

SUPREME COURT OF NOVA SCOTIA

Citation: *Transport Canpar, L.P. v. 3258042 Nova Scotia Limited*, 2020 NSSC
274

Date: 20201008

Docket: Hfx 450706

Registry: Halifax

Between:

Transport Canpar L.P., by its general partner,
Transforce Administration Inc.

Plaintiff

v.

3258042 Nova Scotia Limited

Defendant

LIBRARY HEADING

Judge: The Honourable Justice C. Richard Coughlan

Heard: March 2, 3, 4, 5, 9 and May 27, 2020, in Halifax, Nova Scotia

Written Decision: October 8, 2020

Subject: Contracts – Landlord and Tenant – Breach of implied term
of lease

Summary: Torts – Negligence – Claim of tenant against landlord
On February 22, 2015, a portion of the roof of a building
owned by the defendant occupied by the plaintiff collapsed.
The plaintiff sued for breach of lease and negligence.

The building did not comply with the *National Building Code* standard for snow load capacity. The defendant did not know if the building complied with the *National Building Code*, did not make any inquires or investigations whether the building complied with the *Code*. No changes, repairs or alterations were made to the roof. The defendant did not have a regime or system in place to inspect the roof for snow and ice, nor did it prior to the collapse, ever inspect the roof for snow and ice buildup.

The plaintiff plead there was an implied term of the lease that the building comply with the *National Building Code* and also the defendant was negligent by failing to monitor the snow load capacity of the roof and to properly clean the roof and remove the snow and ice.

Issues: Did the defendant breach an implied term of the lease that the building comply with the standards set out in the National Building Code?

Was the defendant negligent and did the negligence cause damage to the plaintiff?

Result: The parties intended the lease contain a term that the building comply with the standards set out in the *National Building Code*. The building did not meet the required standard. The defendant breached the implied term. The breach caused damage to the plaintiff.

The defendant was negligent in failing to monitor the snow load capacity of the roof and to properly clean the roof and remove the snow and ice.

Damages were assessed.

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Written Release: October 8, 2020

Counsel: Colin D. Piercey and Sarah A. Walsh, for the plaintiff
Andrew J. Sowerby and Tanner McInnis, for the defendant

By the Court:

[1] The winter of 2014-2015 was not your typical Nova Scotian winter. It was terrible. At first there was not much snow but in late January it snowed and the snow kept coming throughout February and March. On February 22, 2015 a portion of the roof of a building at 180 Thornhill Drive , Dartmouth, Nova Scotia, owned by the defendant 3258042 Nova Scotia Limited (Landlord) and occupied by the plaintiff, Transport Canpar L.P, by its general partner TransForce Administration Inc. (Canpar) collapsed. Canpar commenced action against the Landlord for damages for breach of lease and/or negligence in the design, installation, maintenance and/or repair of the leased premises. The Landlord denies it breached the lease or that its negligence caused the collapse.

Facts

[2] The parties agreed to certain facts in an agreed statement of facts dated January 29, 2020 which is incorporated into my judgment and attached as an appendix.

[3] In addition to the agreed statement of facts, the facts are as follows.

[4] Tour Tech East Limited (Tour Tech) was in the business of providing audio and lighting equipment to the entertainment industry, including production and staging of live events. The Landlord was incorporated to own the real property of Tour Tech. At all material times both companies were owned and controlled by Peter Hendrickson.

[5] In 2011 Tour Tech was operating out of premises at 170 Thornhill Drive, Dartmouth. The operations had outgrown the premises. Scanwood Canada Limited, a manufacturing facility owned property at 180 Thornhill Drive. Scanwood went into receivership. Tour Tech was interested in purchasing 180 Thornhill Drive. Tour Tech received a bid package and Craig Whynot, the comptroller of Tour Tech prepared a bid.

[6] Prior to purchasing the property, Mr. Whynot and Mr. Hendrickson walked through the premises at least twice, probably three times. The premises consisted of two buildings connected by a breezeway. Messrs. Whynot and Hendrickson walked through both buildings. No concerns were identified.

[7] The Landlord did not have any investigations or inspections performed prior to purchase other than the walkthroughs and a phase 1 environmental assessment which was required by its mortgage lender. As a result of the assessment, a fuel tank

had to be removed. In particular, no structural inspection of the building was undertaken.

[8] In November 2011 the Landlord purchased 180 Thornhill Drive.

[9] In 2011 Canpar's terminal was located at 181 Thornhill Drive. It was asked to leave its terminal in the later part of that year. Canpar's leasing agent approached Mr. Hendrickson to determine if there was space for Canpar to rent. Canpar's lease was expiring and it had to move quickly. Mr. Whynot was involved in the rental negotiations for the Landlord. Canpar gave the Landlord a copy of a lease and the Landlord prepared a lease. The Landlord had never leased property before.

[10] Canpar inspected the premises it leased at 180 Thornhill Drive before the commencement date of the lease. Jeffrey Hopper, Canpar's Atlantic Regional Manager, together with Mr. Whynot, Mr. Hendrickson and Robert "Allan" Barrett shop manager of Tour Tech, walked through the premises and checked out tenant improvements. Some walls were taken down, other walls and washrooms put in. None of the walls were load bearing. During the inspection the roof structure was not discussed, neither the Landlord nor Mr. Hopper mentioned it. Mr. Hopper, representing Canpar, did not raise any concerns about the roof structure.

[11] Canpar entered into a lease with the Landlord for the premises at 180 Thornhill Drive for a four year term with a commencement date of February 1, 2012.

[12] On Sunday, February 22, 2015 there was heavy rain. Mr. Barrett arrived at 180 Thornhill Drive between 5 and 6:00 a.m. . He was the first person there. Mr. Barrett got ready for the day. That morning Mr. Barrett and another employee were "chasing leaks" in the gutters of the building. The gutters were blocked with ice and water was running under the lips of the gutters.

[13] Mr. Barrett called Peter Hendrickson, the owner of Tour Tech and the defendant. Mr. Hendrickson arrived around 8:00 a.m.. Mr. Hendrickson brought some other people in. Eventually a loud bang was heard and a rush of water was seen coming out of the sprinkler system – the water was all black. Water was escaping from the sprinkler system approximately six feet from Canpar's premises. The sprinkler system was turned off. Mr. Hendrickson called Jeffrey Hopper at home and told Mr. Hopper a loud noise or bang was heard in Canpar's section of the building. Mr. Hopper quickly drove to 180 Thornhill Drive. When he arrived he opened the front door of Canpar's premises. Nobody had been in the Canpar space. Mr. Hopper and the others entered. Mr. Hopper saw daylight. The roof had collapsed and was laying on the floor. Mr. Hopper viewed the collapse on a video from a security camera which showed the collapse occurred at 10:21 a.m. . It continued to rain all

day. There were no injuries as nobody was working at the time of the collapse. The collapse was in the warehouse portion of the premises, the roof over Canpar's office space did not collapse. Although there were different heights in the roof of 180 Thornhill Drive there were not different heights in the roof of Canpar's space. There were gray and red columns in Canpar's space. The red columns collapsed, the gray columns did not. Mr. Hopper spend the rest of the day arranging equipment for operations and speaking to other Canpar employees and insurance adjusters.

[14] Craig Whynot was called at home. Mr. Whynot arrived at 180 Thornhill Drive around 11:00 a.m. or 12 noon. There was water gushing down the east wall. The main sprinkler pipe was leaking. The power was shut off and the premises evacuated. Mr. Whynot called an insurance adjuster. He saw the roof collapsed in the Canpar space. When he entered the Canpar premises on February 22, 2015 and saw the area that collapsed he saw big chunks of ice all over the place with some snow on top.

[15] The Landlord did not know whether the premises it leased to Canpar complied with the *National Building Code*.

[16] Access to the roofs of the two buildings on the land which includes 180 Thornhill Drive is by ladders through hatches in the roofs. Prior to the collapse Mr. Barrett would go up to repair leaks in the roof in the summer. Mr. Barrett did not go on the roof in the winter.

[17] Prior to the collapse, the Landlord did not have any concerns about the structure of the roof. Canpar did not raise any concerns about the roof with the Landlord. Mr. Hopper saw ice and snow on the roof before the collapse but it did not seem excessive to him.

[18] No changes or additions were made to the roof structure before the collapse.

[19] Before February 22, 2015, the date of the collapse, the Landlord had never removed ice or snow from the roof of 180 Thornhill Drive. The Landlord had never inspected the roof for snow and ice buildup. The Landlord did not have a regime or system in place to inspect for snow or ice on the roof and did not instruct anyone else to inspect the roof for snow or ice.

[20] Canpar had not removed snow or ice from the roof. Mr. Hopper did not consider it Canpar's responsibility.

[21] Pursuant to clause 7.01 of the lease, the Landlord was responsible for "repairs or replacements of a capital or structural nature".

Engineering Evidence

Mr. John Richardson, M.Sc., P.Eng.

[22] Mr. John Richardson, M.Sc., a professional engineer, Vice-President of BMR Structural Engineering Ltd., was qualified to give opinion evidence on the subject of structural engineering, failure analysis, applicable standards and related issues, particularly related to roofs, the structural adequacy of roofs, snow loads and the *National Building Code*.

[23] Mr. Richardson received his M.Sc. Civil Engineering from the University of New Brunswick in 1986. From 1984 to 1986, he was a teaching assistant at U.N.B. during which time he taught courses in structural engineering. In the course of his career since 1986 he has designed over one thousand buildings with structural steel roofs.

[24] Retained to prepare a report on the collapse of a portion of the roof structure of the building located at 180 Thornhill Drive, Dartmouth, which collapse is the subject of the proceeding, Mr. Richardson visited the site in June 2015 by which time the site had been cleaned up and the collapsed roof replaced.

[25] Key to Mr. Richardson's investigation was the report prepared by the late Mr. Archie Frost P.Eng. who prepared a report dated March 7, 2015 concerning the roof collapse. Mr. Frost visited the site on February 25, 2015 and again on March 5, 2015. Mr. Frost's report contained critical information which Mr. Richardson used in preparing his report including building dimensions and construction details. During his visit of March 5, Mr. Frost obtained a sample of a Zed purlin which he measured for profile and metal thickness in order to determine its load capacity. Mr. Frost noted on his first visit two to two-and-a-half-foot depth of snow and ice was to the seen on the roof and amongst the collapsed members of the structure.

[26] Mr. Richardson prepared a report dated May 2, 2019, a report commenting on Mr. Frank Lockyer's report and a supplemental report dated February 27, 2020.

[27] In his initial report Mr. Richardson attached a copy of a data sheet for purlins, manufactured by Butler Manufacturing Company (Canada), Ltd. (Butler Manufacturing), a Pre-Engineered building supplier, which included specifications for a 9.5 inch deep Zed purlin with a thickness of 0.076 inches. Mr. Richardson testified 9.5 inches is not a common size for a purlin. Locally, Butler buildings were very popular. Butler Manufacturing manufactured 9.5 inch purlins which he considered a strong indication the purlins used in the structure of the collapsed roof were made by Butler Manufacturing. Mr. Richardson added the Butler

Manufacturing catalogue was an almost perfect match for the dimensions in Mr. Frost's report only one thousandth of an inch difference in thickness.

[28] In preparing his report of May 2, 2019, Mr. Richardson assumed the Canpar premises was constructed between 1986 and 1996. The parties agreed the premises was constructed during that period. He reviewed the 1980, 1985, 1990 and 1995 editions of the *National Building Code of Canada*. The various editions of the *Code* were adopted by the Province of Nova Scotia, 1985 on March 13, 1987, 1990 on June 24, 1991 and 1995 on April 30, 1997. Given the dates the various editions were adopted by Nova Scotia the 1980, 1985 or 1990 editions could apply in this case.

[29] The *National Building Code* sets out the load a building in a particular location should be designed to carry. The load on a roof is made up of both a dead load and a live load. The dead load is the weight which is always on the roof such as the materials used in constructing the roof and any equipment permanently placed on the roof. Mr. Frost, in his calculations used a dead load of 6 pounds per square foot, Mr. Richardson reviewed the calculation and found that dead load acceptable.

[30] Mr. Richardson calculated the snow load or live load prescribed by the various editions of the *Building Code* for Dartmouth Nova Scotia. Both the 1980 and 1985 editions of the *Code* did not allow for a reduction of the snow load for windswept roofs in Atlantic coastal regions. There were significant changes in prescribed roof snow load calculations in the 1990 edition. One change was to allow roofs to be designed for reduced snow load associated with windswept conditions in Atlantic coastal regions. The windswept conditions allowed for the use of an exposure factor of 0.8 which reduces the snow load.

[31] Using the 1980 and 1985 editions of the *Code*, Mr. Richardson determined the prescribed roof snow load for the subject building at Dartmouth Nova Scotia pursuant to those editions was 36.8 pounds per square foot. The snow load prescribed by the 1990 and 1995 editions of the *Code* for the building was 28.0 pounds per square foot. The reduction in the snow load calculated pursuant to the 1990 and 1995 editions resulted from the allowance in those editions for windswept roofs. *The National Building Code* provides a safety factor in that a building in a particular location is to be designed using a dead load multiple of 1.25 and a snow load multiple of 1.50. The snow design load pursuant to the 1980 and 1985 editions of the *Code* for Dartmouth including multiple is 55.2 pounds per square foot and pursuant to the 1990 edition 42 pounds per square foot.

[32] Purlins are secondary structural members under the primary members which support a roof. Purlin systems can be continuous or simple. Continuous purlin systems span over more than one primary member, simple purlins systems do not go

over a primary member. Continuous purlin systems are stronger and deflect less than simple span purlins. In his report, Mr. Frost's calculations were done on the basis of a simple purlin construction. Mr. Richardson was unable to determine whether the purlins were continuous or simple. Mr. Richardson's report analyzed the purlins two ways, firstly as simple span purlins and secondly as continuous purlins.

[33] The bending moment capacity of a structural member is the amount of load a particular member is designed to carry. Based on data obtained from the Butler Manufacturing Company data sheet for 9.5 inch deep purlins times 0.076 inches thick Mr. Richardson calculated the bending moment capacity of the purlins as 15.2 kip*ft., that is when the purlins will start to fail. When referred to a photograph which appeared to him to show every second purlin braced on one side, Mr. Richardson stated every purlin needed to be braced because if one purlin fails the roof fails.

[34] In his report of May 2, 2019 Mr. Richardson concluded:

Factored bending moments were calculated based on the four potentially applicable editions of the NBCC; namely the 1980, 1985, 1990 and 1995 editions of the NBCC. Since it is unknown to us whether the purlins were simple span or continuous, we calculated bending moments for both conditions. The results are summarized in the following table.

TABLE 2 – CALCULATED FACCTORED BENDING MOMENTS

Edition of the NBCC	Exposure Factor	Simple Span Condition Mf (kip*Ft)	Continuous Condition Mf (kip*Ft)
1980	1.0	26.0	22.9
1985	1.0	26.0	22.9
1990	0.8	20.5	18.1
1995	0.8	20.5	18.1

SIMPLE SPAN PURLINS

Based on simple span purlins and using loads as prescribed by 1980 and 1985 editions of the NBCC, the factored bending moment within the purlins under full Dead and Snow Load would be 26.0 kip*ft. The moment capacity of the purlins was calculated to be 15.2 kip*ft. This means that the design load is 71% higher than the capacity of the purlin.

Based on simple span purlins and using loads as prescribed by 1990 and 1995 editions of the NBCC, the factored bending moment within the purlins under full Dead and Snow Load would be 20.5 kip*ft. The moment capacity of the purlins was calculated to be 15.2 kip*ft. This means that the design load is 35% higher than the capacity of the purlin.

CONTINUOUS PURLINS

Based on continuous purlins and using loads as prescribed by 1980 and 1985 editions of the NBCC, the factored bending moment within the purlins under full Dead Load and applicable Snow Load would be 22.9 kip*ft. The moment capacity of the purlins was calculated to be 15.2 kip*ft. This means that the design load is 50% higher than the capacity of the purlin.

Based on continuous purlins and using loads as prescribed by 1990 and 1995 editions of the NBCC, the factored bending moment within the purlins under full Dead Load and applicable Snow Load would be 18.1 kip*ft. The moment capacity of the purlins was calculated to be 15.2 kip*ft. This means that the design load is 19% higher than the capacity of the purlin.

[35] In summary, Mr. Richardson stated, “Based on calculations completed, the load carrying capacity of the roof purlins was significantly lower than prescribed by the applicable National Building Code”.

Mr. Frank C.S. Lockyer, P.Eng.

[36] Mr. Frank C.S. Lockyer, a professional engineer, was qualified to give opinion evidence in the field of structural engineering on the subject of structural engineering, failure analysis, applicable standards and related issues, particularly related to roofs, the structural adequacy of roofs, snow loads and the *National Building Code*.

[37] In February 2015 Mr. Lockyer was retained to assess the structural integrity of the remaining structure at 180 Thornhill Drive, Dartmouth. At the time, he was not involved with the Canpar premises which had collapsed.

[38] Mr. Lockyer visited 180 Thornhill Drive on February 23, 2015. He arrived at approximately 9:00 a.m. and took a number of photographs between 10:16 and 10:30 a.m. As Mr. Lockyer was not assessing the Canpar premises, he did not spend a lot of time looking at the purlins in the Canpar premises. He did not measure the purlins. Although he saw ice and snow on the perimeter of the building and the collapsed portion of the Canpar premises, he did not measure the snow and ice.

[39] In February 2019, Mr. Lockyer was retained to provide his opinion as to whether the Canpar warehouse roof was designed in accordance with the *Building Code*. In May 2019 he was also asked to provide his opinion whether the snow and ice load on the date of collapse, February 22, 2015, was so large that it exceeded the *National Building Code*.

[40] Mr. Lockyer produced a report dated May 31, 2019, in which he stated it was his opinion the Canpar building met the *National Building Code* requirements and the roof collapse was due to the snow load being well in excess of the design load.

[41] I have difficulty with Mr. Lockyer's evidence for the following reasons:

[42] Although Mr. Lockyer knew the parties agreed the Canpar premises were constructed between the years 1986 and 1996, he only reviewed the 1980 and 1985 versions of the *National Building Code of Canada*. Mr. Lockyer acknowledged on cross-examination he knew the 1990 *Code* could apply to the construction, but he did not review that version in preparing his report.

[43] Mr. Lockyer reviewed the *American Iron and Steel Institute (AISI) Manual: Cold-Formed Steel Design 2002 Edition* in preparing his report "as he did not have other charts readily available". The *AISI* standard did not apply to the construction of the Canpar premises. The standard which applied during the relevant period 1986 to 1996 were versions of the CSA "Cold Formed Steel Structural Members" standard incorporated into the *National Building Code*.

[44] Mr. Lockyer testified he agreed with the measurements taken by Mr. Archie Frost in February and March 2015. Mr. Frost measured the Canpar premises and a sample piece of the Zed purlins used in the construction of the Canpar premises. However, in his report, Mr. Lockyer stated the steel frames were 31 feet apart rather than the 30 feet Mr. Frost measured. On cross-examination Mr. Lockyer agreed it would have been better to use Mr. Frost's measurements. In his report, Mr. Lockyer stated the purlins were spaced 3.64 feet apart. Mr. Frost stated the purlins were spaced 3.69 feet apart. Mr. Lockyer did not measure the spacing of the purlins and agreed on cross-examination his figures concerning spacing were incorrect.

[45] Mr. Lockyer's calculations included the assumption the Canpar roof was windswept. He was not aware of Commentary H to the 1985 *National Building Code* which provided:

17. Similarly, in some Atlantic and Pacific coastal areas where it is known from local climatic data that the maximum snow load may be the result of one or more snowstorms occurring over a short period of time without appreciable winds, the wind exposure factor should be taken equal to 1.0

On cross-examination, Mr. Lockyer agreed if the Canpar roof was not a windswept roof it would have to be designed to 36.8 pounds per square foot and the roof would not meet the *National Building Code* standard.

[46] In his report, Mr. Lockyer stated:

Contrast Engineering has site photographs taken by me and others showing a significant lapping of the roof purlins, about 3 feet beyond the frame, after the collapse to provide support of the assumption that the purlins were properly lapped at the beams.

On cross-examination, Mr. Lockyer agreed he did not measure the lapping of the roof purlins and the lapping cannot be known without measurements.

[47] The calculations in Mr. Lockyer's report were based on incorrect assumptions of the amount of snow and rain which fell in February 2015. He stated in his report that there was 161.3 millimeters of rain in February 2015. In fact, the rainfall in February 2015 was 32.8 millimeters. Mr. Lockyer's calculations of the snow load based on faulty assumptions has no validity. Mr. Lockyer did not measure the amount of snow and ice on the roof, he estimated it.

[48] Mr. Lockyer was also in error as to what the prevailing wind direction was during February 2015 which was from the north not the southeast as set out in his report.

[49] Mr. Lockyer was not careful in the preparation of his report. In addition to the above, he made numerous other errors or omissions. When setting out the material reviewed in order to prepare his opinion, he omitted referring to photographs taken at the site on February 24, 2015. He referred to the report of Mr. John Robertson – the report was prepared by John Richardson. Mr. Lockyer referred to the new rink in Brookfield, Hants County which failed at the same time as the Canpar collapse. The rink was in Brooklyn, Hants County and collapsed in April 2015. Mr. Lockyer stated the Canpar premises was an infill construction, when it was an addition to an existing building and not constructed between two existing structures. The snow load on the Canpar roof which collapsed was arbitrarily estimated by Mr. Lockyer as 60 pounds of ice and 35 pounds of crusty snow. I have no confidence in Mr. Lockyer's report.

[50] Given the above, I am not prepared to attach any weight to Mr. Lockyer's conclusions.

Engineering Conclusion

[51] I find Canpar's premises was a Pre-Engineered building manufactured by Butler Manufacturing. I find the snow design load pursuant to the 1980 and 1985 editions of the *National Building Code* was 55.2 pounds per square foot and 42 pounds per square foot pursuant to the 1990 edition of the *Code*. I accept Mr. Richardson's evidence and find the load carrying capacity of the roof purlins was

significantly lower than prescribed by the 1980, 1985 and 1990 editions of the *National Building Code*.

Amount of Snow

[52] The winter of 2014-2015 was severe. Up to January 26, 2015, based on historical data, there was no accumulation of snow or ice on the roof of the Canpar premises. However, between January 26 and February 22, 2015 there was snowfall of 130.3 centimeters and rainfall of 32.6 millimeters.

[53] During his site visit of February 22, 2015, the late Archie Frost observed two to two-and-a-half feet of snow and ice on the roof and amongst the collapsed members of the structure. The parties have agreed to Mr. Frost's measurements, observations, and photographs as fact without further proof.

[54] Mr. Hopper testified on February 22, 2015 he did not measure the snow. From the road, Mr. Hopper saw the snow and ice on the roof. He said there appeared to be 12 inches of snow and ice on the roof. Six inches of snow with ice below. On cross-examination Mr. Hopper agreed he did not know the amount of ice and snow on the roof on February 22 or 25, 2015. He did not dispute Mr. Frost's observation.

[55] Mr. Whynot testified he was on the roof of 180 Thornhill Drive on either February 22 or 23, 2015. He was fearful the rest of the roof might collapse. He was not on the part of the Canpar roof which did not collapse but observed it from 10 or 15 feet away. He did not measure the depth of the snow and ice. Mr. Whynot thought the snow and ice was around 12 to 14 inches deep. The snow was hard packed with a layer of ice on the bottom. While on the roof they used shovels and sledgehammers to break up the ice. The snow and ice was not higher than the roof ribs. Mr. Whynot thought the accumulation of snow and ice on the collapsed roof was uniform.

[56] Mr. Barrett testified there was a fair amount of snow on the roof.

[57] Mr. Hendrickson testified on February 22, 2015 he saw chunks of ice 4 inches and 8 to 12 inches, big chunks of ice all over the place. There was some snow on top but mostly ice. When he was on the roof on February 23, 2015, he saw a lot of snow and ice on the Tour Tech area. Mainly snow with ice underneath. The day after the collapse there was one foot to 18 inches of snow and ice – two thirds snow with one third ice at the bottom. The depth varied because of drifting.

[58] In his supplemental report dated February 27, 2020 Mr. Richardson, after reviewing photographs and videos taken February 22, 23 and 24, 2015, gave his

opinion the depth of ice and snow on the roof at the time of the collapse varied from eight inches to 12 inches. In support of his opinion Mr. Richardson stated:

1. ...it is my opinion that the depth of snow/ice on the roof varied from about 8” to 12”. The depth of the snow in the photographs and video can be compared against the spacing of the ribs visible in the portion of roof which collapsed. Industry standards for rib spacing in metal roofing such as this are either 16” or 24”. In photograph imagejpeg_2.jpg it can easily be observed that the rib spacing on the original building which did not collapse is much closer than the section of roof which did collapse. The ribs in the original roof which did not collapse are spaced at 16” while the ribs in the collapsed section are spaced at 24”. This rib spacing can be further confirmed by counting the number of ribs between high points in the collapsed roof. By knowing the rib spacing is 24” we can get a good estimate of the depth of snow/ice on the roof.

...

2. From a review of the video file DSCF9526.mov taken on February 24, 2015, there are a number of sections of the video which show the concrete block wall which remained standing along the South-East side of the collapsed area. The physical dimensions of a concrete block are 8” high by 16” long. From this known dimension we can once again determine that the space between the ribs in the section of roof which collapsed is approximately 24” which matches the industry standards and reinforces what was described in Point 1 above.

[59] What was the amount of snow and ice on the Canpar roof at the time of the collapse?

[60] During his February 25, 2015 visit Mr. Frost observed two to two-and-a-half feet of snow and ice on the roof and amongst the collapsed members of the structure. The snow and ice amongst the collapsed members would have come off the roof when it collapsed and collected where it came to rest. Also, after the collapse it continued to rain February 22 and froze over the night into February 23. Mr. Frost’s visit was two days later – February 25. Mr. Frost did not measure the depth of the snow and ice but made his observation.

[61] Both Mr. Hopper and Mr. Whynot were at 180 Thornhill Drive regularly during the week after the collapse and gave their opinions as to the depth of ice and snow. Mr. Hopper 12 inches and Mr. Whynot 12 to 14 inches. Mr. Hopper stated he did not believe there was two-and-a-half feet of snow on the roof. They both had ample opportunity to make their observations. Messers Hopper and Whynot gave their evidence in a straightforward, thoughtful manner. Their evidence is supported by Mr. Richardson’s opinion and the photographs and videos referred to in his supplemental report that the depth of snow and ice was not two or two-and-a-half feet deep.

[62] I do not have confidence in Mr. Hendrickson's evidence as to the depth of the snow and ice. At the time he was distracted by business difficulties. He testified that on February 22 he saw snow on top but mostly ice; but on February 23 when he was on the roof he saw mainly snow with ice underneath.

[63] After considering all of the evidence as to the depth of snow and ice on the Canpar roof at the time of the collapse, I find there was approximately 12 inches of snow and ice on the roof at the time of the collapse.

Weight of Snow

[64] In his report dated August 15, 2019 Mr. Richardson discussed the weight of snow and rain stating:

If the building was designed/constructed between 1986 and June 24, 1991, the design snow load would be 36.8 PSF, however if the building was designed/constructed between June 24, 1991 and 1996, the design snow load would be 28 PSF. We know that on January 26, 2015 there was no snow or ice on the roof based on historical data. From January 27 – January 31, 2015, there was a total snowfall of 19 cm and a total rainfall of 1.0 mm. From February 1 – February 22, 2015, there was a total snowfall of 111.3 cm and a total rainfall of 31.6 mm. The total snowfall between January 26, 2015 and February 22, 2015 was 130.3 cm (51.3 inches). The total rainfall between January 26, 2015 and February 22, 2015 was 32.6 mm (1.28 inches). The density of freshly fallen snow varies but is generally accepted to be approximately 100 kg per cubic meter which is equivalent to 6.3 pounds per cubic foot (PCF). When we add up all the snow and rain that fell between January 26, 2015 and February 22, 2015, ignoring blow off and melting, we have 4.275 feet of snow at 6.3 PCF = 26.93 PSF. The total rainfall in the same period is 1.28 inches (0.107 feet). The weight of 0.107 feet of water at 62.4 PCF = 6.66 PSF. Adding the snow to the rain would give a total of 33.6 PSF.

[65] Although the weight of snow does not increase, the density of snow can change which affects its weight per inch. Commentary "G" of the Structural Commentaries of the *National Building Code 2015* addresses the specific weight of snow on the ground as follows:

4. Falling snowflakes usually consist of very large complex ice crystals. Because of their large ratio of surface area to weight, they fall to the ground relatively slowly. On arrival, this snow accumulates in a loose and fluffy layer with a specific weight, "y", of about 0.5 to 1.0 kN/m³. Immediately, however, the snow crystals start to change: the thin, lacy, needlelike projections begin to sublime and the crystals become smaller, irregularly shaped grains. Settlement of the snow results and the specific weight, "y", increases after a short time to about 2.0 kN/m³ or greater, even at temperatures below the freezing point. The specific weight of the snowpack continues to increase with age, ranging from 2.0 to 5.0 kN/m³. As

explained in NBC Appendix C of Division B, average values for seasonal snowpacks have been derived for different regions across the country for use in the ground snow load calculations. The snow surveys from which “y” is derived are made up to four times per month. While the survey measurements reflect to some extent the portion of rainfall that is trapped in the snowpack over a period of time, only a small proportion of measurements would have been made directly after a rainfall. Therefore, the measurements probably do not adequately represent the short-term specific weight increase due to the wetting of snow by rain; for this reason, the rain load, “S_r” is included in the calculation of roof snow loads.

[66] On cross-examination, Mr. Richardson agreed as it compacts, snow becomes denser and the weight of snow increases with age. Commentary “G” states the weight of the snowpack continues to increase with age, ranging from two to five kilonewtons per cubic meter. Mr. Richardson agreed two kilonewtons weight approximately 2.8 pounds per cubic foot and five kilonewtons approximately 32.1 pounds per cubic foot. He also agreed rain will further increase the density of snow. It rained both before and after the roof collapse on February 22, 2015. Mr. Richardson agreed ice weighs 57.3 pounds per square foot.

[67] The weight of the approximately 12 inches of snow and ice on the roof at the time of the collapse would vary depending on the density of the snow and the amount of ice present. For example, if there was four inches of ice and eight inches of snow weighing five kilonewtons, the top of the snowpack weight range, the resulting weight of the snow and ice would be 40.5 pounds per square inch. I find on a balance of probabilities the weight of the snow and ice on the roof at the time of the collapse was less than the 42 pounds per square foot snow load capacity required by the 1990 edition of the *National Building Code*.

Roof

[68] The part of the building occupied by Canpar was in an addition to the original structure. The addition was built between 1986 and 1996. The roof was flat. The roof which collapsed was from 12 to 18 inches lower than the adjacent roof.

[69] The 1990 edition of the *National Building Code* provided the design snow load required increased if the height differential between adjacent low and high roofs was one foot three inches or more. As the evidence is that the difference in height of the roofs was from 12 to 18 inches, I am not satisfied the height differential was one foot three inches or more. Consequently, no increase in the required snow load for height differential is justified.

Analysis

[70] Canpar says there is an implied term in the lease of the premises that the premises be reasonable fit for occupation, such that it would be designed and constructed in accordance with the standards set out in the *National Building Code*. Further, Canpar says the Landlord breached the implied term of the lease.

[71] The test for finding an implied term of a contract was set out by Iacobucci J., in giving the Court's judgment in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.* [1999] S.C.J. No 17 at paras. 27 and 29:

27. ...The general principles for finding an implied contractual term were outlined by this Court in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711 (S.C.C.). Le Dain J., for the majority, held that terms may be implied in a contract: (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" (p.775). See also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.) at para. 137, *per* McLachlin J., and *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 (S.C.C.), at p. 1008, *per* McLachlin J.

...

29. As mentioned, LeDain J. stated in *Canadian Pacific Hotels Ltd.*, *supra*, that a contractual term may be implied on the basis of presumed intentions of the parties where necessary to give business efficacy to the contract or where it meets the "officious bystander" test. It is unclear whether these are to be understood as two separate tests but I need not determine that here. What is important in both formulations is a focus on the intentions of the *actual* parties. A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of *reasonable* parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis. As G.H.L. Fridman states in *The Law of Contract in Canada* (3rd ed. 1994), at p.476:

In determining the intention of the parties, attention must be paid to the express terms of the contract in order to see whether the suggested implication is necessary and fits in with what has clearly been agreed upon, and the precise nature of what, if anything, should be implied.

[72] Canpar submits the basis for implying the term is the presumed intention of the parties by virtue of the "officious bystander" test. The onus of establishing an implied term on this basis is on the party seeking to establish the term. In this case, Canpar.

[73] The lease in question has numerous references to requiring building approvals from various governmental authorities for work undertaken by one of the parties. Clause 7.06 of the lease deals with construction and alterations which may be undertaken by Canpar and work to be completed by the Landlord. The clause provides “All common area changes to meet all construction code requirements, including the demising walls”. Other clauses which require approvals from statutory authorities are 4.04, 6.01 and 7.05.

[74] Compliance with building codes is required to obtain permission from government regulatory authorities to legally occupy buildings.

[75] It would make no sense to require all alterations or repairs to comply with building codes, if the leased premises did not comply with the code requirements. If the parties required alterations and repairs comply with building codes, as they did, they would, if asked, have assumed the leased premises complied with the Building Code.

[76] Given the terms of the lease and the fact it would make no commercial sense to lease premises without an implied term the building was designed and constructed in accordance with the *National Building Code*, I find the parties intended the lease contain an implied term the leased premises be designed and constructed in accordance with the standards set out in the *National Building Code*. I further find the lease contains that implied term. The implied term is necessary to give business efficiency to the lease and meets the officious bystander test.

[77] In this case the Landlord did not design or construct the premises. The Landlord did not repair, alter or change the roof on the premises at any time. Is the Landlord responsible for a breach of the implied term if the roof did not comply with the *National Building Code*?

[78] The Landlord was in the business of leasing commercial property. The Landlord knew, as Mr. Hendrickson testified, the property was purchased on an “as is, where is” basis. The Landlord knew of the risks when it purchased 180 Thornhill Drive. Mr. Hendrickson testified, nothing prevented the Landlord from further investigation of the property. The only investigation the Landlord undertook was an environmental assessment required by its lender. The Landlord could have made inquiries with municipal planning authorities to review building permits and plans. In the absence of such documentation the Landlord could have retained a structural engineer to examine the structure to ensure it met *Code* requirements. The Landlord did not take any such steps.

[79] The premises in question were constructed between 1986 and 1996. The standard of construction which the Landlord has to meet is the lowest standard during the period 1986 to 1996. The lowest standard with regard to snow load during that period was that set out in the 1990 edition of the *National Building Code* which is 42 pounds per square foot.

[80] As set out above, I accepted Mr. Richardson's evidence the load carrying capacity of the roof purlins was lower than prescribed by the 1990 edition of the *National Building Code*. The roof was not constructed to the standard set out in that edition of the *Code*. The implied term of the lease was breached by the Landlord. Given my finding of fact that the load on the roof at the time of the collapse was less than the load the building was required to support to comply with the 1990 edition of the *National Building Code*, the breach of the implied term caused the roof to collapse. If the roof met the standard in the *Code* the roof would not have collapsed.

[81] Clause 10.01 of the lease provides:

10.01 **Non-Liability of Landlord.** The Tenant agrees that, save for cases of negligence or misconduct by the Landlord, the latter will not be liable or responsible in any way for any personal injury that may be sustained by the Tenant or any employee or agent or customer of the Tenant, or any other person who may be upon the Premises or on the Common Area or sidewalks, parking areas, highways, or loading areas adjacent thereto, or for any loss or damage or injury to, property belonging to or in the possession of the Tenant or any employee or agent or customer of the Tenant or any other person, and without limiting the generality of the foregoing, the Landlord will not be liable or responsible in any way for any injury, loss or damage to person or property caused by smoke, steam, water, ice, rain, snow, or fumes which may leak, issue or flow into through or from the Premises or from the water sprinkler, drainage or smoke pipes or plumbing equipment therein or from any other place or quarter or caused by or attributable to the condition or arrangement of any electrical or other wiring or the air-conditioning equipment or by reason of the interruption or stoppage of any public utility or service or, for any matter or thing of whatsoever nature or kind arising from the Tenant's use and occupation of the Premises or otherwise.

[82] The Landlord submits clause 10.01 provides non-liability of the landlord for injury, loss or damage to persons or property caused by, amongst other things, ice, rain or snow leaking, issuing or flowing into, through or from the premises. It says the lease specifically excludes liability on it in any way if snow enters the premises and that is what happened in this case.

[83] Canpar submits clause 10.01 contemplates damage from leaks. Its claim does not arise from leaks or flooding, but rather a collapse of the roof. The collapse did not occur because of Canpar's use or occupation but from an inherent defective

feature of the roof design. Clause 10.01 does not apply to exclude the Landlord's liability for a collapse of the roof. Canpar goes on to submit, in any event, the clause does not apply in light of the Landlord's negligence.

[84] In giving the majority judgment in *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)* 2010 SCC 4, Cromwell J., adopted the analytical approach to use when determining the applicability of an exclusion clause set out by Binnie J. in giving the minority judgment at paras. 121 to 123:

[121] The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.

[122] The first issue, of course, is whether as a matter of interpretation the exclusion clause even *applies* to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.

[123] If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

[85] Clause 10.01 includes the words "or, for any matter or thing of whatsoever nature or kind arising from the Tenant's use and occupation of the Premises or otherwise" after setting out specific exclusions all of which relate to leaks or other sources of damage caused or arising from the operation or use of the leased premises.

[86] In looking at the lease as a whole, it is clear that parties' intention was any construction, alterations, or repairs meet all *Code* requirements. The exclusion clause deals with damage caused by or arising from the operation or use of the leased premises. The damage suffered by Canpar is the result of the breach of the implied term that the building comply with *Code* requirements, and did not arise from or caused by the use, operation, or occupation of the leased premises.

[87] It is also necessary to consider the exclusion clause in light of the requirement to obtain permission from governmental regulatory authorities before occupying a building. It would not be in the contemplation of the parties that the clause applied to damage caused by the collapse of the roof due to a breach of the implied term that the building comply with the *National Building Code*.

[88] If I am wrong in finding the clause does not apply, I will go on to address whether the Landlord was negligent.

[89] The elements of negligence were set out by McLachlin C.J.C. in giving the Court's judgment in *Mustapha v. Culligan of Canada Ltd.* 2008 SCC 27 at para. 3:

A successful action in negligence requires that the plaintiff demonstrate (1) that the defendant owed him a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach.

[90] There is no question the relationship between the parties in this case is one in which the defendant owes the plaintiff a duty of care. A landlord owes a duty of care to its tenant. Here, the Landlord owes a duty of care to Canpar. It is reasonably foreseeable if premises were constructed without capacity to withstand the minimum snow load as required by the *National Building Code* a buildup of snow and ice could cause damage to the premises and cause the type of damage claimed by Canpar.

[91] Did the Landlord breach its duty to Canpar?

[92] The roof of the commercial premises which is the subject of this proceeding is flat.

[93] Peter Hendrickson was the owner of the Landlord at all relevant times. Mr. Hendrickson knew 2015 was an unusual year. There had been nothing like 2015 before. He had never seen so much snow on the roof until 2015. He noticed a tremendous amount of snow that year. Mr. Hendrickson knew the roof of the Halifax Curling Club collapsed as the collapse was reported on the news. A C.B.C. news item dated February 15, 2015 about the Halifax Curling Club roof collapse was entered into evidence. The Curling Club roof collapse occurred by February 15, 2015. I find Mr. Hendrickson knew prior to February 22, 2015 of the collapse of the roof of the Halifax Curling Club.

[94] Prior to the collapse on February 22, 2015 the Landlord did not conduct regular inspection of the roof or structure. The Landlord did not go up on the roof and inspect it for ice and snow. The Landlord did not have a regime in place to deal with snow and ice on the roof. The Landlord had access to the roof. There was a hatch and ladder which provided access. Prior to the collapse, Mr. Barrett used the ladder and hatch for access to repair leaks in the roof in the summer. The ladder and hatch are how Mr. Hendrickson and others accessed the roof on February 23, 2015 to remove snow and ice.

[95] Knowing the unusual snow conditions in the winter of 2015 and being aware of the collapse of the Halifax Curling Club roof and all the evidence, I find a reasonable landlord would be aware that if it breached the standard of care by failing to monitor the snow load capacity of the roof and to properly clean the roof and remove snow and ice from it the roof could collapse and its tenant suffer damage. Being aware of the excessive snowfall and the prior roof collapse (Halifax Curling Club) a reasonable landlord would have checked the amount of snow and ice on the roof. The evidence shows, and I find, the Landlord breached the standard of care it owed Canpar as its tenant.

[96] Canpar must establish the Landlord's negligence caused the injury to its property. The test to establish causation in a negligence claim was described by McLachlin C.J.C. in giving the majority judgment in *Clements (Litigation Guardian of) v. Clements* 2012 SCC 32 at paras. 8 to 11:

8. The test for showing causation is the “but for” test. The plaintiff must show on a balance of probabilities that “but for” the defendant's negligent act, the injury would not have occurred. Inherent in the phrase “but for” is the requirement that the defendant's negligence was *necessary* to bring about the injury – in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

9. The “but for” causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. See *Wilsher v. Essex Area Health Authority*, [1988] A.C. 1074 (U.K.H.L.) at p. 1090, *per* Lord Bridge; *Snell v. Farrell*, [1990] 2 S.C.R. 311 (S.C.C.).

10. A common sense inference of “but for” causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss. See *Snell and Athey v. Leonati*, [1996] 3 S.C.R. 458 (S.C.C.). See also the discussion on this issue by the Australian courts: *Betts v. Whittingslowe*, [1945] H.C.A. 31, 71 C.L.R. 637, at p. 649; *Bennett v. Minister of Community Welfare*, [1992] H.C.A. 27, 176 C.L.R. 408 (Australia H.C.), at pp. 415-16; *Flounders v. Millar*, [2007] NSWCA 238, 49 M.V.R. 53; *Roads and Traffic Authority v. Royal*, [2008] H.C.A. 19, 245 A.L.R. 653, at paras. 137-44.

11. Where “but for” causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant's negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable. As Sopinka J. put it in *Snell*, at p. 330:

The legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of

causation may be drawn although positive or scientific proof of causation has not been adduced. If some evidence to the contrary is adduced by the defendant, the trial judge is entitled to take account of Lord Mansfield's famous precept [that "all evidence is to be weighed according to the proof which it was in the power of one side to have produced, and in the power of the other to have contradicted" (*Blatch v. Archer* (1774), 1 Cowp. 63. 98 E.R. 969, at p. 970)]. This is, I believe, what Lord Bridge had in mind in *Wilsher* when he referred to a "robust and pragmatic approach to the...facts" (p.569).

[97] I found the load carrying capacity of the roof purlins was significantly lower than prescribed by the 1990 edition of the *National Building Code* and it was a breach of the standard of care the Landlord owed to Canpar that the Landlord failed to monitor the snow load capacity of the roof and to properly clear the roof and remove the snow and ice from the roof. I find that but for the Landlord's breach of the standard of care, Canpar would not have suffered the damage to its property. The property damage suffered by Canpar was caused by the Landlord's breach of the standard of care. All essential elements of negligence having been established I find the Landlord was negligent.

[98] The Landlord being negligent clause 10.01 does not apply to Canpar's claims.

[99] In its statement of defence, the Landlord plead section 11.04 of the lease which provides:

Subrogation. The Landlord and Tenant will each cause any insurance policy obtained by it pursuant to this Lease to contain a waiver of subrogation clause in favour of the Landlord and Tenant, as the case may be.

[100] In its pre-trial brief, the Landlord submitted although Canpar did not advance a subrogated claim, it was in the reasonable contemplation of the parties that upon entering the lease, Canpar would seek recovery of any damages to its property from its insurer and not the Landlord.

[101] Canpar submitted clause 11.04 did not apply as its claim is not a subrogated claim. Canpar has not made an insurance claim and has not been reimbursed by any insurance company for losses arising out of the roof collapse. Secondly, no evidence has been adduced to support the Landlord's submission or whether any policy was available which would have covered the loss suffered by Canpar.

[102] The Landlord did not adduce any evidence in support of its position. Clause 11.04 does not provide a defence to Canpar's claims.

[103] As set out above, I find Canpar proved its claims against 3258042 Nova Scotia Limited for both breach of contract and negligence.

Damages

[104] I will now address the damages suffered by Canpar.

[105] The amount of damages claimed by Canpar for the following items are not contested by the Landlord:

Payee	Reason	Amount
Dora Construction Ltd.	Electrical associated with rewiring of conveyor.	\$9,636.92
G. Veinot Metal Fabrication Ltd.	Salvage amount paid for 5 trucks written off.	\$(5,250.00)
Jamesway Environmental Services	Property Clean up following the collapse	\$11,853.05
Archie Frost	Engineering Fees regarding opinion on the cause of the collapse.	\$2,175.80
Cuvelier Home Improvements	Cost to reconstruct office premises following collapse	\$36,925.35
Independent Auto Appraisal Ltd.	Cost of Evaluation report & appraisal fees on damaged vehicles.	\$2,285.00
Container & Trailer Services Ltd.	Cost of repair of delivery truck – unit 127124	\$11,450.41
AvisCar Inc.	Rental of vehicles to carry on delivery business following damage to delivery trucks after collapse	\$1,436.78
BudgetCar Inc.	Rental of vehicles to carry on delivery business following damage of delivery trucks after collapse.	\$998.09
Discount Car and Truck Rentals	Rental of vehicles to carry on delivery business following damage to delivery trucks after collapse.	\$3,851.66

Ryder Truck Rental Canada Ltd.	Rental of vehicles to carry on delivery business following damage to delivery trucks following collapse.	\$742.91
JS Print and Design Ltd.	Replacement of exterior sign following collapse	\$353.05
Tyco Integrated Fire & Security Canada, Inc.	Rewiring broken security wires, installing two zone expanders, reconnect devices, program and test system, lift included.	\$3,950.00

[106] However, the Landlord disputes the amounts claimed by Canpar as the actual cash value of five damaged delivery vans and the cost to replace the parcel conveyor system.

[107] Mr. Hopper testified he drove all the vehicles for which damages are claimed every month or two when they needed repairs or service. The vehicles had vehicle inspections, regular 5,000-kilometer oil changes, and twice a year underwent inspection entailing a 123 point checklist which included checking breaks and gauges. Repairs to vehicles were made as needed. Mr. Hopper enforced the maintenance schedule for vehicles. I accept Mr. Hopper's evidence as to the maintenance of the vehicles. He was of the opinion the vehicles were in great condition.

[108] Canpar had the vehicles appraised by Bill Heighton of Independent Auto Appraisal Ltd. Mr. Heighton, who inspected the vehicles, found they were in good condition. Unfortunately, Mr. Heighton died prior to the trial.

[109] Mr. David Rodgers was qualified to give opinion evidence as an automobile appraiser relating to all vehicles including trucks and able to give appraisals on the value of vehicles. He reviewed the appraisals of Canpar's vehicles prepared by Mr. Heighton and prepared a report dated June 25, 2019. He agreed with Mr. Heighton's appraisals. Mr. Rodgers did not see or inspect the vehicles appraised by Mr. Heighton. Mr. Rodgers did not review the maintenance records of the vehicles. He testified he did not use auction prices to appraise a vehicle.

[110] Elliot M. Offman, an appraiser with Castle Appraisals Ltd., was qualified to give opinion evidence in the field of appraising motor vehicles and related issues. Mr. Offman prepared a report dated November 26, 2017 in which he appraised vehicles owned by Canpar which were damaged when the roof of the Canpar premises collapsed. His valuations of five of the vehicles damaged were referred to in this proceeding. They are as follows:

2003 Ford Utilimaster E350 Step Van Vin# 340,805 km. damage repair cost \$6,430.35. Independent Auto Appraisers Ltd. Total Loss Report retail value is \$9,723.34. Ritchie Bros Comparison (Edmonton Dec 8,2016) 2004 Ford E350 Utilimaster Step Van 344,370 km \$2,000.00, 221,616 km \$2,500.00.

2004 Ford E450 Utilimaster Step Van Vin#1FCLE49L24HB40190, 481,044 km, damage repair cost \$18,456.70. Independent Auto Appraiser Ltd. Total Loss Report retail value \$16,163.34. Ritchie Bros. same as above, this vehicle may be worth \$3,750.00.

2008 Freightliner Step Van Vin #4UZ88RDU28CAJ4624 134,977 km damage repair cost \$19,024.24. Independent Auto Appraiser Ltd. Total Loss Report full retail value \$32,325.00. this vehicle has a Cummins diesel engine with an average life expectancy between 850,000 & 1,000,000 kms. Ritchie Bros. auction value \$27,500.00. Repairing the vehicle is the most economical course of action.

2006 Ford E-450 Utilimaster Step Van Vin#1FCLE49L660A50924 263,927 km damage repair cost \$10,792.39. Independent Auto Appraiser Ltd. Total Loss Report retail value \$18,900.00. Ritchie Bros Comparison same type & year vehicle sold \$8,900.00 but only had 38,000 km Sept. 14, 2016. Working Realistically the vehicle was probably worth \$7,000.00 to \$7,500.00 at the time of loss.

2004 Ford E450 Utilimaster Step Van Vin#1FCLE49L64HB400192 203,000 km damage report cost \$20,640.77. Independent Auto Appraiser Ltd. Total Loss Retail Report value \$17,333.00. This vehicle had an auction value of \$5,500.00 at the time of the loss.

[111] In preparing his report, Mr. Offman reviewed the documents contained in the report prepared by Independent Auto Appraisal Ltd. He focused on the first page of the appraisal of the vehicles by the late Mr. Bill Heighton. Mr. Offman looked at the bottom line figure. Mr. Offman did not examine the vehicles he appraised stating he did not need to examine them. He considered the age, mileage and use of the vehicle. The mileage and age of the vehicle are most important. Vehicles in the delivery service industry which are usually driven over 20,000 kilometers a year are classified as rough. He considered the life expectancy of a gas engine after 450,000 kilometers is not a lot, diesel engines can have more mileage perhaps as much as a million kilometers. To arrive at his valuation of the vehicles, Mr. Offman used auction values which he obtained from Ritchie Bros., a large auction company. A vehicle sold at an auction is sold without warranties “as is, where is”.

[112] On cross-examination Mr. Offman agreed his review of the Independent Auto Appraisal Ltd. appraisals, which is called a “desk top appraisal”, is inferior to an appraisal where the appraiser examines a vehicle. He stated in his report:

The client should note, a desk-top appraisal frequently leads to higher losses in a default situation since the assets were never properly confirmed or physically inspected.

[113] Mr. Offman classified the vehicles as being in rough condition because of their higher mileage. In preparing his report he stated he did not have maintenance records for the vehicles. Mr. Offman agreed on cross-examination that regular maintenance is good. A vehicle's state of repair could have a significant effect on its value.

[114] I do not accept because of their higher mileage the vehicles were in "rough" condition. Considering the maintenance the vehicles received and the evidence as a whole, I find the vehicles were in good condition.

[115] The value Canpar should receive is the price which a willing seller would be expected to receive from a willing buyer after the property, in this case the vehicles, have been exposed to the market for a reasonable period of time (see *Canadian Imperial Bank of Commerce v. R. England's Warehouse Ltd.* 1996 NSCA 22 para 54). An auction would not often result in such price being realized. I do not accept "auction values" as an appropriate price for the vehicles in this case.

[116] The following are the sums Canpar will receive for the vehicles.

[117] **2003 Ford Utilimaster Van Unit 027114** - Based on sale listings Mr. Heighton appraised the value of the vehicle at \$9,723.00 by taking an average of the listings. On review, Mr. Rodgers agreed with the valuation. A listing is what a seller hopes to obtain on the sale. As Warner J. said in *Pothier v. Pothier* 2017 NSSC 230 at para. 59: "As a matter of common sense, assets are listed for more than the hoped for sale price". Based on the evidence I find the value of the vehicle was \$8,750.70.

[118] **2004 Ford Utilimaster Van Unit 047157** – Based on the average of the sale listings, Mr. Heighton appraised the value of the vehicle at \$16,163.34. On the same basis as unit 027114 considering the evidence, I find the value of the vehicle was \$14,547.00.

[119] **2008 Freightliner Utilimaster Van Unit 084717** – Based on the average of the sale listings, Mr. Heighton appraised the value of the vehicle as \$32,325.00. a quote to repair the vehicle of \$19,024.24 was received by Canpar. The vehicle could have been repaired by Canpar for \$19,024.24. It did not repair the vehicle. The amount Canpar will recover is \$19,024.24, the amount for which it could have repaired the vehicle.

[120] **2006 Ford Utilimaster Van Unit 067186** – Based on the average of the sale listings Mr. Heighton appraised the value of the vehicle at \$18,900.00. On the same basis as Unit 027114, considering the evidence, I find the value of the vehicle was \$17,010.00.

[121] **2004 Ford Utilimaster Van Unit 047159** – Based on the average of the sale listings, Mr. Heighton appraised the value of the vehicle at \$17,333.00. On the same basis as Unit 027114, considering the evidence, I find the value of the vehicle was \$15,600.00

[122] Douglas Reynolds, Canpar's National Manager of Buildings, Equipment and Engineering testified. Canpar uses parcel conveyors to move boxes and parcels within a building. Included in his duties is the design and construction of parcel conveyors. The parcel conveyor in Canpar's facility at 180 Thornhill Drive was installed in 2011 by Canpar employees stationed in Ontario. Mr. Reynolds and two Canpar employees were present when the conveyor was installed in 2011 at a cost of \$20,701.60. The roof collapse of February 22, 2015 damaged the conveyor. The collapsed roof bent the frame of the conveyor, compressing its legs which took the conveyor out of alignment, distorting the conveyor. The conveyor was beyond repair as the rollers and shaft would not stay true.

[123] The conveyor was replaced in 2016. The replacement conveyor was the same length as the 2011 conveyor. The width of the new conveyor was 36 inches wide on five-foot centers, whereas the 2011 conveyor was 39 inches wide with 10-foot centers. The new conveyor had slightly less surface and its weight capacity was less than the 2011 conveyor. The difference had minimal impact on Canpar's operations. Canpar paid Rolmaster Conveyors \$34,128.78 for the 2016 conveyor.

[124] The new conveyor was installed by two Canpar mechanics based in Whitby, Ontario. Mr. Reynolds testified it took 70 hours to install. The mechanics are billed at \$40 per hour for a cost of \$2,800.00. Mr. Reynolds estimated their flights to Nova Scotia cost \$600 each, meals were estimated at \$100 per day per employee for three days totalling \$600 and hotels at \$100 per day for three days totalling \$600.

[125] Mr. Reynolds testified conveyor systems will last as long as they are maintained. No parts can wear out that cannot be replaced. Conveyors could be kept going indefinitely. The 2011 conveyor at 180 Thornhill Drive was well maintained. Canpar had conveyor systems which had operated for more than 40 years. These conveyors are not hooked up to computers.

[126] Canpar is seeking payment from the Landlord of \$34,128.78 being the cost of the 2016 conveyor and \$5,200.00 being the cost of installing the conveyor.

[127] The replacement of the conveyor system was made necessary by the collapse of the roof. Canpar is to receive the cost of purchasing the new conveyor system. However, Canpar has received a new conveyor replacing the conveyor installed in 2011. The amount to be recovered by Canpar is to be reduced by 10 percent to

account for wear and tear on the existing conveyor system. The Landlord is to pay Canpar \$30,715.90 as the price of the new conveyor system less depreciation.

[128] Canpar is seeking \$5,200.00 as the cost of installing the new conveyor. Canpar did not provide receipts or other documentation supporting its claim for the flights, hotels or meals. In the ordinary course of business, Canpar would have records showing the amounts it paid or reimbursed its employees for the cost of the flights, hotels and meals it is claiming. No such records were introduced into evidence. Canpar has not proved its claim for the cost of the flights, hotels and meals. I accept Mr. Reynold's evidence it took 70 hours to install the new conveyor and the mechanics are billed at \$40 per hour. Canpar claim for the labour to install the new conveyor is allowed in the amount of \$2,800.00.

[129] In summary, Canpar will recover the following damages:

Amount of items agreed to by parties	\$80,409.92
2003 Ford Utilimaster Van Unit 027114	\$8,750.70
2004 Ford Utilimaster Van Unit 047157	\$14,547.00
2008 Freightliner Utilimaster Van Unit 084717	\$19,024.24
2006 Ford Utilimaster Van Unit 067186	\$17,010.00
2004 Ford Utilimaster Van Unit 047159	\$15,600.00
Cost of new conveyor less deduction	\$30,715.90
Labour claim allowed for installation of conveyor system	\$2,800.00
TOTAL	\$188,856.86

[130] 3258042 Nova Scotia Limited shall pay damages in the amount of \$188,856.86 to Canpar.

[131] If the parties are unable to agree, I will hear them on the issues of pre-judgment interest and costs.

Coughlan, J.

APPENDIX

2016

Hfx No. 450706

Supreme Court of Nova Scotia

Between:

Transport Canpar L.P., by its general partner,
Transforce Administration Inc.

Plaintiff

and

3258042 Nova Scotia Limited

Defendant

AGREED STATEMENT OF FACTS

INTRODUCTION

1. On February 22, 2015, a portion of the roof of the premises located at 180 Thornhill Drive collapsed (the "Collapse").
2. The Plaintiff retained Archie Frost, P. Eng. (now deceased) who attended the scene on February 25, 2015 to inspect the site conditions following the Collapse. Mr. Frost took measurements and made observations at his site inspection. The parties have agreed to Mr. Frost's measurements, observations, and photographs (set out below and attached) as fact without further proof.
3. The Plaintiff retained an appraiser, Bill Heighton (now deceased) who personally inspected six vehicles that were damaged in the Collapse. The parties have agreed to certain of Mr. Heighton's observations as fact, as set out below.

ROOF CONFIGURATION AND MEASUREMENTS

(a) The Premises

4. The portion of premises that collapsed was a pre-engineered steel framed addition to the main building structure, measuring approximately 61 feet x 150 feet (the "Premises").
5. The Premises was formed with six structural steel portal frames that covered a 60'-9" width and were spaced at 30 feet centre to centre.
6. There was no side wall framing attached to the portal columns. The right wall and far wall of the Premises (as depicted in the photograph at Tab 1) were formed by the 8" concrete block side wall of the adjacent building.

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7. The left wall of the Premises (as depicted in the photograph at **Tab 2**) made use of the metal wall cladding of an existing building on that side.
8. The front is closed off by a post-and-beam addition that contains up-and-over doors clad with metal wall cladding (as depicted in the photograph at **Tab 3**).
- (b) The Steel Portal Frame Columns**
9. The steel portal frame columns on the right side were cross-braced in one 30-foot bay using steel rod bracing.
10. The portal frame columns on the left side were braced in two 30-foot bays using steel cables.
- (c) The Zed Purlins and Concrete Plinths**
11. The roof of the Premises was supported using 16 pressed metal Zed purlins and two eaves members.
12. The Zed purlins and eaves members span 30 feet between the portal frames, and supported a fibre glass insulation quilt and corrugated metal roofing (as depicted in the photographs at **Tabs 1 and 4**).
13. After the Collapse, three of the steel portal frames that supported the roof purlins and roofing had collapsed and were damaged beyond possible repair (as depicted in the photographs at **Tabs 5-8**). As well, the Zed purlins in the two remaining 30 foot bays had developed significant deflection.
14. Mr. Frost observed approximately two to two-and-a-half feet of snow and ice on the roof and amongst the collapsed members of the structure (as depicted in the photographs at **Tabs 9 and 10**), during his site visit on February 25, 2015.
15. A sample piece of a Zed purlin measured 9.5" deep x 0.075" thick.
16. A number of concrete plinths upon which the base plate of the portal column rested had cracked due to straining of the anchor bolts (as depicted in the photographs at **Tabs 11 and 12**).
17. The dimensions in the "Plan" prepared by Mr. Frost (**Tab 13**) are agreed.

CONSTRUCTION OF PREMISES

18. The Premises was constructed between the years 1986 and 1996.

DAMAGED VEHICLES

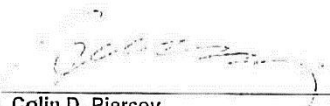
19. The facts, including photographs, as recorded and taken by Mr. Heighton and contained in the attached Appraisal Reports at **Tabs 14-19** in relation to the following vehicles are agreed:
 - (a) Unit 027114, 2003 Ford Utilimaster Van (VIN ending 17304) [**Tab 14**];
 - (b) Unit 047157, 2004 Ford Utilimaster Van (VIN ending 40190) [**Tab 15**];
 - (c) Unit 087147, 2008 Freightliner Van (VIN ending 4624) [**Tab 16**];

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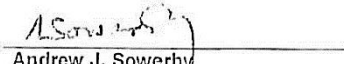
- (d) Unit 067186, 2006 Ford Utilimaster Van (VIN ending 50924) [Tab 17];
- (e) Unit 47159, 2004 Ford Utilimaster Van (VIN ending 40192) [Tab 18]; and
- (f) Unit 127124, 2012 Ford F450 Van (VIN ending 14474) [Tab 19].

The parties do not agree as to the admissibility of the "Condition Code" (at page 1 of 3 of each report) or the "General Conditions" (at the cover page of each report).

Dated at Halifax Nova Scotia, this 29th day of January, 2020.



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