9312374 v Aviva, 2020 ABCA 166: ABCA extinguishes developing line of authority that limited Ledcor's faulty workmanship analysis to Course-of-Construction Policies


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The Supreme Court of Canada's oft-quoted reasoning in *Ledcor v. Northbridge* is a "go-to" analysis when it comes to applying faulty workmanship exclusions in builders' risk policies. Last week, in *9312374 v. Aviva*, 2020 ABCA 166, Alberta's Court of Appeal reversed a Queen's Bench decision premised on the notion that *Ledcor*'s faulty workmanship/resulting damage analysis is limited to course-of-construction policies. In doing so, the Court of Appeal very clearly illustrated how the SCC's reasonable expectations doctrine applies more generally to "all-risks" policies of all types.

With respect to the facts, *9312374* concerns the interpretation of an "all-risks" property policy that insured the plaintiff Condo Corp's building and premises. In June 2011, the Condo Corp retained construction and engineering contractors to remediate its parkade surface, which necessarily involved cutting into the surface membrane. According to their retainer, the contractors were not to perform any work that would impact the structural integrity of the concrete slab. While working on the parkade surface, the contractors cut too deeply through the membrane; into the parkade slab, causing damage to the structural integrity of the parkade. When the Condo Corp claimed indemnification under the Property Policy, the Insurer denied coverage, relying on an exclusion for "*the cost of making good … faulty or improper workmanship*."

In the Queen's Bench, Hall J. would not apply a *Ledcor*-style interpretation to the Condo Property Policy's faulty workmanship exclusion (i.e. limiting the faulty workmanship exclusion's application to membrane damage and excepting slab/structural damage). Hall J. distinguished the Condo Property Policy's nature from builders risk policies, which was "*not subject to the same expectations*." He observed that "*the only insureds are the owners; not the contractors and not the engineers. Here the 'relatively high premium' consideration does not apply. Here the purpose of the Policy is not to provide broad coverage for a construction project, for all involved in that project. In short, this is not a builder's risk/course of construction policy.*" In his view, the Condo Corp was not entitled to indemnification because the exclusion withdrew coverage for both membrane and structural damage.

The Alberta Court of Appeal reversed Hall J's decision, observing that "*the purpose behind multi-peril or all-risk policies.... is to provide broad coverage for fortuitous loss or damage, affording the insured certainty, stability and peace of mind*." Expanding on this principle, the Court of Appeal reproduced the following passage from its decision in *9813678 v. Statesman*, 2007 ABCA 216 (at para 35):

> *Those concerned in a condominium development do not want to have to worry about such unpredictable and complex topics. They want to exclude fault, risk, causation fights, tedious technical investigations, and expense. Statute and bylaws direct the condominium corporation to take out one policy for all,*

> *to avoid delay, expense and uncertainty. They replace lengthy litigation with an immediate no-fault purse for all. That is the whole point of one no-fault all-perils policy. Many authorities find there a close analogy to builders' all-risk policies.*

Conversely, property insurers are not prepared to insure the quality of a contractor's workmanship; faulty workmanship exclusions serve to "*discourage contractors from cutting corners and being careless in order to save money and then relying on the insurer to pay the cost of correcting their mistakes*." Notwithstanding, "*the cost of making good faulty or improper workmanship is informed by the scope of work contracted for*" and the "*scope of work contracted for define[s] the limits of the faulty workmanship exclusion*…"

Applying these principles, the Court of Appeal noted the contractor's contractual mandate had been limited to the parkade surface, therefore "*the consideration of what constitutes faulty or improper workmanship is limited to the scope of the contract … [and] …. the cost of making good the repair and remediation work to the parkade membrane is not covered*…" In the Court's view, to exclude anything more (i.e. the structural damage) would be contrary to commercial context existing between the parties and would fail to fulfil their reasonable expectations; potentially allowing the insurer to "*pocket the premium without risk*". Excluding only the membrane damage "*achieves the commercial purpose of ensuring the contractor and engineer are not paid twice for their faulty workmanship. However ... (loss to the structural integrity of the building) is covered*." The Court concluded:

> *[45] The analytical framework to resolve insurance contract ambiguity as outlined in Ledcor is appropriate here. The parties reasonably expected that the cost of making good the faulty or improper workmanship (determined by the scope of work contracted for) would be excluded, but that the consequences of that faulty workmanship would be covered. This interpretation does not create unrealistic results because, among other reasons, loss of structural integrity to the parkade (and the building itself) is a loss covered by the terms of the Policy. Further, this interpretation is consistent with the jurisprudence. It is not necessary to resort to contra proferentum to resolve the ambiguity, but if we had, the same result would follow.*

Had the parties' intended a different outcome, they ought to have employed a different exclusionary wording to reflect their objective intent. Ultimately, insurers should welcome the decision in *931*, which supports certainty and a uniformity of analysis across different commercial contexts.

Questions?

Should you have any questions with respect to this bulletin, or if you would like more detailed information on insurance defence, please contact Aaron.

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