COMMERCIAL GENERAL LIABILITY INSURANCE POLICIES - THE DUTY TO DEFEND POST-*PROGRESSIVE HOMES*[1]

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This paper reviews key issues relating to CGL insurance policies and the latest case law respecting, the reasonable expectations doctrine, approaches to policy interpretation and the duty to defend in light of *Progressive Homes* and recent caselaw concerning pollution exclusions.

REVIEW AND UPDATE ON THE REASONABLE EXPECTATIONS DOCTRINE

At its simplest, the doctrine of "reasonable expectations" is a tool of construction whereby courts construe insurance contracts in a manner consistent with the reasonable expectations of the contracting parties. As this review and update on the law of reasonable expectations will suggest however, there is not much that is "simple" about it.

a) The American Experience

The doctrine of reasonable expectations originated in the United States. The concept of looking to the reasonable expectations of the parties to a contract was articulated as far back as the 1918 decision of *Bird v. St. Paul Fire and Marine Insurance,*[2] but the doctrine did not achieve prominence in the insurance context until the 1960-1970's.

By 1976, Professor Robert Keeton, a leading scholar of U.S. insurance law, found that there was sufficient case law to credit it with having established a clear departure for American insurance law from the insurance law of the English legal system, stating it was "perhaps a more striking departure than any that had occurred before this doctrine began to emerge in the 1960's".[3]

Keeton is generally credited with creating the modern formulation of the reasonable expectations doctrine. In his seminal 1970 article, he noted the shift from the early days where insurance contracts were negotiated at Lloyd's Coffee House among persons of relatively equal bargaining power to the modern practice of offering mainly contracts of adhesion. Given the changes, Keeton argued that judicial regulation of these contracts was appropriate and set out the following principle:

> The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.[4]

Keeton reasoned that the principle was "too general to serve as a guide from which particularized decisions can be derived" and "too broad to be universally true",[5] but that it pointed in the direction insurance law appeared to be moving and, in his view, ought to be embraced.

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[2] 120 N.E. 86 (N.Y. 1918).

[3] Eric M. Larsson, "Insured's "Reasonable Expectations" as to Coverage of Insurance Policy" (2011), 108 Am. Jur. Proof of Facts (3d) 351.

[4] Robert Keeton, "Insurance Rights at Variance with Policy Provisions" (1970), 83 Harv. L. Rev. 961 at 967.

[5] *Keeton, supra* note 4 at 967.

Many U.S. jurisdictions did go on to adopt and develop this principle, but based on different approaches. Certainly Keeton's suggestion that courts should ignore clear contract language and honour the insured's reasonable expectations regardless was, and still is, controversial. A review of the case law and literature reveals that there is no real consensus on how doctrine is applied. Depending on the article, authorities suggest that there are two,[6] three[7] and even four[8] different applications of the doctrine of reasonable expectations. In the absence of consensus and for our purposes, however, these various approaches can be categorized as adopting either a narrow or broad application of the doctrine.

The narrow application purports to apply the doctrine of reasonable expectations only when policy language is ambiguous. This approach is in line with the traditional contract interpretation canon of *contra proferentem* which construes ambiguity against the drafter. As the vast majority of insurance contracts are unilaterally drafted by the insurer, any ambiguity is construed in favour of the insured.[9]

Courts adopting the broad application of the doctrine hold that it can be applied even in the absence of an ambiguity. These courts are willing to ignore clear policy language in order to ensure that they give effect to the reasonable expectations of the insured.

Various justifications have been put forth in support of a broad application, with the gist of them being that proponents believe insurance policies are essentially adhesion contracts over which insurers exercise extraordinary control. They argue that most insureds do not read, let alone understand, their policy[10] and in fact, many insurance transactions are final before a policyholder even has the chance to view the detailed policy terms.[11] Accordingly, it is up to the doctrine of reasonable expectations to avoid an unfair or unconscionable result. The broad approach upholds public policy and appears to be "part and parcel of the expanding emphasis on consumer protection".[12]

Of course, the broad application also has its detractors. It has been criticized for, among other things, being too imprecise to result in predictable court decisions, precluding insurers from relying

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[6] Peter N. Swisher, "A Realistic Consensus Approach to the Insurance Law Doctrine of Reasonable Expectations" (2000), 35 Tort & Ins. L.J. 729 at 735.

[7] *Brissette v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87, 96 D.L.R. (4th) 609 at para. 37 [*Brisette*].

[8] David J. Seno "The Doctrine of Reasonable Expectations in Insurance Law: What to Expect in Wisconsin" (2002), 85 Marq. L. Rev. 859 at p. 864.

[9] Seno, *supra* note 8 at 865-866.

[10] Seno, *supra* note 8 at 867.

[11] Sharon G. Holz "Insurance Law: The Doctrine of Reasonable Expectations" (1988), 37 Drake L. Rev. 741 at 746 cited in *Brisette*, *supra* note 7 at para. 41.

[12] Larsson, *supra* note 3 at § 4.

on the written terms of their policies, and permitting recovery by insureds who do not bother to read their policies.[13]

Not all jurisdictions in the United States even accept the doctrine.[14] In the jurisdictions that do apply it, however, the courts generally consider one or more of the following factors in determining whether the doctrine is excluded by the policy terms:

1. The existence of ambiguity;
2. Hidden exclusions or technical language;
3. Unconscionable conduct by insurer or unfair result;
4. The physical appearance of the policy; and
5. Public policy considerations.

These factors are interrelated and courts will often cite to more than one factor as grounds for applying the reasonable expectations approach to an insurance coverage controversy.[15]

In summary, the doctrine of reasonable expectations has grown out of, and evolved considerably within, the United States. Application of the doctrine varies widely depending on the particular jurisdiction, and care must be had to determine the state of the law in each jurisdiction when relying on American authorities or practising law across the border.

b) The Canadian Approach

The doctrine of reasonable expectations, as it has been applied in Canada, generally arises only where there is an ambiguity in the terms of the policy. However, case law does mention the possibility of broadening the doctrine so that, in certain circumstances, it would apply even in the absence of an ambiguity. To date, no appellate court has yet embraced the broader application of the principle.

Origins of the Doctrine

The basis for the doctrine of reasonable expectations in Canada is sometimes referred to as *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*[16] In particular, where Estey J. wrote:

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[13] Sharon G. Holz "Insurance Law: The Doctrine of Reasonable Expectations" (1988), 37 Drake L. Rev. 741 at 746-747, cited in *Chilton v. Co-operators General Insurance Co.* (1996), 32 O.R. (3d) 161, 143 D.L.R. (4th) 647 (Ont. C.A.) at para. 34 [*Chilton*].

[14] Larsson, *supra* note 3 at § 7. For example, as of early 2009 the doctrine had not been accepted in the following jurisdictions: Florida, Idaho, Illinois, Michigan, Ohio, South Carolina, South Dakota, Texas, Utah and Washington.

[15] Paul N. Farquaharson, "Chapter 5. Reasonable Expectations" (July 2011),1 Law and Prac. of Ins. Coverage Litig. § 5:8 (WL).

> [L]iteral meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of contract.[17]

Note that there is no explicit mention of "reasonable expectations". While this passage may have indeed laid the foundation for acceptance of the doctrine, in fact, the doctrine of reasonable expectations was first introduced in Canada by the Ontario Court of Appeal in *Wigle v. Allstate Insurance Co. of Canada.*[18]

At issue in *Wigle* was whether an unidentified automobile which struck the plaintiff fell within the designation of an "uninsured vehicle" as that term is used in the Underinsured Motorist Endorsement (S.E.F. No. 42) to a standard policy of automobile insurance. Writing for the majority, Cory J.A. (as he then was), found that the endorsement was a standard form contract. He noted that the American Courts had adopted a policy with regard to the interpretation of standard forms of insurance contracts known as the "reasonable expectations" doctrine. The doctrine required that courts honour the reasonable expectations of an insured in situations where the policy is ambiguous despite the presence of policy provisions which would appear to negate coverage.

Following a review of the history and application of the doctrine in the United States, Cory J.A. stated:

> The basic rules of construction adopted by the American courts are as follows:
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> 1. The court should look at the words of the contract to determine if there is an ambiguity;
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> 2. the court should ascertain the intention of the parties concerning specific provisions by reference to the language of the entire contract;

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[16] [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49 [*Consolidated Bathurst*].

[17] *Consolidated Bathurst, supra* note 16 at para. 26.

[18] (1984), 49 O.R. (2d) 101, 14 D.L.R. (4th) 404 (Ont. C.A.) [*Wigle*].

3. the court should construe ambiguities found in the insurance contract in favour of the insured, and

4. the court should limit the construction in favour of the insured by "reasonableness" and apply it only if it is impossible to give the contract a fair interpretation by using other rules.

> The doctrine has been extended to give effect to the reasonable expectations of policyholders to cases which did not involve ambiguous provisions in the policy. For our purposes it is necessary only to consider situations where there is ambiguity in the contract. I am of the opinion that the first three rules of construction, above, are appropriate to the interpretation of standard form motor vehicle insurance contracts in Ontario. Their application is equitable for it is the insurer that has the only real opportunity to settle upon the wording of the coverage, whether it will offer such coverage and to explain it to their clients who can only accept or reject the coverage.[19]

The Court concluded that the endorsement was ambiguous, as the average person reading it would find nothing that would indicate that unidentified motor vehicles, as defined in the policy, were specifically excluded from coverage. Consequently, it was an appropriate case to give effect to the insured's reasonable expectation.

The Traditional Interpretation

Less than a decade after *Wigle*, the Supreme Court of Canada had the opportunity to consider the doctrine in *Brisette Estate v. Westbury Life Insurance Co.*[20] In *Brisette,* the Court grappled with the question of whether, where a joint policy of insurance is issued to a couple, the husband's murder of the wife absolves the insurance company from paying out under the policy. It was accepted that public policy precluded recovery by the husband, but the wife's estate made a claim for the proceeds.

Sopinka J., writing for the majority, held that there was nothing ambiguous about the wording of the contract and made no mention of the reasonable expectations doctrine. The Court concluded that the insurance contract could not be construed to require payment to the wife's estate. However, Cory J., in dissent, discussed the doctrine at some length. He noted that in the United States there were essentially three versions of the doctrine:

1. Application of the doctrine wherever there is an ambiguity in the policy of insurance, so that ambiguities are resolved in favour of the insured in order to satisfy his or her reasonable expectation;

2. Application of the doctrine to provide that the insured is entitled to all the coverage that might reasonably be expected to be provided under the policy. Only an equivocally plain and

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[19] *Wigle, supra* note 18 at paras. 45-46.

[20] *Brisette*, *supra* note 7.

clear manifestation of the company's intent to exclude coverage will defeat that expectation; and

3. The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honoured even though painstaking study of the policy provisions would have negated those expectations.[21]

With respect to the third version, Cory J. noted that commentators justified the broad approach for three reasons: (1) policy forms are long and complex and cannot be understood without detailed study; (2) rarely do policyholders read their policies carefully enough to acquire such understanding; and (3) most insurance transactions are final before a policyholder has a chance to see the detailed policy terms.[22] He stated that he set out the American authorities "not with any intention of slavishly following any of them" but rather to show how far certain jurisdictions have gone to give effect to the reasonable expectations of the insured. Justice Cory then went on to briefly discuss the Canadian approach, reiterating the basic rules set out in *Wigle*, which accept that the doctrine applies only in cases of an ambiguity.

In applying the relevant legal principles, he found that it was apparent that an ambiguity existed with the policy as it did not address the situation of one spouse murdering another. In his view, whether it was called "the reasonable intention or the reasonable expectation of the parties, the result is the same", that is, that the sum insured should be paid to the wife. He concluded that while public policy reasons precluded the husband from benefiting from his crime, he must hold those funds as trustee for the administrator of the estate of the wife.

Only one year later, MacLachlin J. (as she then was), writing for the majority of the Supreme Court of Canada pronounced the doctrine a "principle of construction" in *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*:[23]

> I turn to the third relevant principle of construction, the reasonable expectations of the parties. Without pronouncing on the reach of this doctrine, it is settled that where the policy is ambiguous, the courts should consider the reasonable expectations of the parties.[24]

Accordingly, in the course of less than a decade the doctrine of reasonable expectations went from being first introduced by the Ontario Court of Appeal to being labelled a "principle of construction" by the Supreme Court of Canada. Today, the doctrine is applied in cases across the country.[25]

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[21] *Brisette, supra* note 7 at paras. 34-39.

[22] Holz cited in *Brisette*, *supra* note 7 at para. 41.

[23] [1993] 1 S.C.R. 252, 99 D.L.R. (4th) 741 [*Reid Crowther*].

[24] *Reid Crowther*, *supra* note 23 at para. 43

[25] For example, the doctrine of reasonable expectations was discussed and applied in the province of British Columbia in both *Gatzke v. Insurance Corporation of British Columbia,* [1989] I.L.R. 1-2480 and *Pacific Rim Nutrition Ltd. v. Guardian Insurance Co. of Canada* [1998] B.C.J. No. 1852, 110 B.C.A.C. 269 as well as in Nova Scotia in *LaPierre v. General Accident Assurance Co. of Canada,* [2007] N.S.J. No.12, 2007 NSSC 9.

Where No Ambiguity is Present

While it is clear that the doctrine of reasonable expectations has been adopted by Canadian courts, there is some debate as to whether a Court may consider the reasonable expectations of the parties absent an ambiguity in the policy. To date, while appellate courts have only endorsed a limited application of the doctrine they have also refused to pronounce on its precise reach.

Most notably, the Ontario Court of Appeal in *Chilton v. Co-Operators Insurance Co.*[26] set out various factors that could merit the application of the doctrine even when the policy wording was unambiguous. The Court reviewed the various justifications that had been used in the United States to extend the principle to unambiguous wording:[27]

> (i) insurance policies are typically long, complicated documents which insurers know policy holders will not even read, let alone study carefully;
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> (ii) insurers' marketing approaches ordinarily do not even allow a purchaser to examine a copy of the policy until after the contract has been concluded;
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> (iii) in some cases protecting reasonable expectations is appropriate because allowing an insurer to enforce limitations or restrictions in the policy would be unconscionable or unfair;
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> (iv) expectations caused by the marketing practices of the insurer should be protected; and
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> (v) expectations resulting from the insurer's characterization of the insurance coverage warrant protection in some circumstances.

The Court stated that no Canadian appellate Court had yet embraced the broader application of the doctrine, and that they need not decide the reach of the principle either, as the wording in the policy at issues was clear. Nevertheless, the Court provided a road map for its possible use:

> In considering whether to apply the reasonable expectations principle to cases in which there is no ambiguity in the policy, first the court should consider whether a reasonable insured could have expected coverage. An arguable case for coverage may exist, for example, if the policy is difficult to read or understand and if the insurer, either by its marketing practices or by giving its policy a misleading name, created or contributed to a reasonable expectation of coverage. Coverage may also be warranted where the insurer's interpretation of the relevant policy provision would virtually negate the coverage the insured expected by paying a premium. In these circumstances the court may be justified in looking beyond the words of the contract

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[26] *Chilton, supra* note 13.

[27] *Chilton, supra* note 13 at 172.

> and holding the insurer responsible for the insured's reasonable expectation of coverage.[28]

The Court of Appeal continued this discussion in *Segnitz v. Royal & Sun Alliance Insurance Co. of Canada,*[29] where it held that its earlier decision on the application of deductibles upon payment of motor vehicle property damage claims under automobile insurance policies was wrongly decided. The Court determined that the statutory condition at issue formed part of the Ontario automobile insurance policy and, therefore, should be considered in light of the principles for interpreting insurance policies, including reasonable expectations. Laskin J.A., for the Court, stated:

> I do not consider the interpretation of statutory condition 6(7) or the application of a deductible in total loss cases to be ambiguous. Nonetheless, and without deciding whether the reasonable expectations principle should have a wider reach in Canada, I think that I can safely say it is always desirable when a court's interpretation accords with the parties reasonable expectations. That is undoubtedly the case here. Deductibles are a well-understood and well-accepted feature of automobile insurance policies. A reasonable insured would fully expect the insurer to apply a deductible in total loss cases, including in those cases where the insurer acquires the salvage. A reasonable insured would not expect to receive more than he or she bargained for.[30]

While the Court did not go so far as explicitly to broaden the doctrine in this case, the decision does seem to suggest that in certain situations, as with deductibles, it is desirable to consider the reasonable expectations of the parties even absent an ambiguity.

Finally, in *Fresh Taste Produce Ltd. v. Sovereign General Insurance Co.*[31] the insured submitted a claim to its insurer following the province-wide power black-out that occurred in the summer of 2003. The insurer brought a motion for summary judgment and the insurer sought an adjournment to file extrinsic evidence regarding its reasonable expectations respecting the policy. The Motion Judge refused, and the insured appealed.

In dismissing the appeal, the Court noted that its decision in *Chilton* recognized the doctrine of reasonable expectations, and stated that it applies "primarily" when a Court is required to construe an ambiguity. The Court noted the discussion in *Chilton* about the potential broader application of the reasonable expectations doctrine but concluded that it had no basis for finding that this case warranted a broader application of the doctrine of reasonable expectations.

Naturally, these comments have led to speculation that the Court is simply waiting for the right case to come along before it will expand the doctrine. At least one commentator suggested that these aforementioned Court of Appeal decisions indicate a willingness to do so:

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[28] *Chilton, supra* note 13 at 172.

[29] [2005] O.J. No. 2436, 76 O.R. (3d) 161 (Ont. C.A) [*Segnitz*].

[30] *Segnitz, supra* note 29 at para. 80.

[31] (2005), 27 C.C.L.I. (4th) 7 (Ont. C.A.).

> Given the Court of Appeal's recent observations about and characterizations of the reasonable expectations doctrine and in what circumstances and on what basis it might be applied, it appears the Court of Appeal is anticipating, or one might even go so far as to say encouraging, the receipt of an appropriate case in which it may directly deal with whether or not the doctrine of reasonable expectations should be extended to the interpretation of unambiguous policy language.[32]

More recently, the Court of Appeal again left the door open for expansion in *CUMIS General Insurance Co. v. 1319273 Ontario Ltd.*[33] The Court stated:

> Moreover, Canadian courts have typically used the reasonable expectations principle to resolve ambiguities in a policy…And even if the reasonable expectations principle had a broader scope it would not apply in this case because the G.L. Plus rider is not misleading.[34]

There is also at least one Ontario lower court case where a court has applied the doctrine of reasonable expectations absent an ambiguity. At issue in *Smith v. Crown Life Insurance Co.*[35] was whether the insured was entitled to increased benefits payable under her disability income policy.

The facts are sympathetic, albeit convoluted. The insured was rendered partially disabled after a surgery left her partially deaf and with facial nerve paralysis. Consequently, she reduced her hours of work and applied to obtain a Future Increase Option (FIO). The FIO rider provided a once-a-year option to increase coverage without having to provide evidence of insurability and was, therefore, available to an insured who was disabled as of the date of application. Her application was denied without reason and she commenced an action against her insurer. She subsequently became aware that the reason she was denied was because she was already eligible for the maximum level of income benefits based on her income. She was then led to believe that if she cancelled her group coverage she would be able to re-apply and obtain an increase in benefits under her individual disability policy. She did so, but was again denied FIO coverage, this time because of the drop in her income since becoming partially disabled. Accordingly, she brought an application for a declaration that Crown Life had wrongly denied her application, for although Crown Life's decision complied with the strict wording of the policy, it produced an arbitrary result.

The Court found that "although the provisions of the policy [were] not ambiguous, the circumstances of this case [were] such that the principle of reasonable expectations ought to apply and that Smith [was] entitled to an increase in benefits of $300 per month in accordance with the FIO rider".[36]

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[32] Michael S. Teitelbaum, "The Reasonable Expectations Doctrine: Signs and Portents" (2006) 24:2 Can. J. Ins. L. 32.

[33] 2008 ONCA 249, 59 C.C.L.I. (4th) 1 [*CUMIS*].

[34] *CUMIS, supra* note 33 at paras. 22-23.

[35] [1999] O.J. No. 89, 90 O.T.C. 54 (Ont. Gen. Div.) [*Smith*].

[36] *Smith, supra* note 35 at para. 26

In reaching its decision, the Court considered Laskin J.A.'s dicta in *Chilton* and appeared persuaded that this was an instance where a "reasonable insured could have expected coverage". The Court held:

> In considering whether to apply the reasonable expectations principle to cases in which there is no ambiguity in the policy, the court should consider whether the reasonable insured could have expected coverage. On the facts of this case, Smith could reasonably have expected increased coverage pursuant to the FIO rider. The nature of the policy and the actions of Crown Life contributed to this reasonable expectation. The court also takes into account that the provisions for determining eligibility under the rider, as outlined above, may produce an arbitrary result. Coverage may be negated for no reason other than the fact that the date of the disabling event is too far removed from the option date. In the present case, Smith could reasonably have expected to receive increased coverage when she cancelled the group policy and reapplied for the FIO option in accordance with the minutes of settlement. In these circumstances, the court is justified in looking beyond the words of the policy and applying the principle of reasonable expectations.[37]

Curiously, the *Smith* case does not appear to have garnered much in the way of discussion or notable judicial treatment. It was cited only once by Bromstein J. of the Ontario Small Claims Court in *Ashby v. Personal*[38] for the proposition that the reasonable expectations principle could apply where there is no ambiguity in the policy. As such, this interesting decision does not appear to carry much weight at this time.

The sum of these cases clearly suggests there is some appetite for expansion of the doctrine. That said, the Supreme Court of Canada has cautioned against doing so haphazardly. In *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*[39] the Court held:

> [T]he courts should try to give effect to the reasonable expectations of the parties, without reading in windfalls in favour of any of them. In essence, "the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought not anticipated at the time of the contract".[40]

In this same decision, the Supreme Court reminded courts to "remain mindful of the rules and principles governing insurance law" and "pay close attention to the structure and actual wording of the policy, read as a whole",[41] suggesting perhaps a return to more conservative methods of interpretation.

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[37] *Smith, supra* note 35 at para 34.

[38] [1999] O.J. No. 4193 at para 12.

[39] 2006 SCC 21, [2006] 1 S.C.R. 744 [*Jesuit Fathers*].

[40] *Jesuit Fathers, supra* note 39 at para 29.

[41] *Jesuit Fathers, supra* note 39 at paras 31-33.

In summary, as set out above, the law with respect to the doctrine of reasonable expectations is in a somewhat uncertain state both within Ontario and across Canada. At present, the law in Canada remains that the reasonable expectations of the parties will only be applied where an ambiguity is found. Some Courts have clearly emphasized that it is only to be applied where an ambiguity in the wording of the particular policy arises, while still others have expressed a desire to expand it beyond requiring an ambiguity in the policy, although there may be a need for ambiguity at a broader level.

c) Application (and Confusion) of the Doctrine

As the doctrine of reasonable expectations is a relatively new one, the methods or rules of application are still developing. At present, however, the case law does provide some general guidelines.

Firstly, the case law suggests that the doctrine requires consideration of the expectations of both the insured and the insurer. This was stated explicitly by Binnie J. in *Vytlingam (Litigation Guardian of) v. Farmer*: "[i]nsurance policies must be interpreted in a way that gives effect to the reasonable expectations of both insured *and* insurer".[42] This differs from the American approach which focuses solely on the expectations of the insured.[43] It also raises the obvious question - how does the doctrine function when the reasonable expectations of the insured invariably differs from those of the insurer?[44] Despite lip service to the contrary, it seems that it is in fact the expectations of the insured which have been considered by Canadian courts.

Second, where an ambiguity does arise the Court will consider the reasonable expectations of the parties at the time that the policy was formed. In making this consideration, a Court may permit the introduction of extrinsic evidence regarding the negotiations and discussions that were involved in the development of the policy.[45] Recently, however, in *Cabell v. Personal Insurance Co.*[46] the Ontario Court of Appeal found that evidence is not "essential" to establishing reasonable expectations. At issue was whether a policy exclusion for the settling, expansion, contraction, etc. of insured property applied to an endorsement specifically providing coverage for losses relating to an outdoor swimming pool.

At the trial level, Penny J. stated that, absent any evidence, he was unable to determine whether the exclusion effectively nullified coverage provided under the endorsement:

> Where reasonable expectations are involved, there typically needs to be some evidentiary record to bring definition and substance to what those reasonable expectations might be.
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> …

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[42] 2007 SCC 46 at para. 4 [*Vytlingam*].

[43] Barbara Billingsley, *General Principles of Canadian Insurance Law*, 1st ed (Markham: LexisNexis Canada Inc., 2008) at 143.

[44] Billingsley, *supra* note 43 at 144.

[45] *Dunn v. Chubb Insurance Co. of Canada*, 2009 ONCA 538, 97 O.R. (3d) 701 (Ont. C.A.).

[46] 2011 ONCA 105 rev'g 2010 ONSC 1666 [*Cabell*].

> Only evidence of "reasonable" expectations is relevant, "reasonableness" being an objective, not a subjective, measure…It is only in the context of such evidence that a proper assessment can be made of whether Common Exclusion 11 is inconsistent with the main purpose of the insurance coverage and whether enforcement of Common Exclusion 11 would virtually nullify the coverage or be contrary to the reasonable expectations of the ordinary person.[47]

On appeal, however, the Court of Appeal dismissed the position that evidence was necessary:

> It may well be that there was some evidence in those [other] cases from which a determination could be made about nullification of coverage and reasonable expectations of the parties, but there is no case that holds such evidence is essential.[48]

The Court of Appeal pointed to *Reid Crowther* and *Foodpro National Inc. v. General Accident Assurance Co. of Canada*[49] as cases where it was not evident that the courts relied on evidence in reaching their conclusions. Finally, the Court concluded:

> I agree that in some cases evidence may be needed, especially if the case concerns some particularly arcane set of circumstances. It seems to me that a court is in a good position to determine what are the most obvious risks for which an ordinary homeowners' policy is issued. If the court is able to determine on an objective basis that the insurer's interpretation would render nugatory coverage for the most obvious risks for which the endorsement is issued, a tactical burden shifts to the insurer. It will be for the insurer to show that the effect of its interpretation would not virtually nullify the coverage and would not be contrary to the reasonable expectations of the ordinary person as to the coverage purchased. This is a reasonable approach given that the insurer is in an ideal position to show that, contrary to what appears to be the case, the endorsement does in fact provide coverage.[50]

Interestingly, for the purposes of the application, both courts seemed content to use the doctrine of reasonable expectations as a "tool of interpretation" for determining whether there was nullification of coverage or not.

This brings us to our final point. A review of the case law suggests it is somewhat unclear as to whether there is a true distinction between the reasonable expectations doctrine and the principle of interpretation that requires consideration of the reasonable intentions of the parties. In some cases, the Supreme Court appears to blur the concepts together. For example in *Brisette*, where Cory J. states "[w]hether it is called the reasonable intention or the reasonable expectation of the parties, the result is the same". This is also apparent in *Cabell*, where the Court of Appeal declined to decide whether there was an ambiguity in the endorsement, but resolved the case by deciding an

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[47] *Cabell, supra* note 46 at para. 40-41(Ont. S.C.J.).

[48] *Cabell, supra* note 46 at para. 25 (Ont. C.A.).

[49] (1986), 57 O.R. (2d) 489, 33 D.L.R. (4th) 427 (Ont. H.C.J.).

[50] *Cabell, supra* note 46 at para. 28 (Ont. C.A.).

interpretation that virtually nullified coverage "could not have been within the reasonable expectation of the parties".[51]

As one commentator notes, "[a] clear conceptualization of this relationship is pivotal to understanding the scope of the reasonable expectations doctrine and its place in the Interpretation Framework".[52] She points out that if the reasonable expectations doctrine merely encompasses the expectations of both parties, then there is no reason to require a finding of ambiguity as the principle is little more than a tool by which courts may infer the intentions of the contracting parties.[53]

The trickle down effect of this confusion is keenly felt in *Lunenburg Industrial Foundry and Engineering Ltd. v. Royal and Sun Alliance Insurance Co. of Canada.*[54] The action arose out of significant damage caused to a marine railway. At issue was whether the marine railway was an object under the Boiler and Machinery Policy (B & M Policy). With respect to the reasonable expectations doctrine the Court stated:

> An addition to the law on insurance contract interpretation is the "reasonable expectation" approach set out by the Ontario Court of Appeal in *Wigle v. Allstate Co. of Canada*…The rule is applied in circumstances where there is a standard form contract that was not subject to negotiation. The court found that the definition of "unidentified automobile" in a policy was somewhat artificial and contrary to what a layman might take from the word. The court used the "reasonable expectation" approach to construe what would be ambiguous to an ordinary insured in favour of the insured and against the insurer. Some judges, including Laskin J.A. in *Chilton*…have suggested that the "reasonable expectation" principle enunciated in *Wigle* does not exist as a separate rule of interpretation, but rather that it is simply another way of expressing the concept that, where ambiguity exists, the deemed intention of the insured is to be preferred over that of the insurer so long as it is commercially reasonable.[55]

In applying the reasonable expectations doctrine the Court held that first the ordinary meaning of the contract must be determined. This ordinary meaning is to be discovered by determining what "ordinary, presumably reasonable, people would say they understand to mean in the context in which it is used."[56] The Court then went on to conflate the exercise of determining the meaning of the words with the application of reasonable expectations, stating:

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[51] *Cabell, supra* note 46 at para. 31 (Ont. C.A.).

[52] Billingsley, *supra* note 43 at 145.

[53] Billingsley, *supra* note 43 at 145.

[54] [2005] N.S.J. No. 65, 230 N.S.R. (2d) 249. (N.S.S.C.) [*Lunenburg*].

[55] *Lunenburg, supra* note 54 at para 27.

[56] *Lunenburg, supra* note 54 at para 42.

> When one applies the "reasonable expectations" approach set out in *Wigle*, an ordinary person in the position of an insured would not expect the terms "hoist" or "conveyor" - used in the context of the B & M Policy - to include an elevator, escalator, crane, power shovel, drag line or excavator - all of which involve lifting or conveying things or people. Nor would an ordinary insured expect those terms to include all forms of motorized transportation such as subways, railways, helicopters or trucks - which a broad functional definition would logically entail. Nor would an ordinary insured expect a hoist or conveyor to include marine railway, which functions as an inclined plane, and not as a hoist or conveyor.[57]

Accordingly, the Court in *Lunenburg* effectively uses the doctrine of reasonable expectations to show that the policy is not ambiguous rather than applying it to resolve an ambiguity.

Based on the above, it is apparent that there is at least some uncertainty with respect to whether the doctrine of reasonable expectations is something distinct from the principle of interpretation that requires consideration of the reasonable intentions of the parties. As there is much potential for confusion, judicial comment on this issue would be most welcome.

d) Conclusion

In just over two decades, the doctrine of "reasonable expectations" has grown from a fledgling idea set out in *Wigle*, to a widely used, and often confused, principle in insurance law. The general rule remains that the reasonable expectations of the parties will only be considered where there is an ambiguity in the terms of the policy. Yet, there are some undertones in the jurisprudence that suggest courts may be willing to broaden this approach in the appropriate situation.

This was done in *Smith* as the Court held that the circumstances surrounding the policy itself created ambiguity, thereby requiring the application of the reasonable expectations doctrine. In *Segnitz,* the Court also suggested that cases involving deductibles may allow for the application of the principle absent ambiguity. These decisions, in connection with some of the other judicial opinions, suggest that while the principle of reasonable expectations as it is applied in Canada may not be quite as broad as it is in the United States, there is scope for its expansion if a court so wishes.

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[57] *Lunenburg, supra* note 54 at para 61.

PROGRESSIVE HOMES AND THE INSURED'S WORK EXCLUSION

The Decision

Progressive Homes Ltd v Lombard General Insurance Co of Canada is probably the most significant decision rendered in the CGL context in the recent past.[58] The Supreme Court of Canada resolved conflicting lines of authority in case law emerging from British Columbia, on the one hand, and Ontario and Saskatchewan, on the other, relating to coverage for construction deficiency claims.[59]

Its Significance

Progressive Homes came before the Supreme Court of Canada as a duty to defend application. The CGL carrier was found to owe a duty to defend the insured general contractor in respect of underlying actions alleging water leakage and damage as a result of inadequate construction of four condominium buildings. The decision is important for at least three reasons.

First, the court emphasized the significance of the particular policy language. Rothstein J. wrote, "[t]he primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole (*Scalera*, at para. 71)." Put simply, "[t]he focus of insurance policy interpretation should first and foremost be on the language of the policy at issue." Policy terms are accorded their "plain" meaning. The particular policy wording trumps general principles of law.

Second, *Progressive Homes* goes some way in clarifying the application of the insuring agreement under a CGL policy in the context of defective construction claims.

Where property damage is defined to mean physical injury to tangible property, including resulting loss of use of that property, or loss of use of tangible property that is not physically injured, property damage to one part of a building caused by another part of the same building can constitute "property damage". Under such policy wording, property damage is not limited to damage to third-party property. The plain language of the definition includes damage to any tangible property. There is no restriction under either the policy definition or the plain and ordinary meaning of "property damage" which limits its reach to damage to another person's property. The pleadings before the Supreme Court of Canada alleged deterioration of building components resulting from water ingress and infiltration. The property damage requirement of the insuring agreement was, therefore, met.

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[58] *Progressive Homes Ltd v Lombard General Insurance Co of Canada*, 2010 SCC 33, [2010] 2 SCR 245, [2010] SCJ no 33 (QL) [*Progressive Homes*].

[59] *Swagger Construction Ltd v ING Insurance Co of Canada*, 2005 BCSC 1269, 29 CCLI (4th) 295, [2005] ILR I-4445, [2005] BCJ no 1964 (QL); *GCAN Insurance Co v Concord Pacific Group Inc*, 2007 BCSC 241, 47 CCLI (4th) 106, [2007] BCJ no 443 (QL); *Bridgewood Building Corp v Lombard General Insurance Co of Canada* (2006), 79 OR (3d) 494, 266 DLR (4th) 182, [2006] OJ no 1288 (QL) (CA), leave to appeal to SCC refused, [2006] SCCA no 204 (QL); *Westridge Construction Ltd v Zurich Insurance Co*, 2005 SKCA 81, 25 CCLI (4th) 182, [2006] 4 WWR 437, [2005] SJ no 396 (QL).

Some have suggested that *Progressive Homes* also stands for the proposition that defective workmanship constitutes property damage. Comments made by Rothstein J. in this regard are less than certain. Rothstein J. stated:

> **it is not obvious** to me that defective property cannot also be 'property damage'. In particular, **it may be open to argument** that a defect could […] amount to a 'physical injury', especially where the harm to the property is 'physical' in the sense that it is visible or apparent (see, e.g. *Annotated Commercial General Liability Policy*, vol. 1, at p. 10-10.). Moreover, where a defect renders the property entirely useless **it may be arguable** that defective property may be covered under 'loss of use', the second portion of the definition of 'property damage'. [emphasis added]

Further, strictly speaking, the comments are *obiter*. Both Progressive and Lombard appear to have agreed that construction defects themselves are not included in the definition of property damage. In the quote reproduced above, Rothstein J. began with the caveat: "[w]hile this point was not contested and nothing turns on it in this appeal".

On the facts of the case, the property damage requirement under the insuring agreement was met by allegations of resulting damage. The pleadings in *Progressive Homes* alleged deterioration of the building components as a result of water leaking in through windows and walls. The court did not have to determine the duty to defend on the basis of the allegations of defectively constructed property alone, i.e. improperly built walls and poorly installed windows.

With respect to the accident or occurrence requirement under the insuring agreement, the Supreme Court of Canada held that faulty workmanship can constitute an "accident" or "occurrence". The question is said to be case-specific, depending on the circumstances of the defective workmanship alleged and the definition of "accident" or "occurrence" in the policy. The court denied this offends the assumption that insurance is intended to provide against fortuitous, contingent risk. A fortuity component remains by virtue of the definition of accident. The insured must show damage neither expected nor intended from its standpoint. The court was also satisfied that holding faulty workmanship to qualify as an accident will not render the CGL policy a performance bond. The latter ensures work is brought to completion whereas the former covers damage to the insured's work once completed.

The accident/occurrence requirement was held to be satisfied in *Progressive Homes* on the basis of the pleadings and policies before the Supreme Court of Canada. The policies at issue essentially defined accident/occurrence to include "continuous or repeated exposure to conditions which result in property damage neither expected nor intended from the standpoint of the Insured." The pleadings alleged negligence without reference to intentional conduct. In addition, the damage alleged in the pleadings was the result of "continuous or repeated exposure to conditions".

Note that the pronouncements of the Supreme Court of Canada in *Progressive Homes* relating to the insuring agreement requirements of a CGL policy were made in the context of a duty to defend application. In its reasons, the court was careful to qualify its findings of "property damage" and an "accident" or "occurrence" as being on the basis of the low bar set on a duty to defend inquiry.

A duty to defend arises where, on the pleadings, there is a mere possibility indemnity could be owed under the policy. Having found sufficient "property damage" for the purposes of the duty to defend, Rothstein J. noted, "[w]hether specific property actually falls within the definition of 'property damage' is a matter to be determined on the evidence at trial. This meets the low

threshold of showing that the pleadings reveal a possibility of property damage for the purpose of deciding whether Lombard owes a duty to defend." With respect to the "accident" component, Rothstein J. warned, "[i]f at trial it emerges that the damage was expected or intended by Progressive, then Lombard would not be required to indemnify Progressive. However, the duty to defend only requires a possibility of coverage and I am satisfied that possibility is made out in this case." It follows that some caution should be exercised when relying upon the court's holdings with respect to satisfaction of the insuring agreement of a CGL in the context of the duty to indemnify.

There is a third reason the decision in *Progressive Homes* is significant. It provides guidance to liability insurers and insureds, alike, with respect to the scope of the "work performed" or damage to the insured's work exclusion. Three versions of the exclusion were considered by the Supreme Court of Canada.

The first version excluded coverage:

> With respect to the completed operations hazard to property damage to work performed by the Named Insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.

This version of the work performed exclusion was held to catch damage caused by the general contractor to the general contractor's own completed work only. In other words, there remains coverage for property damage to the general contractor's work caused by a subcontractor's work or property damage to the subcontractor's work whether caused by the subcontractor or the general contractor. The pleadings under consideration alleged that several subcontractors were responsible for installation of components alleged to be inadequate. In light of the alleged involvement of subcontractors, the work performed exclusion did not negate the insurer's duty to defend.

The second version of the "work performed" exclusion provided that the insurance did not apply to:

> 'Property damage' to 'that particular part of your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'
>
> "Your work" means:
>
> a. Work or operations performed by you or on your behalf; …

The phrase "that particular part of" was emphasized by the court. By virtue of its inclusion, the exclusion was interpreted to "expressly contemplate[ ] the division of the insured's work into its component parts". Property damage to the particular part of the insured's work arising out of that particular part and included in the products-completed operations hazard is excluded from coverage. Property damage to part of the insured's work arising out of another part of the insured's work remains covered. This version of the "work performed" exclusion was held to catch the defective work of a subcontractor and general contractor, but not resulting damage. As previously noted, the pleadings before the court alleged resulting damage. Accordingly, this version of the exclusion did not negate the duty to defend.

The third version excluded coverage for:

> "Property damage" to that particular part of "your work" arising out of it or any part of it and included in the "products-completed operations hazard".
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

This version is the same as the last, but includes a subcontractor exception. In combination, the exclusion and exception were held to negate coverage only for defective property or defective work completed by the insured general contractor. Resulting damage to another part of the work and the defective work of a subcontractor are covered. Again, the pleadings raised a possibility of coverage despite the "work performed" exclusion.

Decisions After *Progressive Homes*

Since *Progressive Homes*, a defence was found to be owed to a general contractor under a wrap-up liability policy in relation to a leaky condo claim in *PCL Constructors Canada Inc v Encon Group*.[60] The Ontario Superior Court of Justice applied the plain meaning approach advocated in *Progressive Homes*. Coverage was determined based on the particular policy language rather than the application of general principles, i.e. that wrap-up insurance is intended to cover an insured's tortious liability to others and not the insured's own defective workmanship. General principles are said to serve as an "interpretative aid" only.

In *PCL Constructors*, the pleadings in the underlying action were held to sufficiently allege property damage for purposes of the "low threshold" on a duty to defend application. The Statement of Claim pled defective workmanship, including improper installation of windows, resulted in water penetration and damage, including moisture and odour damage inside condo suites.

The court was not satisfied that a "your work" exclusion precluded the possibility that the insurer would owe indemnity in respect of the underlying claim. The exclusion negated coverage for "that particular part of any work performed by or on behalf of the insured, if such work is deemed […] faulty […] because of any known or suspected defect or deficiency therein." The exclusion was interpreted as excluding coverage for fixing the particular part of the insured's work on the condo project constituting the deficient work. On a reasonable reading of the Statement of Claim, however, damage was alleged to property other than the building envelope itself (the insured's own work). Rather, on a reasonable reading of the pleading, damage was alleged to property owned by others, i.e. property of condo unit owners, and to work done by others, i.e. interiors. This was not caught by the exclusion.

Since *Progressive Homes*, a defence was found to be owed to an insured under a CGL policy with respect to a claim alleging faulty installation of kitchen cabinetry in *California Kitchens & Bath Ltd v AXA Canada Inc.*[61] The pleadings under consideration in this case alleged the insured or its sub-

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[60] *PCL Constructors Canada Inc v Encon Group*, (2010) ONSC 5911, [2011] ILR I-5064, [2010] OJ no 4566 (QL) (Sup Ct J) [*PCL Constructors*].

[61] *California Kitchens & Bath Ltd v AXA Canada Inc.*, 2010 ONSC 6125, 91 CCLI (4th) 285, [2010] OJ no 4752 (QL) (Sup Ct J).

trades were negligent in failing to install the plaintiff's kitchen in compliance with applicable safety codes. The plaintiff alleged it was necessary to reposition the sink and counter, in turn, requiring the entire kitchen to be torn out and replaced. Damages claimed included the costs of alternative accommodation.

On the basis of *Progressive Homes*, the Ontario Superior Court of Justice held that the pleading "sufficiently" alleged an occurrence. E. Frank J. wrote: "[t]here is nothing in the pleading to suggest that the damage was expected or intended. The fact that the claim arises out of faulty workmanship does not exclude the possibility of coverage." The claim for loss of use of the home during repair of the kitchen was held to constitute property damage within the meaning of the policy. Finally, a named insured's work exclusion was held not to preclude defence since the exclusion was not applicable if the work out of which the damage arose was performed by a subcontractor.

Most recently, the British Columbia Court of Appeal had occasion to consider the implications of *Progressive Homes* in the context of an application for indemnity under a CGL policy. In *Bulldog Bag Ltd v AXA Pacific Insurance Co*, the court set out to apply the principles from *Progressive Homes*, developed in the context of a duty to defend application, to a particular claim under a particular policy in the context of an application for indemnity.[62] In *Bulldog Bag*, the scope of a damage to the insured's product exclusion was in issue. The exclusion included the term "property damage", the meaning of which the British Columbia Court of Appeal considered to have been "expanded in the context of coverage clauses" by *Progressive Homes*.

It is necessary to set out the underlying facts and arguments presented in the case in some detail in order to fully understand the *Bulldog Bag* decision.

The insured manufactured plastic packaging for soil and manure sold by its customer. Such manufacture included printing product information and branding on bags. After the insured had supplied over a million printed bags to the customer and the customer had begun bagging its product, it was discovered that the ink was running. As a result of the defective bags, the packaged soil and manure could not be sold. The insured, subsequently, manufactured new packaging using a different ink. The customer filled the new packaging with manure and soil from its inventory. It could not immediately reuse the previously packaged manure and soil since it froze during storage. Later, the customer was able to extract and salvage approximately 90% of the material from the defective packaging. The remaining 10% was lost or rendered unfit for use in the salvaging process.

The customer claimed against the insured for the cost of packaging material from its inventory into the new bags, removing the soil and manure material from the defective packaging, disposing of the defective packaging and the loss of 10% of its product in the salvaging process. The insured sought indemnity under a CGL policy. Note, the insured conceded that the initial cost of the defective bags themselves was not covered. No indemnity was sought in respect thereto.

Under the CGL policy at issue, the definitions of "property damage" and "occurrence" were similar to those in the policies at issue in *Progressive Homes*. The damage to the insured's product exclusion under consideration in *Bulldog Bag* provided: "[t]his insurance does not apply under Insuring

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[62] *Bulldog Bag Ltd v AXA Pacific Insurance Co*, 2011 BCCA 178, [2011] BCJ no 654 (QL) (CA) [*Bulldog Bag*].

Agreement 1(c) to claims for property damage to: (a) goods or products manufactured or sold by the Insured; […]"

At trial, the insured was found to be entitled to indemnity with respect to the 10% unsalvageable product only. The reasons of the trial judge were issued prior to release of the Supreme Court of Canada decision in *Progressive Homes*. The insured appealed dismissal of the balance of its claims and the insurer cross-appealed the order for indemnity.

The British Columbia Court of Appeal allowed the insured's appeal and dismissed the insurer's cross-appeal. It held that the damage to the insured's product exclusion did not negate coverage for the cost of removing and salvaging the plaintiff's product from the defective bags supplied by the insured, the cost of packaging new materials for sale in different bags nor for the loss of unsalvageable product.

In finding that the duty to indemnify was not limited to the 10% unsalvageable product, the British Columbia Court of Appeal accepted that the insured's defective bags constituted property damage and its negligent manufacture of the bags constituted an occurrence within the meaning of the CGL policy. This, however, was conceded by AXA on the basis of *Progressive Homes*. The issues were not argued and adjudicated by the British Columbia Court of Appeal. Rather, AXA simply accepted the insuring agreement was satisfied. The 10% of the claimant's product which was lost from use clearly sustained property damage. AXA conceded that the property damage requirement was satisfied with respect to the remaining claims on the basis that the insured's faulty bags were "injured" and the claimant lost the use of them. AXA conceded that the occurrence requirement was satisfied on the basis that failure of the ink when exposed to moisture was neither expected nor intended by the insured.

In the circumstances, the significance of *Bulldog Bag* is properly restricted to interpretation of the damage to the named insured's product exclusion.

AXA argued that the exclusion has broader scope since *Progressive Homes* given it incorporation of terms whose meanings were expanded by the Supreme Court of Canada. AXA paraphrased the exclusion to read, "[t]his insurance does not apply to claims for physical injury to and *loss of use* of Bulldog's bags." It argued that the cost of removing the product from the defective bags, repackaging the new materials and salvaging most of the old manure and soil resulted solely from loss of use of the damaged bags. Accordingly, AXA maintained that, on its plain meaning, the exclusion negated coverage for the entire claim.

AXA submitted:

> In conclusion, the case comes to this. The absence of harm to third party property (Sure-Gro property) was the basis of the summary trial judge's dismissal of Bulldog's claim. Bulldog now asserts, based on *Progressive Homes*, that absence of third party damage is not a legally correct criterion for coverage, and that harm to Bulldog's own property is sufficient to engage coverage. That is so. But, AXA submits, the logical corollary, based on *Progressive Homes* and the language of the policy, is that claims based on own property damage are excluded by exclusion 6(a). Exclusion 6(a) is consistent with *Progressive Homes*, as it gives meaning to the insuring agreement and effect to the product exclusion.

The Court of Appeal rejected AXA's argument. It distinguished between damage to the insured's bags including loss of use thereof, on the one hand, and the cost of separating those bags from the

claimant's products, packaging new product in different bags and salvaging the old product, on the other. The damage to the insured's product exclusion was held to preclude coverage for claims for the former, but not the latter. The court was mindful that exclusion clauses are to be interpreted narrowly and in a manner consistent with the reasonable expectations of the parties. M.V. Newbury J.A. noted also that to deny coverage would be a "perversion" of *Progressive Homes*. Cases before *Progressive Homes* had established the "own product" exclusion to apply where the damage is to the insured's own product and not where loss is incurred by an insured's customer as a result of defects in the insured's product.[63]

Finally, the court reasoned that the wording of the "own product" exclusion was more favourable to the insured than the third version of the "work performed" exclusion considered in *Progressive Homes*. The "work performed" exclusion was held to exclude coverage for defective property, but not resulting damage despite language excluding "'[p]roperty damage' to that particular part of 'your work' **arising out of it or any part of it** […]" [emphasis added]. The exclusion at issue in *Bulldog Bag*, on the other hand, "d[id] not purport to exclude coverage for 'claims that flow from' the plaintiff's defective work or work product, and exclude[d] only coverage for property damage to goods supplied by the insured." In essence, the Court of Appeal characterized the customer's claims as being for resulting damage rather than damage to or loss of use of the bags.

Conclusion

With its decision in *Progressive Homes*, the Supreme Court of Canada has provided much needed guidance regarding CGL coverage in the context of construction deficiency claims. The decision will assist insurers and insureds, alike, in deciphering the insuring agreement requirements of "property damage" and "accident", as well as the scope of the insured's work exclusion, at least in relation to the duty to defend. *Progressive Homes* also speaks to policy interpretation more generally.

MIRACLE AND THE POLLUTION EXCLUSION[64]

Introduction

On April 26, 2011, the Ontario Court of Appeal released its decision in *ING Insurance Co of Canada v Miracle (c.o.b. Mohawk Imperial Sales)*.[65] Overturning the lower court decision, the Court of Appeal enforced a pollution liability exclusion, thereby, negating coverage under a Commercial General Liability policy.

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[63] The court cited *Carwald Concrete and Gravel Co v General Security Insurance Company of Canada and the Canadian Indemnity Co* (1985), 24 DLR (4th) 58 (Alta CA) and *Gulf Plastics Ltd v Cornhill Insurance Co* (1990), 47 BCLR (2d) 379 (SC).

[64] An earlier version of this paper by Lori D. Mountford, entitled "*MIRACLE* -- Is It What Insurers Have Been Waiting For?", was included in materials presented by Mark G. Lichty and Jason P. Mangano on CGL Interpretation Principles at the Canadian Defence Lawyers Insurance Coverage Primer held in Toronto on September 30, 2011.

[65] *ING Insurance Co of Canada v Miracle (c.o.b. Mohawk Imperial Sales)*, 2011 ONCA 321, [2011] OJ no 1837 (QL) [*Miracle*].

In the past, the courts have taken a somewhat surprisingly, restrictive approach to application of the pollution exclusion. Beginning with the Ontario Court of Appeal decision in *Zurich Insurance Co v 686234 Ontario Ltd*, generally, "dictionary literalism" has been rejected in favour of a "connotative contextual construction" approach when applying the exclusion.[66] Rather than superimposing the claims made in the underlying pleadings on the particular wording of a pollution exclusion, the courts have preferred a "common sense test for determining what is 'pollution'".[67]

A review of Canadian coverage jurisprudence prior to *Miracle* reveals the adoption by the courts of a number of practices and principles which have had the effect of limiting the application of the pollution exclusion. One such practice has been the tendency to limit the exclusion to industrial-type business activity of the insured. Another was to treat the exclusion as precluding coverage in respect of "active" polluters only. In other words, the passive polluter who inadvertently permits the escape of a pollutant was not caught by the pollution exclusion whereas the active polluter directly responsible for discharge of a pollutant as part of its business activity was caught by the exclusion.

Does the appellate decision in *Miracle* signify restoration of the intent of the pollution exclusion? *Miracle*, at a minimum, appears to mark a step toward restoring the scope of the exclusion intended by insurers and their underwriters.

In *Miracle*, the Court of Appeal clearly rejects the "active" v. "passive" polluter distinction. Both active and passive polluters are said to be caught by the pollution exclusion. On the other hand, the Court of Appeal appears to leave the contextual approach advocated in *Zurich* undisturbed. A hyperliteral approach is not suggested.

Whether or not the industrial-type business activity restriction will continue to apply to limit the reach of the pollution exclusion is unclear. The Court of Appeal did not have to deal with the principle in *Miracle*. The underlying claim arose out of a fuel leak at a commercial gas bar. It was your typical leaky storage tank claim. It resulted from industry-related business activity of the insured. Accordingly, the holding in *Miracle* is consistent with continued application of the industrial-type business activity principle but the reasons of the Court of Appeal do not necessarily advocate such limitation.

Pre-*Miracle*

Before delving into the *Miracle* decision and its impact, a brief review of the key cases is in order.

In *Zurich*, the policyholder owned an apartment building in which the furnace leaked carbon monoxide. Two proposed class actions were brought alleging carbon monoxide poisoning and negligence on the insured's part for failure to maintain and properly inspect the furnace. The Ontario Court of Appeal held that the pollution exclusion contained in the CGL insurance policies at issue did not apply and the insurer had a duty to defend and indemnify.

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[66] *Zurich Insurance Co v 686234 Ontario Ltd* (2002), 62 OR (3d) 447, 222 DLR (4th) 655, [2002] OJ no 4496 (QL), leave to appeal to SCC refused, [2003] SCCA no 33 (QL) [*Zurich*].

[67] *Ibid.*

In so finding, the Court of Appeal reviewed the history of the absolute pollution exclusion. It concluded that the exclusion was intended to eliminate coverage for the cost of government-ordered clean up under legislation making industry responsible for its pollution of the natural environment. The Court of Appeal quoted, with approval, U.S. case law to the effect that the exclusion applies only to traditional industrial environmental pollution. Reference was also made to the Court of Appeal's refusal, in the past, to enforce a clear and unambiguous exclusion clause where to do so would be inconsistent with the main purpose of the insurance coverage and contrary to the reasonable expectations of an ordinary person as to the coverage purchased.

The critical reasoning of the Court of Appeal in denying the application of the pollution exclusion in *Zurich* is contained in two paragraphs of the judgment. Both the industrial-type business activity restriction and the active v. passive polluter dichotomy are evident therein. Borins J.A. wrote:

> There is nothing in this case to suggest that the respondent's regular business activities place it in the category of an active industrial polluter of the natural environment. Put simply, the respondent did not discharge or release carbon monoxide from its furnace as a manufacturer discharges effluent, overheated water, spent fuel and the like into the natural environment. It was discharged or released as a result of the negligence alleged in the underlying claims, which remains to be proved. As I have pointed out, the history of the exclusion demonstrates that it would produce an unfair and unintended result to conclude, in the context of a CGL policy, that defective machinery maintenance constitutes "pollution", even when it gives rise to carbon monoxide poisoning. In this regard, it is necessary to understand that the exclusion focuses on the act of pollution, rather than the resulting personal injury or property damage.
>
> Accepting for the purpose of my conclusion that carbon monoxide is a "pollutant" within the meaning of the exclusion, although it is arguably clear in its plain and ordinary meaning, the exclusion is overly broad and subject to more than one compelling interpretation, as is evident from its construction by American courts. Given that the exclusion is capable of more than one reasonable interpretation, it is ambiguous and should be interpreted in favour of the respondent. The historical context of the exclusion suggests that its purpose is to bar coverage for damages arising from environmental pollution, and not the circumstances of this case in which a faulty furnace resulted in a leak of carbon monoxide. Based on the coverage provided by a CGL policy, a reasonable policyholder would expect that the policy insured the very risk that occurred in this case. A reasonable policyholder would, therefore, have understood the clause to exclude coverage for damage caused by certain forms of industrial pollution, but not damages caused by the leakage of carbon monoxide from a faulty furnace. In my view, the policy provisions should be construed to give effect to the purpose for which the policy was acquired.

The Ontario Superior Court of Justice followed *Zurich* in *Hay Bay Genetics Inc v MacGregor Concrete Products (Beachburg) Ltd.*[68] In the latter case, the insured was a subcontractor who supplied and installed a concrete tank for the storage of pig manure on a hog production farm. The tank leaked and the farm operator was ordered by Environment Canada to clean up the resultant environmental damage. The farm operator commenced an action against the insured. The policyholder was insured under two CGL policies. Both insurers denied coverage on the basis of the total pollution exclusion clauses. The court denied application of the clauses and ordered both insurers to defend.

Like the Court of Appeal in *Zurich*, the Superior Court of Justice took a contextual approach to the exclusion rather than simply applying its terms literally to the facts before it. The Superior Court of

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[68] (2003), 6 CCLI (4th) 218, [2003] OJ no 2049 (QL).

Justice accepted the intent of the pollution exclusion to be avoidance of the enormous exposure presented by increased environmental litigation. The court picked up and expanded upon the active v. passive polluter dichotomy. The passive polluter who inadvertently permits the escape of pollutants but is not directly responsible for same was not caught by the pollution exclusion. The court also relied upon the industrial-type activity restriction. In the case before it, the insured was not in the business of polluting the environment as a result of the nature of its business. In other words, it was not an active industrial polluter.

Sheffield J. wrote:

> Turning then to the pollution clause, on a literal interpretation, it can easily encompass an environmental pollution exception. "Waste" could cover just about every conceivable item. Even accepting that waste covers animal waste, particularly, "pig manure", it is against the interests of justice to apply "hyperliterally" the terms of the exclusion clause without taking into account the specifics of this situation, as stated by Justice Borins in Zurich, supra at paras. 10 and 36. MacGregor would not have taken out this insurance coverage if it were not to cover potential pollution risks. Just as in the Zurich, supra, situation, MacGregor is not in the business of polluting the environment as a result of the nature of its business. Pollution may have been a risk, but it was not a probable consequence of carrying out its business. The pollution that occurred here was unplanned and could have occurred for a variety of reasons.
>
> If MacGregor is not an active industrial polluter and if the damage was caused as a result of pure accident or perhaps negligence, this would render an ambiguity in the exclusion clauses such that the insurance companies cannot invoke the protection of the pollution exception clause. Thus, the interpretation of this exclusion clause should be dealt with at trial on the basis of evidence presented by all parties.[69]

The Alberta Court of Queen's Bench adopted the Ontario Court of Appeal's interpretive approach to the pollution exclusion from *Zurich* in *Palliser Regional School Division No. 26 v Aviva Scottish & York Insurance Co.*[70] In *Palliser*, the insured acquired ownership of land on which there was an inactive coal bed covered by soil and vegetation. The insured operated a school on the land. Through no fault of the insured, the coal bed became exposed and coal dust was blown onto an adjacent subdivision. An action was commenced on behalf of some residents alleging damage to property and persons.

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[69] In its reasons, the Ontario Superior Court of Justice held that the reasonable expectations of the parties ought to be taken into account when interpreting the pollution exclusion even where the exclusion is clear and unambiguous. An exclusion should not be enforced where to do so would defeat the main purpose of obtaining insurance. Note that the Supreme Court of British Columbia was critical of this proposition in *Corbould v BCAA Insurance Corp*, 2010 BCSC 1536, 90 CCLI (4th) 257, [2010] BCJ no 2125 (QL) [*Corbould*]. There, the court held that the reasonable expectations doctrine is an interpretative tool to be applied only in the event of ambiguity in the policy. Like *Miracle*, *Corbould* arguably signals a more inclusive approach to the pollution exclusion. A pollution exclusion under an all-risks property policy was held to negate coverage for a property damage claim arising out of a fuel oil leak from an above-ground storage tank. The spill of oil into the soil was held to meet the common sense definition of pollution. If the exclusion was not read to catch a heating oil tank leak on the insured's residential property, then what was it intended to catch? The oil was being stored for home-heating as opposed to business purposes. Unlike under a CGL policy, however, an industrial-type business activity restriction could not be read in. The policy at issue was a residential property policy. Accordingly, this B.C. case may not be as prophetic with respect to future treatment of the pollution exclusion under a CGL policy as one might first assume.

[70] *Palliser Regional School Division No. 26 v. Aviva Scottish & York Insurance Co*, 2004 ABQB 781, 370 AR 294, 18 CCLI (4th) 98, [2004] AJ no 1356 (QL) [*Palliser*].

The court found the pollution exclusion in a comprehensive liability insurance policy did not negate the insurer's duty to defend the underlying action.

Reliance was placed on the passive v. active polluter dichotomy as well as the industry-related business activity restriction by the court. It was emphasized that the insured did not cause the alleged pollution as a result of its business activities. The coal dust was not created nor was it permitted to escape as part of the insured's business activities in operating a school. There was no connection between the insured's business activities and the coal dust. Park J. wrote, "[i]t is my view that the airborne coal dust is not industrial pollution or pollution to which the Pollution Exclusion clause should apply." The court also noted that the coal bed was not exposed nor was the coal dust released by any direct action on the insured's part. The Alberta Court of Queen's Bench disagreed with an earlier decision of the Ontario Court of Appeal in *Ontario v Kansa General Insurance Co* in which any attempt to distinguish between active and passive polluters was rejected.[71]

There are past cases in which a Canadian court has enforced the pollution exclusion clause in a CGL policy. For example, in *Dave's K. & K. Sandblasting (1988) Ltd (c.o.b. K&K Sandblasting Ltd) v Aviva Insurance Co of Canada,* the British Columbia Supreme Court applied a pollution exclusion to preclude coverage.[72] In that case, the policyholder carried on a sandblasting business on leased premises. The sandblasting residue stored on the property resulted in unacceptable concentrations of antimony and chromium in the soil. The lessor was required to clean up the property. It sued the policyholder for the cost of remediation. The policyholder sought coverage from Aviva. Aviva relied on a pollution exclusion clause within its CGL policy. The British Columbia Supreme Court agreed that the pollution exclusion clause precluded coverage.

The court determined that the insured's direct business activities caused contamination to the outdoor environment. Applying the principles developed in various cases, inclusive of *Palliser* and *Zurich*, it determined that the exclusion had application in such circumstances. In other words, the insured was an active industrial polluter to whom application of the pollution exclusion in previous cases had generally been limited.

Miracle

This brings us to the recent Ontario Court of Appeal decision in *Miracle*. The insured operated a self-service gas bar. Gasoline leaked from an underground storage tank on the insured's property and contaminated adjacent lands. The adjacent property owner brought an action against the insured seeking damages for loss of property value, the costs of conducting an environmental assessment and the costs of clean up. The claim was advanced in nuisance, negligence and strict liability. The pleading specifically relied upon environmental protection statutes. The CGL carrier brought an application seeking a declaration that it had no duty to defend or indemnify the insured on the basis of the pollution exclusion in the policy.

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[71] *Ontario v. Kansa General Insurance Co* (1994), 17 OR (3d) 38, 111 DLR (4th) 757, [1994] ILR 2719, [1994] OJ no 177 (CA) [*Kansa*], leave to appeal to SCC refused, [1994] SCCA no 123. Under Ontario law, the passive polluter permitting pollution to occur was just as much a polluter as the active polluter who discharged the pollution.

[72] 2007 BCSC 791, 51 CCLI (4th) 229, [2008] 2 WWR 163, [2007] BCJ no 1203 (QL).

The particular wording of the "Pollution Liability Exclusion" at issue was typical. It provided that the insurance did not apply to:

> 2. Pollution Liability
>
> a. "Bodily injury" or "property damage" or "personal injury" or "advertising liability" arising out of the actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of pollutants:
>
> …
>
> (2) At, or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any Insured;
>
> …
>
> (5) At or from any premises, site or location on which any Insured or any contractors or subcontractors working directly or indirectly on any Insured's behalf are performing operations:
>
> (a) if the pollutants are brought on to the premises, site or location in connection with such operations by such Insured, contractor, or subcontractor; or
>
> (b) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify, decontaminate, stabilize, remediate or neutralize, or in any way respond to, or assess the effect of the pollutants.
>
> b. Any fines or penalties assessed against or imposed upon any Insured arising out of the actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of pollutants.
>
> c. Any loss, cost or expense arising out of any request, demand or order that any Insured or others test for, monitor, clean up, remove, contain, treat, detoxify, decontaminate, stabilize, remediate or neutralize or in any way respond to, or assess the effect of pollutants unless such loss, cost or expense is consequent upon "bodily injury" or "property damage" covered by this policy.
>
> d. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapour, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

The Ontario Superior Court of Justice held the pollution exclusion not to apply. The lower court reasoned that the insured did not release the gas into the environment as a result of its regular business activities. It was not an industrial polluter. Rather, it was alleged in the underlying action that the insured was negligent in allowing the gasoline to escape from its tank. In essence, the insured was characterized as a passive, non-industrial polluter.

The Court of Appeal allowed the appeal. No duty to defend or indemnify was owed by the insurer. In so holding, the Court of Appeal expressly rejected that the effect of the *Zurich* decision is to restrict application of the CGL pollution exclusion to "active industrial polluters". Rather, the Court of Appeal confined the *Zurich* case to its particular facts. R.J. Sharpe J.A. wrote:

> ... *Zurich* must be read in the context of the specific issue the court was addressing. Borins J.A. rejected what he quite appropriately described as a "hyperliteral" argument that the claim was

> excluded because it arose from the "escape" of "gas". The court refused to accept the insurer's strictly literal interpretation of the clause in favour of one that determined the meaning and reach of the exclusion, given its historical purpose and a common sense assessment of the insured's business activity. The exclusion's ordinary meaning in those circumstances was found to be ambiguous and contrary to the insured's reasonable expectations.

The facts before the court in *Miracle* were distinguishable. The activity of the insured, namely, underground storage of gasoline for resale at a gas bar, carried with it an "obvious" and "well-known" risk of pollution and environmental harm. This was held to fall squarely and unambiguously within the language of the pollution exclusion.

R.J. Sharpe J.A. reasoned:

> Unlike *Zurich*, in this case, the insured was engaged in an activity that carries an obvious and well-known risk of pollution and environmental damage: running a gas station. Indeed, the statement of claim is framed as a claim for damage to the natural environment caused by a form of pollution. While the respondent Canada now attempts to characterize its claim as if it primarily, if not exclusively, sounds in negligence, that ignores the fact that the statement of claim asserts the causes of action commonly associated with pollution-based claims for environmental damage: strict liability (presumably on the basis of *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330) and nuisance as well as negligence. The negligence claim is based in part upon alleged breaches of both provincial and federal environmental legislation and regulation. The damages claimed are for harm to the environment: the loss of property value due to contamination of the soil, the cost of investigating, testing and monitoring the contamination caused by the migration of a hazardous product from the lands of the insured, and the cost of rectifying the contamination and remediating the plaintiff's property. Such a claim fits entirely within the historical purpose of the pollution exclusion, which was "to preclude coverage for the cost of government-mandated environmental cleanup under existing and emerging legislation making polluters responsible for damage to the natural environment": See *Zurich*, at para. 13.

The Court of Appeal went on to reject the active v. passive polluter distinction. Reliance was placed on *Kansa*. *Kansa*'s continued authority for the proposition that the pollution exclusion applies to the passive polluter who permits pollution to occur and the active polluter who discharges or causes the discharge of the pollution was confirmed.

The Ontario Court of Appeal decision in *Miracle*, therefore, appears to mark an expansion of the circumstances in which the pollution exclusion will be held to apply. It should go some way in restoring the intent of the pollution exclusion under the CGL policy.

Post-*Miracle*

There is no question that *Miracle* restores previous Ontario authority holding that the distinction between an "active" and "passive" polluter is not relevant. The "active" element in the "active industrial polluter" restriction has been eliminated. Query, however, whether the "industrial polluter" requirement survives? Based on *Miracle*, the pollution exclusion applies where the insured is engaged in an activity that carries with it a known risk of environmental harm. Running a gas station is such an activity. It also, however, happens to be an industrial-type business activity. By its very nature, the insured's business carried with it a risk of pollution. Whether, post-*Miracle*, there

will remain a tendency by the courts to limit application of the pollution exclusion to industrial-type business activity of the insured remains to be seen.

Post-*Miracle*, the pollution exclusion would not apply to circumstances in which a furnace in an apartment building operated by the insured leaks carbon monoxide. *Zurich* was distinguished in *Miracle*. *Zurich* was not overturned.

The question is whether a case like *Hamelin v Commercial Union Assurance Co*, for example, would be decided differently today.[73] In *Hamelin*, approximately 800 litres of heating oil escaped from a rupture to an outside storage tank on the insured's commercial premises. The owners and occupiers of the abutting residential lands sought recovery for contamination of their water supply in the underlying action. The court held that a rider exclusion relating to the escape of pollutants was not a bar to the insurer's duty to defend or indemnify.

The Ontario Court of Justice, General Division reasoned that the intent of the exclusion was "to deal with pollutants actually applied or which were a part of the business activity of the insured". The fuel oil which leaked was used to heat the insured's premises as opposed to being used as part of the insured's business activity. Therefore, the pollution exclusion did not apply.

In light of *Miracle*, characterization of the insured in *Hamelin* as a passive polluter is no longer relevant to application of the pollution exclusion. If an industrial-type business activity restriction continues to apply after *Miracle*, it is probable that the pollution exclusion would still not negate coverage. While storage of oil in a tank on one's premises carries with it a well-known risk of environmental harm should the tank leak, the leakage of oil used to heat an insured general contractor's premises is not a known risk of the industry-related business activity of the insured. Storage of fuel oil in these circumstances is not an industrial-type business activity.

The Ontario Superior Court of Justice very recently had occasion to revisit application of the pollution exclusion, but with the benefit of the Court of Appeal's guidance in *Miracle*. In *699982 Ontario Ltd v Intact Insurance Company*, the pollution exclusion was held to apply in relation to a claim for property damage caused by a dry cleaning business operated by the insured's tenant.[74] The tenant was alleged to have put PCE and VC on the insured's property which migrated to adjacent property. PCE and VC were accepted to be "pollutants". As well, it was alleged that the insured knew about pre-existing damage which it failed to remediate or report to the subsequent owner.

In finding the pollution exclusion to preclude defence under the policy, Justice Roberts reasoned that the tenant's use, storage and disposal of PCE in its dry cleaning operations, for which the insured owner is responsible, carries a known risk of pollution and environmental harm. Such

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[73] *Hamelin v Commercial Union Assurance Co*, [1995] OJ no 4969 (QL) (Ct J (Gen Div)) [*Hamelin*].

[74] *699982 Ontario Ltd v Intact Insurance Company* (October 3, 2011), Toronto CV-10-409536 [*699982 Ontario Ltd*].

handling of PCE is closely regulated by environmental protection legislation because of the known risks. [75]

Like *Miracle*, therefore, *699982 Ontario Ltd* demonstrates a readiness of the courts to apply the pollution exclusion to passive polluters in respect of activity carrying a known risk of pollution and environmental harm. *699982 Ontario Ltd*, like *Miracle*, does not answer the question whether the courts will continue to limit application of the pollution exclusion to industrial-type business activity. It is by no means a stretch that dry cleaning operations involving the discharge of PCE into the groundwater would fall within the concept of industry-related business activity. Futher, Justice Roberts' reasons distinguishing *Zurich* and *Palliser* suggest the restriction may continue:

> The present case is completely different from the instances of an accidental discharge of carbon monoxide from a broken furnace (*Zurich Insurance Co. v. 686234 Ontario Ltd.* (2002), 62 O.R. (3d) 447) or the unexpected escape of coal dust from a school's coal bed (*Palliser Regional School Division No. 26 v. Aviva Scottish & York Insurance Co.*, [2004] A.J. No. 1356), where the pollution was not released as a result of any direct action on the part of those claimants or **as a by-product of their respective business activities.**
>
> Here, there is a clear connection pleaded between the dry cleaning operations of 699982's tenants and the alleged pollution. [emphasis added]

Accordingly, *699982 Ontario Ltd* leaves open the possibility that an industry-like activity restriction continues.

Conclusion

Only time will tell whether the Ontario Court of Appeal decision in *Miracle* is the decision insurers have been waiting for, namely, a case restoring the reach of the pollution exclusion in a CGL policy to that intended by its drafters.

Prior to *Miracle*, the courts tended to limit application of the pollution exclusion to "active" polluters despite the absence of language in the exclusion itself distinguishing between active and passive pollution. The Court of Appeal in *Miracle* refused to read in such a distinction. Both active and passive polluters are caught by the pollution exclusion.

Prior to *Miracle*, there has been a tendency to restrict application of the exclusion to industrial-type business activity of the insured. The Court of Appeal in *Miracle* held the exclusion to apply where the insured was engaged in a business activity carrying a well-known risk of pollution: running a gas station. Whether, the courts will continue to limit application of the exclusion to industry-related business activity of the insured, albeit industry-related activity carrying a well-known risk of environmental harm, remains to be seen.

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[75] With respect to the pre-existing pollution, the pleadings were held to allege "discharge, dispersal, release or escape of pollutants" while the insured owned the property. In particular, the pleadings referred to continuing discharge of PCE and VC into the groundwater and natural environment.