

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Boone v. Gentile*, 2017 NSSM 91

SCC SN No. 462284

BETWEEN:

ANN LOUISE BOONE

CLAIMANT

and

**DARLENE GENTILE/A.A. MUNROE INSURANCE (“AA Munroe”)
and
CINDY DRAPEAU/INTACT INSURANCE (“Intact”)**

DEFENDANTS

Editorial Note: The electronic version of this judgment has been edited for grammar, punctuation and like errors, and addresses and phone numbers have been removed.

REASONS FOR DECISION

BEFORE: A. Robert Sampson, Q.C., Adjudicator
DATE OF HEARING: Hearing held at Sydney, Nova Scotia on July 19, 2017
DECISION RENDERED: December 8, 2017

APPEARANCES:
For the Claimant: Self-Represented

For the Defendant: **Intact Insurance:**
Ian A. Parker, Counsel
Cindy Drapeau
Mr. Jean-Sebastian Pelletier
A.A. Munroe Insurance:
Darlene Gentile

Interpreter: Marie Frosst

PRELIMINARY NOTE

1. At the request and with the consent of all parties, this hearing was extended to approximately 11:00 p.m. on the date of hearing in order to accommodate two of the Defendant's (Intact) witnesses who had travelled from Quebec to provide evidence.
2. Further, prior written notice had been provided to the Court that one of the Defendant's witnesses, Mr. Pelletier who was French speaking, was not fluent in the English language and therefore required the assistance of an interpreter. With the Court's consent, Marie Forrest, confirmed she had provided similar interpretation services dealing in the French language in court proceedings in the past and was present to assist Mr. Pelletier in providing his evidence.

SUMMARY OF CLAIM/DEFENCE

3. The Claimant sues for indemnification under a policy of insurance issued by the Defendant, Intact, for a loss resulting from damage caused to the roof of her residence situate at [address removed], Glace Bay, Nova Scotia ("residence"). The claim for loss deals with two events, one having occurred on or about October 10, 2016 whereby it is alleged as a result of a windstorm the roof of the Claimant's home suffered damage and more particularly the loss of roof shingles throughout the main portion of the roof and that such loss was covered by her Home Owners Insurance Policy which was held by Intact. In addition, she alleges against both Defendants in a written Notice of Claim that "I was misled that I had coverage".
4. The second part of the claim alleges that as a result of a temporary roof repair which was carried out following the initial storm damage to her roof by a third party (Aucoins), alleged to have been engaged under the direction of the Defendant, Intact, damage was caused to the Claimant's automobile which was on the Claimant's property at the time the work was completed.
5. Written Defences were filed on behalf of each of the named Defendants, namely A.A. Munroe, Darlene Gentile, Intact and Cindy Drapeau. Both Intact and Cindy Drapeau were represented by legal counsel. The Defence states that the named Defendant, Cindy Drapeau, was an employee of Intact at all material times and consequently her actions were on behalf of the Defendant, Intact, and submits that she would have no personal liability in connection with this matter. The Defence further states on behalf of Intact that coverage was denied under the following exclusions in the Claimant's Insurance policy: "wear and tear, inherent vice, latent defect, mechanical breakdown, deterioration". The Defendant further states in their written Defence that the damage to the Claimant's roof was not due to an incident that was covered under her Insurance policy but due to one or more of the above-referenced exclusions, or, in the alternative, coverage was denied for reasons otherwise provided for in the insurance policy.
6. The Defendant, Intact, further stated that, with respect to any damage claimed to be caused to the Claimant's motor vehicle, they did not attend at the Claimant's residence

property or engage anyone to attend to carry out any repairs and therefore bear no liability for any damage that may have been caused. Finally, both Defendants (AA Munroe and Intact) state that they did not mislead the Claimant by indicating that she had coverage.

7. Brief written Defences were filed by both Darlene Gentile and A.A. Munroe Insurance, both stating they did not mislead the Claimant into thinking she had coverage.

THE CLAIMANT'S EVIDENCE

8. The Claimant, Ann Louise Boone, provided her direct evidence under oath. She requested the Court's permission to reference a written summary she had personally prepared in anticipation of the Court hearing. That summary was tendered as Exhibit 1.

9. The Claimant reported that on or about October 10, 2016, which was the Thanksgiving weekend, there was a severe wind and rain storm which took place throughout Cape Breton.

10. The Claimant confirmed that she resides in her family home situate at [address removed] Glace Bay and following the storm event referred to above, she discovered that she had lost a significant number of shingles throughout the main portion of the roof on her home which she determined was a result of high winds the storm had brought the previous day.

11. The Claimant confirmed that in the days following she contacted her insurance agent, A.A. Munroe, to report her loss. As a result of this contact, the Claimant was subsequently contacted by Cindy Drapeau, a representative from Intact who advised that she was assigned to her claim. The Claimant confirmed she had explained the nature of her loss and Ms. Drapeau confirmed that she would be sending someone to look at her roof and would report back to her.

12. The Claimant confirmed that on October 25, 2016 two people came to her home (one male and one female) who advised that they were representing P/G Premiere First Generale from Drummondville, Quebec and that they were there on behalf of her insurance company to inspect her roof. She stated they took several pictures of her roof and asked if they could enter her home. Her evidence was that the male person had said "the roof would be getting done" noting that she had lost a lot of shingles. She further stated that he confirmed that she would be receiving a new roof. The Claimant acknowledged that this conversation and these statements took place through a translator (the female accompanying the male) at the time of their visit.

13. The Claimant further stated that at the time of inspection, the representatives also wanted to do moisture tests in her home and they asked about the condition of her basement. The Claimant indicated to them that she had not been down in the basement since the storm. Upon inspection, it was discovered that the basement was flooded and further pictures were taken of the basement and resulting damage.

14. The Claimant confirmed that the male inspector conducted a further inspection throughout the residence including the first, second and third (attic) levels. She confirmed her home was an older two-storey with a large attic area which was seldom used. She confirmed that the inspection included taking moisture tests throughout the home.

15. Following the visit, the Claimant reported that she again spoke with Cindy Drapeau regarding the basement area and told her what the gentleman from P/G Premiere First Generale had advised her. She confirmed that at this point the discussion principally related to the basement situation dealing with who would complete the clean-up and the need for the Claimant to prepare a list of things that needed to be discarded/replaced due to the water damage. In conversation with Ms. Drapeau she confirmed the Claimant had coverage for the basement.

16. The Claimant confirmed that she had worked out an arrangement with Ms. Drapeau where she would undertake to clean up her basement and be compensated for carrying out such work. She confirmed that she completed the required paperwork and took a number of photos of the various items that had to be discarded and sent them off to Ms. Drapeau. Her evidence confirms that with respect to the value of her lost items, estimated to be over \$18,000.00, initially Ms. Drapeau offered to pay her \$1,000.00 for her lost items. She confirmed she was not happy about the amount offered and further confirmed that Ms. Drapeau called her back the following day and offered to pay her \$7,600.00 together with a new washer, dryer, freezer and furnace. Based on this discussion, the Claimant confirmed that she was satisfied with the settlement that she had negotiated with her Insurance company (Intact) with respect to her loss associated with her basement and the compensation agreed upon to be paid.

17. The Claimant tendered a letter addressed to her from A.A. Munroe dated July 21, 2015 (Exhibit 2) wherein Sherry Johnson on behalf of A.A. Munroe confirms that the Claimant's insurance company, Intact, was requesting certain information to update their files. The information sought on behalf of Intact was set forth in the following questions:

- (i) Has the furnace been replaced since 1990? If not, please confirm if it is serviced under an annual contract?
- (ii) Has the roof been replaced? They have the roof being 25 years old.
- (iii) Type of electrical panel and wiring?
- (iv) Type of plumbing (pipes) and age of the hot water tank?

18. Exhibit 2 goes on to confirm that upon receipt of this information it will be passed along to the insurance company on behalf of the Claimant. The Claimant's evidence was that she promptly responded to the information sought and sent photos, including photos of her

roof of her residence and replied to each of the questions in writing and sent it to A.A. Munroe. She confirmed that she had to complete similar information received from AA Munroe in relation to her oil tank in years past and as a result had been advised that she had to replace her oil tank and she promptly did so.

19. In the Claimant's written submission (Exhibit 1), she confirmed that on November 17, 2016 two men from Aucoins came to her door to let her know that they were going up on her roof to carry out some temporary repairs as heavy rains were anticipated during the upcoming weekend.

20. The Claimant inquired if this was through her insurance company and both gentleman said yes. She confirmed that while she couldn't see what work they were carrying out on the main roof of her residence, she could view the work they carried out on the roof over her front porch because she could easily see it from her bedroom window. She confirmed that she witnessed them placing tarpaper down, shingle nails and a tar strip (roofing tar) over the top of the tarpaper. She confirmed that she knew what tarpaper, tar and shingle nails were and was certain these were the materials used to carry out the temporary repairs to her roof. The Claimant further tendered as Exhibit 7 a piece of tar paper which she indicated was from her home roof and used in connection with the repair. This Exhibit appeared to show that tar had been placed over the tar paper itself.

21. The Claimant confirmed that the following weekend there was heavy rain. She confirmed that on Sunday of that weekend she went to enter her automobile which was parked at the side of her house in her driveway. Her vehicle was a white dodge. She noticed a number of black marks over the roof, door and hood area of the vehicle. Initially she wasn't certain what it was and attempted to wash it off without success. Upon closer investigation, it appeared to be light speckles of tar on her car and she concluded it was a result of a run off of tar from the temporary work that had been completed on her roof immediately above her driveway where her car was parked.

22. The Claimant reported on November 21st she called Ms. Drapeau to explain about the damage to her motor vehicle. Ms. Drapeau's position was that it was the fault of the person that was on the roof. The Claimant stated, in response to Ms. Drapeau that "those guys were the guys her insurance company had sent".

23. She confirmed it was during this conversation and in response to this allegation Ms. Drapeau confirmed that could not be the case as her roof was not covered, she had already denied her claim saying her roof was too old. Ms. Drapeau then asked if she wished to place a claim under her auto policy for her truck to which the Claimant responded "no" because she felt that it was not her fault for the resulting damage to her vehicle but rather "the Aucoin guys who had completed the temporary repair which she understood were sent to her home by Intact Insurance".

24. The Claimant confirmed that she spoke with the owner of Aucoins who indicated that if they were responsible they would definitely have it fixed.

25. The Claimant reported that Ms. Drapeau later called her back and said, “they didn’t use the tar bucket because it is too cold for that....they used a stick of something but it wasn’t tar” to which the Claimant responded that she could see the work that was carried out from her bedroom window and that she had taken pictures and sent them to Ms. Drapeau. Ms. Drapeau again asked if she wished to put a claim through on her auto insurance to have it dealt with and the Claimant responded, “no because it was not her fault”.

26. The Claimant reported through her summary notes (Exhibit 1) that it was during this call that Ms. Drapeau provided an explanation for denying her roof claim. Ms. Drapeau confirmed that her roof looked bad because it was brittle and had been broken down from the sun. At this point the Claimant’s evidence was that she confirmed to Ms. Drapeau that she had sent pictures in 2015 of her roof in response to her Insurance company’s inquiry and that because she did not receive a response she assumed it was fine. The Claimant’s evidence was that prior to October 10th she did not experience any problems with her roof such as leakage or loss of shingles.

27. The Claimant reported that on January 3, 2017 she attempted to contact Richard Fulton, a representative with the insurance company, and was unable to connect. She further confirmed that on February 17th she spoke with Darlene Gentile who indicated that she had talked to a James Carr and that he would be in contact with her. The Claimant confirmed that she was finally contacted by a Neil Vallieres and indicated that he was going to send someone to look at her truck and roof to see if the tar on the truck matched the tar on the roof. She reported that she didn’t hear anything further back as a result of this claim. The Claimant reported that again on March 15, 2017 she spoke with someone at Intact and was told that no one could get to her residence because their four adjusters from Atlantic Canada were in Newfoundland dealing with claims, however, he told her he would try to get someone to visit her home to look at her truck. The Claimant confirmed no one showed up.

28. The Claimant confirmed that she was not pleased with her claim being denied for her roof and again contacted her insurance agent, A.A. Munroe, and spoke with Darlene Gentile. The Claimant confirmed that Ms. Gentile indicated that she was going to speak with the claims representative, Ms. Drapeau, and that she would get back to her. The Claimant indicated that she did not receive any call back and she made several additional attempts to contact A.A. Munroe with regards to her claim. The Claimant’s evidence is that in February 2017 she again spoke with Darlene Gentile who indicated that she had spoken to a James Carr and that he would be in contact with her.

29. The Claimant tendered a letter dated February 8, 2017 from A.A. Munroe Insurance to herself tendered as Exhibit 3. This letter references a phone conversation with Richard Fulton of A.A. Munroe and deals exclusively with matters surrounding a possible claim under her motor vehicle policy as a result of tar falling from the roof of her home.

30. The Claimant reported that on February 10, 2017 she received a call from a Manager with the Dominion Credit Union asking her if she had switched insurance companies. She confirmed that she had not and asked why he was calling and he in turn confirmed that he had received a registered letter from Intact confirming as of March 29th her home owner's insurance would expire without renewal.

31. The Claimant confirmed that as a result of information she learned from the Credit Union she called Darlene Gentile to find out what happened. Ms. Gentile advised that they were not renewing her home owner's insurance because her roof was too old. The Claimant reported that she did not receive any formal notice of her home owner's insurance being cancelled. On March 22, 2017, she received renewal papers from Intact for her automobile insurance only.

32. Under cross-examination the Claimant confirmed that she did not know who requested the repairmen to attend at her residence nor had she been told by anyone that someone was coming. The Claimant further confirmed on cross-examination that when the individuals from Aucoins showed up she was not sure at that point whether her claim had been denied because Ms. Drapeau had advised that she was going to get someone else to look at the roof.

33. The Claimant tendered as Exhibit 4 an insurance renewal document that she had received from Intact effective the 29th of March 2017. This renewal relates to her automobile policy only and included the billing statement for the renewal.

34. The Claimant tendered as Exhibit 5 an estimate from W.P. Construction dealing with the anticipated replacement costs of her roof arising from the damage sustained, confirming a quote of \$7,800.00 (including HST).

35. The Claimant tendered as Exhibit 6 an estimate from Steve Lewis Autobody confirming an estimate for a 2012 Dodge Journey XST pertaining to the repair/removal of "tar all over the vehicle" at an estimated repair cost of \$1,129.30 (including HST).

36. The Claimant also tendered as Exhibit 7 what she represented as a piece of the roof tarpaper and evidence of tar confirming that it was a piece that had blown off her roof and was part of the materials used in connection with the temporary repairs that had been carried out.

37. The Claimant tendered Exhibit 8, a handwritten note signed by her neighbor Tracey Cook which confirmed the following:

"I Tracey Cook witnessed the Aucoin truck parked in front of 7 Catherine Street, home of Anne Boone, on November 17/16 at approximately 8:50 am. I was on my way to work."

Signed Tracey Cook.

38. The Claimant tendered as Exhibit 9 a form set out in French on P/G Premiere First Generale stationery dated the 25th of October 2016 and signed by Ann Boone which confirms permission for them to carry out an inspection on the Claimant's residence in relation to roof/wind damage and water.

39. The Claimant tendered Exhibits 10 and 11 (same document). This was a letter dated October 31, 2016 from Intact (Ms. Drapeau, Claims Representative) to Ann Boone which warrants setting forth in its entirety in this decision:

Dear Ann Boone,

Thank you for notifying us about your loss caused by wind storm. I have now completed my investigation.

Your property is insured by our "comprehensive" form policy. **This loss was caused by wind storm.*** There does not appear to be coverage available for your loss due to the following exclusions:

Wear and tear, inherent vice, latent defect, mechanical breakdown, deterioration.

In accordance with the Insurance Act of Nova Scotia I am enclosing a blank proof of loss. You have one year from the date of loss to finalize your claim. In the event you do not finalize your claim within that period you should know that in order to protect your right to make a claim under your policy you are required to begin legal proceedings against Intact before that same period expires.

If you have any questions about your claim or the content of this letter please do not hesitate to contact me.

Regards,
Cindy Drapeau

*(emphasis added by court)

40. The Claimant further submitted under Exhibit 12 several photographs of the Claimant's car showing speckles of black on it corresponding to her evidence.

41. The Claimant confirmed in her evidence that she has held her insurance through A.A. Munroe for upwards of 25 years. She confirmed that she had no prior claims with respect to her home or vehicle.

42. The Claimant confirmed that with respect to the damage (tar) to her motor vehicle, she had discovered this on Sunday morning, October 20th and had taken the several pictures which were tendered (exhibit 12) confirming the tar was present on her car roof, passenger doors, the front of her vehicle, the back bumper (driver's side), driver's door and mirror. She confirmed that she took the pictures herself.

43. Under cross-examination the Claimant further confirmed that, prior to the temporary repairs being carried out on her roof, there were three different individuals who attended at her home and took pictures of her roof, namely the representative from P/G Premiere Generale, Mr. Pelletier, a Gary LeBlanc (local contractor) and a Brent Seymour (local contractor).

44. The Claimant acknowledged that the roof had been worked on approximately 10 years ago when her husband personally had carried out some repair work but she was not able to comment on the reason for the repair work or the extent. The Claimant confirmed that she did not at any time indicate to Ms. Drapeau that there were any problems with the roof shingles and further confirmed that all she knew was that her husband worked on the roof to carry out repairs. The Claimant confirmed that her husband has since passed away.

45. The Claimant further confirmed on cross-examination that in response to the 2015 request to send information, she had sent pictures of her roof. She further indicated that previously they were advised by her insurance company that the oil tank needed replacing and that she completed the requested work immediately.

46. The Claimant was showed on cross-examination Exhibit 14 representing several pictures of her house taken from Google maps. The Claimant's position was that she believed these pictures would have been taken in 2008 because there was a sticker in one of the windows visible in one of the photos and that sticker would have been present when the windows were replaced in 2008. She also explained there was one shingle obviously missing on the front porch roof of her residence. The Claimant confirmed there had been no water damage to her knowledge in her house and that while she didn't attend in her attic very often she had never known there to have been any problems with water damage. She indicated her children used to keep a drum set in the attic and again there was never any problem with moisture until the occurrence of this storm.

47. The Claimant on cross-examination confirmed that she was operating under the assumption regarding her home owner's insurance policy that if "anything goes wrong – she would be covered".

48. Through cross-examination, Exhibit 13 was identified as a copy of the actual insurance policy issued to the Claimant. The Claimant confirmed she had been made aware that her insurance was cancelled because of the age of her shingles. She further confirmed that the water damage claim was paid in the amount of \$7,600.00. together with replacement of several appliance items and furnace, and she had dealt with Intact directly on this.

49. Finally, the Claimant confirmed that the total amount claimed, \$9,254.80, results from the two repair estimates, one dealing with the vehicle and the second with the roof, both of which had been tendered (exhibits 5 &6).

THE DEFENDANT'S EVIDENCE

50. Ms. Cindy Drapeau was sworn in. She confirmed she is a claims adjuster with Intact who deals principally with home owner's insurance. She indicated that she has been in this position for approximately two years and has dealt with over 400 claims.

51. Ms. Drapeau confirmed that after Ms. Boone made the initial call to AA Munro the matter was referred to Intact, and in turn referred to her to deal with adjustment. She confirmed that when she initially spoke with the Claimant she had asked a number of questions and during this initial conversation the Claimant had confirmed to her that her husband had completed roof repairs approximately ten years prior. During the initial call, she confirmed that there was no mention of the water damage which was later found in the basement of the residence.

52. Ms. Drapeau confirmed that as a result of a significant number of claims resulting from the storm that had taken place, she would be referring the matter to her extra adjusters in the area and that she would refer the matter to First General to visit the property for the purposes of viewing the damages and providing pictures and a report to her.

53. In a subsequent call with the Claimant, Ms. Drapeau confirmed that she was really busy and took pictures of the roof herself from the internet (Google maps). She confirmed that she was looking at wear and tear because it was excluded under the policy. She requested a report back from the Project Manager which indicated that the roof "showed signs of deterioration on shingles".

54. Exhibit 16 was tendered which showed a series of photos she had received from the contractor – First General. She also confirmed that she had went to Google maps in an effort to see if there was any prior damage.

55. She stated that after review of the photos from Google maps and communication with the adjuster, she denied the claim and spoke with the Claimant. Ms. Drapeau confirmed that she spoke with the Claimant on October 31, 2016 and advised her of her decision. She also

confirmed recalling that the Claimant had indicated to her that she had sent in photos back in 2015 of her roof as requested. Ms. Drapeau confirmed that during her phone discussion with the Claimant, she told her the roof claim was denied but said she was going to send someone else to confirm (to look at the roof). She further confirmed that she did not pay the claim but did send someone else to have another look. Ms. Drapeau confirmed that on November 3, 2016 she sent Brent Seymour with First General to review the roof.

56. Ms. Drapeau identified Exhibit 13 as the renewal policy which related only to the automobile insurance held by Intact. Ms. Drapeau confirmed Exhibit 15 was a copy of the client's Home Owner policy and confirmed that she was aware of the terms and the policy's workings. She specifically referenced page 5 confirming that the nature of the policy was an "all-risk policy" and confirmed that it was the best policy to have. Ms. Drapeau further referred to paragraph 20 on page 5 dealing with the exclusion – wear and tear. She confirmed that "we do not cover maintenance".

57. Ms. Drapeau confirmed in her evidence that she had determined the damage was as a result of wear and tear, and that the Claimant confirmed to her that they had lost shingles before the high winds. Ms. Drapeau went on to state "when shingles are blowing off they are not serving their purpose".

58. Ms. Drapeau further confirmed that the contractor had advised her that there was moisture in the attic and areas were blackened and that wouldn't be present unless there was some leaking.

59. Ms. Drapeau tendered Exhibit 17 which was a series of emails which she represented as the "contractor's report" which she relied upon to make her decision. She confirmed that she had never contacted anyone, and in particular Aucoins, to carry out any repairs to the Claimant's roof. She further reported that after she learned of the potential claim involving the Claimant's automobile she did contact Aucoins and they confirmed they didn't use tar on the roof. Ms. Drapeau further confirmed that she denied the claim on October 31st and would not have sent anyone to the house to carry out repairs.

60. Ms. Drapeau's evidence confirmed that an all-risk policy covers everything except what is excluded.

61. Ms. Drapeau reviewed a number of the photos that she had received from the contractor notably pictures 1 through 7 (exhibit 16). Her comments relative to these photos are as follows:

Picture 1 – missing shingle, says shingles are curled

Picture 2 – confirmed not a good picture and didn't know what it represented

Picture 3 – confirms presence of moss on the shingles and acknowledges no damage to the shingles

Picture 3A – confirms it is blurry and not clear and therefore hard to determine what it represents

Picture 4 – confirms presence of moss, roof in poor condition

Picture 5 – confirms presence of some moss but shingles okay

Picture 6 – not directly relevant to roof condition

Picture 7 – not directly relevant to roof condition

62. Ms. Drapeau confirmed that she was 100% confident in her position. She further confirmed that she never dealt with Aucoins and the contractors she dealt with in Cape Breton area were First General and Service Master. She noted that maybe First General could have called Aucoins.

DIRECT EVIDENCE – JEAN-SEBASTIAN PELLETIER

63. Mr. Pelletier's evidence was provided through the use of an interpreter, Marie Frosst. She was sworn in together with Mr. Pelletier. His evidence confirmed he was a Project Manager with Instruction Minharecvar (Court not certain of correct spelling) which is a franchise of First General. The witness confirmed he has operated as a project manager for six years and has been dealing with roofs and construction matters for the past 14 years. He confirmed that he would have viewed upwards of 100 roofs during this period.

64. He confirmed that his involvement resulted from a request by Intact to his company and in turn him to check the residence at [address removed], Glace Bay, Nova Scotia and make a report.

65. He confirmed that on October 25, 2016 he attended at Ms. Boone's residence and did a complete review of the home. He confirmed that he took pictures and completed a humidity test and had a tour of the house with the owner, including the bathroom on the second floor and the attic.

66. When questioned as to what he observed with regard to the roof, he confirmed the main roof shingles were curling, looked like they were damaged over time. He further confirmed that on other parts of the roof there was green moss which appeared very old.

67. He confirmed that the shingles principally on the main roof were curling and not so much on the back of the house.

68. In response to a question of how roof shingles would result in this condition the witness confirmed that the shingles would curl either as a result of age or other factors such as poor insulation and that cold and heat will affect older shingles and humidity. He confirmed that when cold and hot come together it creates humidity.

69. In response to a question as to why he felt there was humidity in the Claimant's residence, he confirmed that on his visit in the attic he determined there was improper air circulation. It was his opinion that there was a lot of humidity that would cause condensation and in turn freezing resulting in damage to the roof over time. He re-confirmed that in his opinion there was not enough air circulation to get rid of the humidity. He further confirmed in his opinion that the humidity was likely not something caused by the recent storm and offered the opinion that there should be heat in the attic to avoid humidity as it is a gradual process.

70. He examined Exhibit 16 which included a series of photographs he had taken. He reviewed each of the photos and provided the following comments:

Photo 1 – This was a picture of the front of the house and showed general damage of the roof pointing to one shingle being missed to the outer end indicating the wood was starting to lift up.

Photo 2 – Confirm this is the back of the house. It confirmed the roof was not supposed to be in this condition where there is presence of dry moss which in his opinion meant that it was there for a long period of time.

Photo 3 – Photo confirmed moss was forming on the roof area in the back (lower roof). He confirmed he took this picture because it should not be like that. Moss can cause damage in the long-term as it will enter the pores in the plywood resulting in damage.

Photo 3A – Indicated this photograph represented that the shingles were lifting everywhere and in his opinion, could not have been caused by the storm. He acknowledged the storm may have caused the missing shingles but not curling of shingles.

Photo 4 – Picture showed presence of moss at the back of the house.

Photos 5 and 6 – Similar to photo 4, this photograph represents the general damage at level of attic which he believed the damage was caused by too much humidity. He pointed to the black area above the door where it was blackened which, in his opinion, confirmed the starting of getting moldy. He confirmed that plaster with humidity gradually damages after three months or more.

Photo 7 – This is a photograph of the same roof (Photo 6) in the attic. He believed that it showed water damage.

In response to this the Claimant indicated the black area was a result of coal dust over the years. She further confirms the strips in photo 7 are from when her home was re-wired in recent years and not from water damage.

Photo 8 – Picture appears to be the same room as photo 7. Witness indicated that personally he would not put anything in the attic as there was, in his opinion, too much humidity and that the air is not controllable.

The Claimant interjected during the review of these pictures and indicated in her opinion there was no moisture in the attic. Further as to photo 7 and in response to the Claimant's comments about the damage being a result of the home being re-wired, the witness said he would have to go back to the house to be 100% sure "if water is cause of damage". It appears no inquiries were made to the Claimant arising from his observations at the time the inspection took place.

The witness confirmed they had taken a humidity test which was 90% or so and indicated that it should be less. He confirmed that the attic and the basement had the same amount of humidity and that the first and second floors were normal.

The Claimant again interjected, confirming that the basement was full of water as a result of the storm damage at the time the tests were completed.

Photo 9 – It was confirmed similar to earlier photos.

Photo 10 – Represents picture of the roof on the little porch, first floor, and showed signs of what he believed to be old moss.

Photo 11 – Confirmed it represented water on the closet in the attic. Picture of a portion of the attic door. He concluded that the humidity was breaking up the plaster.

Photo 12 – Moisture in the attic so much so that you couldn't see through the window.

Photo 13 – Light spots, in his opinion, represented rotting. He acknowledged that the blackened color may be from the chimney.

Photo 14 – Indicated this is a picture of the roof on front of the home similar to Photo 1 where it shows part of the roof boarding appears to be rotting.

Photo 15 – Confirmed this photo is similar to Photo 3A

71. The witness was asked, based on all of the photos, what his conclusions were as to the roof. In response, he said either the roofing is too old or aged too quickly.

72. The witness was further asked whether the roof was performing its purpose as a roof. His response was "it should stop the water from coming in but no longer efficient".

73. The Defendant, when asked if he had ever told Ms. Boone that the roof was covered by her insurance, confirmed he had a translator when he was at the residence and that his position would always be that he would provide his report to the insurance company and that he did not have the authority to confirm that anything would be covered.

74. The Defendant was asked if he had direct communication with Aucoins and he indicated that he did not and did not ask them to attend at the Claimant's residence.

75. The Defendant upon cross-examination acknowledged that he had been indirectly involved with Aucoins. He was aware of the company because "he had sent Aucoins to another house a few blocks away". He confirmed that he did not send them to Ms. Boone's house.

BY THE COURT

76. The Court made several inquiries regarding Exhibit 17 represented as a contractor's report. The contractor confirmed that he had no conversation directly with Ms. Drapeau. He further confirmed that his email exchange would have been with the assistance of an English translator. The witness confirmed that he was given a list of local contractors to use and acknowledged that Aucoins had been on it. He indicated that he used them approximately eight times out of 14 when requiring the services of a sub-contractor. He confirmed that he was here in Cape Breton initially for two weeks and again one week later and while here he always had someone to translate for him.

DEFENDANT – DARLENE GENTILE

77. Ms. Gentile was sworn to. She confirmed she is an employee of A.A. Munroe and that Ms. Boone was a client of that firm and her file was assigned to her. She confirmed that A.A. Munroe played no role in the claim other than to pass it off to the Insurance company, Intact once it was reported to them.

SUMMATION BY DEFENDANT COUNSEL

78. In summation, counsel for the Defendant confirmed there were two main issues, one dealing with the car and the second with the roof. As it relates to the issues surrounding damage to the car, he indicated that the onus was on the Claimant to provide sufficient evidence to establish her claim. He argued that the Court cannot infer that Intact or A.A. Munroe ordered Aucoins or anyone else to attend and carry out temporary repairs to the Claimant's home. He noted that there were a number of claims going on at the time and further that the temporary repairs were carried out well after the claim was denied.

79. As to the roof issue, the Defendant's counsel argued that the policy covers wind damage but not if the damage was a result of deterioration or wear and tear. He submitted that moss could cause problems and the fact that the roof was old left the Court with the

question – “Is this a case where damage is from wind storm or wear and tear?” He argued that the insurer is only compensated for what is lost, there was no value remaining in the roof and therefore no loss.

80. Counsel for the Defendant tendered one reported authority for the Court to review – that being a Provincial Court of Alberta (Civil Division) decision of ***Chong Hui Shen and Rong Ye and Security National Insurance Company*** -- noting that this case was similar in facts and relevant logic in law and submitted that the decision should be applied in this instance resulting in a denial of the claim.

ANALYSIS OF EVIDENCE

81. I am satisfied that there was a contract of insurance between the Claimant and Intact. The terms of that contract were represented by the terms of a Home owner’s comprehensive coverage plan, the terms of which were tendered to the Court under Exhibit 15. I am further satisfied that the nature of this policy is most often referred to as “an all-risk policy”, in accordance with the definitions set forth under Section 1 – property coverages –, provided the loss falls within the parameters of the coverages set forth. The nature of the terms of this policy, similar to most comprehensive/all-risk home owner’s insurance policies, is such that all risks of direct physical loss or damage are covered to the maximum amounts set forth in the coverage summary of the policy issued unless such loss is subject to one of the exclusions and conditions of the policy.

82. Exhibit 13 provides the particulars of the policy issued to Ms. Boone effective the 29th day of March 2016 and in effect on October 10th, 2016, the date of loss. Further, with specific reference to the coverage summary contained in Exhibit 13, in addition to the general insurance for the dwelling, detached structures, personal property, etc., specifically included is wind storm coverage with a \$500.00 deductible, coverage to the amount of the policy limit.

83. Again, with reference to Exhibit 15 which was presented by the Defendant being the “policy wording” in effect and associated with Ms. Boone’s insurance policy, page 5 sets forth 25 exclusions as to when the terms of the policy do not apply to a loss or damage. As confirmed by Ms. Drapeau’s evidence, while the policy did cover damage from a wind storm, she had concluded that the loss or damage to the roof shingles were as a result of wear and tear and deterioration and thus excluded under condition 20 of the general exclusions. In the simplest form, the principal issue the Court is challenged with is to determine the cause of the loss sustained by the Claimant as a result of the loss of a substantial number of roofing shingles from her home. More succinctly, was the loss of the shingles to the roof of her home on October 10th/2016 as a result of wear and tear and deterioration or otherwise as a result of a weather event.

84. There was a significant amount of evidence submitted including photographs of the condition of the Claimant’s roof, both sometime prior to the event (by Google) and within weeks following the event. From this evidence, there appears to be little debate and for certain

the roof was not new and showed signs of deterioration. The principal issue before this court to decide can also be viewed in the following manner. The claim advanced relates solely to the Claimant's loss of a significant number of shingles on her roof as a direct result of a weather event which in part included high winds and rain. There does not appear to be any conflict between the parties as to the extent and nature of the loss (missing roof shingles) but rather the issue is the cause. Further, there does not appear to be any conflict in the evidence that there had been a significant weather event including high winds on October 10, 2016.

85. It is trite to say that immediately after the installation of any shingled roofing system to a home, conditions resulting from normal wear and tear and depreciation begin to take hold. As to the degree and speed in which these factors come into play will be dependent on a host of factors including the quality of the shingles, the quality of the workmanship upon installation, the nature of the environment in which the home may be located such as its close proximity to trees, in an open area and so forth. However, what is certain is that the elements of wear and tear and deterioration are generally accepted as something that occurs over time and must be determined on an individual basis.

86. Therefore, as to the determination of the cause of this loss, the question can be viewed as whether, regardless of the condition of the shingles on this roof on this particular house in this particular location on this particular date, would the Claimant's roof have sustained the loss as a result of this particular weather event, or was the sole cause wear and tear? The Court is prepared to take notice that on or about October 10, 2016 the Industrial Cape Breton region experienced the remnants of Hurricane Matthew, a weather system off the coast of the Carolinas which gave rise to substantial amounts of rain and high winds to the region resulting in a significant and devastating event for many property owners throughout the region. The evidence of both witnesses on behalf of Intact confirm that there was an unusually high number of insurance claims resulting from the October 10th weather event which led Intact having to send out-of-town adjusters such as Mr. Pelletier who is employed through P/G Premiere First Generale from Drummondville, Quebec.

87. The evidence confirmed by both the Claimant and Mr. Pelletier was that the Claimant's home on [address removed] Glace Bay, suffered a substantial loss of roofing shingles, mainly off the main portion of her roof as a result of this October 10th wind storm. The relevant wording of the home owner's comprehensive coverage found on page 5 is as follows:

Insured Perils – You are insured against **all risks** of direct physical loss or damage subject to the exclusions and conditions of this policy.

Loss or Damage not Insured – (para 20) wear and tear, inherent vice, latent defects, mechanical breakdown and deterioration

88. I find based on the evidence of Ms. Drapeau that the operative words from Section 20 which she considered in denying the claim were “wear and tear” and “deterioration”.

89. The evidence of Ms. Drapeau is clear that on October 31st, based on the information she had on hand, she denied the claim. This is confirmed in her letter to the insured dated October 31, 2016 (Exhibit 11) which was reproduced earlier in this decision. She confirms in this letter that she had completed her investigation and concludes “this loss was caused by a wind storm”. However, she then goes on to state “this does not appear to be a coverage available for your loss due to the following exclusions” and proceeds to list those items found in Section 20 of the policy terms, also referred to earlier.

90. With reference to the above, clearly by her own words she confirms that “this loss was caused by wind storm” and that is an event covered under the policy provisions.

91. As referred to earlier, in her viva voce evidence to the Court, Ms. Drapeau confirmed “we do not cover maintenance” and went on to conclude that she had determined the damage was caused by “wear and tear”. She went on to highlight the fact that, based on her discussion with the Claimant, the roof had lost shingles before the high winds. Finally, she concluded “when they are blowing off (assume she means shingles) – not serving their purpose”. In my view, there is clearly a conflict between her statement set forth in her October 31st letter to the Claimant where on one hand she specifically confirms that the loss was caused by “wind storm” yet goes on to say that it falls under the exclusions set forth in Section 20. The question remains, was the cause...“the wind storm” or ‘wear and term/deterioration”? Simply put, it can’t be both, as she has stated in her letter.

92. It is the Court’s opinion, in order for the insurance company to be able to claim one of the exclusions, they must also prove that the damage or loss incurred was as a result of or caused by one of the exclusions and not a peril covered under the policy such as a wind storm.

93. Along this same vein, it is worthy for the Court to take a closer look at Exhibit 17 which is represented as the “contractor’s report”. This is a series of email exchanges between Ms. Drapeau and Jean-Sebastian Pelletier. This report essentially contains a series of emails dealing directly with the investigation of this claim. The relevant emails extend from October 25th through to November 3rd, 2016 and are re-produced below:

#6 from Jean-Sebastian Pelletier (First General)
To Cindy Drapeau (Intact)
October 25, 2016, 7:54 am

Upon arrival we constated that (outside) there are missing a lot of shingles, the roof seems old the back park (picture) there is green moose.

(inside) we constate that main has nothing but up on the first floor in the bathroom we have 100 percent humidity on the ceiling by the bath tub (shower).

(attic) we constate that there is strong humidith cause attic was closed off and there was no heat, a lot of humidity in the windows (window very wet)

A lot of walls demolished and open air that was there before the storm, while stains on wood structure on the roof.

p.s. we went to the basement and the client told us water came in and we saw with our own eyes that there was water no southpump in basement.

Recommendation open ceiling of the bathroom 1st floor and repair the roof ask authorization to start the work please get back to us for the basement if insured or not. Thank you.

#7 from Drapeau
To Pelletier
October 26, 2016, 11:27 am

Hi, thanks for the report. Can you upload pictures please.
Thank you.
Cindy

##*8 from Pelletier
To Drapeau
October 27, 6:43 am

The picture we been added

#9 from Drapeau
To Pelletier
October 27, 2016, 7:17 am

Hi,
It's hard to tell by the pictures if wind or wear and tear was the cause of loss.
From what you saw would wear and tear & deterioration be a factor.
Thank you.
Cindy

#10 from Pelletier
To Drapeau
October 28, 2016, 2:31 pm

I have sent you some more pictures of the roof, I hope these pictures will help you take a decision. If you give me the o.k. to send a roofer to this claim I believe he would be better of answering to your question.

#11 from Drapeau
To Pelletier
October 31, 2016, 8:31 am

This is not a covered claim.
You can upload estimate fee.
Thank you,
Cindy

#12 from Drapeau
To Pelletier
October 31, 2016 10:43 am

Hi Jean-Sebastian,
Would you be able to let me know cause of loss. We require report, pictures and estimate for repairs. I only have pictures to make a decision. I would like to know the opinion of contractor that was on site.
Were the shingles in good condition or were they past their life expectancy.
Thank you,
Cindy

#13 from Brent Seymour (First General – Cape Breton)
To Drapeau
November 3, 2016, 10:15 am

Good afternoon Cindy,
As per your request we inspected the roof today and found that the shingles were deteriorated and beyond their life expectancy.
Let me know if you need anything further on this one.
Have a great day.

94. I have numbered each of the emails in accordance with the exhibit for ease of reference. This report confirms, as did the evidence, that Ms. Drapeau was introduced to this file on October 21, 2016 when she was assigned to be the adjuster. As the sequence of emails evolve, it confirms that she had contacted Mr. Pelletier with First Generale who in turn confirms that he had spoken with the client and made arrangements to visit at her residence on the 21st of October. In email #6 which is a response from Mr. Pelletier back to Ms. Drapeau it confirmed a number of points. Initially he confirmed that the roof was missing a lot of shingles and that the roof seemed to be old in the back park (part). He further confirmed “there is strong humidity cause attic was closed off and there was no heat, a lot of humidity in the

windows (window very wet)". He notes a few other observations and provides a recommendation to open the ceiling of the bathroom on the first floor and repair the roof...ask authorization to start the work please get back to us for the basement if insured or not, thank you".

95. The response under email #7 from Ms. Drapeau acknowledges the report and asks for pictures to be uploaded. Email #9 from Ms. Drapeau back to Mr. Pelletier acknowledges it is hard to tell by the pictures "if wind or wear and tear was the cause of loss". She goes on to ask, "from what you saw, would wear and tear and deterioration be a factor".

96. In email #10 Mr. Pelletier responds back to Ms. Drapeau the following day (October 28, 2016) and provides more pictures to her hoping that will help her to take (make) a decision. It further goes on to say, "if you give me the o.k. to send a roofer to this claim I believe he would be better of answering to your question".

97. The next email in this sequence (email #11 dated October 31, 2016) Ms. Drapeau sends an email to Mr. Pelletier stating only "this is not a covered claim...you can upload estimate fee".

98. It is important to note at this juncture, based on the contractors report noted above, the same report Ms. Drapeau confirmed she relied on to make her decision, the most essential question she had asked of the contractor (e-mail #9)... "from what you saw would wear and tear and deterioration be a factor" was not and by the contractor's own response (email #10) could not be answered, at least by Mr. Pelletier. Further, again by Ms. Drapeau's own e-mail response she confirms that she herself could not "tell by the pictures" sent to her (email #9).

99. The direct evidence of Ms. Drapeau was that she spoke with the Claimant on October 31st and at that time verbally advised her she had denied the claim. Similarly, as referred to above, her letter (Exhibit 11) to Ms. Boone dated October 31, 2016 further confirmed her denial of the claim although, as previously noted, she confirmed in that letter that "this loss was caused by wind storm".

100. The point is, as at October 31, 2016, based on Ms. Drapeau's communication with Mr. Pelletier, not only, as set forth in email #10, did he not answer the question squarely put to him by Ms. Drapeau "from what you saw would wear and tear & deterioration be a factor" he further confirmed "...a roofer to this claim I believe he would be better of answering your question".

101. It is worthy to note that at this point in time, October 31, 2016, although Ms. Drapeau had in hand information provided in the earlier emails from Mr. Pelletier exhibited as the contractor's report (Exhibit 17) as well as the contractor's pictures forwarded to her on October 28, 2016, which one can reasonably assume reflect the same pictures found in Exhibit 16, even with that information she acknowledges that it was hard to tell by the pictures if the wind or the wear and tear was the cause of the loss. Mr. Pelletier himself fully acknowledged that he

was not prepared to answer that question. Therefore, it begs the question as to what information Ms. Drapeau had on hand which allowed her to conclude that the damage caused to the roof shingles fell within one of the exclusions and therefore this was not a covered claim.

102. I further note in email #12, again dated October 31, 2016, Mr. Pelletier states the following: "Would you be able to let me know the cause of loss? We require a report, pictures and estimate for repairs. I only have pictures to make a decision, I would like to know the opinion of contractor that was on site". "Were the shingles in good condition or were they past their life expectancy?"

103. Continuing with this email chain, under email #13 it appears a Brett Seymour with First General confirms to Ms. Drapeau that "...we had inspected the roof today and found the shingles were deteriorated beyond their life expectancy. Let me know if you need anything further on this one."

104. What is clear from my review of this email exchange is that Ms. Drapeau made her determination to deny this claim at a point in time (Oct 31st) when, by her own admission, neither she herself nor Mr. Pelletier could determine the cause of the loss with any level of certainty. Yet she appears to have boxed herself into a scenario where she had decided to deny the claim, and to inform the Claimant and confirm the same by correspondence.

105. The Court acknowledges that the Defendant chose to subpoena Mr. Pelletier as a witness into this proceeding. However, in regard to his testimony there is no evidence to suggest that he witnessed, examined or saw anything further beyond his initial visit to the Claimant's residence on October 25, 2016 after which he entered into the series of emails (contractors report-exhibit 17) providing what he personally found in his investigation. By his own admission as set forth in email #10, based on both his experience and what he had viewed from his site visit he simply did not feel he could answer the direct question being asked of him from Ms. Drapeau (email #9) – "From what you saw, would wear and tear & deterioration be a factor?"

106. Further, while it appears from the email exchange with Brett Seymour on November 3, 2016 in which Mr. Seymour provides a very short, direct response to Ms. Drapeau's question and appears to confirm in his opinion that the shingles were deteriorated and beyond their life expectancy, there is absolutely no evidence from Mr. Seymour as to what experience, if any, he has and more directly what information he based his opinion on. Mr. Seymour was not called to provide evidence. Further, again referring back to email #9 where Ms. Drapeau commented to Mr. Pelletier, "It's hard to tell by the pictures if wind or wear and tear was the loss" and in turn questioned, "From what you saw would wear and tear & deterioration be a factor", it appears that same question was not put directly to Mr. Seymour based on the limited information provided.

107. Clearly, in advancing this claim the onus rests with the Claimant to establish that an event, covered under the terms of her insurance policy did occur, and that as a result damage

was caused to her property. There appears to be no dispute amongst the parties that a significant weather event did occur and that further, as a result of that event, the Claimant had lost a significant amount of shingles from her roof.

108. Should the Defendant wish to rely on one of the exclusion clauses under the terms of the policy, the onus then shifts to them to establish that in spite of the weather event, the damage claimed was a direct result of one of the excluded provisions, in this instance wear and tear and/or deterioration. As such, I fully concur with Ms. Drapeau's initial assessment of this matter and her recognition of the need to determine cause and whether in fact wear and tear and deterioration was a factor. The only evidence that Ms. Drapeau had which led to her justification to deny this claim was from Mr. Pelletier's report and some questionable Google map photos of which the date was not verified. Clearly, Mr. Pelletier was the professional contractor who Ms. Drapeau sought to rely on to obtain sufficient information in order for her to make a reasoned determination of the cause based on the facts before her.

109. Given that Mr. Pelletier himself, based on his October 28th email (email #10) could not answer this question, challenges the court to question the reasonableness of Ms. Drapeau's denial of the claim at that point in time. Given the fact that she spoke directly with the Claimant and confirmed her denial of the claim and generated a letter on the same date (October 31, 2016) re-confirming her denial leaves the Court with no other conclusion other than finding that she was firm in her position at that point in time, right or wrong. However, again that begs the question as to whether her determination was reasonable based on the evidence she had before her. Even she herself in her October 31st letter (Exhibit 11) acknowledges that the loss was caused by a wind storm.

110. Earlier in this decision I had set out from my notes the evidence given by Mr. Pelletier. He reviewed with the Court in detail his commentary on a host of photographs he had taken. These photographs were taken when he initially visited the Claimant's property and, despite his recollection of what he saw during his inspection and his commentary on a multitude of pictures which led him to conclude, in his opinion, that there were areas of moss on the roof and that some of the shingles were curling, over the front porch the wood flashing was deteriorating, in his response to Ms. Drapeau he was simply not prepared to offer any opinion, based on what he saw, as to whether wear and tear and deterioration may have been a factor resulting in the damage associated with the loss of shingles.

111. Further, in analyzing Ms. Drapeau's evidence, I confirm that her experience in adjusting Home owner's claims was approximately two years. Beyond that there was no evidence as to what, if any, experience and/or training she may have as it relates to construction in general and in particular conditions of roof shingles and determinations as it relates to life expectancy and limits of deterioration and wear and tear. The Court appreciates that this would not be unusual as most often, as was the case here, adjusters are prudent to turn to experienced contractors and, no doubt at times, experts familiar with specific matters surrounding issues of causation, and ultimately formulate their decisions based on informed information. However, in this situation, the Court is left, based on the evidence given, as to

what reasonable and reliable information was before Ms. Drapeau when she made her determination. Clearly, the most salient question she sought to have asked was not answered.

112. When one puts the pieces of evidence together, appreciating the information or lack of, which Ms. Drapeau had before her on October 31, 2016 when her determination of the Claimant's claim was made, it may place in context two particular comments of note that she had entered through her direct evidence. As referenced earlier, she indicated that as a result of her initial conversation with the Claimant, the Claimant had acknowledged that she recalled her husband completing some roof repairs approximately ten years earlier. The Claimant in her evidence couldn't recall the nature of those repairs other than the fact that something was done by her husband to the roof. It appears that Ms. Drapeau drew a conclusion from that when she stated in her direct evidence "lost shingles before from high winds". Immediately after she went on to say, "shingles were blowing off, they are not serving their purpose". Frankly, there was no evidence presented to the court to support these conclusions relating to the condition of the claimant's roof prior to October 10th. While the Claimant appears to have been forthright in the information provided to her insurance company when asked, she herself was not able to shed any light on what and why repairs had been carried out some 10 years prior.

113. As best I can determine these two statements noted above by Ms. Drapeau and in conflict with the Claimant's evidence likely formed the basis for her determination that the damage was "wear and tear".

114. The Court finds it difficult to rationalize reaching a conclusion that because (unknown) repairs to roof had occurred some ten years prior and further that because shingles were blowing off the roof, either or both of these events lay sufficient foundation to make a determination that the cause of the loss of shingles to the Claimant's roof on October 10th was not as a result of an extraordinary high wind event but rather wear and tear.

115. A review of the relevant case law reveals that it is relatively settled that "deterioration" and "wear and tear" exclusions found in all-risk insurance contracts refer to gradual, expected, inevitable degradation, and not extraordinary events. However, in many cases the courts are still left with the question of whether the particular damage was in fact caused by wear and tear or an extraordinary event.

116. In *Richard Brown v. Atlantic Insurance Company Limited (1996) CanLII 6603 (NL SCTD)*, the Supreme Court of Newfoundland Trial Division defined wear and tear and deterioration:

(i) Wear and Tear

An extraordinary event does not classify as "wear and tear". That term contemplates degradation arising from the normal use of any article.

(ii) Deterioration

The term “deterioration” should be confined to a “gradual, and perhaps imperceptible process...which would be expected to occur under normal circumstances”. See *Trane Sales & Service Agency v. Integrated Building Corp. Ltd. (1987)*, 26 C.C.L.I. 36 (B.C.S.C.).

117. In *Crowe v. Davis*, 2015 CanLII 80171 (ON SCSM), the Court considered the history and rationale of “wear and tear” exclusions:

44. The real problem is fortuity, or the unrelated concept of wear and tear, an excluded risk. Fortuity is a fundamental concept in insurance law. **Insurance is for losses caused by accident or fortuity, not losses which inevitably occur in the ordinary course of events or as a result of intentional acts by the insured. The common exclusion from property insurance policies of losses caused by wear and tear is grounded in this concept.** Indeed, in a long-standing authority on the interpretation of “all risk” policies, *British & Foreign Marine Insurance Co. v. Gaunt*, Lord Birkenhead held:

In construing these policies it is important to bear in mind that they cover “all risks”. These words cannot, of course, be held to cover all damage however caused, for such damage is inevitable from ordinary wear and tear and inevitable depreciation is not within the policies. Damage, in other words, if it is to be covered by policies such as these, must be due to some fortuitous circumstance or casualty.

(Emphasis added)

118. In *Wence v. Wawanesa Mutual Insurance Company*, 2005 BSCS 1878 (CanLII), the insured claimed for indemnity under their insurance contract for damage to their roof arising out of the Okanagan Mountain Park Fire. The insurer argued that the damage was the result of natural wear and tear, which was excluded from the all-risk contract. The Court found that the burden of proving on a balance of probabilities that the damage was a result of the heat exposure rested with the insured, and if the insured was able to meet this burden the burden would then shift to the insurer to prove on a balance of probabilities that such damage is excluded by the specific language of the contract. The insurer relied upon the report, photographs and testimony of an expert who inspected the roof to the effect that the roof was approximately 11 to 13 years old, showed curled and checked shakes in the siding, which could be attributed to poor installation and substandard grade materials and the improper placement of heat damage, and that the condition of the roof was typical for its “style and vintage” and that there was no indication of fire or heat damage. The Court accepted the expert’s opinion and as a result found that the damage was a result of age and deterioration.

119. In contrast to the case above, in the case before the court the evidence appears undisputed that there was a significant “wind event” and significant damage to the Claimant’s roof. The onus shifted to the insurer if they wished to rely on exclusions under the home owner’s policy to satisfy the court, on balance that the cause of the damage was not as a result of the wind but as a result of one or more of the exclusions. Unlike the Wence case where the

Insurance company secured expert reports to confirm the cause of damage, the evidence before me or more importantly the facts before Ms. Drapeau when she made her determination do not support the conclusions she reached.

120. The Court has reviewed the *Chong Hui Shen and Rong Ye v. Security National Insurance Company* as provided by Defendant counsel. In that case, the plaintiff made a claim under the policy for the cost of replacement of a roof and eaves-troughs and to repair and repaint the facia, fencing, flower boxes and a flue cap. The defendant insurance company declined to indemnify the plaintiffs for the cost of the replacement of the roof on the basis that “the roof had no economic value on the date of the loss”. The essential aspect of the plaintiff’s position was that in this instance, prior to a severe hail storm, he had not experienced any problems with the water shedding properties of the roof. Following the storm, the plaintiff had his roof inspected by a contractor who indicated that he needed a new roof. The court confirmed that they had no evidence of the reason for the requirement for the new roof. In this decision, both the plaintiff and defendant tendered to the court evidence from independent specialists dealing with property, construction and roofs. Both reports appear to conclude that the plaintiff’s roof was found to be in poor condition prior to the storm and that the roof system was worn out and appears to have been that way for at least for one year, concluding that the life (of the roof) was reached approximately one year prior to the hail event.

121. The court at paragraph 6 of the decision found that the plaintiff had failed to demonstrate any damage was caused to the roof as a result of the hail storm on July 5, 1998 and further found that the roof apparently had and retained the ability to shed moisture and did not fail as a result of the hail storm. This led the court to conclude that the hail storm did not cause any damage to the water shedding capability of the roof or affect the appearance of the roof.

122. The court then went through a lengthy analysis dealing with the nature of the indemnity provisions set forth in insurance policies and specifically the one before it. The court analyzed the decision of *Brkich & Brkich Enterprises Ltd. v. American Home Insurance Co.*, [1994] 1 W.W.R. 532, a decision of the British Columbia Supreme Court. In that decision, the court confirmed that under a contract of indemnity, in addition to an insurable interest, the insured must also demonstrate that he suffered a loss within the provisions of the policy. The facts of that case involved a plaintiff seeking to be paid replacement cost coverage when in fact they had not incurred the actual costs of replacing the loss.

123. The thrust of the court’s decision in the *Brkich* case was that:

While replacement cost coverage violates the principle of indemnity to the extent that it replaces old with new, the insurers, by the wording used, and the Courts in their interpretation of that wording, have preserved the indemnity principle by requiring that replacement be

effected by the insured before the entitlement to indemnity for replacement cost arises...”

124. In **Brkich**, the plaintiff, after the loss, again contracted to replace the building but later sold the property and the building contract. Consequently, her entitlement was determined to be the actual cash value at the time of the loss and not the replacement cost simply because they had not incurred the actual cost of replacing the building themselves. This decision was subsequently reviewed by the British Columbia Court of Appeal, who maintained the original judgment, and was later dismissed without reasons by the Supreme Court of Canada at [1997] 1 S.C.R. 1149.

125. However, Judge Hess in rendering his determination in the **Chong Hui Shen and Rong Ye** decision submitted to me by counsel, extracted from the **Brkich** decision that the starting point in determining whether the insured suffered a loss was the result of the fire. Judge Hess went on to state that in the facts before him he could not find a starting point as he had already found as a matter of fact that the roof element of the plaintiff's residence had no value whatsoever at the date of the loss based on the evidence before him. He therefore determined that the plaintiff had not suffered any loss and the terms of the policy dealing with the formula for indemnifying them did not need to be considered. He determined that the plaintiffs must first demonstrate an actual loss before the policy of insurance has an application. To establish loss, it is necessary to first establish value and he found that the plaintiffs had failed to satisfy the prerequisite.

126. I suspect, in order to find that Judge Hess's rationale is applicable, whether I agree with it or not, one must first look at the starting point in this particular case. That starting point, unlike the case before Judge Hess, was clearly confirmed by all evidence that an extraordinary event, in this case a wind storm, did in fact cause a loss to the roof shingles of the Claimant's home. Ms. Drapeau in her October 31st letter confirms this point. In contrast to Judge Hess' decision, based on the reports that were presented to him, he found that there was no evidence that the hail storm had caused any damage to the roof of the Claimant. Further, in contrast to that decision where it appears the court was afforded two separate expert reports relating to the condition of the roof both prior to the event and as a result of the event, in the case before me the only report I have is a series of email exchanges between Ms. Drapeau and Mr. Pelletier (exhibit 17). Mr. Pelletier's report, at least as at October 28, 2016 did not offer any evidence as to the life expectancy and/or value of the roof other than noting several factors relating to the condition of the roof. Further, there were no conclusions provided by him as to the useful value of the roof at the time of the loss or whether wear and tear or deterioration was a factor.

127. The court does recognize the fact that Mr. Pelletier's direct evidence provided to the court in his testimony extended well beyond the actual evidence of his investigation as set forth in his report back in October 2016 (Exhibit 17). However, following his written report to Ms. Drapeau in October 2016 there is no evidence that he himself had conducted any further investigation of the Claimant's roof. As such, I find the "best evidence" from Mr. Pelletier

would be that which was the freshest arising immediately after his investigation and as set forth in his written report. If, days following his personal investigation of the damage claim in October 2016, he confirms in writing that he is not able to offer an opinion on whether the damage to the Claimant's roof was caused by wind or whether wear and tear and deterioration was a factor, then how could he possibly make these conclusions some nine months later? The same rationale would apply to his direct evidence surrounding the life expectancy of the Claimant's roof shingles when at the time of his report he was not able to answer this question. Ms. Drapeau appears to have been firm in her determination to deny the claim on October 31st. Subsequently, as evidenced by the e-mail stream in Exhibit 17, she sought a further opinion from a Mr. Seymour which appears to justify her decision. While that in itself remains questionable, at a minimum, if the court was to provide any weight to any opinion Mr. Seymour had, the onus remained with the Defendant, Intact, to produce such evidence before the court and afford the Claimant the right to test such evidence. That did not occur.

128. I found the evidence of the Claimant, Ms. Boone, to be credible to the extent that she could speak to matters surrounding her claim. From her testimony, it appears that she was knowledgeable of her insurance coverage. In her formal written statement, she claims that she was misled by all of the Defendants to believe that she had appropriate coverage. I suspect the reason for this allegation arose as a result of her testimony where she confirmed by way of a letter she had received from A.A. Munroe (Exhibit 2) in 2015 that she was called upon to turn her attention to the condition of her roof. Her testimony was that she answered all of the questions put to her and at that time and provided photographs of the condition of her roof to her insurance agent, A.A. Munroe. The letter explicitly states that upon receipt of the information, they would be forwarding it along to her insurance company, which at the time was Intact. Therefore, it is reasonable to assume that the information being requested was not for the benefit of A.A. Munroe but rather Intact directly. It is clearly understandable that she would have been left with the impression, right or wrong, that having responded to the question being asked about the condition of her roof in 2015 and providing pictures of the same and not having received any further response or inquiries in this regard, together with the fact that her insurance continued to be renewed by the same company, that they were satisfied with the information provided and in turn the condition of her roof. Her evidence further indicated that in years past similar inquiries regarding her oil tank were asked of her by her insurance company which led to their direction that it was necessary that she replace her oil tank, which she confirms she had done.

129. I acknowledge that the simple fact that the insurance company asked for this additional information and chose not to provide any further response and/or follow up does not in itself relieve an insured from their obligation to abide by the written terms of their insurance policy in effect at any point in time. As such, the Court further acknowledges the continuing obligation on this Claimant and indeed any insured to maintain their property and be conscious of issues such as wear and tear and/or deterioration which could trigger a loss or damage which would be excluded under the terms of an all-risk policy. I suspect that this above-noted scenario formed the basis for the claim that she had been misled. I find that the facts do not support the claim that any of the Defendants had misled the Claimant. Again, it is

understandable based on the exchange which occurred back in 2015 involving her roof as to why she would think this way.

130. Based on the foregoing, as it relates to the Claimant's claim relating to the damage she sustained as a result of the loss of her roof shingles, I find that this loss occurred as a result of a wind storm on October 10, 2016 and that such loss was covered under the terms of her policy in effect at that time.

131. I further find that the Defendant Insurance Company has not met the burden imposed upon them to provide sufficient evidence, on the balance of probabilities, that the actual cause of the loss of the roof shingles was not wind storm but rather the condition of the roof based on reasonable wear and tear and deterioration. In conclusion on this point and based on the evidence submitted, I am satisfied that the nature of the loss fell within the policy coverage and that the evidence of the Defendant, Intact, was simply not sufficient, in spite of the fact that there were signs of deterioration and wear of the roof, that either of those factors played any role in the actual cause of the loss sustained by the Claimant.

132. I order that the Defendant, Intact, pay to the Claimant the estimated value of the loss sustained to her roof in the amount of \$7,800.00 less the applicable deductible amount of \$500.00 (see Exhibit 13) for a total award of \$7,300.00 (including HST).

AUTO CLAIM

133. The facts surrounding this part of the Claimant's claim are puzzling at best. She alleges that several weeks after her roof sustained damage, early one morning a local contracting company which she noted as "Aucoins" showed up telling her that they were sent by the insurance company to complete some temporary repairs in anticipation of further rain on the coming weekend. The Claimant was somewhat surprised at this because at that point she had already been advised by Ms. Drapeau that her claim had been denied, however, she was hopeful that there may have been some re-consideration of that decision. Therefore, I suspect she saw this as something positive and for certain would have no reason to prevent anyone from carrying out temporary repairs to her roof to ensure there was no further damage to her home.

134. I further accept the Claimant's evidence that she witnessed a portion of the repairs being carried out to the roof over the porch as she was able to view it from her bedroom window and that I accept the fact that she had sufficient knowledge to recognize tar paper, roofing nails and the product of tar. I further accept the Claimant's evidence that tar was applied to the tar paper placed on her roof for the purposes of securing it on a temporary basis.

135. However, where this aspect of her claim seems to go adrift is the fact that Ms. Drapeau in her evidence states firmly that at no time did she engage or request Aucoins to attend to the Claimant's residence to effect any temporary repairs. Ms. Drapeau confirms when this temporary work was carried out, the decision had already been made and the

Claimant had been informed that her claim was denied based on the exclusion provisions of her policy. In addition, the evidence of Mr. Pelletier confirmed that he at no time contacted the Aucoins for the purposes of attending at the Claimant's residence. He did acknowledge that he had used Aucoins as a sub-contractor to carry out other repairs in the weeks following the storm event but had not received any instructions and therefore did not have the authority to direct anyone to attend at the Claimant's residence.

136. Finally, in this regard, Ms. Drapeau's evidence was that she had contacted the Aucoin company on behalf of the Claimant to investigate this matter and determine whether they did carry out temporary repairs to the Claimant's home and whether in fact they used the product of tar in their application of the repairs. She reported back to the Claimant that they had advised Ms. Drapeau that they had not used any tar substance carrying out the repairs.

137. Finally, as to the evidence presented on this issue, I do find it somewhat perplexing that Ms. Drapeau investigated this aspect of the claim by contacting Aucoins directly and receiving their response and reporting back to the Claimant the fact that a tar substance was not used yet during these discussions had failed to advise the Claimant that she/Intact had not engaged Aucoins to attend at her residence. Further, in the written Defence filed on behalf of the Defendant, while it confirms that the Defendant, Intact, did not attend at her property and bears no liability for the same, they do not, at least at that point in time, confirm that they had not contacted any third party (Aucoins) to attend at the Claimant's property on their behalf. With all that said, the court is left to accept the direct evidence of both Intact witnesses that neither had any knowledge of who may have contacted Aucoins to attend at the Claimant's residence.

138. The law is firm as it relates to who bears the burden of proving the existence of an agency relationship. It rests with the person asserting an agency relationship exists. Therefore, in this case, the burden of proving the existence of an agency relationship between Intact and Aucoins rested with Ms. Boone. This proposition has long been held as confirmed by the following two decisions:

***Continental Oil Co. v. Canadian Pacific Railway Co.*, 52 SCR 605, 1916 CanLII 44 (SCC)**
***County of Halifax Municipal School Board v. Logan*, 1965 Can LII 620 (NSCA)**

139. Although the evidence before me, including that of the Claimant, as well as a neighbor, Tracey Cook, confirmed she had witnessed an Aucoin truck parked in front of the Claimant's home (see Exhibit 8) none of this provides sufficient foundation to establish, on balance, that the Aucoins' attendance at the Claimant's residence and in turn their possible negligence resulting in damage to the Claimant's motor vehicle was as a result of them acting as an agent for the Defendant, Intact.

140. For the same reason, as it was open to the Defendant, Intact, to subpoena evidence from Brett Seymour and any other contractor who subsequently reviewed the condition of the Claimant's roof, so too was it open to the Claimant to subpoena a representative from Aucoins

for the purposes of affording the Court an opportunity to determine with some level of certainty that there was in fact an agency relationship between Aucoins and the Defendant, Intact. I find that there was simply insufficient evidence presented to me in support of this allegation. Therefore, while I have little doubt that Aucoins did complete temporary repair work to the Claimant's home and based on the Claimant's account, her automobile suffered damage as a result of the work they had carried out, I am not able to conclude that this was the responsibility of the Defendant, Intact, based on an agency relationship.

141. As a matter of note for the benefit of the Claimant, in accordance with the Civil Procedure Rules of Nova Scotia (Rule 88), I do not believe the Claimant would be barred by the doctrine of *res judicata* from initiating an action against Aucoins. Therefore, while it is open for the Claimant to initiate a separate action against Aucoins, it will be left to the person hearing that case to make any final determination as to whether a further and separate claim is appropriate to be heard and to ultimately make a determination of any such claim.

142. Therefore, I dismiss the portion of the Claimant's claim relating to the damage to her automobile based on the fact that there is insufficient evidence to establish an agency relationship between the Defendant, Intact, and Aucoins.

143. The Claimant shall be entitled to judgment in the amount of \$7,300.00 (\$7,800.00 less \$500.00 deductible, inclusive of HST) plus the costs of this action.

A. ROBERT SAMPSON, Q.C.

Adjudicator