LOOKING BACK – HOW 2021 CASES ARE SHAPING 2022 RISK MANAGEMENT

Presented by:

The ARC Group Canada

Wednesday, September 28, 2022
12:00 pm – 1:00 pm EST

The ARC Group Le Groupe ARC
CANADA

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WESTERN CANADA

Presenter:

Jennifer D. Pereira, K.C.

Partner | Robertson Stromberg LLP
T: (306) 933 1320
E: j.pereira@rslaw.com
Saskatoon, SK

Temple Insurance Company v. Aberdeen Specialty Concrete Services et. al. 2021 SKCA 94

- Dispute between wrap-up policy issuer and sub-contractor's CGLs
- General contractor added a number of its sub-contractors as third parties to leaky condo litigation
- The subcontractors were unaware of the existence of the wrap of policy at the time they were sued
- After years of litigation, the wrap up insurer offered to assume the third-party sub-contractor's defences
- At issue were the defence costs incurred by the sub-contractors prior to the wrap up insurer's voluntary assumption of the defences

Temple Insurance Company v. Aberdeen Specialty Concrete Services et. al. 2021 SKCA 94

- The underlying action was brought by way of originating motion. There was no evidence before the Court as to when the wrap up insurer became aware of the claims against the subcontractors
- Based on the available evidence, the Court of Appeal declined to confirm that the wrap-up insurer had notice of claims when the action was first brought against the general contractor
- As the sub-contractors did not provide the wrap up insurer with notice of the claim, the wrap up insurer was entitled to rely on the voluntary expense exclusion in the policy

Temple Insurance Company v. Aberdeen Specialty Concrete Services et. al. 2021 SKCA 94

- Take away for CGLs called upon to defend subcontractors in construction litigation – inquire about the existence of additional coverage immediately!

Trial Lawyers Association of British Columbia v. Royal & Sun Alliance of Canada 2021 SCC 47

- SCC considered whether insurer was estopped from denying coverage by its conduct before it had actual knowledge of material facts constituting the insured's breach of the policy

Trial Lawyers Association of British Columbia v. Royal & Sun Alliance of Canada 2021 SCC 47

- Case involved an Ontario MVA where deceased driver injured two other motorists
- Injured motorists brought claim against estate and RSA provided defence
- RSA learned that deceased had been drinking at the time of the collision and provided statutory minimum coverage
- Injured motorist received $750,000 from State Farm under family protection endorsement
- State Farm sought to recover the settlement with the injured motorist

Trial Lawyers Association of British Columbia v. Royal & Sun Alliance of Canada 2021 SCC 47

- State Farm argued that RSA had waived the Deceased's breach, voluntarily relinquishing their right to deny coverage on the basis that they ought to have known, or had constructive knowledge of the Deceased's breach

- Alternatively, State Farm argued that promissory estoppel applied as RSA provided assurances to the injured motorist through the defence of the claims against the Deceased's estate

Trial Lawyers Association of British Columbia v. Royal & Sun Alliance of Canada 2021 SCC 47

- Since RSA lacked actual knowledge of the Deceased's alcohol consumption and was ignorant to this fact until three years after the Collision, RSA could not be held to the assurances that it provided to injured driver for the purposes of establishing promissory estoppel

- Intention could not be established since RSA's assurances at the time they initially defended the claims were not informed by actual knowledge of the Deceased's policy breach

Trial Lawyers Association of British Columbia v. Royal & Sun Alliance of Canada 2021 SCC 47

- Take away -an insurer is not expected to know every single detail of a claim brought by an insured
- Reservation of rights is key!
- Insurers do not owe any duties to third parties in the course of investigating a claim

CENTRAL CANADA

Recent Ontario Jurisprudence considering Policy Exclusion Clauses

Presenter:

Jennifer Huneault

Associate Counsel | Alexander Holburn
T: (416) 639 9054
E: jhuneault@ahbl.ca
Toronto, ON

Backyard Media Inc. v. HDI Global Specialty SE, 2021 ONSC 2341

OSCJ judgment that illustrates the risks an insurer exposes itself to when a court finds that an exclusion clause is drafted in ambiguous and equivocal terms.

BACKGROUND FACTS

- Backyard Media Inc. had a policy of insurance with HDI global with a yearly term that expired on April 18.
- On March 4, 2020, Backyard received a demand letter asserting that it was liable on numerous grounds to a former business partner.
- Backyard retained counsel who responded to the demand letter on March 25, 2020.
- On April 18, 2020, the prior one-year term of the insurance policy with HDI expired. It was renewed for an additional one-year term.
- On April 24, 2020, a Statement of Claim was served on Backyard. The claim was reported to HDI a few weeks later.
- While the policy was renewed for an additional year, the demand letter was received in the prior policy year – the policy year before Backyard reported the claims made in the Statement of Claim.

THE COVERAGE DISPUTE

- The Applicant, Backyard, sought a defence from HDI pursuant to the terms of its policy.
- HDI took the position that coverage was excluded under a policy exclusion.
- The exclusion clause in question stated that the policy did not apply to:

> 20. Any "**Claim"** of which any director, officer, member, partner, manager or supervisory employee of an "**Insured"** entity is aware, as of the inception date of this "**Policy"** or of any fact, circumstance or situation which could reasonably give rise to any **“Claim"** being brought against any **“Insured”**
>
> **(*You will note that the clause did not contain the words “first made aware”)**

THE COURT’S ANALYSIS

- The policy was characterized as a “duty to defend policy”.
- A defence was owed if there was a *possibility* that the policy would have to respond to the substantive claims in the litigation, unless it was clearly and unambiguously excluded by the policy wording.

- HDI advanced the argument that the policy was a “claims made” policy.

- The Court’s analysis included interpretation of the wording of the exclusion clause including the terms:

    - “inception date of this **Policy**”; and

    - “**Policy**” – which was defined in the policy as:

        "**Policy"** means the application for insurance, the Declarations page, the insurance coverage described in this document that the "**Insurer"** has issued as evidence of insurance coverage, and any endorsements issued by the "**Insurer".**

- The Court also looked to the balance of the policy including the defined term “Policy Period” – which was defined in the policy as:

    "**Policy Period"** means the period between the Inception Date shown in the Declarations and the Expiry Date shown in the **Declarations** or until the "Policy" is cancelled in accordance with the conditions of this "Policy", If the "OPTIONAL REPORTING PERIOD" is exercised in accordance with General Condition "Optional Reporting Period" then it shall be part of the last "Policy Period" and not an additional period.

THE COURT'S FINDING

- The exclusion clause in the HDI policy was described by the Court as being "hopelessly ambiguous".

- As per the Court – If HDI wanted to achieve the exclusion that it sought, it had the unilateral ability to limit the insuring agreement.

- The interpretation of Backyard – that the inception date referred to the date that the initial policy was issued, and not the date of each successive renewal – was "narrowly" favoured.

- HDI had a duty to defend the claims advanced against Backyard.

Panasonic Eco Solutions Canada Inc. v. XL Specialty Insurance Company, 2021 ONCA 612

ONCA judgment that considers an exclusion for claims arising from breach of contract in a liability insurance policy and the common exception to the exclusion for liability that the insured would have in the absence of the contract.

BACKGROUND FACTS

- Panasonic entered into two agreements with Solar Flow-Through Fund – an Engineering Agreement and a Proceeds Agreement.
- The Engineering Agreement contained within it a substantial completion clause with specified liquidated damages in the event that the clause was breached.
- The Proceeds Agreement governed the payment of proceeds by Panasonic to Solar.
- Solar alleged that Panasonic was in breach of both Agreements and commenced arbitration proceedings.
- Panasonic had incurred $492,965.25 in defending the arbitration and turned to XL for a defence pursuant to its E&O policy held with XL.

THE POLICY

- The XL E&O policy contained coverage for monetary judgments that Panasonic became legally obligated to pay because of a claim “resulting from an act, error or omission in Professional Services”.

- XL agreed that Solar’s claim arised from the delivery of professional services.

- XL had a duty to defend any claim against Panasonic “to which this insurance applies” regardless of the merits of the claim.

- The application of the insurance afforded under the policy was dependant on the interpretation of the following exclusion and exception to the exclusion clause:

> This Policy does not apply to any Claim … arising from the Insured’s:
>
> 1. assumption of liability in a contract or agreement; or
>
> 2. breach of contract or agreement.
>
> This exclusion does not apply to: (i) liability that the Insured would have in the absence of the contract or agreement…

THE LOWER COURT JUDGMENT

- The Court considered Article 13 of the Engineering Agreement between Panasonic and Solar, which stated:

  > "if a system has not reached Substantial Completion by the Guaranteed Substantial Completion date solely due to Contractor's acts or omissions, Owner shall be entitled to receive as daily liquidated damages from Contractor…".

- XL submitted that it had no duty to defend a claim for liquidated damages as they arose out of Panasonic's breach of contract (which was excluded).

- The Application Judge rejected XL's argument, reasoning that the claim for liquidated damages arose out of Panasonic's "acts of omissions" which *could* have been caused by negligence, in which case they would be covered (*there was no evidence before the Court as to the cause of the breach).

- It was noted that Solar had not plead negligence, but that the pleaded facts were capable of supporting a claim in negligence.

- On the basis that the breach could be the result of negligence, a duty to defend was triggered.

- There was no duty to defend the Proceeds Agreement.

THE QUESTION ON APPEAL

- Did the Application Judge err in his interpretation of the policy wording?

- The Court's analysis began with the coverage clause which read:

> XL "will pay on behalf of the Insured for Professional Loss which the Insured becomes legally obligated to pay because of a Claim resulting from an act, error or omission in Professional Services".

- The coverage clause was subject to the aforementioned exclusion clause which excluded coverage for any claim arising from contractual liability, including breach of contract, save for liability that an insured would have in the absence of a contract.

- The Court first considered whether the clause was ambiguous and found that it was not.

- The Court then turned to determining the meaning and effect of the exception in the exclusion clause.

- The exception clause was deemed ambiguous and required the application of the principles of contractual interpretation summarized in the *Progressive Homes* case.

- Upon analysis, the meaning of the exception was clear – that the policy continued to cover professional losses caused by the insured in performing its professional functions in its relationship with the claimant that arise in law, regardless of the terms of their contract.

- Did the claims made by Solar give rise to a duty to defend? The Court determined that:

    - Panasonic's delay was an act or omission in performing its professional obligations.

    - By agreeing to the liquidated damages clause, Panasonic effectively contracted out of its insurance coverage.

    - The exclusion excludes coverage for liability arising from breach of contract, and the exception does not apply because the obligation to pay liquidated damages was purely contractual and, otherwise, did not arise. Furthermore, because the Agreement provided that liquidated damages were the sole remedy available to Solar, there was no way to read Solar's pleading to claim any other or additional remedy for the delay.

- While Panasonic was free to make whatever promises it wished when it contracted to perform services, including agreeing to pay liquidated damages, it could not bind the insurer, XL, to that bargain.

- XL was only obligated to cover liability that Panasonic would have had without the contract.

- Consequently, there was no duty to defend.

- Turning to the Proceeds Agreement claim, the Court of Appeal agreed that the second contract was for a debt owning which arose under the contract. There would be no claim without the contract, and therefore the exclusion applied.

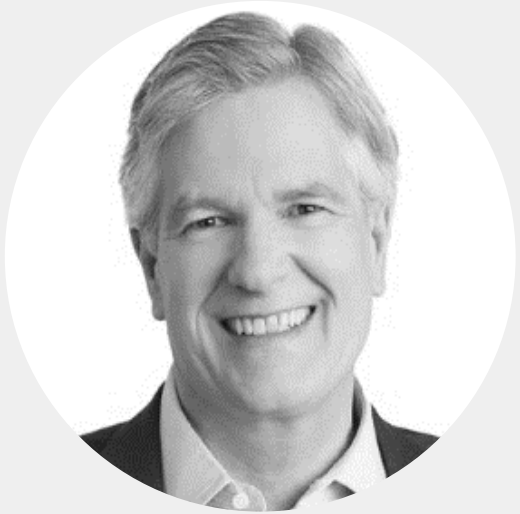
KEY TAKEAWAYS

- An insurer will expose itself to risk when exclusion clauses are drafted in ambiguous terms
- Exclusion clause wording must be clear and unambiguous
- Policy language must be internally consistent – this applies to policy clauses, defined terms, and the wording used in other exclusion clauses
- Further to the decision in *Panasonic Eco Solutions Canada Inc. v. XL Specialty Insurance Company*, damages caused by breach of contract and liquidated damages can be properly excluded from coverage when such exclusion is clearly drafted
- Care should be given to clearly review any underlying contractual agreements when determining whether a cause of action may be excluded from coverage

QUEBEC

Coverage Cases

Presenter:



Ronald W. Silverson

Partner | Gasco Goodhue St-Germain, SENCRL/LLP
T: (514) 887 1648
E: ronald.silverson@gasco.qc.ca
Montreal, QC

Placo Inc v. Kingspan 2021 QCCS 2004

- « Wellington » type motion
- Rendered March 18, 2021
- Justice Sandra Bouchard, Quebec Superior Court

Noteworthy because in the context of a construction case, the Judge concluded that there was no possible duty to indemnify and therefore, no duty to defend.

Placo Inc v. Kingspan

FACTS

- Placo obtained a contract to supply and install metal wall panels from the general contractor Cegerco. The product was only partially installed (only a few panels) and then refused, as it did not meet the specifications.
- Placo sued Kingspan and Cegerco in order to recover a deposit paid to manufacturer of the wall panels and to obtain damages resulting from the termination of its contract.
- Cegerco and Kingspan cross-claimed against Placo for $1,804,238.36.

The cross-claims alleged different elements such as transportation costs, late delivery costs, defective product replacement, loss of productivity, costs relating to delays.

Placo Inc v. Kingspan

Wellington Motion

- Placo filed a Wellington motion to force Northbridge to defend, to choose its own attorneys and to have Northbridge pay its attorneys' past and future fees.

- Northbridge had advised Placo that not only did the damages claimed not constitute « property damage » under the policy, but submitted that in any event, exclusions i), j), k) and l) applied.

Placo Inc v. Kingspan

DECISION

- After reviewing the policy coverages and definitions (particularly « Property Damage » and « Occurrence »), the Court considered the exclusions for « Damage to Your Product, to Your Work, Impaired Property and Recall ».

- After having indicated that, generally, CGL policies only cover when there is Property Damage resulting from an Occurrence during the policy period, the Court reviewed the principles governing the Duty to Defend (*Progressive Homes* and others) and stipulated that the insured does not benefit from coverage if the claim only concerns costs relating to the poor execution of the insured's work if no resulting damage or property damage occurred.

Placo Inc v. Kingspan

- If the proceedings and exhibits (given a wide scope of interpretation) show a prima facie possibility of property damage resulting from an occurrence, the Court would then turn to an analysis of the exclusions.

- Given the Court's analysis of the allegations and exhibits, it found that:

  – as concerns transportation costs, they are not covered damages.

  – as concerns delays and loss of productivity, they were the consequence of Placo's incomplete performance of its contract, and not property damage. Economic losses relating to defective performance did not result in or constitute, property damages, especially since the product had not been fully installed (save for a few panels).

Placo Inc v. Kingspan

- There was an allegation that there were water damages resulting from the late delivery of the panels. On that issue, the Court found that these infiltrations were caused by Cegerco's own measures taken to protect the building in the absence of panels caused by Placo's inexecution of its contractual obligations.

- In view of the above, there was no Duty to Defend.

Centre de Santé Dentaire Gendron Delisle Inc v. La Personnelle, Promutuel, RSA, Economical et al., 2021 QCCS 3463

- This decision dealt with a Motion for autorisation to institute a class action by certain Quebec dentists, claiming insurance indemnities as a result of business interruption which, allegedly, resulted from Covid-19 decrees.

- This decision of the Quebec Superior Court to not authorize the Class Action, rendered on August 18, 2021, was the object of an Appeal which was dismissed by the Court of Appeal on November 26, 2021, based on the finding that the appeal had no resonable chance of succeeding (2021 QCCA 1758)

Centre de Santé Dentaire Gendron Delisle

FACTS

- The class was described as: "*All dentists* (whether practicing individually or through a professional *corporation), dental clinics, and dental offices situated in the Province of Québec who, as of March 16, 2020, were subject to a contract of insurance with the Defendant that included "business interruption" or "operating loss" or similar types of insurance coverage, the whole as it more fully appears in the Court Record*"

- The proposed class asserted that Covid-19 was a covered risk under All-Risk Insurance Policies as the virus was not specifically excluded. They also argued that business interruption was stand-alone coverage that did not require direct physical damage to the insured property.

Centre de Santé Dentaire Gendron Delisle

- The insurers argued that Business Interruption coverage only applied if the interruption resulted from an insured risk. It would have to be established that 1) there was property damage to insured property; and 2) that this damage resulted in a business interruption or the reduction of business.

- The insurers also argued that the mere negative effects of the pandemic and Government-imposed measures are not covered.

Centre de Santé Dentaire Gendron Delisle

DECISION

- Having stipulated that the question posed was one of law, the Court found that there was no ambiguity in the policy wording and that Business Interruption coverage only applies in cases where an event causes direct physical damages to insured property.

- For the Court, none of the allegations allowed for any factual basis supporting a claim for coverage.

- With respect to the argument relating to the loss of enjoyment of property having sustained no damage, the Court found that in such a case, the loss of enjoyment must result from an « occurrence ». In the present matter, no covered loss occurred.

Centre de Santé Dentaire Gendron Delisle

- In reviewing the allegations, the Court found that none of the allegations "… *would allow proof on the merits of the case (…) that could show that the dentists' equipment in general of that of the Plaintiff was directly affected or damaged by Covid-19* » (para. 75; our translation).

- Essentially, the Court found that « *the Plaintiffs' claim is not for a loss of revenues caused by a loss or property damage to its insured property. It is simply a request to be indemnified for a business interruption caused by the limitation of its activities itself caused by the implementation of the government's decree* » (ibid.; our translation).

- For the Court: «*it is clear that the insurance policy subscribed to does not provide for such coverage. The Plaintiff has failed in its attempt to show an arguable case* » (para.76; our translation).

ATLANTIC CANADA

Cases at the SCC

Presenter:

Sharyl Rowsell

Partner | Martin Whalen Hennebury Stamp
T: (709) 754 1831
E: srowsell@mwhslaw.com
St. Johns, NL

Grant Thornton LLP v. New Brunswick, 2021 SCC 31, 2021 CSC 31.

Facts

- Province of NB hired Grant Thornton LLP to audit a company.
- Based on Grant Thornton's opinion, the Province agreed to provide a loan guarantee for the company.
- On March 18, 2010 the Province had to pay the bank under the loan guarantee.
- The Province retained an accounting firm to review the company's financial position; they provided a report in draft on February 4, 2011 which showed different findings than Grant Thornton.

Grant Thornton LLP v. New Brunswick, 2021 SCC 31, 2021 CSC 31.

Legal Proceedings

- Province of NB filed a Statement of Claim against Grant Thornton on June 23, 2014 seeking damages for negligence in relation to the audit.

- Grant Thornton brought summary judgment motions to have the Province's claim dismissed as statute-barred by virtue of the two-year limitation period under s.5(1)(a) of the *Limitations of Actions Act*, S.N.B. 2009, c.L-8.5.

- The motions judge granted summary judgement in favour of Grant Thornton. The Court of Appeal overturned that decision.

Grant Thornton LLP v. New Brunswick, 2021 SCC 31, 2021 CSC 31.

Outcome

- The SCC restored the motion judge's judgment, determining that the Province discovered its claim against Grant Thornton on February 4, 2011.

- At para. 3: "[…] a claim is discovered when the plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. It follows from this standard that a plaintiff does not need knowledge of all the constituent elements of a claim to discover that claim."

Grant Thornton LLP v. New Brunswick, 2021 SCC 31, 2021 CSC 31.

Considerations

- Keep limitations periods and discoverability in mind as potential defence.
- This decision has been considered in most provinces.
- Could be distinguished based on wording of NB's *Limitations of Actions Act* s. 5(2) which states when a claim is discovered.
- However, SCC noted that this section codifies the common law discoverability rule, so on that basis it would apply to all common law provinces.
- Followed in NL: *Walsh v. TRA Company Limited*, 2022 NLSC 6.
- Followed in NS: *Rudolph v. Nova Scotia (Attorney General)*, 2021 NSSC 279. (Similar legislation.)

Corner Brook (City) v. Bailey, 2021 SCC 29, 2021 CSC 29

Facts

- In a motor vehicle-pedestrian collision, Bailey struck a pedestrian who was performing road work as an employee with the City of Corner Brook.

- Bailey sued the City for property damages and personal injury, and they reached a settlement.

- The Release was broadly worded to be in relation to the collision.

- Later, Bailey commenced a third-party claim against the City in an action where she had been sued by the pedestrian.

Corner Brook (City) v. Bailey, 2021 SCC 29, 2021 CSC 29

Legal Proceedings

- City brought a summary trial application taking the position that the Release barred the third party claim. Bailey took the position that the third party claim was not barred as it was not specifically contemplated by the parties when they signed the Release.

- The Application judge (Supreme Court, Trial Division) agreed with the City.

- The Court of Appeal overturned that decision.

Corner Brook (City) v. Bailey, 2021 SCC 29, 2021 CSC 29

Outcome

- The SCC reinstated the decision of the Application judge, determining that the third party claim against the City was barred by the Release.

- There is no special rule of contractual interpretation that applies only to releases. General rules of contract interpretation apply.

- At paragraph 58: “The claim comes within the plain meaning of the words of the release, the surrounding circumstances confirm that the parties had objective knowledge of all the facts underlying Mrs. Bailey’s third party claim when they executed the Release, and like *Biancaniello*, the parties limited the scope of the release to claims arising out of a particular event.”

Corner Brook (City) v. Bailey, 2021 SCC 29, 2021 CSC 29

Considerations

- Based on this decision, a release signed by an individual can bind their insurance company, preventing them from bringing a third party claim in a related action.

- Consider including wording in a release that would make it clear whether the release will cover unknown claims and whether it will cover claims in a particular subject matter or area, or particular types of claims.

- Consider warning insureds not to sign any Release without it being reviewed by the insurance company.

QUESTIONS?

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Questions?
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The ARC Group Le Groupe ARC
CANADA

Contact

Jennifer D. Pereira, K.C.
Partner | Robertson Stromberg LLP
T: (306) 933 1320
E: j.pereira@rslaw.com
Saskatoon, SK

Jennifer Huneault
Associate Counsel | Alexander Holburn
T: (416) 639 9054
E: jhuneault@ahbl.ca
Toronto, ON

Ronald W. Silverson
Partner | Gasco Goodhue St-Germain, SENCRL/LLP
T: (514) 887 1648
E: ronald.silverson@gasco.qc.ca
Montreal, QC

Sharyl Rowsell
Partner | Martin Whalen Hennebury Stamp
T: (709) 754 1831
E: srowsell@mwhslaw.com
St. Johns, NL

Hollis Bromley
Partner | Alexander Holburn
T: (604) 484 1739
E: hbromley@ahbl.ca
Vancouver, BC

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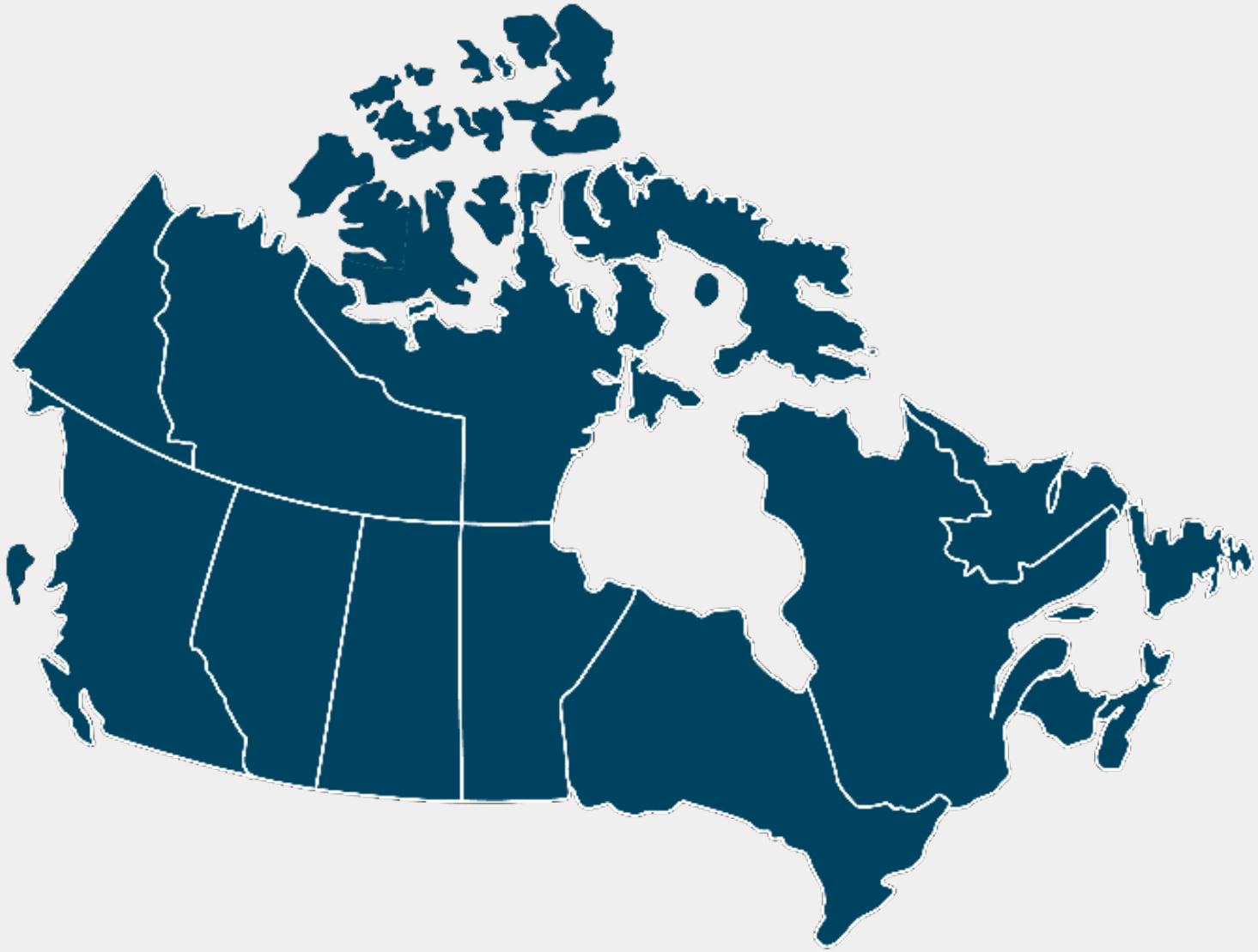

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