

AXA Insurance v. Ani-Wall Concrete Forming – Coverage for Faulty Concrete

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The Ontario Court of Appeal recently issued a significant decision in favour of policyholders. In *AXA Insurance (Canada) v. Ani-Wall Concrete Forming Inc.* (2008), 91 O.R. (3d) 481, the Court held that insurance cannot be a “trap for the unwary” and that policyholders should not be “left guessing” about the extent of their coverage. As a result, the Court held that there was coverage for a concrete forming contractor that had been sued in the massive Dominion Concrete litigation in Toronto.

In the spring, summer, and fall of 2002, Dominion Concrete manufactured and sold defective concrete. The concrete was sold to a number of concrete forming companies, which in turn formed the concrete into footings and foundations for dozens of residential buildings. The concrete deteriorated prematurely and would not support the weight of the homes. The potential liability for removal and replacement of the concrete was in the tens of millions of dollars.

The Ontario Court of Appeal had previously heard two other cases arising out of the Dominion Concrete litigation. In *Bridgewood Building Corp. (Riverfield) v. Lombard General Insurance Co. of Canada* (2006), 266 D.L.R. (4th) 182 (Ont. C.A.), the court held that two general contractors were covered under their own CGL policies for the cost of repairing the defective concrete. That case was precedential because the lower court held, for the first time in Canada, that statutory liability under Ontario’s new home warranty legislation triggered CGL insurance coverage in the absence of a lawsuit. The Court of Appeal’s decision in the case was also significant as it ruled on the scope of broad-form CGL coverage and rejected a common defence used by insurers in construction defect claims. In *Mid-Park Construction (1995) Ltd. v. Conbora Forming Inc.*, 2006 CarswellOnt 3077 (C.A.), the Court upheld summary judgment motions by the builders against one of the forming contractors.

The most recent litigation arose out of a denial of insurance coverage by AXA Insurance to its insured, Ani-Wall Concrete Forming Inc. Ani-Wall was one of the formers that had unknowingly formed the defective concrete supplied by Dominion Concrete, and it was sued in a number of actions by the owners and builders. While AXA agreed to defend the claims against Ani-Wall, it refused to pay for the cost of removing or repairing the defective concrete.

AXA brought a court proceeding and sought a judicial declaration that it had no obligation to indemnify Ani-Wall for the cost of removing or replacing the defective

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concrete. It relied on the “Your Work”, “Your Product”, and “Rip and Tear” exclusions in the policy. Thomas Gold Pettingill LLP acted for Ani-Wall and argued that the claim was covered. Justice Paul Perell of the Ontario Superior Court agreed with Ani-Wall and held that none of the three exclusions applied.

AXA appealed, and the Court of Appeal upheld the decision. The two main issues on appeal were the scope of the “Your Work” and “Rip and Tear” exclusions. The “Your Work” exclusion applied to work performed by or on behalf of Ani-Wall, and included materials supplied in connection with such work. However, there was an exception for work performed by a “subcontractor”. This meant that there would be coverage for replacing the faulty workmanship if the work had been done by a “subcontractor”. At issue was whether Dominion Concrete was a “subcontractor” of Ani-Wall, as argued by Ani-Wall, or whether it was merely a supplier and not a subcontractor, as argued by AXA.

Justice Moldaver of the Court of Appeal wrote the decision in *Ani-Wall*. He had also written the Court’s decision in *Bridgewood* which dealt with the same subcontractor exception. He commented on the similarity of the two cases, but ultimately distinguished *Bridgewood*:

“Bridgewood, of course, is not a full answer. The application judge’s reference to two of the American authorities cited by AXA on appeal indicates that he may have recognized this. Whether he did or not, it is worth clarifying that although the facts in Bridgewood bear many similarities to the facts of this case, including Dominion’s involvement as the supplier of defective concrete, this court in Bridgewood did not address (nor was it asked to address) the issue of Dominion’s status. Rather, the case was argued on the basis that the “Your Work” exclusion applied even if the defective work was attributable to a subcontractor employed by the insured. By contrast, this case raises four-square the issue of Dominion’s status.”

While no Canadian cases had previously set out a test for determining whether a party was a “subcontractor” within the meaning of the exception to the “Your Work” exclusion, there was a series of American cases on point. The American cases held that, to be a subcontractor, three elements had to be satisfied: (a) The product supplied should be custom made according to specifications identified in the prime contract; (b) The supplier should provide on-site installation or supervision services; and (c) The product supplied should form an integral or substantial part of the prime contract. AXA argued that these elements were not met and, accordingly, Dominion Concrete was not a “subcontractor”.

In a significant decision, however, Justice Moldaver declined to import the American criteria into Canadian law and stated that it was necessary to retain more flexibility when dealing with denials of coverage. He commented:

“. . . I return to AXA’s submission that this court should transpose into our law the three criteria identified in the American authorities . . . by which subcontractors are distinguished from mere suppliers. With respect, I would not do so. I come to this conclusion not because I reject the criteria outright or find them unhelpful in differentiating a subcontractor from a mere supplier for insurance purposes, but rather because I am reluctant to carve them in stone. Instead, I prefer to retain a degree of flexibility in the realm of insurance coverage, especially in cases like this, where coverage is acknowledged but the insurer seeks to rely on exclusionary provisions to limit its scope. As Ani-Wall points out, if insurers want to lay down hard and fast criteria, they can do so by defining the word “subcontractor” to their choosing. Insured persons who pay substantial premiums would then know where they stand and would not be left guessing about the extent of the coverage available to them. To date, for reasons unknown, AXA has chosen not to define the word “subcontractor” in the policy. Unless and until it does so, I believe the word should be construed broadly, lest it become a trap for the unwary.”

Although Ani-Wall’s contracts with the builders referred to the “supply” of concrete by Ani-Wall, they also stated that Ani-Wall reserved the right to “sublet” any part of the work to a reputable contractor. Justice Moldaver commented:

“I think it can reasonably be said that Ani-Wall subcontracted to Dominion its contractual obligation to *supply* concrete to the builders. In doing so, it triggered the “subcontractor” exception to the “Your Work” exclusion. At the very least, AXA has not met its burden of showing otherwise. For that reason, it follows that the “Your Work” exclusion is ousted by the “subcontractor” exception.”

He also held, in the alternative, that Dominion Concrete would have met the three criteria set out in the American cases.

With respect to the Rip and Tear exclusion, he agreed with Ani-Wall and the lower court that it was poorly drafted and unenforceable. Importantly, he confirmed that the Court will not rewrite incomprehensible exclusion clauses in favour of the insurer:

“AXA acknowledges that the “Rip and Tear” clause is badly drafted and that read literally, it is difficult to comprehend. AXA nonetheless urges a less-literal interpretation and submits that when the clause is read purposefully, its meaning is plain and obvious – AXA will not indemnify Ani-Wall for the cost of tearing down and removing the defective footings and foundation walls.

AXA’s proposed interpretation is not illogical. It presumably reflects the limitation on coverage that AXA sought to achieve. But AXA cannot get out from under the wording it chose to use, at least not without having this court rewrite the clause. That is not our function.

I agree with Ani-Wall that in its present form, the clause is incomprehensible, a view that was shared by the application judge. As counsel for AXA fairly concedes, that is fatal to its applicability. AXA, of course, is at liberty to rewrite the clause in a manner that makes sense. It cannot, however, look to this court to correct the problem.”

The appeal was dismissed, and the Court thereby confirmed that the claims against Ani-Wall were covered by the insurance policy.

The decision in *AXA v. Ani-Wall* is significant in a number of respects. It clarifies the scope of coverage for builders involved in construction defect litigation, and will help resolve the massive Dominion Concrete litigation. However, the decision will have a wider impact in favour of policyholders and consumers in their claims against insurers. Insurance is often written so that it is incomprehensible to someone who is not in the insurance industry. The Court held that such policies should not become a “trap for the unwary”, and that policyholders should not be “left guessing” about the scope of their policy. If insurers want to be able to deny coverage successfully, they must use plain and clear language to do so.

Bruce Thomas, Tom Donnelly, and Catherine Clark of Thomas Gold Pettingill LLP represented Ani-Wall. Tom and Catherine had also represented Bridgewood in the *Bridgewood v. Lombard* case.