SUPREME COURT OF NOVA SCOTIA

Citation: *Halifax Regional Municipality v. Zurich Insurance Company Ltd*. 2020 NSSC 69

Date: 20200219
Docket: Hfx. No. 435745
Registry: Halifax

Between:

Halifax Regional Municipality

Applicant

v.

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

Respondents

Decision	
Judge:	The Honourable Justice Robert W. Wright
Heard:	November 4 and 5, 2019 in Halifax, Nova Scotia
Written Decision:	February 19, 2020
Counsel:	Martin Ward, Q.C. and Andrew Gough for the Applicant D. Geoffrey Machum, Q.C. and Christopher W. Madill for the Respondents

Wright, J.

INTRODUCTION

[1] This Application in Court requires a judicial interpretation of a property insurance policy issued to Halifax Regional Municipality ("HRM") by the respondents as the three subscribing insurers. Amongst the HRM properties insured under this policy was the large Halifax Transit bus depot located on Ilsley Avenue in Burnside, Nova Scotia.

[2] During a four month period in early 2014, approximately 200,000 litres of diesel fuel escaped from an underground pipe at the depot which migrated underneath the depot property, and beyond it, before the leak was discovered and remedied.

[3] HRM has since incurred significant pollution clean up costs pertaining to both the depot property and a neighbouring property which are said to be in excess of $2,000,000. It has sought indemnity from the respondents for part of these costs under the coverages afforded by its property insurance policy which contained a Decontamination Expense (Pollution Clean Up) coverage extension. The respondent insurers have denied coverage under the policy provisions.

[4] Consequently, HRM filed this Application in Court on January 29, 2015. It now seeks a Declaration from this court that the Decontamination Expense (Pollution Clean Up) extension of the policy affords HRM coverage up to the policy limits of $1,000,000 for the clean up costs of its property arising from the escape of diesel fuel that occurred in 2014.

SUMMARY OF FACTS

[5] The material facts in this case are not in dispute such that no cross-examination of the various affiants was required by either party. Rather, the dispute between the parties centres on the application of the law to the facts in determining how this coverage extension clause should be interpreted.

[6] Halifax Transit is a business unit of HRM under which it operates a fleet of approximately 200 buses. Those buses are regularly fueled with diesel on a nightly basis at the depot which requires the onsite storage of a large volume of diesel fuel. On weeknights, Halifax Transit regularly dispensed between 23,000 and 25,000 litres of diesel fuel when refueling the buses each evening, with lesser amounts on the weekends.

[7] Prior to 2009, Halifax Transit stored diesel fuel and furnace fuel in four underground storage tanks ("USTs") having a capacity of 46,000 litres each. Two of the USTs stored diesel fuel for the buses and were connected to underground pumps that in turn were connected to the two fuel dispensing stations inside the depot. The underground pumps were located in a sump-pit adjacent to the wall of the depot.

[8] Sometime in 2008, HRM decided to replace the USTs with a modern above ground storage tank system ("ASTs"). It retained professional engineers to design the new system which ultimately was comprised of two 50,000 litre storage tanks.

[9] The AST project was tendered in 2008 and the successful bidder was Redden Petroleum Enterprises Ltd. ("Redden").

[10] HRM wanted to avoid the possibility of an interruption in fueling operations should the new AST system not immediately function properly. As a safeguard, it wanted a backup fuel system available while the AST system was being commissioned. HRM therefore requested Redden to interconnect the UST system and the AST system such that the UST system could be used as a backup in case problems were encountered during the commissioning of the new system.

[11] Redden accomplished this objective by interconnecting the two systems such that the UST system remained connected to the fueling stations by way of a supply line and a return line. A hand turned shutoff ball valve was then connected to the supply line on each fueling station. The ball valve was designed to open to allow diesel fuel to be supplied to the fuel dispensers from the UST system should the AST system not function as intended.

[12] Fortunately, no problems were encountered in the change over to the new AST system and the existing UST system was never used again. However, it was not until 2012 that HRM tendered for the excavation and removal of the UST system and the associated piping. The successful bidder was A&L Concrete Forming Ltd. who carried out the work on January 17 and 18, 2013.

[13] Prior to the removal of the UST system, HRM had retained AMEC, a firm providing environmental engineering services, to conduct soil samples at the excavation site to ensure compliance with applicable regulations. At the time the USTs were removed, there was no sign of corrosion, metal dimpling, significant rusting or any other deterioration of that underground equipment. AMEC did identify some minor petroleum contamination in the form of residual oil found on top of some standing water in one of the excavated pits. However, this was determined to be weathered fuel oil from a past contamination event and was of no consequence.

[14] By this time, HRM was using red-dyed diesel fuel which was different from the residual weathered fuel found by AMEC. There was then no sign of escape or leakage of fresh fuel from the underground piping.

[15] No one suspected anything to be amiss until April 9, 2014 (some 15 months later) when HRM was advised by the Halifax Water Commission that the escape of red-dyed diesel fuel had been detected along an embankment adjacent to the depot's property line and into a ditch along Highway 111. HRM responded by immediately retaining AMEC once again to orchestrate an emergency response to contain the contamination and investigate the source of the leak.

[16] Because of the inherent difficulties in identifying the source of an underground fuel leak (which had migrated a considerable distance), it was not until May 21, 2014 that the transit depot was identified as the source of the red-dyed diesel fuel. It was then that AMEC excavated the sump-pit that had been used with the former UST system which was located adjacent to the depot building. As noted earlier, that sump-pit had housed the underground pumps for the UST system and that is where AMEC found fresh red-dyed diesel fuel.

[17] HRM then called in Redden to inspect the two indoor fueling stations whereupon an open ball valve was discovered within the pipe that lead to the sump-pit. That ball valve was identified as one of the tie-in valves installed by Redden in 2009 to temporarily interconnect the old and new storage systems.

[18] HRM does not know how or when the ball valve was inadvertently opened (which was manually operated) because it was to serve no purpose after the UST system was discontinued. As was later determined from the fuel data, however, this shut-off ball valve was somehow opened in late January or early February of 2014.

[19] As an experiment to confirm the causation of the fuel leak, transit officials powered up the AST system which normally would not be pressurized unless the buses were refueling. As soon as that happened, with the ball valve left open, the result that could readily be seen was the flow of fresh red-dyed diesel fuel into the excavated sump-pit from the supply line pipe that was previously connected to the USTs. Fatefully, that pipe had been cut and left uncapped underground by a third party contractor when the UST equipment had otherwise been removed in January of 2013. The flow of diesel fuel from this pipe was described by one witness present as a "significant stream" of red-dyed diesel fuel pouring out of the cut pipe into the excavated sump-pit. As soon as the ball valve was then closed, the stream of diesel fuel ceased.

[20] The cause of the fuel leak was thereby definitively determined. It was the result of the underground supply pipe having been cut and left uncapped above the sump-pit presumably in January of 2013, coupled with the inadvertent opening of

the shut-off ball valve approximately a year later. This combination of misdeeds allowed the escape of diesel fuel underground whenever the fuel lines were pressurized for refueling the buses.

[21] Upon learning this, HRM then arranged the same day for another company, National Energy Equipment Ltd., to disconnect and cap the severed pipe and to remove all remaining piping from the UST system. That remedial work marked the end of the problem.

[22] Upon the determination of the cause of the leak on May 21st, HRM promptly reported the loss to the respondent insurers who in turn retained a firm of adjusters to investigate. Contemporaneously, HRM engaged new site professionals (at the request of the respondents) to undertake extensive remedial measures to control any further escape of fuel and to remove affected soils both from the depot property and the neighbouring property. The cost of this remedial work was well in excess of the coverage limits of the policy.

[23] At the same time, HRM personnel examined the fuel consumption and fuel delivery records for the subject period and ascertained that the estimated volume of the leak of diesel fuel was in the order of 200,000 litres spanning the four month

period between January and April of 2014. This information was then passed on to the adjusters in early July.

[24] Once the adjusters completed their investigation under a Reservation of Rights letter dated May 26th, they informed HRM by letter dated August 18th that coverage was being denied by the respondent insurers under their interpretation of the relevant provisions of the property insurance policy.

[25] To complete the chronology, HRM retained independent forensic accountants to provide an opinion as to the likely period when the fuel escape began and was ongoing. The conclusion reached and expressed in a Rule 55 expert report (which is not challenged by the respondents) is that the most likely period of the fuel escape was between February and May of 2014. That was found to be the only four month period between January 2013 and December 2014 with four consecutive months of variances where deliveries exceeded consumption by more than the weighted average variance during that time. These variances (of a small percentage overall) had previously gone unnoticed. It is undisputed that this loss occurred entirely within the effective period of the policy.

PROPERTY INSURANCE POLICY

[26] The opening Insuring Agreement in the policy obligates the insurers, in consideration of the payment of a premium of $819,498, and subject to the terms and conditions of the policy, to pay for direct physical loss of or damage to "covered property" caused by a "covered cause of loss" occurring at a "premises", unless excluded elsewhere in the form. It was further provided that the loss or damage must occur during the policy period shown on the Declarations and must take place in the "coverage territory".

[27] The battleground in this case, however, falls under one of the optional Coverage Extensions added to the policy. More specifically, this extension provides coverage for Decontamination Expense (Pollution Clean Up) which carries with it policy limits of $1,000,000 and a deductible of $100,000. This Coverage Extension reads 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", that are in amounts or concentrations that exceed allowable levels or concentrations established under government 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".

[28] I will also note here the policy definitions of "Accident" and "Occurrence" which will be referred to later in this decision.

[29] "Accident" is defined to mean a sudden and accidental breakdown of an "object" or part of an "object", which manifests itself by physical damage at the time that it occurs and necessitates repair or replacement.

[30] After specifying a series of situations that fall outside this definition, the policy goes on to read that "If an initial "accident" causes other "accidents", all will be considered one "accident". All "accidents" at a "premises" that manifest themselves at the same time and are the result of the same cause will be considered one "accident".

[31] Later in the policy, "Occurrence" is defined to mean "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".

ISSUE OF LAW TO BE DECIDED

[32] At its core, this case requires the Court to determine the correct meaning of the phrase "sudden and accidental" as a qualifier of the various mechanisms of contamination specified in the Decontamination Expense Coverage Extension. That interpretation must be made reading the policy as a whole and in light of the context of the fact situation at hand.

POSITIONS OF THE PARTIES

[33] Essentially, the respondents have denied coverage on their interpretation that the word "sudden" as used in this phrase unambiguously imports a temporal component of briefness pertaining to the emission of contaminants, and should be taken to mean immediate or abrupt. They say that whether this court finds that the emission of diesel fuel over four months was intermittent, or whether it should be treated as one continuous event and is therefore gradual, coverage was properly denied in that neither intermittent nor gradual means "sudden".

[34] HRM, on the other hand, asserts that the word "sudden" means unexpected and unforeseeable and does not import a temporal limitation on the duration of the emission. It says that the only temporal dimension to that word is its application to the onset or initiation of the event causing pollution, and not to the duration of the event. HRM maintains that there is no ambiguity in the word "sudden" and that the discharge of diesel fuel at the transit depot is properly characterized as "sudden and accidental" given the plain and ordinary meaning of those words in the context of the insurance policy.

[35] HRM further advances the alternative arguments that:

(a) There are at the very least competing reasonable interpretations of the phrase "sudden and accidental" such that the coverage extension contains an ambiguity;

(b) The interpretation of this phrase proffered by the insurers flies in the face of the reasonable expectations of the parties and would not produce a sensible commercial result; and

(c) If the court cannot otherwise resolve the competing interpretations of the coverage extension, the remaining ambiguity ought to be decided in favour of HRM upon the application of the *contra proferentem* doctrine.

LEGAL ANALYSIS

[36] The most recent pronouncement on the rules of interpretation applicable to insurance policies is the decision of the Supreme Court of Canada in **Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.**, [2016] S.C.J. No. 37. The approach to be taken, affirming its earlier decision in **Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada**, 2010 SCC 33, was summarized as follows:

> 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.
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> 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.*, [1980] 1 S.C.R. 888, at pp. 900-902.
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> 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.

[37] The court then went on to affirm that it is the insured who has the onus of establishing that the damage or loss claimed falls within the initial grant of coverage.

[38] Interwoven in this framework is the well-known principle that the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. As the Supreme Court of Canada put

it, for example, in **Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada**, 2006 SCC 21 (at para. 27): "As with all contracts, the terms of the policy must be examined, in light of the surrounding circumstances, in order to determine the intent of the parties and the scope of their understanding."

[39] Consistent with this is the following passage from **Ruffolo v. Sun Life Insurance Co. of Canada**, [2007] O.J. No. 4541, affirmed at 2009 ONCA 274 which was cited with approval by the Nova Scotia Court of Appeal in **Industrial Alliance Insurance and Financial Services Inc. v. Brine**, [2015] N.S.J. No. 486 (at para. 36):

> 82. It is accepted that some special rules apply to the interpretation of insurance contracts. However, it is also accepted that the normal rules of contract interpretation apply to insurance contracts and that the normal rules are the starting place for interpreting insurance contracts...
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> 83. The normal rules for the interpretation of contracts direct a court to search for an interpretation from the whole of the contract that advances the intent of the parties at the time they signed the agreement...In searching for the intent of the parties, the court should give particular consideration to the terms used by the parties, the context in which they are used and the purpose sought by the parties in using those terms...

[40] In searching for the intent of the parties, the court must, at the first stage of the analysis, examine the impugned terms used in the policy, seeking to ascertain their ordinary meaning. That is to be done through a lens "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". (see **Sabean v. Portage La Prairie Mutual Insurance Co.**, 2017 SCC 7).

[41] What then is the ordinary meaning of "sudden and accidental" as a qualifier of the various mechanisms of contamination specified in the Decontamination Expense Coverage Extension? Can these descriptive words be said to be clear language importing a temporal component of briefness of emission of contaminants, or is an ambiguity created in the absence of an express temporal limitation, and by the inclusion of the words "seepage" and "migration" as escape mechanisms covered by the policy? That question must be answered not only by focusing on the terms used, but by reading the policy as a whole and considering its purpose. Of particular note elsewhere in the policy are its definitions of "Accident" and "Occurrence".

[42] Paradoxically, counsel for both the applicant and the respondents contend that this policy language is unambiguous in their favour. It is important to note at the outset that both acknowledge that they have been unable to find any case precedent that is directly on point with the policy wording and surrounding facts of this case. They have therefore resorted to various dictionary meanings of "sudden" and "accidental" and purportedly similar or analogous cases in Canada (as well as

several United States cases relied on by the respondents) in support of their respective arguments.

[43] Before expanding on that, it is worthwhile examining, as background information, the origin and history of the use of the phrase “sudden and accidental” in Canadian insurance policies which dates back to the 1970s and 1980s. This history is set out in the decision of the Ontario Court of Appeal in **Zurich Insurance Co. v. 686234 Ontario Limited**, 2002 CarswellOnt 4019. In that case, the court was considering a pollution liability exclusion in a Commercial General Liability (“CGL”) policy in the context of a duty to defend application. The policy language before the court did not include the phrase “sudden and accidental”, but the court commented on the evolution of that wording in the context of pollution liability exclusion clauses in CGL policies as follows (at paras. 11-14):

> 11. The background and purpose of the pollution liability exclusion is discussed in detail by Professor Stempel. For many years, CGL liability policies did not contain any exclusions designed to limit coverage for environmental risks. Traditionally, CGL policies generally provided coverage with respect to liability imposed by law to pay damages because of bodily injury or property damage caused by an accident or occurrence. Coverage under CGL policies for pollution-related claims depended upon whether the claim fell within the scope of the insurance contract.
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> 12. In 1970 in the United States the Insurance Rating Board, a predecessor of the Insurance Service Office, Inc.("ISO"), in response to litigation that emerged from environmentally significant discharges of pollutants resulting in damage to the natural environment, introduced by way of an endorsement attached to CGL policies, a specific exclusion with respect to environmental liability. By 1973, a pollution liability exclusion became part of the standard CGL policy. It was known as the "sudden and accidental"

> pollution exclusion because, by its language, it did "not apply if [the] discharge, dispersal, release or escape was sudden and accidental".
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> 13. In the early 1980s, following extensive litigation over the scope of the sudden and accidental pollution exclusion, the ISO introduced a new version of the exclusion, the "absolute" pollution exclusion. As Professor Stempel points out at p. 5: "All observers agree that the new exclusion was drafted to replace the 1973 'sudden and accidental' exclusion because insurers were distressed by judicial decisions holding that the 1973 exclusion did not preclude coverage for gradual but unintentional pollution." The absolute exclusion, therefore, was intended to preclude coverage for the cost of government-mandated environmental cleanup under existing and emerging legislation making polluters responsible for damage to the natural environment. Thus, as a practical matter, the absolute pollution exclusion, free of the "sudden and accidental" language, appeared to solve the insurance industry's problem in the industrial pollution context. By 1986 the absolute pollution exclusion became the insurance industry standard and is found in virtually every CGL policy issued since that time. It is this absolute pollution liability exclusion that is found in the respondent's CGL policy.
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> 14. As Hilliker points out at p. 197, it was in 1985, with the introduction of a new standard form CGL policy, that the Insurance Bureau of Canada changed the environmental liability exclusion then in use, to the absolute pollution exclusion that had been drafted in the United States by the ISO. Thus, with some minor variations introduced by individual insurers, the absolute pollution exclusion is now found in all CGL policies in the United States and Canada.

[44] It appears therefore that the use of the “sudden and accidental” exception to the environmental liability exclusion clauses contained in CGL policies was discontinued in Canada in 1985. That explains the reason for the paucity of Canadian case law interpreting that phrase since the 1990s although it has been interpreted in a few reported cases dealing with boiler and machinery insurance policies which are of a different ilk.

[45] In any event, this policy wording has resurfaced in the property insurance policy now before the court within an optional extension of coverage, rather than

as an exception to a pollution liability exclusion clause as in the former CGL policies. There is no evidence before the court as to the extent to which this policy wording is currently in use in policies of property insurance. There is certainly a dearth of reported cases on the subject.

[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.

[52] That brings me to the succession of terms to which "sudden and accidental" serve as a qualifier in describing the various mechanisms of contamination specified in the coverage extension. The first four of these terms, namely, "discharge, release, escape and disbursal" largely overlap with one another. However, the words "seepage" and "migration" have a different nuance.

[53] The word "seepage" is defined in the **Oxford English Dictionary, supra**, as "Percolation or oozing of water or fluid; leakage; the slow movement of water into or out of the ground (as distinct from percolation through it); the slow movement of water through the ground under the action of gravity; also, that which oozes".

[54] The word "migration" implies a slow movement of something over a period of time.

[55] Counsel for HRM emphasizes that these words "seepage" and "migration" contemplate coverage for gradual escapes of fuel over a longer period of time and fit in with the policy definitions of "accident" and "occurrence" above recited, with the proviso that there was a sudden onset or initiation of the event causing the pollution. Counsel for the insurers is dismissive of that proposition, maintaining

that the words “seepage” and “migration” denote nothing more than the pace of the escape of the contaminant, rather than its duration.

[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.

[57] Not only is there no case precedent directly on point with the case at bar, but it has often been recognized that there are divergent authorities in both Canada and the United States concerning whether the word “sudden”, as it is used in CGL policies as aforesaid, imports a temporal component of briefness. For example, that observation was made in the recent case of **Aviva Insurance Co. of Canada v. Intact Insurance Co.**, [2017] O.J. No. 263 (at para 22) although the court in that case found it unnecessary to decide which of the divergent lines of judicial authority is correct.

[58] In American jurisprudence, the South Dakota Supreme Court made the same observation in **Demaray v. DeSmet Farm Mutual Insurance Company**, [2011] 801 N.W. 2d 284 (at para 12). In the latter case, one involving pollutants from

farm waste, the court observed that while several courts in other jurisdictions have interpreted the phrase "sudden and accidental" or similar policy language, there is no prevailing view. After recognizing that "sudden" has multiple dictionary meanings, the court in that case deduced that "sudden", as used in the insurance contract before it, has a temporal meaning (a case distinguishable on its facts).

[59] Counsel for HRM has put before the court all Canadian case authorities able to be located that interpret the policy language of "sudden and accidental". Most of these are found in connection with pollution liability exclusion clauses in CGL policies, with a few in boiler and machinery policies and the occasional property insurance policy. Some are relied upon by HRM; some are distinguished.

[60] The only Canadian appellate authority on the subject able to be located is the endorsement of the Alberta Court of Appeal of the trial court decision in **Edmonton (City) v. Protection Mutual Insurance Co.**, [1997] A.J. No. 149. That case required the judicial interpretation of the words "sudden and accidental" within a boiler and machinery policy arising out of the faulty design of turbine rotors that resulted in cracking damage from fatigue. The court there ruled that the words "sudden and accidental" should be interpreted to mean "unexpected and unforeseen" without importing a temporal element to the phrase in that context.

However, I find this case to be of little precedential assistance because it is distinguishable on the facts, as well as the policy language and its purpose.

[61] Counsel for HRM has also put before the court the three Ontario cases on the subject which date back to the 1980s and 1990. Those three cases, each of which involved leaks from fuel oil tanks, have already been conveniently summarized in the **Aviva** case, supra, which for expedience are here reproduced as follows:

> 24. In *Murphy Oil Co. v. Continental Insurance Co.*, the trial judge found as a fact that water in the well on property owned by the plaintiff in the underlying action was rendered useless for human consumption by reason of the escape of a quantity of gasoline from the area of the underground storage tanks and pipes located on the insured's premises. The trial judge accepted evidence that the underground installation on the insured's premises was defective in that there was leakage from a pipe or pipes and that the gasoline which escaped seeped into the well on the adjacent property of the plaintiff in the underlying action.
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> **25** The trial judge in *Murphy* considered whether the exception to the environmental liability exclusion provision in the applicable policy applied. The trial judge concluded that if a leak occurs in a pipe, it occurs suddenly in the sense that at one point in time the pipe is not defective and at another point in time there is a leak in the pipe. The trial judge decided that, in this context, it was not necessary to consider the cause of the leak. The trial judge decided, therefore, that the exception to the environmental exclusion clause applied.
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> 26. The second Ontario case that addressed the exception to the environmental exclusion clause based upon a sudden and accidental discharge of fuel oil is *Zatko v. Paterson Spring Service Ltd.*, 1985 CarswellOnt 796 (Ont. S.C.). In *Zatco,* there was a settlement with the defendant's insurer but additional property damage was discovered later, and the plaintiffs sued the defendant for damages resulting from the subsequent property damage. The defendant brought a third party claim against its insurer for indemnification for liability for damages caused by the subsequent property damage. The trial judge decided

both (i) whether the defendant was liable to the plaintiffs for damages caused by a flow of oil from property occupied by the defendant, and (ii) whether the defendant was entitled to indemnification from its insurer. The insurance policy had the same environmental liability exclusion provision as the provision in the Aviva 1993-97 Umbrella Policies and the Intact 1983-86 Policy.

27. In *Zatko*, the trial judge found that the oil drained out of the tank over a considerable period of time and gradually, through the action of water, moved towards, onto and under the plaintiffs' property. The trial judge, at para. 33, cited a U.S. case that followed one line of the divergent authorities and concluded that there was "no doubt" that the original escape of oil was sudden and accidental and that the original property damage (that was the subject of the settlement) was covered by the insurance policy. The trial judge held, however, that because the plaintiffs knew about the leak that resulted in the original dispersal, the subsequent property damage was not accidental. The third party claim against the defendant's insurer was dismissed.

28. The third Ontario case that addressed this exception to the environmental exclusion clause is *BP Canada Inc. v. Comco Service Station* 1990 CarswellOnt 637 (Ont. S.C.). This decision was made on a motion for an order declaring that a third party insurer is obliged to defend claims made against its insured.

29. At the hearing of the motion in *BP Canada*, an affidavit was admitted into evidence on consent of the parties. The motion judge, Sutherland J., accepted, for purposes of the motion, that the gas had leaked from a cracked coupling in the storage system on the defendants' property, that the coupling had been defective from the time of its installation, and that the leak had been going on for a considerable although unspecified period of time. Sutherland J. considered the meaning of the term "sudden and accidental" as it is used in the environmental exclusion clause. He reviewed the U.S. authorities as well as the *Murphy* and *Zatko* decisions in Ontario and concluded that the word "sudden" means something more than "undesired, unintended and unexpected". Sutherland J. decided that the term "sudden and accidental" definitely includes a temporal element and is clearly not to be extended to include unintended consequences that are not sudden.

[62] As can be seen, all of these cases involve the interpretation to be given to the phrase “sudden and accidental” as it appears in the exception to the environmental liability exclusion clause in a CGL policy. The first two of these cases are

supportive of HRM's position but are of limited precedential value to this court where again, they are distinguishable on both the facts and the policy language.

[63] The third of these cases, **BP Canada**, is not supportive of HRM's position and indeed is heavily relied upon by the respondents, especially with the profile that this case has been given in the loose-leaf edition of the text *Insurance Law in Canada* authored by Craig Brown and Thomas Donnelly.

[64] In that text (at Ch.18.25), the authors opine that the **BP Canada** case establishes the prevailing view in Canada that the policy language "sudden and accidental" (at least in the context of an exception to the pollution liability exclusion in CGL policies), definitely includes a temporal element. **BP Canada** is described as the leading case in Canada on this point, making the Canadian position now clear (while noting that various American states have differed on whether "sudden and accidental" contains a temporal element).

[65] While the outcome in the **BP Canada** case may be unassailable, it must be recognized that it bears several distinguishing features from the case at bar. It was based on a different fact situation involving a different loss mechanism (leakage of fuel from a defective pipe installed 13 years earlier); it was based on different policy language which did not include the wording "seepage" or "migration" of

contaminants; it relied only on selective case precedents from U.S. jurisprudence; and it was interpreting not a coverage extension in a property insurance policy, but rather an exception to a pollution liability exclusion clause in a CGL policy.

[66] In my view, all of these factors make **BP Canada** distinguishable from the case at bar. At the very least, it is certainly not directly on point here. Where based on this single trial court decision from 30 years ago, I regard it as too sweeping a proposition to say that the Canadian position in law is now clear on this point of inclusion of a temporal element of briefness in the phrase "sudden and accidental" (unless restricted to cases with the same policy language and having a similar factual context).

[67] What this court must now decide, within the **Ledcor** framework, is how this policy language should be interpreted in this factual context, reading this policy as a whole.

[68] It should also be noted that counsel for the insurers has made extensive reference to several cases from the United States in support of their position. Those cases are of such limited assistance to this court that there is no need to delve into a separate analysis of them, particularly where there is a divergent line of authorities in that country, as earlier alluded to, that have largely been excluded.

Suffice it to say that the selected cases in the respondents' Book of Authorities are all distinguishable by different policy wordings (long since discontinued), in different factual contexts, and based on different policy considerations at play used to deny coverage which are not present here. None of these cases are directly on point with the case at bar and in any event, they are not binding on this court.

[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.

[71] That ambiguity is compounded by the policy definitions of "Accident" and "Occurrence" which are recited in paragraphs 29-31 of this decision. In essence, if

an initial accident causes other accidents and all are the result of the same cause, all will be considered as one "accident". Similarly, all damage attributable to one cause, or a series of similar or related causes, will be treated as one "occurrence". These policy definitions do not harmonize with an interpretation of the words "sudden and accidental" that imports a temporal component of briefness of emission of contaminants, thus compounding their ambiguity.

[72] Within the **Ledcor** framework, the court must therefore now turn to the general rules of contract construction which must be employed to resolve that ambiguity. As earlier recited, these rules include that:

(a) The interpretation should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the policy language;

(b) 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 policy was contracted; and

(c) It should be consistent with the interpretations similar insurance policies.

[73] These general rules of construction were applied in **Ledcor** to resolve an ambiguity in the wording of an exclusion clause in a builders' risk policy. The

court therefore examined the purpose behind such policies in determining the parties' reasonable expectations as to the meaning of the exclusion clause. That is to say, the parties' reasonable expectations were informed largely by the purpose of builders' risk policies which is to provide broad coverage for construction projects to promote certainty, stability and peace of mind and to thus avoid construction delays because of disputes. This lead to a policy interpretation in favour of the insured which in that context was considered to align as well with the commercial realities in that industry.

[74] The reasonable expectations of the parties to an insurance contract must be taken to accord with their intent. As further stated in **Ledcor** (at para 78), "The interpretation should respect the intentions of the parties and their objective in entering into the commercial transaction in the first place, as well as promote a sensible commercial result". This passage is quoted in part from the decision of the Supreme Court of Canada in **Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.** [1980] 1 S.C.R. 888 which is worthwhile reproducing here as follows (at pg. 901):

> Even apart from the doctrine of contra proferentem as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the

> insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

[75] Here, of course, we are dealing with a policy of property insurance in which the insured opted to add a pollution clean-up coverage extension with policy limits of $1,000,000. The ostensible reason for adding this coverage was to guard against the fortuitous contingent risk of the escape of fuel stored at the bus depot property from some mishap.

[76] As referred to earlier, HRM was normally dispensing between 23,000 and 25,000 litres of diesel fuel each evening, which required a large fuel storage system. The contingency of the escape of diesel fuel from some triggering event was the only likely means of soil contamination on this property. It represented the most obvious inherent risk of causing such damage in the operation of the bus depot. In the absence of that risk, there would be little purpose in opting for the coverage extension as HRM did.

[77] Counsel for HRM readily acknowledges that there could be no reasonable expectation of coverage in this case if the cause of the loss was any of the following:

(a) From gradual deterioration or breakdown of infrastructure through corrosion, rust, metal fatigue or similar means;

(b) From neglect, indifference or deferred maintenance;

(c) From lack of diligence (and there is insufficient evidence in this case from which an inference of lack of due diligence could be made);

(d) From intentional or deliberate actions of the insured; or

(e) If such contamination was anticipated from normal business operations.

[78] There are obviously sound policy reasons to preclude a reasonable expectation of coverage were the damage to result from any of the foregoing causes. However, the damage in this case was caused by the dual discrete events of an underground pipe that was cut and left uncapped and the inadvertent opening of a manual ball valve in a pipe whose use had been abandoned. That produced the escape of diesel fuel whenever the storage system was activated for fueling the buses.

[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.

[86] As similarly put in **Ledcor**, even if I were to determine that the general rules of contractual interpretation do not clarify the ambiguous wording of the coverage extension clause, I would reach the same conclusion on the basis of the *contra proferentem* rule. That rule, of course, will be applied to construe the ambiguity against insurers as drafters of the insurance policy.

CONCLUSION

[87] In summary, I have concluded that the subject wording in the pollution clean-up coverage extension, read in the context of the policy as a whole, is capable of more than one reasonable interpretation and is therefore ambiguous.

[88] I have further concluded that this ambiguity ought to be resolved in favour of HRM upon the application of the general rules of interpretation for insurance policies.

[89] In the alternative, I would reach the same conclusion in favour of HRM upon the application of the *contra proferentem* rule.

[90] Accordingly, HRM is entitled to a Declaration from this Court that the Decontamination Expense (Pollution Clean-Up) extension added to the policy affords coverage up to the policy limits of $1,000,000 (subject to the policy deductible). It remains for the parties to determine the appropriate quantum of the clean-up costs of the property eligible for indemnity under the policy. Failing agreement on that amount, the court will retain jurisdiction to deal with that matter.

[91] HRM will also be entitled to party-and-party costs of this proceeding. If the parties cannot agree on costs, I invite written submissions from counsel within the next 30 days.

J.