NOVA SCOTIA COURT OF APPEAL

Citation: *Zurich Insurance Company Ltd. v. Halifax Regional Municipality*, 2021 NSCA 43

Date: 20210603
Docket: CA 501584
Registry: Halifax

Between:

Zurich Insurance Company Ltd., Royal & Sun Alliance Insurance Company of Canada, and Arch Insurance Canada Ltd.

Appellants

v.

Halifax Regional Municipality

Respondent

Judge:	The Honourable Chief Justice Michael J. Wood
Appeal Heard:	March 24, 2021, in Halifax, Nova Scotia
Subject:	Insurance – Interpretation of Policy
Summary:	HRM obtained a policy of insurance from the Appellant Insurers which included coverage for the costs of decontaminating their property provided the contamination resulted from a cause that was "sudden and accidental". During the policy period diesel fuel was found in the soil near the HRM transit bus depot. An investigation showed the fuel came from an old supply line that had not been capped. Diesel was discharged every time the bus refueling system was activated as a result of a valve that had been inadvertently left open. This went on for three months before the problem was discovered.

	The parties disagreed on whether the remediation costs were covered under the policy. The NSSC determined that the loss was covered and the Insurers appealed.
Issues:	Did the policy cover the costs of decontaminating the HRM property?
Result:	The ordinary meaning of the words "sudden and accidental" encompassed the mechanism whereby the diesel fuel was discharged and so the loss was covered. The hearing judge erred in finding the words to be ambiguous but reached the correct conclusion on coverage. The appeal was dismissed.

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Respondent

Judges:	Wood, C.J.N.S.; Bryson and Derrick, JJ.A.
Appeal Heard:	March 24, 2021, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Wood, C.J.N.S..; Bryson and Derrick, JJ.A. concurring
Counsel:	D. Geoffrey Machum, Q.C., Scott Campbell and Christopher W. Madill, for the appellants Martin Ward, Q.C. and Andrew Gough, for the respondent

Reasons for judgment:

[1] In April 2014, hydrocarbon contamination was discovered in the vicinity of the Halifax Regional Municipality ("HRM") transit bus depot at Ilsley Avenue, Dartmouth, Nova Scotia. Subsequent investigations determined that the contamination was diesel fuel which had been discharged from an underground pipe at the bus depot.

[2] HRM incurred significant costs in cleaning up the contaminated soil and sought indemnity from Zurich Insurance Company Ltd., Royal & Sun Alliance Insurance Company of Canada and Arch Insurance Canada Ltd. (the "Insurers") pursuant to a policy of insurance effective for the period June 1, 2013 to June 1, 2014 (the "Policy").

[3] The Insurers denied the HRM claim for the decontamination expenses on the basis they were not covered under the terms of the Policy. HRM disagreed and commenced proceedings in the Supreme Court of Nova Scotia for a declaration that the Policy provided coverage for these costs.

[4] The application in court was heard by Justice Robert W. Wright who issued a written decision in favour of HRM (2020 NSSC 69).

[5] The Insurers appealed, alleging that Justice Wright erred in law in his interpretation of the Policy. For the reasons which follow, I would dismiss the appeal.

Events Leading to the Contamination

[6] The HRM bus depot is used to fuel and service transit buses and, as a result, requires a system for storage of diesel fuel and delivery of it to individual buses.

[7] In 2008, HRM made the decision to replace the existing underground fuel storage tanks ("UST") with an above-ground storage tank ("AST") system. The UST system was kept in place as a potential backup and, as a result, the systems were connected by way of supply and return lines. The supply line included a ball valve which could be manually operated to allow diesel fuel to move between the UST and AST systems.

[8] The UST were never used as backup for the AST and, ultimately, they were removed in January 2013. The supply line connecting the systems was cut but remained in place, connected to the AST. It was never capped off.

[9] Following the discovery of hydrocarbon contamination in April 2014, an investigation was carried out which concluded that the ball valve had been opened at some point leading to discharge of diesel fuel whenever the AST system was activated. This was described in the affidavit of David Neil Laws sworn on June 14, 2016:

> 23. On May 21, 2014, Steven Redden ('Mr. Redden'), of Redden Ltd., came to the Depot at the request of Ms. Miedema and discovered the Ball Valve on pump station number 2 (that isolated the former USTs system) was in the open position.
>
> 24. Ms. Miedema and Mr. Redden were inside the Depot and when I arrived they showed me the open Ball Valve on pump station number 2. The open Ball Valve was connected to this supply line that would have been used to supply diesel fuel from the UST system to the interior dispensing stations as previously described. I powered up the AST system, which would normally not be on while not in use for fueling. As soon as the AST system was powered up and activated we could see red-dyed diesel flowing out into the excavated sump pit from the cut supply line that would have been previously connected to the USTs. I observed that diesel fuel flowed out much like water from an opened tap. When the AST system was not activated we did not see any red-dyed diesel flowing out of the supply line. The supply line, which came out underground in the sump pit, was only exposed when the sump pit was excavated.
>
> 25. I do not know when or how the Ball Valve was opened as the Transit employees that fuel the buses would not have had any need to activate this valve for any reason.

[10] An investigation of fuel consumption by HRM showed an increase starting in January 2014 which led the hearing judge to conclude this was when the ball valve had been inadvertently opened.

Insurance Policy and Denial of Coverage

[11] The Policy included coverage for the cost of decontaminating HRM property in certain circumstances:

> 8. Decontamination Expense
>
> We will pay for the reasonable and necessary additional expense(s) that you actually incur to clean-up, remove and dispose of 'contaminants', that are in

> amounts or concentrations that exceed allowable levels or concentrations established under governmental authority, from land or water on the 'premises', resulting from the sudden and accidental actual, not suspected, discharge, release, escape, dispersal, seepage or migration of such 'contaminants' occurring at 'premises'. This coverage does not apply to the Premises Not Described extension.
>
> This coverage does not apply to the costs to test for, monitor or assess the existence, concentration of or effects of 'contaminants'. But we will pay for the reasonable and necessary cost of testing performed in the course of extracting the 'contaminants' from the land or water on the 'premises'.
>
> We will not pay expenses you incur to clean up waste treatment sites, to remove and dispose of asbestos, lead-based paints, contamination from underground tanks, 'ammonia contamination' or radioactive contamination. Nor will we pay or reimburse you for any fines, penalties or punitive or exemplary damages.
>
> We will pay the additional expense(s) only if they are reported to us within ten (10) days following the discovery of the actual sudden and accidental discharge, release, escape, dispersal, seepage or migration of such 'contaminants'.
>
> The most we will pay for all Decontamination Expense claims in any one (1) policy year is the 'annual aggregate' Limit of Insurance shown on the Declarations for Decontamination Expense regardless of the number of claims involving Decontamination Expense.

[12] The Policy also defined contaminant:

> 9. Contaminant(s) – any solid, liquid, gaseous, thermal or other irritant or pollutant, including but not limited to smoke, vapour, soot, fumes, acids, alkalis, chemicals, waste (including materials to be recycled, reconditioned or reclaimed) or other hazardous substances.

[13] On August 1, 2014, HRM wrote to the adjusters for the Insurers setting out its position as to why the claim was covered under the Policy:

> In general, we can confirm the following:
>
> 1) The underground storage tanks (UST) were removed circa January/February 2013.
>
> 2) The piping to the UST was not completely removed nor was it capped by the contractor retained to do so.
>
> 3) The pit that was excavated to remove the UST was inspected and sampled by AMEC prior to being back filled.
>
> a. No significant contamination was noted
>
> b. No sign of leakage was observed from the piping to the pumps.

> 4) Between Pump Island 2 (the farthest pump from the foundation wall) and the foundation wall, the pipe from the UST was equipped with a 'backflow' and 'ball' shut-off valve.
>
> 5) A review of the fuel deliver v. consumption records indicates a substantial increase in fuel used between January 2014 and May of 2014 in an amount between 100,000 and 150,000 litres.
>
> 6) Staff at the Transit terminal advise that the ball valve was discovered in an open position circa May 2014.
>
> Based on the above information we surmise that the escape of fuel at the Dartmouth Terminal was caused when the ball valve inadvertently opened allowing the line to be 'charged', the backflow valve was not substantial enough to maintain integrity when the line was pressurized during fuel dispensing operations. As the line to the UST was not capped, the fuel escaped and eventually reached beyond the property line. It is our interpretation that this loss was a sudden and accidental occurrence that happened circa January 2014 that did not manifest until May of 2014, when it was determined that the Transit property was the source of the contamination. As such, coverage should be afforded under the insurance policy issued by your principals.

[14] The Insurers' response was set out in a letter from their adjuster dated August 18, 2014:

> Coverage Position
>
> The insuring agreement does not provide coverage for direct physical loss of or damage to soil as it is not *covered property*. The coverage which is available under the Policy is with respect to the decontamination expense provided as an optional extension of coverage. In order to fall within the coverage for decontamination expense it is incumbent upon HRM to *inter alia*, establish that contamination has resulted from '*the sudden and accidental, actual not suspected, discharge, release, escape, dispersal, seepage or migration of such contaminants occurring at premises'*.
>
> It is the position of the Subscribing Insurers that the requirement that the discharge or dispersal of the contaminants be sudden and accidental imports a temporal component of briefness, meaning momentary or lasting only a short time. Sudden is to be contrasted with gradual and occurring over a lengthy period of time. It is our respectful position that the leakage which has occurred as a result of the opening of the valve took place over at least a 4-month period and accordingly, cannot be viewed as sudden and accidental.

Decision on the Application in Court

[15] The parties agreed there was no factual dispute related to the circumstances of the contamination. The issue presented to the hearing judge was how to interpret

and apply the Policy provisions to those facts. The parties said the applicable law was found in the Supreme Court of Canada decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37. According to that decision, the following rules govern the interpretation of an insurance policy:

> [49] The parties agree that the governing principles of interpretation applicable to insurance policies are those summarized by Rothstein J. in *Progressive Homes*. The primary interpretive principle is that where the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole: para. 22, citing *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 71.
>
> [50] Where, however, the policy's language is ambiguous, general rules of contract construction must be employed to resolve that ambiguity. These rules include that the interpretation should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the language of the policy; it should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted, and it should be consistent with the interpretations of similar insurance policies. See *Progressive Homes*, at para. 23, citing *Scalera*, at para. 71; *Gibbens*, at paras. 26-27; and *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, 1979 CanLII 10 (SCC), [1980] 1 S.C.R. 888, at pp. 900-902.
>
> [51] Only if ambiguity still remains after the above principles are applied can the *contra proferentem* rule be employed to construe the policy against the insurer: *Progressive Homes*, at para. 24, citing *Scalera*, at para. 70; *Gibbens*, at para. 25; and *Consolidated-Bathurst*, at pp. 899-901. *Progressive Homes* provides that a corollary of this rule is that coverage provisions in insurance policies are interpreted broadly, and exclusion clauses narrowly.

[16] The position of both parties before the hearing judge was that the decontamination expense clause did not contain any ambiguity and, properly interpreted, the provision favoured each of their respective positions on coverage.

[17] The Insurers conceded the discharge of diesel fuel was accidental and, therefore, the issue presented to the hearing judge was whether it resulted from "the sudden…actual, not suspected, discharge, release, escape, dispersal, seepage or migration" of contaminants. The hearing judge adopted the *Ledcor* approach and, at the first stage, concluded that the Policy language was ambiguous:

> [69] In the absence of any determinative case law on point, I am left with the conclusion at this stage of the analysis that no plain or ordinary meaning of the words "sudden and accidental", as used in the subject policy, is ascertainable. In its distilled application, the clause can be narrowed down to read as follows:

> We will pay for the reasonable and necessary additional expense(s) that you actually incur to clean-up, remove and dispose of contaminants … resulting from the sudden and accidental actual … discharge, release, escape, dispersal, seepage or migration of such contaminants occurring at premises.
>
> [70] In my view, this policy language, which is to be broadly interpreted in a coverage extension clause, and read in light of the policy as whole, is capable of more than one reasonable interpretation. It must therefore be characterized as ambiguous.

[18] In his application of the second stage of the *Ledcor* analysis, the hearing judge concluded that one of the purposes in HRM obtaining coverage was to protect against the risk of diesel fuel contamination at the transit bus depot. He went on to find the reasonable expectation of the parties was to have coverage for a loss such as occurred here. He, therefore, found in favour of HRM:

> [79] HRM maintains that its reasonable expectations based on the purpose of the added coverage are further enhanced and supported by the language of the policy. The coverage extension clause here focusses on the ways in which contamination may occur, rather than the resulting property damage or its duration prior to its discovery. Those ways include sudden and accidental "seepage" or "migration" which connotes the slow and gradual escape and spread of contaminants.
>
> [80] There can be little doubt that the very first escape of diesel fuel, after the ball valve was inadvertently opened, was "sudden and accidental" within the meaning of the coverage extension. Unfortunately, because the problem was a latent one, it was not discovered and remedied for a period of four months. The question then becomes at what point does this escape of fuel cease being "sudden" when it recurs from the same cause. Undoubtedly, the policy definitions of "accident" and "occurrence" above recited add fuel to HRM's reasonable expectations that the loss which occurred here would be covered by the policy.
>
> [81] The insurers', on the other hand, essentially maintain that there was no intent or reasonable expectation on their part that long term environmental damage would be covered by this policy and that such a result is not supported by the language of the policy.
>
> [82] When adding this coverage extension to the policy, the insurers must be taken to have known about the nature and extent of the storage and fuel dispensing operations at the bus depot property. They must also be taken to have known that the escape of diesel fuel from those operations was the most obvious material risk for which coverage would be sought. The insurers could have chosen to narrow the scope of the coverage extension by expressly adding an

> exclusion clause with a temporal limitation on the duration of the loss but they did not do so.
>
> [83] After considering all the submissions presented to the court, I am persuaded that a policy holder, through the lens of an ordinary person, would reasonably expect that the policy issued in this case insured the very risk of loss that ultimately materialized here. In my view, that expectation is capable of being reasonably supported by the language of the policy.
>
> [84] Furthermore, it can hardly be said that indemnity for the loss which here occurred could not have been sensibly sought or anticipated when the policy was issued. As it was put in **Ledcor**, an interpretation in favour of HRM would not give rise to results that are unrealistic or that could not have been contemplated in the commercial atmosphere in which the policy was issued. Beyond that, such an interpretation would not be inconsistent with judicial precedent simply because, as acknowledged, there are no prior case authorities directly on point with this one.
>
> [85] I therefore conclude that the application of these general rules of contract construction resolves the ambiguity created by the language of the coverage extension in favour of HRM. In my view, its interpretation of the coverage extension is in keeping with the purpose of the insurance policy and produces a sensible commercial result.

Issues on Appeal

[19] In their factum, the Insurers set out the following issues for determination:

1) Did the application judge commit a reviewable error at stage 1 of the analytical framework from *Ledcor*?

2) Did the application judge commit a reviewable error at stage 2 of the analytical framework from *Ledcor*?

Standard of Review

[20] The parties disagree on the standard of review to be applied to interpretation of the Policy. The Insurers say it should be correctness, relying on the analysis set out in *Ledcor*. HRM says the standard should be palpable and overriding error, relying on the Supreme Court of Canada decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.

[21] In *Sattva*, the court concluded that contractual interpretation is a question of mixed fact and law because of the necessity to interpret the contractual words in

light of the factual matrix from which the contract arose. Findings of this nature are to be given deference on appeal.

[22] In *Ledcor*, the Supreme Court said standard form contracts are an exception to the principles found in *Sattva*:

> [24] I would recognize an exception to this Court's holding in *Sattva* that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal. In my view, where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

[23] The court explained why such an exception was appropriate:

> [42] Contractual interpretation is often the "pure application" of contractual interpretation principles to a unique set of circumstances. In such cases, the interpretation is not "of much interest to judges and lawyers in the future" because of its "utter particularity". These questions of contractual interpretation are appropriately classified as questions of mixed fact and law, as the Court explained in *Sattva*.
>
> [43] However, the interpretation of a standard form contract could very well be of "interest to judges and lawyers in the future". In other words, the interpretation itself has precedential value. The interpretation of a standard form contract can therefore fit under the definition of a "pure question of law", i.e., "questions about what the correct legal test is": *Sattva*, at para. 49; *Southam*, at para. 35. Establishing the proper interpretation of a standard form contract amounts to establishing the "correct legal test", as the interpretation may be applied in future cases involving identical or similarly worded provisions.

[24] Despite recognizing an exception to *Sattva*'s approach, the Supreme Court acknowledged interpretation of a standard form contract might be subject to appellate deference in some cases:

> [48] Depending on the circumstances, however, the interpretation of a standard form contract may be a question of mixed fact and law, subject to deferential review on appeal. For instance, deference will be warranted if the factual matrix of a standard form contract that is specific to the particular parties assists in the interpretation. Deference will also be warranted if the parties negotiated and modified what was initially a standard form contract, because the interpretation will likely be of little or no precedential value. There may be other cases where deferential review remains appropriate. As Iacobucci J. recognized in *Southam*, the line between questions of law and those of mixed fact and law is not always

> easily drawn. Appellate courts should consider whether "the dispute is over a general proposition" or "a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future" (para. 37).

[25] In this case, the record demonstrates the decontamination expense coverage is part of a standard insurance contract. It is found on page 15 of 30 of a document entitled Form ZC 6304 U(08/12) which is described as the Property Damage Form in the Insurance Declaration issued by Zurich to HRM.

[26] It is clear from the submissions of the parties the interpretive exercise here involves a general proposition and not a "very particular set of circumstances". A decision on the meaning of "sudden and accidental" may have precedential value given the dearth of cases on point.

[27] In *Marsh Canada Ltd. v. Grafton Connor Property Inc*., 2017 NSCA 54 this Court followed *Ledcor* and adopted the correctness standard for review of the interpretation of an insurance policy. I would do the same in this case.

Analysis

Issue #1 – Did the application judge commit a reviewable error at stage 1 of the analytical framework from *Ledcor*?

[28] The Insurers say the hearing judge erred in his conclusion that the decontamination coverage, and in particular the phrase "sudden and accidental", was ambiguous. They argue these words, viewed from the perspective of the ordinary person, have a clear meaning which supports their interpretation of the Policy.

[29] In approaching the interpretation of an insurance contract the Supreme Court of Canada has emphasized the importance of applying the ordinary meaning of words:

> [21] In *Mutual of Omaha Insurance Co. v. Stats*, [1978] 2 S.C.R. 1153, Spence J. stated the word 'accident' is 'an ordinary word to be interpreted in the ordinary language of the people' (p. 1164). Such terms should be construed 'as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law': *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029, at p. 1043. This approach was affirmed by McLachlin C.J. in *Martin*, at para. 19.
>
> [*Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59]

[30] As Chief Justice Wagner said in *Ledcor*, the starting point in the interpretive analysis is the policy language:

> [49] The parties agree that the governing principles of interpretation applicable to insurance policies are those summarized by Rothstein J. in *Progressive Homes*. The primary interpretive principle is that where the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole: para. 22, citing *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at para. 71.

[31] In determining whether there is an ambiguity, the court must examine the policy wording in relation to the dispute before it. Ambiguity does not exist in a vacuum. If the issue in dispute is whether there is coverage under the policy, it may be apparent certain claims are covered, whereas for others the language may be unclear. In these latter circumstances, the interpreting court would be required to engage in the second and third steps of the *Ledcor* analysis.

[32] In *Ledcor*, the court was considering a builder's risk policy. The issue was whether an exclusion which denied coverage for the cost of making good faulty workmanship, precluded recovery of the expense of replacing windows damaged by a cleaning contractor. The policy included an exception which provided coverage for any physical damage resulting from faulty workmanship.

[33] As here, each party argued the policy was not ambiguous and should be interpreted in their favour. The Chief Justice's analysis illustrates the interpretive approach to the question of ambiguity:

> [61] I am of the view that the language of the Exclusion Clause slightly favours the interpretation advanced by the Insureds, but is nonetheless ambiguous. The word "damage" figures only in the exception to the Exclusion Clause; it is not included in the language setting out the exclusion itself, i.e., the "cost of making good faulty workmanship". As such, "making good faulty workmanship" can, on its plain, ordinary and popular meaning, be construed as redoing the faulty work, and "resulting damage" can be seen as including damages resulting from such faulty work.
>
> [62] That said, the language of the Exclusion Clause does not clearly point to one interpretation of "cost of making good faulty workmanship" and "resulting damage" over the other. The Policy does not define these terms. The general coverage provisions, clauses 1 and 2, do not resolve the ambiguity, and neither do the other provisions in the Policy.

[34] Here, the Policy provides HRM with an optional extension of coverage for decontamination expenses. As a matter of convenience, I will repeat the relevant provision:

> 8. Decontamination Expense
>
> We will pay for the reasonable and necessary additional expense(s) that you actually incur to clean-up, remove and dispose of 'contaminants', that are in amounts or concentrations that exceed allowable levels or concentrations established under governmental authority, from land or water on the 'premises', resulting from the sudden and accidental actual, not suspected, discharge, release, escape, dispersal, seepage or migration of such 'contaminants' occurring at 'premises'. …

[35] At the hearing before Justice Wright, the Insurers conceded the discharge of diesel fuel was "accidental" and, therefore, the argument focused on the meaning of the word "sudden". The Insurers said, and the hearing judge accepted, that the word "sudden" must carry a separate and distinct meaning from "accidental" because both words are used. This led to the submission of various dictionary definitions for "sudden" as outlined by the hearing judge:

> [46] With that, both counsel have engaged in the lexical semantics of dictionary meanings of the words in issue to illustrate their ordinary meaning. The emphasis has been on the word "sudden" and whether or not that word imports a temporal component of briefness.
>
> [47] Counsel for HRM cites the **Oxford English Dictionary, 2ed. (Oxford: Clarendon Press, 1989)** which defines "sudden" in relation to actions, events or conditions as "Happening or coming without warning or premonition; taking place or appearing all at once; (unexpected, unforeseen, unlooked for)" and in relation to physical objects, "appearing or discovered unexpectedly".
>
> [48] **Webster's New Universal Unbridged Dictionary, 1st ed. (1994)** defines sudden, *inter alia*, as "Happening, coming, made or done quickly without warning or unexpectedly; Occurring without transition from the previous form, state, etc…; abrupt … an unexpected occasion or occurrence".
>
> [49] As noted earlier, counsel for HRM asserts that any temporal dimension of the word "sudden" refers to the onset or initiation of the event, and not the duration of the event, and that it relates to the coming about of a transition from one state to another. It is argued that this characterization is consistent with the ordinary meaning of the word "sudden" which does not give rise to any ambiguity.
>
> [50] Counsel for the respondents cites the definition of "sudden" from **Collins English Dictionary, (Harper Collins, 2008)** as "Occurring or performed quickly

> and without warning". It is also defines "accidental" as "Occurring by chance or unintentionally".
>
> [51] I interject here that there can be no doubt but that the calamitous event which occurred in this case was accidental. It undoubtedly was unexpected, unforeseen and unintentional. Accordingly, counsel for the respondents contends that in applying the interpretive rule against redundancy of words in an insurance contract, the word "sudden" must carry a separate meaning distinct from the word "accidental". The insurers contend that that distinct meaning is the importation of a temporal component of briefness and that the discharge of the contaminant must have been abrupt or immediate. Conjunctively, the insurers maintain that the word "sudden" cannot be taken to mean intermittent nor gradual which are very opposite terms.

[36] The hearing judge's conclusion on the dictionary definitions did not resolve the issue:

> [56] All of these arguments go to show how elusive it is to ascribe a plain and ordinary meaning to the words at issue in this policy on the basis of their common usage in everyday language and their dictionary meanings. Unfortunately, neither is there a conclusive answer to be found in the case law provided to the court which I will now turn to.

[37] The jurisprudence presented by the parties was not particularly helpful to the hearing judge. It was dated, from other jurisdictions and involved fact situations and insurance policies which were distinguishable from the situation before him. In the end, the hearing judge felt there was an unresolved ambiguity which required him to proceed with the subsequent steps in the *Ledcor* analysis.

[38] I agree with the Insurers that the hearing judge erred in his ambiguity analysis. In my view, he was led to that mistake by the manner in which the parties argued the case. Rather than examining the policy as a whole, including the entirety of the decontamination expense provision, everyone focused on whether the word "sudden" had a temporal component.

[39] The policy provides coverage for the costs of removing and disposing of contamination resulting from "the sudden and accidental…discharge, release, escape, dispersal, seepage or migration" of contaminants. The words "sudden" and "accidental" are very similar in meaning. An examination of the dictionary definitions presented by the parties illustrates this. They both refer to something which happens unexpectedly and without warning. The definition of "accident" in the Policy demonstrates this by including "sudden":

> Accident – a sudden and accidental breakdown of an ‘object’ or part of an ‘object’ which manifests itself by physical damage…

[40] The proper interpretive approach to the phrase “sudden and accidental” is not the one undertaken by the hearing judge at the invitation of counsel which was to take those words and attempt to ascribe independent meaning to each. This led to potential confusion because of the similarity in meaning. Both convey an element of unexpectedness and surprise. However, not all sudden events are accidental (e.g. an assault) and not all accidental events are sudden (e.g. leaving food unrefrigerated so it spoils).

[41] In my view, the reason for the use of both “sudden” and “accidental” in the decontamination coverage is to include the element of abruptness and to ensure the exclusion of intentional acts. The ordinary meaning of “sudden and accidental” is something that is abrupt, unexpected and unintentional.

[42] The Insurers argue there is a temporal element to the phrase “sudden and accidental” and coverage is limited to contamination which results from an event of short duration. They do not explain how long this must be but argue it would be brief and, in any event, not extend to the period between January and April 2014.

[43] There is no time frame identified expressly, or by implication, in the decontamination coverage provision. In its ordinary meaning, a sudden and accidental event can continue for a significant period of time. For example, a dam might unexpectedly fail causing the downstream area to be flooded. The flood could last for days or weeks before it subsides as water flows through the damaged dam. An ordinary person would say that the flood was sudden and accidental.

[44] The Insurers’ interpretation means the determination of whether an event is “sudden and accidental” could depend on how quickly it is discovered. For example, if a water pipe in a home becomes frozen and bursts, causing the homeowner to shut off the water supply immediately, the Insurers would say it was a sudden and accidental event. However, if the homeowner was away on vacation and the pipe continued to discharge water for two weeks, it would not. The result is less clear if they were away from home for a day.

[45] There is nothing in the language of the Policy to support the interpretation advanced by the Insurers. It is worth noting that before the hearing judge, and on appeal, counsel for the Insurers acknowledged the initial discharge of diesel fuel would be covered under the policy if it had not been repeated. Since fuel discharge only occurred when the AST system was turned on, each subsequent event would

be just as “sudden and accidental” as the first. The position of the Insurers is that due to the lack of discovery and repeated discharges the contamination no longer results from a cause which is sudden and accidental.

[46] The Insurers argue the passage of time between January and April means contamination from the series of fuel discharges is not covered under the policy. The ordinary interpretation of a “sudden and accidental” discharge or seepage would not lead to this outcome. To the contrary, there are policy provisions which contemplate coverage for a series of related claims. For example, “occurrence” (which would apply to the calculation of deductibles) means:

> 30. Occurrence – means all loss(es) or damage that is attributable directly or indirectly to one cause or a series of similar or related causes. All such loss(es) or damage will be treated as one occurrence. However, if occurrence is specifically defined otherwise in this Form or its endorsement(s), that definition will apply to the applicable coverage provided.

[47] When one looks at the entire Policy and applies an ordinary meaning to its words, there is no ambiguity in the language of the decontamination clause and its application to the causal events leading to the diesel fuel discharges. The hearing judge erred in finding ambiguity in the Policy. However, he did ultimately reach the correct coverage decision through application of the subsequent steps in the *Ledcor* analysis.

Issue #2 – Did the application judge commit a reviewable error at stage 2 of the analytical framework from *Ledcor*?

[48] In light of my conclusion with respect to Issue #1, it is unnecessary to deal with the hearing judge’s approach to the second stage of the *Ledcor* analysis.

Conclusion

[49] Although I believe the hearing judge erred in finding the decontamination expense coverage to be ambiguous, he was correct to find that the cost of removing the contamination was covered under the terms of the Policy. I would dismiss the appeal with costs in favour of HRM in the amount of $2,500.

Wood, C.J.N.S.

Concurred in:

Bryson, J.A.

Derrick, J.A.