

APPEAL COURT ORDERS REHEARING ON COVERAGE FOR WORKPLACE ACCIDENT

19 December 2017

National Gallery of Canada v Lafleur et al., 2017 ONCA 688

The Ontario Court of Appeal recently overturned an Order from the Ontario Superior Court of Justice finding that Intact Insurance Company had a duty to defend a defendant in an action arising out of a fatal trip and fall accident which occurred while the deceased was in the course of his employment. The Ontario Court of Appeal overturned the Order on the basis that the underlying reasons were insufficient and lacked “analysis of the critical issues that had to be addressed”, and ordered the rehearing of the Application before a different Judge.

The Application was brought by National Gallery of Canada, a defendant in two actions commenced by the family members of a deceased worker, Conrad Lafreniere. The fatal accident occurred while Mr. Lafreniere was performing maintenance work along a vehicle ramp at the National Gallery of Canada, while in the course of his employment with Lafleur de la Capitale. Prior to his fall, Mr. Lafreniere was sweeping the vehicle ramp when a vehicle approached with an intent to enter the underground garage. As the vehicle approached, Mr. Lafreniere stepped back towards the ledge of the ramp and fell, resulting in fatal injuries. At the time of the incident, National Gallery had in place a Maintenance Contract with Lafleur for landscaping and maintenance services at the premises. At the time of his fall, Mr. Lafreniere was performing maintenance work pursuant to Lafleur’s Maintenance Contract with the National Gallery.

The Workplace Safety and Insurance Act, 1997 SO 1997, which regulates Worker’s Compensation Benefits in Ontario, provides that a worker of a Schedule 1 employer is not entitled to commence an action against his or her employer for injuries or death arising in the course of employment. Lafleur is considered a Schedule 1 employer and, as such, Mr.

Lafreniere's survivors were precluded from commencing a civil action against Lafleur as a result of his death.

Under the terms of the Maintenance Contract, Lafleur agreed to obtain a comprehensive general liability insurance policy which included National Gallery as an additional insured. At the time of Mr. Lafreniere's fall, Lafleur was insured under a comprehensive general liability policy with Intact Insurance which included an endorsement identifying National Gallery as an additional insured with respect to legal liability arising out of Lafleur's operations under the Maintenance Contract. Lafleur's policy with Intact was subject to a number of exclusion clauses, including exclusions for claims arising out of "any obligation of the named insured under worker's compensation" or similar laws ("worker's compensation") and for claims arising from "bodily injury to an employee of the insured arising out of and in the course of employment by the insured" ("employer's liability").

National Gallery sought a declaration that Intact and Lafleur were required to provide and fund its full defence in the underlying actions, pursuant to the terms of the Maintenance Contract and its status as an additional insured under the Intact policy. Intact and Lafleur took the position that the underlying actions arose out of a workplace accident, and are therefore excluded from coverage pursuant to the "worker's compensation" and "employer's liability" exclusions.

The Application Judge determined that the allegations made in the underlying actions "could relate to the issues of maintenance or of measures that should have been taken in the course of maintenance" and therefore fell within the scope of the Maintenance Contract between the parties. The Application Judge further held that the duty to defend was triggered and that Intact was required to fund the National Gallery's full defence in both actions. The Application Judge did not comment on the application of the "worker's compensation" or "exclusion clauses" in his reasons.

Intact and Lafleur appealed the Application Judge's Order on the basis that the brief reasons provided were inadequate and did not take into account the application of the relevant exclusion clauses contained in the Intact policy.

The Ontario Court of Appeal found that the Application Judge's reasons were insufficient, as they did not conduct the required analysis of the pleadings, the Maintenance Contract and the Intact Policy, in order to address the issues relevant to the determination of coverage in this case. In particular, the Court noted that the potential application of the exclusion clauses contained in the Intact Policy should have been considered.

The Court of Appeal further held that it was unable to determine whether the duty to

defend was triggered in this case, as it lacked a full argument on the essential issues. As a result, the Court allowed the appeal and ordered the rehearing of the Application by a different judge. The rehearing of the Application is currently scheduled to take place in March 2018.

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