THE LAWYER'S DAILY

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COVID-19

Court of Appeal insurance ruling could be relevant to COVID-19 cases, says lawyer

By **John Schofield**

(August 26, 2020, 1:20 PM EDT) -- When is a flood not a flood?

In the age of climate change and COVID-19, the Ontario Court of Appeal recently answered that critical insurance question in a case involving a Mississauga wedding and convention centre that was significantly damaged by the biggest rainstorm in the region's recorded history. The July 2013 storm dropped more than 90 millimetres of water on some parts of the Greater Toronto Area in less than two hours, according to Environment Canada records.

In its July 29 decision in *Le Treport Wedding & Convention Centre Ltd. v. Co-operators General Insurance Company* 2020 ONCA 487, the three-judge panel comprised of Justices Peter Lauwers, Kathryn Feldman and Grant Huscroft found that the trial judge, Superior Court Justice Douglas Gray, partially erred in May 2019 by finding that a flood endorsement under an "all-risks" policy did not apply. The appeal by the wedding and convention centre was allowed in part and the Appeal Court awarded about $429,000 for flood damage, including pre-judgment interest and costs.

But in an aspect of the ruling welcomed by Co-operators, the Court of Appeal upheld the trial judge's finding that the policy's sewer backup endorsement applied, that the insurer had fully paid out the policy limit of $500,000, and that the appellant was not eligible for additional insurance compensation for extra-contractual damages due to delays or business interruption losses under a profits endorsement form. The appellant was also denied compensation for professional fees incurred to establish the extent of the business interruption loss under the commercial plus endorsement form.

Co-operators representatives met with Le Treport about a week after the storm in July 2013 to discuss the damage and sent a letter the next day detailing the steps the wedding hall should take to mitigate losses, including shutting down the business to allow for repairs. Days later, the appellant got a quote for emergency repairs of just over $46,000, which the insurer paid. In late September, the insurer's contractor estimated the full-replacement cost to be paid after repairs were completed at just over $105,500 and Co-operators informed Le Treport in a letter.

Le Treport felt the quote was much too low to justify closing the business for repairs. Months later, in April 2014, the insurer told Le Treport that the actual cash value of the repairs was not $105,500, but about $79,150, which it paid. According to facts of the case presented at trial, Le Treport later got a quote estimating the repair cost at just over $681,800.

Because of the wide gap, Le Treport triggered the appraisal process provided under statutory condition 11 of the policy and s. 128 of the *Insurance Act*. The appraisal award in March 2016 put the replacement cost at an actual cash value of almost $562,000. The actual cash value of the contents and equipment loss was placed at about $253,300.

By April 2014, the insurer had paid a total of about $124,000, but delayed payment of the full claim under the sewer backup endorsement. In November 2018, five years after the loss, Co-operators paid the remaining balance up to the $500,000 limit of the sewer backup endorsement. But it denied the appellant's claim for business interruption compensation under the profits endorsement form of the policy because Le Treport continued to operate after the rainstorm.

The appellant sued the insurer for the additional payments it claimed Co-operators owed beyond the

$500,000 limit of the sewer backup endorsement, including for claims under the flood endorsement, for losses associated with business interruption and for extra-contractual damages. In *Le Treport Wedding & Convention Centre Ltd. v. Co-operators General Insurance Co*. 2019 ONSC 3041, Justice Gray found that the sewer backup endorsement applied, but that the insurer had paid out the policy limit of $500,000 and owed nothing more. He dismissed the appellant's other claims.

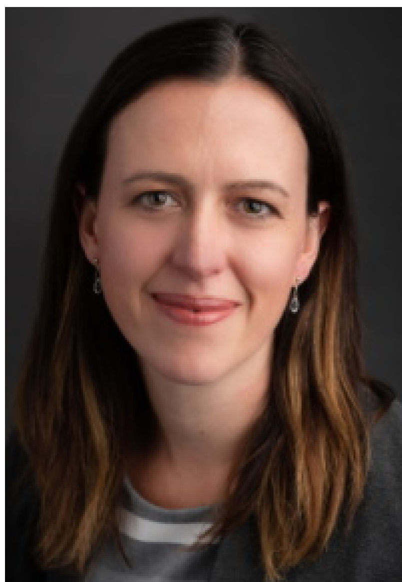
Justice Gray found that the flood endorsement did not apply because the surface water exclusion in the commercial broad form policy pertained and because the mishap did not meet the definition of a flood in the endorsement — "the rising of, the breaking out or the overflow of any body of water, whether natural or man-made," including waves, tides, tidal waves and tsunamis.

"The term 'surface water' is not included in the definition of a flood," Justice Gray wrote, "while it is a specific exclusion in the policy itself."

But the trial judge erred, the Court of Appeal ruled, by applying the surface water exclusion in the main policy to the flood endorsement. "The policy and the endorsement must be read together" and the flood endorsement "should be read as entirely displacing the flood exclusion in the commercial broad form policy," Justice Lauwers wrote for the three-judge panel.

In interpreting the flood endorsement, Justice Gray "departed from the principle that provisions granting coverage ought to be construed broadly," wrote Justice Lauwers. There was ample evidence, the Appeal Court determined, to indicate that the water overflowed from nearby Tonelli Creek.

"To conclude," he wrote, "it is difficult to imagine a realistic scenario that would constitute a flood within the meaning of the flood endorsement if, on the facts, this event did not satisfy that definition. In my view, the flood endorsement applies and the appellant is entitled to compensation on that basis."



Emily Stock, Reain Lui Stock LLP

Emily Stock, a lawyer with Toronto-based Reain Lui Stock LLP who acted as co-counsel for the appellant, said Justice Gray put a very limited definition on the overflow of a body of water, interpreting it to mean a pre-existing body of water and determining that Tonelli Creek was not a body of water.

"The problem with the *Treport* decision initially," she told *The Lawyer's Daily*, "was that basically what the judge found was that if there was a flood event that caused the sewer system to back up, that the homeowner or commercial property owner would be limited to the insurance available under the sewer backup endorsement, which is always for a much lower amount.

"My argument was there's no possibility of coverage unless this is a flood," she added, "and ultimately that's what the Court of Appeal said, as well."

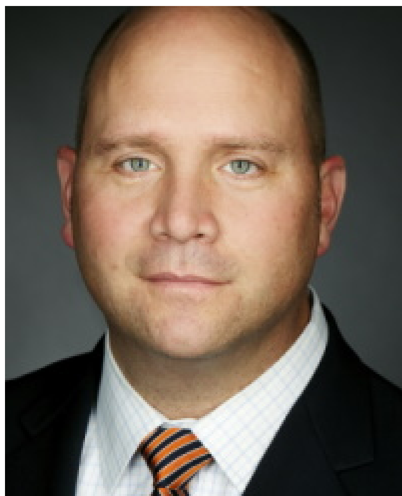
Amid climate change and more frequent extreme storms, the capacity of urban water infrastructure to cope is a hot topic in engineering and risk assessment circles, said Stock. At a disaster management conference two years ago, she recalled, "one of the panel discussions was, given the risk of flood and how significant it is, how can we find universal language that will give protection to homeowners so that it doesn't land on the shoulders of municipalities?"

The Court of Appeal decision will be helpful in the interpretation of insurance endorsements because it clearly defines the interaction between an exclusion and an endorsement, she added.

"This interaction is potentially relevant to the claims anticipated following COVID," she observed in a separate e-mail. "Where there is coverage for COVID, it is often on an endorsement that brings partial coverage back in following an endorsement. And, like the flood coverage endorsement, it often uses slightly different definitions."

That issue stirred some controversy recently when Aviva initially denied claims from dentists who had endorsements covering pandemics and had been forced to close due to public health orders. The insurer later agreed to provide coverage. "The argument that they were trying to make in the denial," said Stock, "was similar, I believe, to what the trial judge in this decision was trying to make, which is that the exclusion in the policy was relevant to the endorsement, such that there was no coverage."

Stock said the most concerning aspect of the case for her was the trial judge's finding that coverage for business interruption required a complete shutdown — and the Court of Appeal did not overturn that. In some cases, she added, there could be implications for the pandemic because partial shutdowns have been so common.



Robert Dowhan, SV Law

Robert Dowhan, a partner with Guelph, Ont.-based SV Law who served as co-counsel for Co-operators General Insurance Company, said the business interruption aspect of the Court of Appeal's decision is far more significant for insurers than its flood interpretation. From a financial perspective alone, the appellant was seeking about $400,000 for the flood issue, but more than $1 million for business interruption and about $600,000 in extra-contractual damages for the insurer's delay in paying.

"It's more important in the sense that business interruption can happen as a result of any type of risk," he told *The Lawyer's Daily*. "Whether it's a fire, a flood, a tornado or whatever — businesses will be adversely impacted. And this (decision) sort of stands for the reasoning that if your insurer tells you or asks you that you have to shut down, we have to make these repairs, if you ultimately make the choice to disregard the insurer's suggestion, you may have issues claiming something larger later on."

Amid an ongoing push in insurance law to seek bad faith damages from insurance companies, the Court of Appeal decision puts those allegations in perspective, said Dowhan.

"It's become boiler plate in every pleading now," he said. "For it to be suggested that this was an example of bad faith and have a trial judge say not a chance — this insurance company did what they're supposed to do — takes us back to where we should be, in that punitive damages have to be for something in an insurance context that's more than just a denial of the claim and a disagreement as to the type and scope and nature of the loss."

Even so, said Dowhan, Co-operators has instructed his firm to investigate seeking leave to appeal to the Supreme Court of Canada on the flood issue because the Court of Appeal decision runs counter to Supreme Court decisions like *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.* 2016 SCC 37, which established the pattern for interpreting insurance contracts.

"In this case, it sounds to me like they're saying we're going to add geography and your proximity to the risk as one of the factors to consider in interpreting the policy, and I'm suggesting that's a new factor," he said. "I think that they've entered new territory with this decision that's going to be problematic."

Joseph Campisi, Campisi LLP

"If there is differing law across the provinces," he added in an e-mail, "we will likely engage the appeal process."

Joseph Campisi, founding partner at Toronto-based Campisi LLP who has taught insurance law at Osgoode Hall Law School since 2009, said the Court of Appeal decision underlines that an insured is entitled to recover on coverage for which he or she has paid a premium, while the insurer is forced to accept a claim for coverage for which it accepted a premium.

While it is not a landmark ruling, he added, it is important because it considers the reasonable expectation of the parties: Le Treport wanted additional coverage and it paid the extra premium to secure the flood endorsement.

"The court says that importing the 'surface water' exclusion into the flood endorsement would effectively nullify flood coverage, not only in this case but in almost all cases, because few buildings stand right on the edge of a body of water," Campisi said. "So taking such a narrow interpretation would defeat the purpose of purchasing an endorsement, which provides enhanced coverage."

If you have any information, story ideas or news tips for The Lawyer's Daily *please contact John Schofield at* john.schofield@lexisnexis.ca *or call (905) 415-5891.*

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