

2013 CarswellAlta 954, 2013 ABQB 325

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Canalta Construction Co. v. Dominion of Canada General Insurance Co.

Canalta Construction Co. Ltd and Marc Tougas, Applicants and The Dominion of Canada General Insurance Company, Respondent

Alberta Court of Queen's Bench

V.O. Ouellette J.

Heard: May 23, 2013

Judgment: June 3, 2013

Docket: Edmonton 1103-18853

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Ryan L. Martin, for Respondent

Subject: Civil Practice and Procedure; Contracts; Insurance; Property; Torts

Construction law

Contracts

Insurance

Real property

**Cases considered by V.O. Ouellette J.:**

*Poplawski v. McGrimmon* (2010), 2010 CarswellOnt 32, 2010 ONSC 108, (sub nom. *McGrimmon v. Personal Insurance Company*) [2010] I.L.R. 1-4929, 100 O.R. (3d) 458, 86 C.C.L.I. (4th) 94 (Ont. S.C.J.) — followed

*Poplawski v. McGrimmon* (2010), (sub nom. *McGrimmon v. The Personal Insurance Company*) [2010] I.L.R. 1-5057, 2010 ONCA 655, 2010 CarswellOnt 7424, 89 C.C.L.I. (4th) 230 (Ont. C.A.) — followed

*Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada* (2010), [2010] 2 S.C.R. 245, (sub nom. *Progressive Homes Ltd. v. Lombard General Insurance Co.*) [2010] I.L.R. 1-5051, 406 N.R. 182, 92 C.L.R. (3d) 1, [2010] 10 W.W.R. 573, 2010 SCC 33, 2010 CarswellBC 2501, 2010 CarswellBC 2502, 89

C.C.L.I. (4th) 161, 73 B.L.R. (4th) 163, 9 B.C.L.R. (5th) 1, 323 D.L.R. (4th) 513, 293 B.C.A.C. 1, 496 W.A.C. 1 (S.C.C.) — followed

*Rocky Mountain House (Town) v. Alberta Municipal Insurance Exchange* (2007), 54 C.C.L.I. (4th) 161, [2007] 12 W.W.R. 719, 428 A.R. 169, 2007 ABQB 548, 2007 CarswellAlta 1176, 79 Alta. L.R. (4th) 141 (Alta. Q.B.) — considered

*V.O. Ouellette J.:*

## **I. Introduction**

1 Canalta Construction Company Ltd and Marc Tougas ("Canalta") seek a declaration that the Dominion of Canada General Insurance Company ("Dominion") must defend in an action commenced against them by the **Condominium Corporation No. 0322472** ("Condo Corp.").

## **II. Facts**

2 Canalta acted as a general contractor/developer of a condominium project. During the construction/conversion of the project, Canalta obtained a Commercial General Liability (CGL) insurance policy from Dominion with a term or terms from November 29, 2002 to January 1, 2008. The conversion or renovations occurred between 2003 and 2005. Canalta registered a condominium plan in May 2003, becoming the owner of all of the condominium units created by the plan. All 20 of the condo units created were sold between May 2003 and September 2006.

3 On July 21, 2010, Condo Corp. sued Canalta for breach of contract and negligence resulting in alleged deficiencies and/or defects in relation to the condominium units which had been sold by Canalta. The alleged deficiencies are in the design and construction of the condos, resulting in failure of a water main and failure of a roof system to repel water vapour and to provide insulation to the premises. All of these alleged deficiencies in design and construction and alleged damage caused were located in the common area and not in individual condo units. Canalta has filed a Statement of Defence and subsequently filed third party claims against subcontractors. Dominion has refused to provide a defence in the Condo Corp. lawsuit.

## **III. Issue**

4 Does Dominion owe Canalta a duty to defend, pursuant to the CGL, in the Condo Corp. lawsuit against Canalta?

## **IV. CGL Policy and the Law**

5 The CGL policy provides the following sections regarding coverage:

### **Coverage A. Bodily Injury and Property Damage Liability**

#### ***1. Insuring Agreement***

a. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of... "property damage" to which this insurance applies... This insurance applies only to... "property damage" which occurs during the policy period. The... "property damage" must be caused by an "occur-

rence"...

## 2. Exclusions

This insurance does not apply to:

b.... "property damage" for which the insured is obligated to pay compensatory damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for compensatory damages:

- 1) Assumed in a contract or agreement that is an "insured contract"; or
- 2) That the insured would have in the absence of the contract or agreement.

h. "Property damage" to:

- 1) Property you own, rent or occupy;
- 2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises:

...

Paragraph 2 of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

j. "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

6 Negligence constitutes an "accident": *Annotated CGL Policy*, §11:20.2 and cases cited therein.

7 The Supreme Court held in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245 (S.C.C.) at para 19 that the mere possibility that a claim falls within the insurance policy gives rise to a duty to defend. To determine this, the Court must consider whether the claim falls within the insuring agreement, whether any exclusions apply, and whether any exceptions to exclusions apply.

## V. Position of Canalta and Dominion

8 Canalta submits that there is a possibility that the claim falls within the policy. They acknowledge that some of the alleged damage could fall under exclusion 2.j. However, the exception to the exclusion applies because they employed subcontractors to design and construct the condo.

9 Dominion argues that coverage is excluded because: 1) the action relates to property damage that occurred outside the applicable policy period; 2) the essence of the action is a claim for breach of contract; 3) the action relates to damage to property that was sold by Canalta prior to the damage occurring; or 4) the definition of

property damage is limited to third-party property damage.

## VI. Analysis

### *1) The action relates to property damage that occurred outside the applicable policy period*

10 Dominion argues that the policy only covers property damage that "occurs during the policy period" which was from November 29, 2002 to January 1, 2008. The water main failed on July 26, 2008. All property damage resulting from a water main failure occurred after the end of the policy period.

11 Canalta submits that the courts have wrestled with four trigger theories: 1) damage does not occur until it manifests itself; 2) if the damage pre-dated its discovery or manifestation, then all policies in effect while it was undetected, but nonetheless was occurring, are triggered; 3) mere exposure to a harmful condition is sufficient to cause damage; 4) developing damage represents a continuous series of new injuries, triggering every policy in effect from first exposure to discovery or manifestation: MB Snowden, MG Lichty, *Annotated Commercial General Liability Policy*, Vol. 1 (Toronto: Canada law Book) at 11-24 and 11-25.

12 Canalta points out that the condo plan was registered on May 14, 2003 and all renovations were completed by January 2005, during the currency of the policies. Canalta submits that there is at least a mere possibility that the court would determine that there was ongoing damage so as to trigger the policy under the second and fourth theories.

13 As stated above, Dominion argues that coverage is excluded firstly because the action relates to property damage that occurred outside the applicable policy period. In that regard, para. 19 of the Statement of Claim filed by Condo Corp. alleges negligence in the design installation and construction. It seems that it is at least arguable that the damage occurred when the work was done.

### *2) The essence of the claim is breach of contract*

14 Dominion argues that the essence of the claim is breach of contract. The Plaintiffs plead negligence in the alternative in paras 19 and 20 of the Statement of Claim. Dominion argues that these allegations of negligence are essentially a repetition of the allegations of contractual breach. Dominion relies on *Rocky Mountain House (Town) v. Alberta Municipal Insurance Exchange*, 2007 ABQB 548, 428 A.R. 169 (Alta. Q.B.). Dominion also cites HA Sanderson, RDG Emblem & JL Woodley, *Commercial General liability Insurance* (Vancouver: Butterworths, 2000) at 152 for the proposition that Exclusion 2.b removes from coverage all claims for property damage alleging a breach of contract.

15 In *Rocky Mountain House* the alleged negligence was negligent misrepresentation, held to be derivative of the contract claim. Here, the alleged negligence includes the actual design installation and construction.

16 Dominion argues that Exclusion 2.b. applies because the insured would be "legally obligated to pay" these damages by reason of the assumption of liability in a contract.

17 Canalta relies on *Poplawski v. McGrimmon*, 2010 ONSC 108 (Ont. S.C.J.), aff'd 2010 ONCA 655 (Ont. C.A.) in which the negligence claims included negligent construction and design.

18 Canalta argues that claims for breach of contract can be found to fall within the phrase "legally obligated to pay". If breach of contract was not covered by that phrase, then there would be no need to add Exclusion 2.b.

which excludes assumption of liability in a contract or agreement. The exception specifically deals with liability for negligence that the insured would have in the absence of the contract. Further, there was no assumption of liability in contract in this case; rather, the claims allege breach of contract and negligence independent of the contract pertaining to the construction/renovations.

19 Canalta argues that the situation is analogous to *Progressive Homes* where the Court held that faulty or deficient work can fall under the definition of property damage under a CGL policy; if that were not the case, it would leave no work for the work performed exclusions.

20 Dominion's argument that coverage is excluded because the essence of the claim is for breach of contract is not supported by a plain reading of the Statement of Claim filed by the Condo Corp. *Poplawski v. McGrimmon* is persuasive authority for the proposition that a negligent design/construction claim is not simply redundant *vis-à-vis* a breach of contract claim. Although the Statement of Claim alleges deficiencies as a result of Canalta's breach of warranty misrepresentation, breach of contract, breach of fiduciary duty and negligence or any of them, it cannot be said that the deficiencies due to negligence are simply a derivative of the breach of contract.

**3) The action relates to damage to property that was sold by Canalta prior to the damage occurring**

21 Dominion submits that if property damage occurred during the policy period but when Canalta did not own the property, then coverage is excluded by Exclusion 2.h.2 which excludes coverage for property damage to premises the insured sells, gives away or abandons. Further, Dominion submits that the exception to Exclusion 2.h.2 (if the alienated premises are the insured's work and were never occupied, rented or held for rental by the insured) does not apply. Dominion argues that the evidence adduced so far establishes that Canalta exercised sufficient control over the premises to prevent strangers from interfering with the premises and therefore "occupied" the premises after the renovations were completed, and the onus is on Canalta to prove that the exception applies.

22 Canalta argues that they need not prove on a balance of probabilities that an exception applies to raise a duty to defend, rather they need only show a mere possibility that it does so.

23 Canalta refers to American case law which discusses the fact that interpreting the "premises alienated" exclusion to preclude coverage for damage to portions of any property sold by the insured makes little sense, and the purpose of the provision was never to deny coverage to developers and contractors for defects in completed projects arising from the work of others. Canalta argues that to interpret the alienated property exclusions as advocated by Dominion would be to virtually eviscerate coverage under a CGL policy for contractors and developers, especially when the work was completed by subcontractors.

24 Dominion cites alternate American case law for the proposition that the "premises alienated" clause does operate to exclude coverage in situations where a contractor's allegedly negligent acts occurred prior to a builder or developer's alienation of the property.

25 Canalta further submits that if it was held that the alienated property exclusion applies, there is a possibility that the exception to Exclusion 2.h.2. applies. Canalta states that they did not occupy, rent or hold for rental the common property after conversion, nor did they occupy, rent, or hold for rental the water main and roof system. Condo Corp. was created on May 14, 2003 prior to conversion and at that point it was Condo Corp. who occupied the common property.

26 Dominion submits that Canalta has not tendered any evidence on whether they occupied, rented or held for rental the common property after conversion. Tougas testified that Canalta controlled access to the common property, was caretaker, and hired and instructed a property manager until the condo board was elected. This is sufficient to amount to "occupation" and therefore, the exception does not apply.

27 Based on the materials before the Court, it is not clear when and if Canalta "occupied" the common property during the period in question.

28 Dominion has argued that the coverage is excluded because the action relates to damage to property that was sold by Canalta prior to the damage occurring. In that regard, it must ultimately be determined when the property was alienated and when the damage occurred. Unless the law has been settled with respect to the trigger theories that have been cited by Canalta, it is possible that the damage occurred during construction. The Statement of Claim provides that the negligence would have occurred at the beginning of the design stage and continued through the construction stage until the actual failures of both the water main and the roof. As a result, although the property damage to the roof only manifested itself after the end of the policy period on July 26, 2008, it is alleged in the Statement of Claim that the damage was continuous, raising the possibility that at least two trigger theories would apply.

*4) The definition of property damage is limited to third-party property damage*

29 Dominion argues that the definition of "property damage" under Clause 1.a (Coverage) and 2.b and 2.h (Exclusions) restricts "property damage" in the CGL policy to third party property or claims. This interpretation was rejected by the Supreme Court of Canada in *Progressive* (see paras. 34-37), and therefore there is a possibility that the alleged property damage in this case would be covered.

**VII. Conclusion**

30 The Supreme Court of Canada in *Progressive* has set out the test to determine if an insurer is required to defend a claim. That test is one of mere possibility that the claim may fall within the CGL policy.

31 Arguably, the damage occurred when the actual design and construction occurred, which of course was when the CGL policy was in effect and, arguably, before it was alienated. I have found that the claim of negligent design and construction is not simply a derivative of a breach of contract claim, but rather is a stand alone claim. As well, it is not obvious that the definition of "property damage" in the policy is limited to third-party property damage.

32 For all of the reasons stated above, I find that it is possible that the claim falls within the CGL policy, and that the exclusions either do not apply or if they do, then exceptions to the exclusions apply.

33 Therefore, Dominion has a duty to defend Canalta in the Condo Corp. action.

34 If the parties cannot agree on costs, leave is granted to come back before me within 30 days.

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