

The CGL Policy: Coverage A Concepts

Co-Authors: Jason Mangano[1], Zack Garcia[2]

INTRODUCTION

The Commercial General Liability (“CGL”) Policy is the standard policy of insurance issued to businesses and commercial organizations to insure against third party liability for, among other things, bodily injury and property damage that arising out of the course of the insured’s business operations. The CGL policy is sometimes referred to, in a nutshell, as the policy that insures businesses from third party claims resulting from accidents, including negligent behaviour, for which the insured is legally obligated to pay damages.

At the same time, as has been argued on countless occasions by insurers with some success, the CGL policy is not a warranty or performance bond to be looked to in the event of product or workmanship failures. This paper focuses on judicial interpretations of certain terminology and exclusions from Coverage A of the CGL policy. Specifically, this paper canvasses the meaning of “bodily injury” and “property damage” as those terms are typically defined in the CGL policy. Moreover, the scope and judicial interpretation of the typical “business risks” exclusions from coverage are also discussed.

THE MEANING OF “BODILY INJURY”

Most CGL policies cover “bodily injury” caused by an “occurrence”, which is typically defined to mean an accident, including the continuous or repeated exposure to the same harmful conditions, for which the insured is legally obligated to pay damages to another.

The term “bodily injury” is commonly, though not always, defined as follows:

Bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.

In reference to the foregoing definition, one question that may come to mind is what exactly constitutes a “bodily injury” given that it makes reference to the term “bodily injury” in the definition itself. Similarly, other questions include what is the significance of the words “bodily”, “injury”, “sickness”, or “disease” as they appear in the definition?

Scope of Coverage

Judicial interpretation of the CGL “bodily injury” definition has extended the term beyond typical physical pain. Any sickness or disease, whether it is physical or mental, is now generally captured by the definition.

The current judicial consensus in Canada appears to be that the words “sickness or disease” contemplate internal body issues. Authors of the *Annotated Commercial General Liability Policy* note that the term “sickness” “has been defined as a condition which simply interferes with one’s usual activities”, and that the term and its interpretation are quite broad. The term “disease” has specifically been found by Canadian courts to include “an ailment that disorders one or more of the vital functions or organs of the body, causing a morbid physical condition”, as a condition of pathological origin, or finally as a deviation of normal or healthy functions.^[3]

One issue that attracted considerable judicial attention in the past was whether emotional distress absent a physical manifestation of injury could constitute a “bodily injury” as that term was defined in the CGL policy. In *Victoria General Hospital v. General Accident Assurance Co. of Canada*^[4], it was held that “bodily injury, sickness or disease” included coverage for a claim for severe emotional trauma resulting from incidents of sexual abuse. The Court in *Victoria General Hospital* relied on a perceived ambiguity on the basis that the insurer:

chose to define “bodily injury” as “bodily injury”, followed by a comma, and then followed by the words, “sickness or disease.” It is certainly open for a court to consider that in this policy “bodily injury” means three separate and distinct acts or events or occurrences, namely:

- (a) bodily injury, which taken alone might be restricted to those cases involving physical injury but, according to some of the American authorities, not necessarily so*
- (b) sickness, which is by definition something different from physical injury;*
- (c) disease, which is by definition something different from physical injury.*

Consequently, a physical manifestation of the “sickness or disease” was not necessary for the Court to find that severe emotional trauma caused by sexual abuse constituted a “bodily injury” as defined in the policy. At the time, *Victoria General Hospital* represented a divergence from Ontario precedent, which had held that where the alleged injuries originated in the mind, and not the body, the “bodily injury” definition was not satisfied.^[5] *Victoria General Hospital* is consistent with judicial opinion across Canada at present.

It has also been held that nervous shock, depression and psychological trauma stemming from sexual abuse amounted to “bodily injury, sickness or disease” in the context of an exclusion in a directors’ and officers’ liability policy.^[6] This is significant as exclusions by their nature are interpreted more narrowly than the CGL Insuring Agreement’s “bodily injury” definition.

There is also precedent in Ontario extending the definition of “bodily injury” to non-physical injuries. In *Elmford Construction Co. v. Canadian Indemnity Co.*^[7], the Ontario Superior Court of Justice held that emotional distress that resulted from a plaintiff’s fear that a retaining wall might collapse could possibly be argued to constitute “... bodily or mental injury or illness ... “:

With respect to the Caverlys’ claim for damages for emotional stress, Canadian Indemnity submits that the policy covers only for “mental injury” and that emotional stress is not mental injury. It appears that Canadian Indemnity believes the policy covers only a direct injury to the brain. I suspect that, in a business liability policy such as in issue in this case, there would be very few situations where there would be evidence of objective mental injury. The policy covers “... damages because of bodily or mental injury or illness...” A court could possibly fit damages for emotional stress within that provision.

While mental illness and severe emotional distress absent any physical manifestation often constitutes “bodily injury”, the term does not encompass injury to a person’s reputation. In *Maillet v. Halifax Insurance ING Canada*^[8], the Court of Queen’s Bench of New Brunswick held that an injury to an individual’s reputation could not trigger a liability policy’s insuring agreement:

With respect however, it bears repeating that the Plaintiff is suing for defamation because of injury to his reputation. He is not claiming damages for ‘loss of sleep’ or for any other physical inconvenience. Those manifestations are supportive of his allegation that the Applicant’s alleged defamatory remarks caused him grief and damaged his reputation in the community. That is the basis of his suit.

The policy covers damages arising from personal injuries or property damage. It would be stretching the ordinary terms of the policy to find that damages arising from injury to reputation falls within the category of ‘bodily injuries.’

The British Columbia Supreme Court made a similar finding in *Strata Plan NW3341 - Riverwest v. Royal Insurance Co.*^[9] An action was commenced against the owners of a Strata Plan alleging that the failure to complete repairs made a unit unfit for habitation. An argument was raised that such unfitness vis-à-vis a person with a heart condition constituted an allegation of “bodily injury... sustained by a person.” The Court quickly rejected this argument:

Even reading the pleadings broadly as I must do in considering whether there is a duty to defend, in my view the allegation is one of lost usage of the property, not bodily injury. I do not consider the pleadings might raise a claim for damages for bodily injury, and I do not find a duty to defend on the basis of “bodily injury”.

Difference from Personal Injury

There is a fundamental distinction between the concepts of “bodily injury” and “personal injury” in a Commercial General Liability policy. The terms are far from synonymous and relate to two distinct classes of coverage. The Nova Scotia Supreme Court in *Ben’s Ltd. v. Royal Insurance Co.*^[10] reviewed the difference between the two:

In this policy at least “personal injury” coverage is clearly something quite different from “bodily injury”. In Vol. 7A Appleman, Insurance Law and Practice, it is stated at p. 4 (footnote 1):

Note that courts frequently use the terms ‘bodily injury’ and ‘personal injury’ interchangeably. In insurance terminology the two terms have entirely different meanings. The first deals with medically recognizable injuries such as a broken bone whereas the second deals with libel, slander and false arrest.

In the insurance coverage context, “personal injury” refers to an injury, other than a bodily injury, which arises out of a number of enumerated offences including privacy breaches and slander, whereas “bodily injury” is concerned with physical and potentially emotional distress of the human body, without any reference to what caused the distress itself. The CGL policy’s “personal injury” coverage is typically set out in the Coverage B insuring agreement; as opposed to “Coverage A”, which sets out the typical “bodily injury” and “property damage” coverage. The discussion in this paper is restricted to “Coverage A” of the CGL Policy.

THE MEANING OF “PROPERTY DAMAGE”

Historically, the CGL policy did not include a definition of “property damage”. Instead, it provided coverage for “damages because of injury to or destruction of property, including loss of use thereof”. The definition’s inclusion of an unqualified “injury”, however, has resulted in declarations of coverage for claims asserting the infringement of a property right.^[11] For example, it has been found that both an infringement of the right to enjoy water^[12] constitute “injury to property”.

As a result, a number of revisions were made to the CGL policy, such that the current standard definition of “property damage” provides as follows:

“Property damage” means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

The result has been that a number of litigious issues have now been resolved. The modern definition contains “tangible” qualifier, hence claims for property damage to electronic data, should not attract coverage. Moreover, where there is an actual physical injury, any resulting loss of use of that property is deemed to occur at the time of the injury that caused it. Finally, loss of use of property that is not physically injured is deemed to have occurred at the time of the “occurrence” that caused the loss of use of that property.

Scope

As Gordon Hilliker notes in *Liability Insurance Law in Canada*, “property damage” includes damage to an insured’s own work or own product, but property that is defective can also be found to constitute “property damage”. The seminal Supreme Court of Canada decision in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*^[13] provided guidance as to the scope of “property damage” as defined in a CGL policy. The Court held that a policy’s insuring agreement should be given a “plain meaning” interpretation that is consistent with the context of the entire policy. Accordingly, where a defect renders property entirely useless, it could be argued that defective property is covered under the “loss of use” component of the definition.

As with “bodily injury”, the definition of “property damage” welcomes a number of questions, most obviously with respect to what constitutes “physical injury” and “loss of use”.

a) Physical Injury to Tangible Property, and Resulting Loss of Use

The definition of “property damage” requires a “physical injury” to tangible property. However, a number of decisions demonstrate that what exactly constitutes a “physical injury” is less intuitive than the “plain meaning” of the term. The Court in *Canadian Equipment Sales & Service Co. Ltd. v. Continental Insurance Co.*^[14] dealt with an interesting scenario in which a labourer allowed a piece of metal to fall into a water pipeline. The owner feared that the metal would impede the flow of waters, which were used for industrial processes, and cause significant damage. The owner attempted to find the piece of metal at considerable expense but failed. The owner subsequently claimed for its investigation expenses. The finding at trial that there was no “injury to property” was reversed by the Ontario Court of Appeal, which held that the dropped piece constituted an impairment (*i.e.* injury) to the water system (*i.e.* property).

In *Beaverdam Pools Ltd. v. Wawanesa Mutual Insurance Co.*^[15], the insured had installed a pool at the home of a customer, who then installed a deck around and level with the pool. The pool subsequently fell apart, and the customer brought an action against the insured seeking, *inter alia*, the cost of raising his deck to make it level with the pool. The insured’s subsequent claim under its CGL policy was denied by Wawanesa. At trial, the Court found that if the deck (which was *not* part of the insured’s work) had to be rebuilt because of defects in the pool (which was part of the insured’s work) the corresponding damages were recoverable under the CGL policy.

On appeal, Wawanesa argued that the plaintiff’s claim for the deck was not an allegation of “property damage” because no “physical injury to tangible property” had occurred given that the

deck had remained intact. Thus, the cost of raising it to render it functional once again was argued to be an economic loss. In dismissing the appeal, the New Brunswick Court of Appeal found that “the relevant provisions of the policy and the case law interpreting them do not support such contentions”. The insured’s inadequate installation of the pool made it necessary to remove the deck, rendering it useless until a new pool was installed. This process satisfied the “property damage” definition. Specifically, the customer’s negligence claim for losses associated with the deck constituted “property damage” (as well as an “occurrence”) within the scope of the CGL policy.

It was not clear in the New Brunswick Court of Appeal Court’s opinion where in fact a “physical injury” had occurred to the deck or whether there had simply been a “loss of use” of tangible property. However, the Court did rely on the oft-cited *Carwald Concrete and Gravel Co. Limited v. General Security Insurance Company of Canada et al.*^[16] decision, where it was held that defective concrete rendered the embedded reinforcing steel useless, and that the act of pouring the concrete constituted “physical injury to tangible property”, the tangible property being the reinforced steel.

Finally, the Supreme Court of Canada in *Progressive Homes* provided further insight into what may constitute “property damage”. BC Housing had hired the insured to build housing complexes. Following the completion of construction, water was found to have leaked into the complexes and to have caused damage. BC Housing alleged inadequate construction on the part of the insured’s subcontractors. One of the many issues before the Court was whether defective property itself could constitute “property damage” as defined in a CGL policy. Notable in the decision, for present purposes, was the finding that the definition of “property damage” did not categorically exclude defective property, and that defective property could be argued to satisfy the definition’s “physical injury” or “loss of use” conditions.

We note further to the Supreme Court of Canada’s analysis, the standard CGL “property damage” definition does not make a distinction as between damage to the insured’s own work and damage to the property or work of others.

b) Loss of Use of Tangible Property not Physically Injured

“Property damage” also includes the “loss of use” of tangible property that is not physically injured. It is important to note, however, that while the latter definition of “property damage” contemplates loss of use of property without actual physical injury, any “loss of use” must be directly related to tangible property that, had it been physically injured, would satisfy the definition of “property damage”. It follows that “loss of use” requires injury to a right or interest in tangible property.

A claim for pure economic loss absent any injury or damage to property or a property interest will not generally constitute “property damage” before a Canadian court. In *Raylo Chemicals v. AXA*^[17] the Alberta Court of Queen’s Bench was unable to locate an allegation of “property damage” in a pleading alleging damage, injury or disruption to (or loss of use of) any property or to any rights to or in property owned, possessed or enjoyed by the claimant. The claim in *Raylo*

was based on multiple breaches of contractual obligations, negligence and misrepresentation for the increased expense in time, labor and materials to carry out and complete constructions and additions that the insured was contracted to do. The Court characterized the claim as one for damage to the financial or economic interests of the insured. In this regard, the claim, according to the Court, did not alleged a loss of use of *property*. The Court was unwilling to accept that a claim for pure economic loss could be equated with damage to — or loss of use of — “property”.

A commonly cited decision in which there was a finding of “loss of use of tangible property that is not physically injured” is *International Radiography and Inspection Services (1976) Ltd. v. General Accident Assurance Co. of Canada*.^[18] The insured conducted radiographic hardness tests on new steel piping and flanges at a plant, which failed to properly reveal hardness levels. Following completion of these tests, the plant was restarted but quickly shut down once again because of a compressor failure. During this shutdown, Suncor conducted its own hardness tests, which disclosed readings that conflicted with those provided by the insured. The problem was remedied at significant financial expense, due to production delays. At trial, the Court found that while there was no physical injury to tangible property, there was a loss of use of tangible property that was not physically injured (the plant shutdown), which triggered the “property damage” definition and thus the policy’s insuring agreement. This decision was upheld on appeal.

THE “BUSINESS RISKS” EXCLUSIONS

The CGL is a comprehensive insurance policy that provides Canadian businesses and organizations coverage for common risks that arise in the course of daily business. As with all insurance policies, however, the CGL policy is meticulously drafted with a number of conditions and exclusions to cover these businesses for a carefully defined category of risks, namely third party bodily injury and property damage that results from the insured’s business operations, products, or premises.

Most CGL policies contain a number of exclusions that are often referred to as the business risk exclusions. These exclusions are among those most commonly litigated exclusions in the CGL policy as their application is quite often fact specific and often. This paper will analyze the Damage to “Own” Property, Damage to “Your Product”, Damage to “Your Work” and Damage to “Impaired Property” exclusions. The inclusion of these “business risk exclusions” is a clear acknowledgment by underwriters that CGL coverage cannot be purchased in place of a warranty. In claims for coverage, then, insurance practitioners in Canada must pay close attention when interpreting the policy and considering whether a seemingly covered incident is precluded from coverage by a “business risk” provision.

a) Damage to “Own” Property

A typical “Damage to Own Property” exclusion will preclude coverage for “Property Damage” to:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

The underwriting intent behind this exclusion is to ensure that the CGL policy is not interpreted in a manner so as to provide first-party coverage to an insured, which instead should be negotiated independently. The exclusion is meant to preclude coverage for any "property damage" over which a policyholder has a measure of control, and thus the exclusion also operates to discourage fraudulent insurance claims and moral hazard with respect to the insured's own property. While the exclusion is most typically applied to preclude coverage for real property, it has also been applied to include personal property. The exclusion itself does not distinguish between real property and chattel.

The issue of what constitutes an insured's "own property" was addressed in *Romay Automotive Ltd. v. Dominion of Canada General Insurance Co.*,^[19] where the insured's employee negligently started a fire that completely destroyed its product stock. Romay later obtained unsatisfied judgments, and its insurers subrogated against its liability insurer. At issue was whether the liability policy responded to situations where one insured (Romay) sued another (its employee). Dominion denied coverage based on an "own property" exclusion. The Ontario High Court of Justice found that the exclusion precluded coverage to *any* insured under the policy, regardless of whether or not *that* insured was not *the* insured against whom a claim was made. The Court also endorsed the concept that third party liability insurance provides coverage only in situations where a third party is making a claim against an insured.

Similarly, the New Brunswick Court of Queen's Bench in *Archway Holdings Ltd. v. Royal Insurance Co. of Canada*^[20] considered a policy that excluded coverage for property damage to "Property owned or occupied by or rented to the insured". The insured's underground storage tank located on its property leaked and a subsequent investigation and study was commissioned. The insured's liability insurer had previously covered third party claims that were traced to the leaking tank. While the insured sought reimbursement for the investigations relating to its own land, the Court made clear that because the investigations were confined to the insured's own premises and were not related to continuing or past damage to the property of others, they were not covered by the policy. The Court confirmed that the policy was only intended to cover claims arising out of third party property damage.

A second issue is what constitutes "rent" or "occupy". In *Fraser River Pile Driving Co. v. Fidelity Insurance Co. of Canada*,^[21] a general contractor (the "General") had hired two subcontractors. The General asked the insured subcontractor (the "Insured") to use the claimant subcontractor's (the "Claimant") crane to remove debris that was interfering with the construction of a bridge. The bridge failed while the Claimant was using the Insured's crane, and the crane fell into a river. The Claimant sued the Insured. The Insured sought indemnity from its liability insurer for damage caused by the crane's collapse. Coverage was originally denied on the basis that the crane was being "used by" or "rented" by the Insured at the time of

the occurrence. However, the British Columbia Supreme Court instead found that the crane had not been rented, and the Insured did not have actual “possession” of the crane. This case has been used to suggest that the degree of control an insured exercises over the property in question is quite relevant in determining whether the exclusion applies.

The Ontario Court of Appeal brought the owned property exclusion’s temporal constraints to light in *Poplawski v. McGrimmon*.^[22] In this case, the insured had constructed and sold a home, and the buyers sued upon discovery of defects. The defendants’ homeowner policy precluded third party liability for claims for “damage to property you own, use, occupy or lease”. The Court found that this clause was ambiguous and, construing it narrowly, found that because it was written in the present tense (“own”), the exclusion did not apply given that the home was once owned (past tense) by the insured. Although this case involved the interpretation of a homeowner’s policy, the *Poplawski* reasoning highlights the importance of carefully reading the tense of policy language. Drafters should consider making reference to property sold if the exclusion is intended to apply to sold property.

The tense issue arose before the Ontario Court of Appeal again in *Hector v. Piazza*,^[23] where the pleadings alleged negligent construction in relation to a property that had been sold. In *Hector*, however, the “own property” exclusion contained the words “owned or occupied by or rented to the Insured.” The Court of Appeal found this wording ambiguous on the basis that “owned” could refer to present or past ownership. The Court reasoned that the exclusion did not appear to be intended to apply to circumstances in which property was transferred to a third party. It would follow, based on this reasoning, that property caught by the exclusion at the time of underwriting may not be caught by the exclusion at the time coverage is being analyzed.

b) Damage to “Your Product”

A typical CGL policy will also exclude coverage for:

- i. “Property damage” to “your product” arising out of it or any part of it.*

In turn, “your product” is usually defined as:

Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by ... You ... Others trading under your name; or ... A person or organization whose business or assets you have acquired; and ... Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

This exclusion precludes coverage for damages resulting from an insured’s liability for providing a faulty or deficient product to third parties, and the risk that the insured will be sought for repair or replace its faulty product as a result. It bears mentioning that this exclusion is focused on an insured’s actual product, but that it does not otherwise exclude from coverage bodily injury or property damage caused by an insured’s faulty or deficient product. The exclusion also does not operate to remove from coverage any resulting damage caused by an insured’s faulty or deficient product.

Unlike the “own property” or “your work” exclusion, the “your product” exclusion is considered by most insurance coverage practitioners to be relatively straight-forward. While the decision in *Alie v. Bertrand & Frère Construction Co.*^[24] is incredibly complex, it demonstrates the clear application of the exclusion. Recall in *Alie* that Lafarge supplied cement powder and fly ash to Bertrand, which supplied faulty concrete to contractors who, in turn, constructed faulty concrete footings and foundations. The homes thus had major structural defects and required replacing. The Court found, *inter alia*, with respect to the “your product exclusion” that a CGL insurance policy does not cover the costs of replacing the insured’s own faulty product. Thus, Lafarge was not covered for the cost of new cement material and Bertrand had no coverage for the cost of replacing its faulty concrete.

In addition to clarifying how this exclusion operates *prima facie*, *Alie v. Bertrand* is also authority for the proposition that the “your product” exclusion does not exclude from coverage damage to real property when the defective product is incorporated into that real property.^[25] Justice Roy found that Lafarge was nevertheless covered for the property damage it caused when its defective product was incorporated into Bertrand’s concrete. Furthermore, Lafarge was covered for property damage caused to the plaintiffs when Bertrand’s faulty concrete became part of the foundations of the plaintiffs’ homes, rendering the properties useless. Similarly, Justice Roy found that Bertrand had coverage for the property damage it had caused when its faulty concrete was incorporated into the property of the homeowners.

A leading decision on the operation of this exclusion with respect to resultant damage is *Bulldog Bag Ltd. v. Axa Pacific Insurance Co.*^[26] The insured manufactured packaging which was defective, for which it settled with its customer and subsequently sought indemnification from its CGL insurer. The customer’s losses related to the costs directly associated with having to package different products for sale, removing raw materials from the defective packaging, disposing the defective packaging and the loss of some raw material in the salvaging process. The Court ultimately found that the exclusion in the policy for property damage to “goods or products manufactured or sold by the Insured” did not preclude coverage. This was because, while the exclusion operated to preclude coverage for any claims for damage to the insured’s bags (the defective product), it could not be extended to preclude coverage for compensation for a customer’s costs for separating the bags from its products, repackaging its products in different bags and salvaging any old product.

It bears mentioning that an important restriction to the scope of the “your product” exclusion is found in the definition of “insured’s product”, which expressly carves out application of the exclusion to real property. This was critical in *Axa Insurance (Canada) v. Ani-Wall Concrete Forming Inc.*^[27] where, as in *Alie v. Bertrand*, one company supplied cement powder and three other companies supplied fly ash for concrete. Ani-Wall eventually used the concrete to construct the footings and foundations for various builders, whose homes suffered property damage when the footings and foundations failed. In his decision, Justice Perell found that the “Your Product” exclusion not apply, for when Ani-Wall’s “product” was incorporated into the homes, it became a part of the real property, for which the exclusion did not apply. In this

regard, the distinction between real property and chattel is important to know when determining the applicability of the “Your Product Exclusion.”

c) Damage to “Your Work”

Another “business risk” exclusion provides that there is no coverage for:

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.

In turn, “your work” is defined as:

a. Work or operations performed by you or on your behalf; and

b. Materials, parts or equipment furnished in connection with such work or operations.

“Your work” includes warranties or representations made at any time with respect to the fitness, quality, durability or performance of any of the items included in a. or b. above.

There are some case law examples where the “your work” exclusion is applied in a very straightforward manner. Recall the facts of *Beaverdam Pools Ltd.* (discussed above), where the insured was sued by its customer for the negligent installation of an above-ground pool that subsequently collapsed, necessitating the removal of a deck that had been rendered useless. The policy in that case also contained an exclusion clause precluding coverage for the cost of repairing or replacing the insured’s “work” or “work product”. The New Brunswick Court of Appeal thus found that the policy did not provide the insured any indemnity for the cost of repairing or replacing the pool itself. However, the claim for loss associated with the deck was found to be within the scope of the policy, and the duty to defend was triggered by the claim for costs to raise the deck.

The British Columbia Supreme Court in *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.*^[28] considered this exclusion in the context of an asbestos claim brought under six different insurance policies. The insured sought reimbursement for defence costs, and the Court considered six different “work/product” exclusion clauses. It noted that the underlying contract in this matter pertained to the renovation of an existing building and not the construction of a new building. Consequently, the Court found that the exclusion applied to the installation of asbestos, but not to damage to other property:

...bearing in mind the underlying purpose of a CGL policy, I am of the opinion that the work/product exclusion clause found in each of the subject policies, including those of Allstate and Dominion, relieves the insurer from any obligation to defend Foundation against the claims that have been advanced by the plaintiffs with respect to the removal and replacement of the [asbestos], the installation of which was part of Foundation’s “work” or “product”...

However, the clause would be of no effect with regard to other property, whether corporeal or incorporeal that may have been damaged...

The Ontario Court of Justice considered the exclusion in *Dow v. Trumper*,^[29] an action seeking the recovery of expenses required to repair and replace work that had been done by the insured. The Court interpreted and summarized the “your work” exclusion as follows:

“This insurance does not apply to physical injury to or loss of use of materials, parts or equipment furnished in connection with work performed by Mr. Trumper that arises out of the work performed by him or materials furnished in connection with such work, or that arises out of any part of such work or materials.”

Given that the claim in *Trumper* concerned only damage to the insured’s work, and because there was thus no “property damage” exclusive of the insured’s work, the Court found that the exclusion precluded coverage for the repair or replacement of the insured’s work, as well as any materials he had used in connection with such work.

But what is meant by “materials, parts or equipment furnished”? In *Hipperson Construction (1996) Ltd. v. H.J.H. Steel Erectors Inc.*^[30], the Saskatchewan Court of Appeal considered the application of this exclusion to a construction defect. The insured contracted to assemble a steel rafter, which was provided by Hipperson, in a pre-engineered metal building. Midway through the insured’s work, the partially erected structure collapsed, allegedly as a result of the insured’s negligence. The trial court did not apply the “your work” exclusion on the basis that the steel rafters were not “materials, parts or equipment furnished” by the insured. The Court of Appeal disagreed, however, and found that the plain meaning of the clause was to preclude coverage for damage to any property that requires replacing as a result of an insured’s work that was incorrectly performed.

An important exception to the exclusion that is sometimes (but not always) included is for “damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor”, known as the “subcontractor exception.” The central exclusion in the *Progressive Homes* appeal was the “work performed” exclusion. In its decision, the Court reviewed the evolution of the exclusion as contained in the insured’s successive CGL policies. The original “work performed” exclusion, the Court reviewed, was limited to work performed by the insured and did not apply to work performed on its behalf; it was thus unambiguous and only excluded damage caused by Progressive to its own completed work. The second form of the exclusion was found to expressly contemplate the division of the insured’s work into component parts by use of the phrase “that particular part of your work”. Thus, coverage for repairing defective components would be excluded, while coverage for resulting damage would not.

However, the third and final CGL policy under review in *Progressive Homes* contained a “subcontractor” exception to the exclusion: “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”. The Supreme Court of Canada reasoned that this third iteration of the exclusion was simply a

combination of the first and second versions. Thus, the “exclusion” portion of the clause, which was identical to the second iteration, only excluded coverage for defective property. However, the subcontractor exception, which was deemed implicit in the first iteration, expanded coverage once again, allowing for coverage of defective work where it is work completed by a subcontractor.

The Supreme Court of Canada’s recent decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*,^[31] (a first party property coverage case) is instructive as to what qualifies as an insured’s “work”. During the cleaning of windows on an office tower, Bristol Cleaning caused damage to the windows by using inappropriate tools and methods. The glass had to be replaced at considerable expense. The insurers denied coverage, asserting that the damage to the windows was excluded through operation of an exclusion that precluded coverage for “the cost of making good faulty workmanship ... unless physical damage ... results, in which event this policy shall insure such resulting damage”. The Court ruled that Bristol Cleaning’s “work” was limited to the cleaning itself, and therefore any damage to the windows was covered “resultant damage”.

While the Court in *Ledcor* was interpreting a Builders Risk policy, the Ontario Court of Appeal in *Parkhill Excavating Limited*^[32] appears to have endorsed the decision. In May 2010, a local health unit had warned homeowners of potential problems with their septic systems, which had been installed by Parkhill. 36 septic systems were eventually replaced, and Parkhill was sued for negligence and breach of contract relating to the above deficiencies. On motion for summary judgment, it was found that the “Your Work” exclusions in the applicable policies applied to vitiate coverage. Without citing *Ledcor*, the Ontario Court of Appeal commented that Canadian jurisprudence has established that the exclusion only applies to the “direct costs” of repairing or replacing defective work, and that there remains coverage for any consequential damage. The Court did however make express reference to *Progressive*. Ultimately it was held that the “increased costs to remedying work” as the homes had already been sold constituted consequential damages. Thus, the narrowed scope of the exclusion as provided by *Ledcor* in the context of a Builder’s Risk policy appears to be making its way into CGL case.

d) Impaired Property

Finally, the “impaired property” business risk exclusion provides that there is no coverage for:

k. “Property damage” to “impaired property” or property that has not been physically injured, arising out of:

1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or

2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

“Impaired property”, in turn, is commonly defined as:

5. “Impaired property” means tangible property, other than “your product” or “your work”, that cannot be used or is less useful because:

a. It incorporates “your product” or “your work” that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

a. The repair, replacement, adjustment or removal of “your product” or “your work”; or

b. Your fulfilling the terms of the contract or agreement.

While there has been a great deal of litigation with respect to interpreting the first three business risk exclusions, the “impaired property” exclusion is particularly convoluted. Lichty and Snowden endorse the following summary of the exclusion written by Hendrick and Wiesel:^[33]

Summarizing, the clearest application of [this] exclusion . . . in the contractor context is to the work of an insured contractor or subcontractor which, because of some defect in the work, renders adjacent property or pre-existing work either useless or reduced in property value. In such cases, assuming that all aspects of the “impaired property” definition are met [this] exclusion . . . eliminates coverage unless the loss of use or property value came about due to “sudden and accidental” physical damage to the insured’s work. Where the property that is made useless is the work of the insured or its subcontractors, the “impaired property” clause is inapplicable and the effect, if any, of [this] exclusion . . . hinges on the interpretation of the vague second clause of the exclusion.

Canadian courts have proffered their own interpretations of the exclusion. In *R.W. Hope Ltd. v. Dominion of Canada General Insurance Co.*,^[34] for example, the Ontario Court of Appeal provided that:

64 *...This exclusion applies to property that was not physically damaged, but which is less useful because the insured’s work was defective or inadequate.*

65 *...This clause does not apply without proof that the property can be restored to use.*

An interesting, if simple, example of how this exclusion has been interpreted is found in *Romlight Inc. v. AXA Insurance (Canada)*.^[35] The insured supplied a lighting system to be used

in a chicken hatchery. The lighting system subsequently failed, causing abnormally low egg production in the chicken flock. The Court reviewed the exclusion and found that it did not apply given that (1) the damage to the chickens could be considered “physical damage”; (2) the chickens did not “incorporate” the insured’s product or work; and (3) the allegations were grounded in negligence and not breach of contract (*i.e.*, “a delay or failure . . . to perform a contract or agreement in accordance with its terms”).

In *March Elevator Co. v. Canadian General Insurance Co.*^[36] the Ontario Court of Justice considered the scope of the “impaired property” exclusion with respect to pure economic loss resulting from the insured’s failed performance of an elevator maintenance contract. The plaintiff was forced to repair the elevator, during which it had to reduce rent to compensate for its reduction in services. The Court found that the exclusion precluded coverage on the basis that the CGL policy was designed to insure the risk that an insured’s work or product might cause bodily injury or property damage to another. It was *not* intended to encompass the risk that an insured might be required to correct its own defective work or product. The plaintiff’s elevator thus qualified as “impaired property”, or tangible property that was not the insured’s that could not be used (or was rendered less useful) because it incorporated the insured’s defective work. The exclusion also precluded coverage on the basis that the insured did not fulfill the terms of the maintenance agreement.

Finally, the Ontario Court of Appeal’s decision in *Alie v. Bertrand & Frère Construction Co.*^[37] provides some assistance in unmasking the “impaired property” exclusion. Before the Court was a dispute on damages arising from an insured’s defective manufacturing of concrete that was then used in residential foundations. As a result, deficiencies in the concrete caused an enormous structural defect necessitating total replacement. In disagreeing with the insurers’ argument that the program of repair or replacement did not involve physical injury or damage of another’s property, the Court found that the “impaired property” exclusion did not apply. The replacement of the insured’s faulty foundations, and the corresponding costs, constituted more than economic loss in that replacement required the destruction of the foundation and the claimants’ affixed property.

[1] Jason is a Partner in Blaney McMurtry LLP’s Insurance Coverage & Insurance Litigation practice groups. He has provided hundreds of insurance coverage opinions in respect of all types of policies and has acted as lead counsel in numerous cases involving complex issues relating to insurance coverage as well as the defence of claims.

[2] Zack is an Associate in Blaney McMurtry LLP’s Insurance Coverage & Insurance Litigation practice groups. He provides insurers with advice on a diverse range of policies, with a focus on commercial general liability, professional errors and omissions and directors’ and officers’ liability. He also maintains a general insurance litigation practice.

[3] *Tomlinson v. The Prudential Insurance Company of America*, [1954] O.R. 508; *Kerr Estate v. British Columbia Motorist Insurance Co.*, [1972] B.C.J. No. 510.

[4] *Victoria General Hospital v. General Accident Assurance Co. of Canada*, [1995] M.J. No. 276.

[5] *Dow v. Trumper*, [1995] O.J. No. 2261 (Ont. Gen. Div.). See *L. (C) v. Dominion of Canada*, [1997] I.L.R. I-3456.

- [6] *Wellington Guarantee, a division of Wellington Insurance Co. v. Evangelical Lutheran Church in Canada*, [1996] B.C.J. No. 872.
- [7] *Elmford Construction Co. v. Canadian Indemnity Co.*, [1995] O.J. No. 1022.
- [8] *Maillet v. Halifax Insurance ING Canada*, 2003 NBQB 7.
- [9] *Strata Plan NW3341 - Riverwest v. Royal Insurance Co. of Canada*, [1996] B.C.J. No. 618.
- [10] *Ben's Ltd. v. Royal Insurance Co.*, [1985] N.S.J. No. 47.
- [11] *Raylo Chemicals, Inc. v. AXA Pacific Insurance Co.*, 1999 ABQB 177.
- [12] *Hildon Hotel (1963) Ltd. v. Dominion Insurance Corp. Ltd. et al.*, [1968] B.C.J. No. 217.
- [13] *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33.
- [14] *Canadian Equipment Sales & Service Co. Ltd. v. Continental Insurance Co.*, [1975] O.J. No. 2355.
- [15] *Beaverdam Pools Ltd. v. Wawanesa Mutual Insurance Co.*, 2009 NBQB 123 aff'd 2010 NBCA 1.
- [16] *Carwald Concrete and Gravel Co. Limited v. General Security Insurance Company of Canada et al.*, [1985] A.J. No. 1086.
- [17] *Raylo Chemicals, Inc. v. AXA Pacific Insurance Co.*, 1999 ABQB 177.
- [18] *International Radiography and Inspection Services (1976) Ltd. v. General Accident Assurance Co. of Canada*, [1996] A.J. No. 1053.
- [19] *Romay Automotive Ltd. v. Dominion of Canada General Insurance Co.*, [1974] O.J. No. 1814.
- [20] *Archway Holdings Ltd. v. Royal Insurance Co. of Canada*, [1992] N.B.J. No. 594.
- [21] *Fraser River Pile Driving Co. v. Fidelity Insurance Co. of Canada*, [1972] B.C.J. No. 548.
- [22] *Poplawski v. McGrimmon*, 2010 ONSC 108 aff'd 2010 ONCA 655.
- [23] *Hector v. Piazza*, 2011 ONSC 1302 aff'd 2012 ONCA 26.
- [24] *Alie v. Bertrand & Frère Construction Co.*, [2002] O.J. No. 4697.
- [25] See also *Westridge Construction v. Zurich* 2005, SKCA 81 at para 54.
- [26] *Bulldog Bag Ltd. v. AXA Pacific Insurance Co.*, 2011 BCCA 178.
- [27] *Axa Insurance (Canada) v. Ani-Wall Concrete Forming Inc.*, [2007] O.J. No. 3989.
- [28] *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.*, [1991] I.L.R. 1-2737.
- [29] *Dow v. Trumper*, [1995] O.J. No. 2261.
- [30] *Hipperson Construction (1996) Ltd. v. H.J.H. Steel Erectors Inc.*, 2007 SKCA 52.
- [31] *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37.
- [32] *Parkhill Excavating Limited v. Royal & Sunalliance Insurance Company of Canada*, 2016 ONCA 832.
- [33] J. T. Hendrick & J. P. Wiesel, "The New Commercial General Liability Forms: An Introduction and Critique" (1986), 36 *Federation of Insurance & Corporate Counsel Quarterly* 319 at pp. 358-68.
- [34] *R.W. Hope Ltd. v. Dominion of Canada General Insurance Co.*, [2001] O.J. No. 4936.
- [35] *Romlight Inc. v. AXA Insurance (Canada)*, [2004] O.J. No. 1919.

[36] *March Elevator Company Ltd. v. Canadian General Insurance Company*, [1995] I.L.R. 1-3227.

[37] *Alie v. Bertrand & Frere Construction Co.*, [2002] O.J. No. 4697.