

LIABILITY INSURANCE COVERAGE AND LATENT DEFECTS

A Recent Decision Rendered in the Context of a *Wellington* Motion

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What are the damages covered by a Liability Insurance Policy in a claim for latent defects? A recent decision of the Superior Court reiterated the principles on the subject in the context of a *Wellington* Motion in the matter of *Pageau vs Leblanc and al.*

First, a *Wellington* Motion is an interlocutory motion filed by an insured against its liability insurer in order to compel the latter to undertake its duty to defend in an action instituted by a third party. This type of interlocutory motion was first recognized by our Courts in the matter of *Compagnie d'assurance Wellington vs M.E.C. Technologie inc.*², hence the name *Wellington* Motion.

The Context

On September 30, 2004, Plaintiff Sylvie Pageau acquired the property of Defendants Lise Leblanc and Paul Richard. Subsequently, Ms. Pageau instituted a recourse for latent defects against Ms. Leblanc and Mr. Richard for an amount over \$75,000. Ms. Pageau's Claim included the repairs cost, the demolition cost, the cost of emergency works, damages for inconveniences and a loss of rental income.

On July 30, 2004, Ms. Leblanc and Mr. Richard instituted a recourse in warranty against their liability insurer

SSQ Assurances générales inc. ("SSQ") under a Homeowner Insurance Policy. Ms. Leblanc and Mr. Richard also filed a motion asking that the Court orders SSQ to undertake its duty to defend them in Ms. Pageau's action. The decision rendered by Justice Suzanne Ouellet of the Superior Court deals with this *Wellington* Motion.

The Decision

The Court starts by reiterating that liability insurance coverage will be triggered if there is an occurrence, i.e. an event causing damages, and underlines that Section 2465 of the *Civil Code of Quebec* ("C.C.Q.") exclude from coverage "*injury resulting from natural loss, diminution or losses sustained by the property arising from an inherent defect in or the nature of the property*." The Court indicates that the existence of a latent defect and the works necessary to correct it is not an occurrence but the damages caused by an event related to said defect may be an occurrence covered by the insurance policy. Therefore, the latent defect itself is not covered but the consequences of said latent defect, as for example an ensuing fire, may be covered.

Once the principle established, the Court goes on and analyses Ms. Pageau's Claim in order to determine if SSQ's Insurance Policy and duty to defend apply.

As for the non-pecuniary damages claimed by Ms. Pageau for inconveniences, the Court indicates that in a recourse for latent defect, the right to compensation for damages requires the proof that the seller was aware of the latent defect, in virtue of Section 1728 C.C.Q. The Court underlines that there are allegations of intentional fault on the part of Ms. Leblanc and Mr. Richard in Ms. Pageau's Claim. As a matter of

fact, the proceeding instituted by Ms. Pageau used the words "*camouflage*" and "*omission volontaire de dénoncer*" in reference of Ms. Leblanc and Mr. Richard. The Court finds that these allegations implied an intentional fault and that therefore, this part of Ms. Pageau's Claim was not covered, notably in regard of Section 2464 C.C.Q. which excludes from coverage injury resulting from an intentional fault of the insured. The Court refers to the decision rendered by the Court of Appeal in 2001 in the case of *Axa Assurances inc. vs Habitations Claude Bouchard inc.*³

As for the loss of rental income, the Court underlines that it is not a "Property Injury" as defined in the Insurance Policy. The Court also indicates that this loss, although it may have been construed as a "Loss of Use" as defined in the Insurance Policy, was not covered since it did not result from an occurrence caused by the latent defects. The Court finds that the loss of rental income was rather caused by the latent defect itself and the repair works undertook to correct it.

Lastly, the Court concludes that the repair works, demolition works and emergency works were also not covered by SSQ's coverage since they were undertaken by Ms. Pageau to correct the latent defect and therefore were corollary of the latent defect. They did not result from an occurrence. The Court based its decision on the allegations of Ms. Pageau's Claim and the expert report she filed in support thereof.

The Superior Court therefore dismissed the *Wellington* Motion of Ms. Leblanc and Mr. Richard with costs since all of the amounts claimed by Ms. Pageau were not covered by SSQ's Insurance Policy.

¹ Quebec S.C., No. 200-17-009084-070, AZ-50523332

² Quebec C.A., No. 200-09-001957-981, REJB 1999-10958

³ C.A. Montreal, No. 500-09-010616-019, REJB 2001-26010