied, as the foundation monitoring works would not be performed by or on behalf of KPCL. Per *Monenco* at para 31, ambiguity in the pleadings should be resolved in favour of KPCL as the insured and impose the duty to defend on Lloyd's.

The Court of Appeal rejected this argument on the basis that other segments of CP Rail's pleadings alleged that KPCL was ultimately responsible for the construction project, which included the monitoring of foundation soils and associated supervision of Clifton. The Court of Appeal noted, however, that its rejection of KPCL's argument on this point did not preclude the possibility that Lloyd's would be found as having a duty to indemnify KPCL following findings of fact in the underlying action.

Impermissibly Placing Onus on KPCL

Once it has been accepted that a claim falls within the initial grant of coverage under an insurance policy, the onus is placed on the insurer to establish that a provision of the policy excludes the claim. KPCL asserted that the trial judge erred by reversing this onus and requiring KPCL to establish that the Policy exclusions did not apply to CP Rail's claims.

While the trial judge considered and commented on KPCL's arguments as to whether Lloyd's had discharged their burden, this was found merely to be consideration and rejection of KPCL's submissions on the matter, rather than the placing of onus on KPCL. The Court of Appeal noted that the trial judge conducted a fulsome analysis which found Lloyd's to have discharged its evidential and persuasive burdens by establishing that the claims against KPCL were excluded from Policy coverage.

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Misinterpretation of Policy Exclusions

KPCL submitted that the trial judge erred by broadly interpreting the Policy exclusions in favour of the insurer where a narrow interpretation was required, particularly with regard to the inclusion of foundational soils in the composition of the embankment. KPCL argued that if the foundation was to be considered integral to the embankment, thus excluded from coverage, clear terms to this effect had to be included in the Policy.

In the Court of Appeal's assessment of the trial judge's decision, it found that the trial judge well understood his interpretive task. When read together in their ordinary and grammatical sense, the trial judge found the Operations Exclusion and Endorsement No. 22 to be unambiguous. Further, he found no logical basis to conclude that the foundation of the embankment is not part of the embankment itself. As such, there was nothing to be construed narrowly or broadly in favour of either party, thus there was no reason for the Court of Appeal to overturn the trial judge's interpretation of the Policy exclusions.

Failure to Consider Relevant Legal Authority

KPCL alleged that two precedents were overlooked by the trial judge. The Court of Appeal dismissed this ground of appeal, noting that the trial judge drew from the leading authorities to apply the correct legal principles, the two precedents allegedly overlooked were not probative of the issues in the matter, and it is not an error of law to fail to consider authorities.

Key Takeaways

Analysis of Pleadings when Assessing the Duty to Defend

An insurer's duty to defend is broader than its duty to indemnify. The duty to defend is triggered by the mere possibility that a claim against the insured falls within the insurance policy. This is a relatively low bar that is cleared where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim. Although a finding of facts is not undertaken to prove or disprove facts alleged in a claim, pleadings are to be assessed to determine their true nature and substance. In other words, the specific terms or labels used by a plaintiff to describe the underlying facts are not assumed to be appropriate.

Prudent Policy Management

A wide variety of insurance policies are available to construction project stakeholders. It is critical that a gap analysis is performed by the parties to ensure appropriate coverage on a construction project. Here, a builder's risk

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policy likely would have filled the coverage gap considering the wording of Endorsement No. 22.

Earthworks Project Implications

Every earthwork or heavy civil construction project will have a physical elevation or depth where new construction or excavation work interfaces with existing foundational base. In this matter, the courts were unable to separate foundational soils from new construction, considering the foundation to be integral to the new construction. Recall that no finding of fact occurred in this matter. However, if this line of reasoning is applied by courts in liability matters, liability for foundation damage may be levied in an unanticipated manner. As such, it is critical that parties ensure their insurance policies clearly state how the risk of foundational soil damage is to be allocated.

General Construction Project Implications

The court's struggle to delineate similar or identical component parts in its interpretation of a "particular part" exclusionary provision is noteworthy for any construction project. Careful consideration of these exclusions in applicable project insurance policies, and the consequential allocation of risk of loss to project stakeholders, is a crucial step in project risk management.

THE LESENKO DECISION: WHAT DOES IT MEAN FOR THE SECTION 48 TEMPLATE ORDER IN ALBERTA?

LU #168 [2024]

Primary Topic:
IX. Construction and Builders' Liens
Jurisdiction:
Alberta
Authors:
Catriona Otto-Johnston, Partner, and Carter Czaikowski, Student-at-Law at Rose LLP

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THE LESENKO DECISION: WHAT DOES IT MEAN FOR THE SECTION 48 TEMPLATE ORDER IN ALBERTA?

Introduction

The Alberta Court of King's Bench decision in *Lesenko v Wild Rose Ready Mix Ltd* ("*Lesenko*")[1] involves a lien claimant's appeal from an Applications Judge's finding that builders' liens were extinguished due to the lien claimant's failure to commence an action on its liens within the time required by a consent order. The consent order at issue was in the form known in Alberta as the "template section 48 order", which provides for removal of builders' liens upon deposit of security. The Chambers Justice allowed the appeal and reinstated the liens. In doing so, he held that certain wording contained in the Court-approved template order was offside both the *Prompt Payment and Construction Lien Act* ("PPCLA") and the Alberta *Limitations Act*. To understand this decision, it is necessary to review how and why the template order came into existence in the first place and how the *Lesenko* decision changes the practice in Alberta of removing liens in return for deposit of security.

History of the Template Order

Before there was a template order, construction counsel typically had their own preferred form of Section 48 Order. When a party sought removal of a lien under s.48 of the *Builders' Lien Act* ("BLA"), as it then was, counsel would usually propose its own form of order, and the opposing party's counsel would often propose changes to the draft order, typically involving several rounds of negotiations before landing on a form acceptable to all. The Court would then have to review each provision of the order when deciding whether it should be granted.

In or around 2016, following discussions with the construction bar and the Calgary Applications Judges, a group of construction lawyers came together to prepare a template s.48 order. The template was to include key provisions for routine s.48 orders, thereby reducing or eliminating "battle of the forms" negotiations and streamlining the s.48 process, making it faster and less expensive. Importantly, use of a template order would give the Court comfort that the terms of the s.48 orders being sought were "standard", such that most orders were the same, with any differences having to be highlighted and explained to the Court. This resulted in a more efficient application process overall.

The group started by gathering various forms of s.48 orders from the construction bar and identifying where the orders were the same and where they differed. Each provision was analyzed and discussed to determine which were required or recommended and why (whether under the legisla-

[1] *Lesenko v Wild Rose Ready Mix Ltd*, 2024 ABKB 333 [*Lesenko*].

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tion or at common law). The result was a form of order that was presented to the Calgary Applications Judges for review and comment. These comments were discussed and incorporated, resulting in a standard template form of order that was posted to the Alberta Courts' website.[2] From that point forward, the template order was recommended to be used for all s.48 applications, revised as necessary to suit the particular facts of the application.

Including a Deadline to Commence Proceedings in the Template Order

The group specifically considered whether to include a deadline to commence proceedings in the template order. While s.43 of the BLA (and now, the PPCLA) provides that proceedings must be commenced within 180 days of the lien being registered, s.44 of the BLA (and the PPCLA) says that where security has been deposited in lieu of the lands under s.48, a lien does not cease to exist by reason that an action is not commenced within 180 days. Notwithstanding, it was the practice of many lawyers to include the 180-day deadline in s.48 orders to make sure that lien actions were prosecuted without delay once security had been deposited.

As part of the overall discussion as to whether the 180-day deadline should be included in the template order, the group considered the 1974 Alberta Court of Appeal decision in *Driden Industries Ltd v Sieber*.[3] In *Driden*, the lien registration was cancelled upon deposit of security under (then) s.35 (now s.48 of the PPCLA, and the BLA before it). The lien claimant failed to commence proceedings within 180 days, and Driden applied for return of funds paid into court. Unlike the BLA and PPCLA, the lien legislation in place at the time did not contain a provision stating that the 180-day deadline was inapplicable where liens were removed upon deposit of security. However, the Court found that upon reading the legislation as a whole, it was clear the 180-day deadline did not apply in such situations.

The Court in *Driden* went on to discuss what duty, if any, a lien claimant has to proceed to have its claim determined once security is deposited in place of a lien.[4] In noting the absence of a specified procedure for applying the security until the validity of the lien is determined at trial, the Court said the "general intention of the Legislature…provides that proceedings are to be of a summary character and the enforcement thereof is to be at the least expense" and that the "proper procedure to be followed is for the applicant, at the same time as the money is paid into Court, to ask the Court to settle the issue to be decided and direct who should be the plaintiff and who should

[2] See Civil Templates.
[3] 1974 ALTASCAD 14, 44 DLR (3d) 629 [*Driden*].
[4] *Driden* at para 11.

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be the defendant".[5] In short, that the lien proceedings should proceed, without delay.

In response to *Driden*, the lien legislation was amended in 1985 to add s.32.1 (now s.44), which says that a lien remains a charge against money paid into Court or the security given, regardless of whether an action has been commenced within 180 days of lien registration. However, this change, which remains in effect today, did not require a lien claimant to proceed with its lien action by any certain deadline.

After much discussion, and in keeping with the intention of the lien legislation as a whole to deal with liens quickly and at the least expense, the group decided to include the 180-day deadline as a term of the template order. However, the decision in *Lesenko*, discussed below, has, at least for the time being, rendered this provision of the template order unenforceable. This leaves at least two questions. First, for orders that pre-date *Lesenko* and include the 180-day deadline, is it now unenforceable? Second, are counsel required to remove the 180-day deadline from the template order when seeking a s.48 order? The answer to both, is yes.

The *Lesenko* Decision - Background

In *Lesenko*, Wild Rose Ready Mix Ltd. ("Wild Rose") supplied concrete required to complete work on the Lesenko's property for which it remained unpaid. As a result, on October 4, 2019, Wild Rose registered two liens against the Lesenko's property. On November 27, 2019, the parties executed a consent order which contemplated deposit of $99,182.60 by the Lesenkos into Court as security in return for discharge of the liens. The consent order, based on the template order, required Wild Rose to commence lien enforcement proceedings within 180 days of the lien registration.

Wild Rose failed to commence legal action within the 180-day timeframe, prompting the Lesenkos to apply to have the liens declared invalid. Applications Judge Schlosser granted the Lesenko's application, dismissing Wild Rose's cross-application to extend the lien enforcement period in the consent order under Rule 13.5 of the Alberta *Rules of Court*. Schlosser AJ held that a strict reading of s.43(1) supported the Lesenkos' position, emphasizing that "a proceeding to enforce liens is always mandatory. Otherwise, the liens cease to exist."[6]

Wild Rose appealed Schlosser AJ's decision. On appeal, the Chambers Justice correctly identified Schlosser AJ's erroneous conclusion that the 180-day deadline was statutory in nature and that the liens had ceased to exist because of s.43. As the Chambers Justice aptly noted, this conclusion by

[5] *Driden* at para 12.
[6] *Lesenko* at para 87.

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the Applications Judge failed to consider s.44, which specifically says that where a lien is removed under s.48, it does not cease to exist for lack of registration of a certificate of *lis pendens* or for commencing an action within 180-days of lien registration.

However, the Chambers Justice went on to find that the consent order at issue was an "agreement" and that the requirement on the lien claimant to commence an action within 180 days offends s.5 of the PPCLA, which says that an agreement to contract out of the PPCLA is void. The Chambers Justice also found that the 180-day deadline in the consent order offended s.7(2) of the Alberta *Limitations Act*, which says that an "[a]greement that purports to provide for the reduction of a limitation period provided by this Act is not valid".[7] On the basis of these findings, the Chambers Justice allowed the appeal and reinstated the liens.

The PPCLA Expressly Contemplates Shortened Limitation Periods

In drawing his conclusions, the Chambers Justice does not mention (or appear to consider) other sections of the PPCLA which expressly shorten the period during which a lien claimant must commence an action failing which it loses its lien. For example, s.45(1) permits a party to serve a notice to commence action on a lien claimant, even where a lien has been removed under s.48, after which the lien claimant has 30 days to commence an action, failing which the lien ceases to exist. This section of the PPCLA, when invoked, shortens the period for commencing an action on the lien.

Further, ss.48(3), (4) and (5) and 52(3), (4) and (5) permit a party to serve a notice to prove lien on a lien claimant, triggering a 15-day deadline for the lien claimant to file an affidavit containing particulars of its lien. If the lien claimant fails to file the affidavit, it "loses" its lien. While there is greater leeway when it comes to Notices to Prove Lien and treatment of the 15-day deadline, these are two more examples of ways in which a lien claimant can lose its lien claim for failing to take a procedural step within a prescribed period.

Clearly, the PPCLA contemplates at least two ways in which a lien claimant's deadline to commence an action on a lien can be shortened, as well as two avenues to "lose" a lien claim if procedural deadlines triggered under the PPCLA are not met. These are not limitation periods in the sense contemplated by the *Limitations Act*. A lien claimant does not lose its right to pursue a claim for breach of contract if it fails to commence an action on the lien. It simply loses its lien. This is very different. The procedural deadlines specifically provided for in the PPCLA accord with the overall purpose of the legislation, which is that lien matters are to proceed summarily and be determined quickly and at the least expense, as expressly required in s.49(6)

[7] *Lesenko* at paras 106, 108.

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(and as discussed in *Driden*). Therefore, with respect, the inclusion of a 180-day deadline in the template order is not inconsistent with s.44(b), nor does it violate s.5 of the PPCLA or s.7(2) of the *Limitations Act*. It simply provides procedural deadlines to be met, failing which a lien ceases to exist (or is lost), though the underlying action remains subject to the applicable limitation periods under the *Limitations Act*.

Takeaways

Regardless of the authors' views of the *Lesenko* decision, it is binding on Applications Judges, who are typically the ones granting s.48 orders. As the law currently stands, the 180-day deadline in the template order is not valid *when the application goes by consent*. What is unclear, however, is whether the 180-day deadline is still problematic where the application does not go by consent. In that case, arguably there is no "agreement", meaning the 180-day deadline does not offend s.5 of the PPCLA or s.7(2) of the *Limitations Act*.

In any event, practically speaking, the *Lesenko* decision means that when parties seek a s.48 order *by consent*, the 180-day deadline should be struck from the template order. For parties who have template orders that pre-date *Lesenko*, they should be aware that an application to extinguish a lien based on failure to commence an action within 180-days is unlikely to be successful. As for whether the *Lesenko* decision makes any practical difference for an owner or contractor wishing to force a lien claimant to commence proceedings on its lien, it does not. One can simply serve a notice to commence action on a lien claimant under s.45(1), after which the lien claimant has 30 days to commence an action, or the lien ceases to exist.

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Part 1: The Duty to Defend in Long-Tail Claims: An initial review of the Ontario Court of Appeal's decision in *Loblaw Companies Limited v Royal & Sun Alliance Insurance Company of Canada*

Introduction

On February 27, 2024, the Ontario Court of Appeal (ONCA) provided guidance – and some issues for further consideration – in *Loblaw Companies Limited v Royal & Sun Alliance Insurance Company of Canada*, 2024 ONCA 145, addressing the allocation of defence costs, self-insured retentions, and the management of conflicts of interest for liability insurers and insureds.[1]

This article is the first in a multi-part series discussing key take-aways from *Loblaw*. Below, we briefly summarize the background and the issues addressed by the ONCA, delving into the Court's reasoning regarding the allocation of defence costs among liability insurers.

Background

The ONCA's decision arises out of five underlying opioid class actions alleging negligence in the manufacture, distribution, and sale of opioids in Canada since 1995. Loblaw Companies Limited, Shoppers Drug Mart Inc., and Sanis Health Inc. (together, "**Loblaws**"), all named as defendants in the class actions, sought coverage from their primary and excess insurers (the "**Insurers**").[2]

Loblaws was continuously insured by the Insurers over the relevant period – although individual coverage periods ranged from eight months to over 14 years, policies were subject to different self-insured retentions (SIRs), and different coverage was available under each policy.[3]

Each insurer acknowledged a duty to defend Loblaws in the underlying actions, subject to satisfaction of the applicable SIR. In addition, some insurers only extended coverage to Loblaws pursuant to a reservation of rights letter, particularly concerning alleged intentional acts of the insured. Dissatisfied with this arrangement, Loblaws applied for a declaration that each insurer had a duty to defend Loblaws in the class actions and that Loblaws could select any single policy under which there was a duty to defend, requiring the chosen insurer to defend all claims.[4]

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[1] *Loblaw Companies Limited v Royal & Sun Alliance Insurance Company of Canada* 2024 ONCA 145 [*Loblaw*].

[2] *Ibid* at paras 1-5, 35.

[3] *Ibid* at para 7 and 36.

[4] Ibid at para 5.

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The Application Judge's Decision

The application judge held that:

- Loblaws was entitled to coverage for all reasonable defence costs associated with the class actions from any one insurer. Contrary to a *pro rata* allocation based on each insurer's "time on risk", the application judge allowed each respondent to choose any single policy for defence, with the selected insurer being required to defend all claims, even those falling outside its coverage period, subject to equitable contribution between Insurers.[5]
- Loblaws was not entitled to coverage until it had exhausted an SIR. However, once an SIR had been exhausted and coverage had been engaged, ongoing defence cost contributions of the triggered insurer could be used to erode the SIRs of other insurers.[6]
- Loblaws was entitled to relief from forfeiture for defence costs incurred prior to its tender of the claims to the Insurers.[7]
- Given the reasonable apprehension of a conflict, and the lack of adequate handling protocols, only insurers who had signed the Defence Reporting Agreement (DRA) were entitled to receive privileged defence information.

The Court of Appeal's Decision

On appeal, the Court overturned the application judge in many respects, holding that:

- A "time on risk" approach rather than an "all-sums" approach should be applied to the contributions of insurers to the defence of Loblaws.
- Satisfaction of one SIR does not permit the insured to then apply defence costs paid by one insurer to the erosion of another SIR. The insured must satisfy each SIR before coverage will be triggered under the respective policy.
- An insured is not entitled to relief from forfeiture with respect to voluntarily incurred pre-tender defence costs where an insurer subsequently confirms its duty to defend.

[5] *Ibid* at para 46.
[6] *Ibid* at para 117.
[7] *Ibid* at para 144.

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- An insured is entitled to a "conflict-free defence". Given the nature of the claims advanced and the reservations taken by certain insurers, the application judge's decision upholding the use of the DRA and the information to which the insurers were entitled, was reasonable in the circumstances.

Below, we take a closer look at the Court's reasons with respect to the defence cost obligations of Loblaws' primary insurers.

The Duty to Defend in Long-Tail Claims

The Duty to Defend Stems from the Pleadings

It is trite law in Canada that where there is a possibility that the claim as pled could fall within the coverage provided by the policy, the insurer's duty to defend will be triggered.[8] Where the claim in question arises out of a discrete "occurrence" and therefore falls within only one policy period, such an analysis is relatively straight forward: the insurer on risk for the policy period will be obligated to defend the insured. However, with long-tail claims involving continuous or progressive injury spanning many years, multiple policies and insurers, and consecutive rather than concurrent coverage, the analysis becomes more complex. As the ONCA described it, this is "among the thorniest problems in insurance law."[9]

Contractual Bargain in Insurance Agreements

Applying the duty to defend analysis, the ONCA found that the application judge erred in allowing Loblaws to select one policy to provide coverage for defence costs for all claims arising during the entire period of the class action.[10] First noting that the policies in question were liability policies which provided coverage for occurrences arising during the policy period, the ONCA emphasized that insurance agreements are a contractual bargain, with coverage provided for a specific time period in accordance with the terms of the policy.[11] Applying this lens, the ONCA found that the application judge departed from the language of the insurance policies by extending one insurer's obligation to defend the insured for claims arising from conduct outside the period specified in the policies. This contravened the contractual framework of the policies, which were designed to cover risks within defined temporal parameters.[12]

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[8] *Ibid at para 88.*
[9] *Ibid* at para 65.
[10] *Ibid* at para 68.
[11] *Ibid* at paras 69-75.
[12] *Ibid* at paras 73.

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Relying on this contractual foundation, the ONCA further found that the application judge erroneously classified insurers as concurrent rather than consecutive insurers, leading to an inappropriate expansion of the coverage available under any one policy. As clarified by the ONCA, consecutive insurers are only liable for claims stemming from conduct occurring within their policy periods. Should multiple claims arise across multiple policy periods, the appropriate approach is to identify the insurers on risk at the time the occurrence arose rather than to paint all insurers with the same brush and leave the insurers to sort out contribution between themselves.[13]

Rejection of All-Sums Approach

The ONCA's focus on the contractual bargain between the insurer and insured was further buttressed by the ONCA's confirmation that the "all sums" approach to coverage has generally been rejected by Canadian courts. The "all-sums" theory of allocation argues that each insurer is responsible for covering all defence costs incurred by an insured in the defence of a covered claim, allowing the insured to choose the policy with the best coverage and compel that insurer to pay all costs. The chosen insurer must then seek contributions from other insurers.

Moreover, a potential conflict of interest arises when insurers are obligated to defend claims beyond their policy parameters, as required by an "all-sums" approach. Conflicts arise when insurers must defend claims outside their policy coverage as their interest is to have liability found on grounds not covered by the policy. This misalignment of interests can compromise the defence. Mandating an insurer to defend claims that fall outside the policy's coverage places the insurer in a position where it must advocate for claims for which failure would be beneficial for the insurer, potentially creating a conflict of interest.[14]

In rejecting this approach, the ONCA endorsed a pro rata "time on risk" approach in line with the consecutive nature of the coverage available to Loblaws.[15] Unlike the "all sums" approach, a pro rata "time on risk" allocation of defence costs – i.e. insurers sharing in the defence of the insured based upon their proportionate time insuring the insured – is both better aligned with the contractual basis for coverage and has salutary policy implications as it ensures early participation of all insurers, fostering a stronger defence and encouraging settlement while mitigating the potential for conflicts in the defence.[16] This approach recognizes that it is not appropriate for an in-

[13] *Ibid* at paras 76-78
[14] *Ibid* at para 113.
[15] *Ibid* at para 108.
[16] *Ibid* at para 114.

Part 1: The Duty to Defend in Long-Tail Claims:
An initial review of the Ontario Court of Appeal's decision in *Loblaw Companies Limited v Royal & Sun Alliance Insurance Company of Canada*

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surer with minimal exposure to control the defence and associated costs.[17]

Commentary

The ONCA's decision confirming the application of a "time on risk" analysis to the sharing of defence costs between insurers does not discuss the trigger theories underlying the claim. However, this is a relevant concern in applying the ONCA's analysis to other cases involving consecutive insurers.

As set out in *Alie v Bertrand*, 2002 CanLII 31835 (ONCA), when considering whether an occurrence has arisen during a policy period for the purpose of determining whether a liability policy is engaged, a Court may consider and apply any one of four "trigger" theories as the situation may dictate, being: exposure, manifestation, injury in fact, and continuous.[18] Where, as in the case of *Loblaws*, multiple injuries are alleged to occur to a class of plaintiffs over the entire class period, it likely makes sense to apply the exposure or continuous trigger theories thereby engaging all insurers who provided coverage during the class period and permitting a straightforward "time on risk" analysis.

With this in mind, one should be cautious in applying a blanket approach to other scenarios. For instance, a construction claim may allege resulting damage arising out of the work of a contractor on site, with the damage occurring over multiple policy periods. While the contractor may be insured by multiple policies during the period in which damage occurred, it may be more appropriate to apply the "injury in fact" trigger to find that the "occurrence" arose during only one policy period such that there is no requirement for a "time on risk" analysis.

A further question arises as to the appropriate manner of proceeding. While here the insured applied for a finding that it was entitled to call upon a single policy, often it will be an insurer who has been tagged for coverage that will seek equitable contribution from other consecutive or concurrent insurers – often times on a "time on risk" basis. The decision in *Loblaws* would indicate that the obligation is now squarely on the insured to ensure that all potentially responsive insurers are engaged and contributing, especially, as will be discussed in the next part of this series, where each policy is subject to deductible obligations.

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[17] *Ibid* at para 115.

[18] *Alie v Bertrand*, at para 93; See also, *Privest Properties Ltd. v Foundation Company of Canada Ltd.*, 1991 CanLII 2346 (BCSC)

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Part 2: The Duty to Defend in Long-Tail Claims: The Application of Self-insured Retentions following *Loblaw Companies Limited v Royal & Sun Alliance Insurance Company of Canada*

Introduction

This article is the second part of a multi-part series discussing the ONCA's decision in *Loblaw Companies Limited v Royal & Sun Alliance Insurance Company of Canada,* 2024 ONCA 145. This article reviews and provides commentary on the Court's decision with respect to self-insured retentions ("SIRs") and deductibles, while highlighting some potential issues that may arise with the *pro-rata* "time on risk" formula to the exhaustion of SIRs endorsed by the ONCA.[1]

Background

This article focuses on the ONCA's discussion of the application judge's finding that an insured was entitled to select any one policy to defend it and that payments made by the selected insurer could be used to reduce the SIRs on other policies.[2] Specifically, we address the legal and policy issues raised by the ONCA in respect of whether, in effect, an insured's satisfaction of a single SIR could unlock a "cascade" of insurance funds that would relieve the insured of paying any further SIRs where multiple policies may respond to a given claim.

The Court of Appeal's Decision Regarding SIRs and Deductibles

Overturning the decision of the application judge, the ONCA's reasons effectively plugged the leak that had threatened to turn into a waterfall. The Court rejected Loblaw's contention that once a SIR has been exhausted and coverage had been engaged, ongoing defence cost contributions of the triggered insurer could be used to erode the SIRs of other insurers.[3] Instead, the ONCA found that because the insured's entitlement to coverage is a question of the insured's satisfaction of each individual contract of insurance – the same *pro-rata* formula applicable to the defence obligations of each insurer must equally apply to the exhaustion of the insured's SIRs. The insured must, itself, satisfy each SIR before coverage will be triggered under each respective policy.[4]

Again, premised on the contractual basis for coverage and the *pro rata* "time on risk" analysis, the ONCA also disagreed with the application judge's finding that, until such time as another SIR was exhausted, the insurer under the policy whose SIR had been satisfied would be required to pay all defence costs.[5] Rather, the insured is responsible for defence costs

[1] *Loblaw Companies Limited v. Royal & Sun Alliance Insurance Company of Canada,* 2024 ONCA 145 [*Loblaw*].
[2] *Ibid* at para 5 and 46.
[3] *Ibid* at para 117.
[4] *Ibid* at para 135 and 138.
[5] *Ibid* at para 140.

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incurred up to the exhaustion of the SIR and such responsibility does not affect the proportion of time for which other insurers are responsible. It is incumbent on the insured to pay the percentages of legal fees allocated to those policies based on the "time on risk" formula until the SIR is exhausted. After that point, the insurers are responsible for the proportion of the defence costs equivalent to their "time on risk".[6]

Commentary

As we noted in our prior comment (above), the ONCA's decision emphasized that insurance agreements are contractual bargains, with coverage provided for a specific period of time and subject to specific conditions precedent (in this case, including the satisfaction of an SIR).[7] The Court said: "given that the respondents look to each policy for coverage for separate policy periods, it follows that the SIR obligation in each policy must be satisfied before that insurer has a duty to defend".[8]

One of the reasons identified by the Court in support of its conclusion was that Loblaws was a sophisticated insured who had chosen to manage its risk for many years by purchasing policies with high SIRs to reduce the premiums payable. In those circumstances, the Court observed, Loblaws should not be relieved from the consequence of its risk management decision (ie. a high SIR) simply because it had at some earlier time purchased a different policy with a lower deductible or SIR that would also respond to the present claim. The Court's reference to this circumstance raises the question as to whether or not the same result would arise in the case of a less sophisticated insured. In our view, it likely would – or certainly should. The Court's reference to Loblaws' risk management strategy is consistent with the broader theme underlying the entirety of its decision, which is that the obligations of the insured and insurer ought to reflect the "bargain" to which the parties agreed as set out in the insurance contract.

On a related point, we note that the ONCA stated that SIRs do not have to be collectively exhausted before the obligation of a single insurer with an exhausted SIR is triggered.[9] What was neither discussed nor decided in the ONCA's *pro-rata* "time on risk" approach to SIRs is the situation where an insured has several consecutive policies with the same insurer. Take, for example, an insured contractor supplying metal roofing materials to a building site. Many years after the initial installation, corrosion is identified on

[6] *Ibid* at para 141.
[7] *Ibid* at paras 69-75.
[8] *Ibid* at para 135.
[9] *Ibid*.

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the roofing materials supplied by the insured and a claim is commenced against them for defective product. That insured obtained product liability insurance from the same insurer for the entire period from the delivery of the materials on site to the date of the claim, with coverage under each policy subject to a $25,000 deductible. In that circumstance, does the insured have to exhaust every single deductible in order to obtain the benefit of each policy? Is the insured entitled to request a defence from only one policy for damage occurring during that period or is it obligated to trigger and then satisfy the SIR for each policy that *may* cover some portion of the alleged damage period? We anticipate that this and other related issues will be addressed in subsequent cases to refine the general approach outlined by the ONCA.

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