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## **S.C.C. ADDRESSES COMPLEX ISSUES IN QUEBEC BOILER CASE**

- Reported Case: Abb Inc. and Alstom Canada Inc. v. Domtar Inc.; Chubb Insurance Company Canada v. Domtar Inc.; Domtar Inc. v. Arkwright Mutual Insurance Company (sub. nom Domtar Inc. c. Abb Inc.)
- Citation: 2007 SCC 50
- At Issue:
- 1) Can a manufacturer be held liable under Quebec civil law for latent defects in a recovery boiler, or in breach of a duty to inform with respect to problems with boiler, despite the existence of a limitation of liability clause in a contract of sale between sophisticated parties?
  - 2) If so, can the manufacturer's quantum of damages be reduced for payments made by Underwriters at Lloyd's to its insured under a settlement agreement for "all past, present and future claims of any and all other types"?
  - 3) If there was no latent defect, but only a breach of a duty to inform, can Chubb Insurance Co. still be liable under a performance bond where it stood as surety for the manufacturer in respect of its obligations under the contract of sale?
  - 4) If there was a latent defect, is the insurer Arkwright still liable under an "all risk" policy despite a clause excluding damage resulting from latent defects in the boiler?
- The Court: Supreme Court of Canada
- Judgment Rendered: November 22, 2007
- Factual Summary: Domtar bought recovery boiler from Abb. Superheater of the boiler used rigid tie welds at a time when flexible hinge-pins were becoming the recognized standard. After two years of operation, inspection revealed cracks and leaks in superheater attributed to use of rigid tie welds. Domtar decided to replace superheater with model using flexible hinge-pins rather than repair existing superheater. Domtar instituted proceedings against Abb and a number of insurers for damages.

Disposition By  
Lower Court:

Cracks and leaks related to use of tie welds did not constitute a design defect, but a design feature of the superheater, since it could be used for its intended purpose despite the cracks. However, Abb did not discharge its duty to inform, since it did not give Domtar the information it possessed about the respective characteristics of tie-welds and hinge-pin attachments. Abb could not invoke limitation of liability clause against breach of duty to inform. Damages reduced by amount paid by Lloyd's, who was subrogated to Domtar's rights. Because there was no latent defect, Chubb was not liable under performance bond. Arkwright was not liable as damage to superheater did not constitute insured loss.

Appellate Decision:

Since Domtar was looking for a reliable boiler that would operate without interruption, the problems with the superheater constituted a latent defect. Abb also breached its duty to inform. Because Abb knew or was presumed to know about the defect, it could not rely on limitation of liability clause. Lloyd's settlement did not include an indemnity for Abb's latent defect. Chubb was liable under the performance bond for the defect. Arkwright was not liable because of the exclusion clause.

Supreme Court  
of Canada Decision:

Under Quebec civil law, sophisticated manufacturers and sellers are presumed to have knowledge of latent defects. Abb did not rebut the presumption of knowledge and could not rely on the limitation of liability clause. Because clause in insurance contract between Lloyd's and Domtar expressly excluded damage from breakdown or defect in recovery boiler, settlement payment by Lloyd's did not relate to Domtar's claim against Abb, and Lloyd's was not subrogated to Domtar's rights. Because there was a latent defect, Chubb was liable to Domtar under the performance bond. The exclusion clause in Arkwright's contract applied.