IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Corbould v. BCAA Insurance Corporation,* 2010 BCSC 1536

Date: 20101101
Docket: S094585
Registry: Vancouver

Between:

Brian Bernard Corbould

Plaintiff

And

BCAA Insurance Corporation

Defendant

Before: The Honourable Mr. Justice Sigurdson

Reasons for Judgment
In Chambers - 18A

Counsel for the Plaintiff:	Andrew J.P. Winstanley
Counsel for the Defendant:	Nigel P. Kent Jennifer R. Loeb
Place and Date of Hearing:	Vancouver, B.C. April 29-30, 2010
Place and Date of Judgment:	Vancouver, B.C. November 1, 2010

INTRODUCTION

[1] The issue in this summary trial application is the scope of what has been referred to as the "pollution exclusion" clause contained in a policy of insurance issued by the defendant, BCAA Insurance Corporation, to the plaintiff, Brian Corbould.

[2] The plaintiff seeks a declaration of coverage in connection with a property damage claim that occurred when an above-ground storage tank for home-heating fuel oil leaked and dispersed the oil into the soil surrounding his vacation home and damaged his home.

[3] This application does not concern coverage for liability to third parties as no such claims are advanced, but Mr. Corbould has incurred substantial cost in removing soil and repairing the damage to his home.

[4] This exclusion clause the defendant relies on to exclude coverage, the plaintiff's counsel said, has become known as the "absolute pollution exclusion."

[5] I should note that most of the cases that were cited to me were cases that dealt with a form of this pollution exclusion clause in third party liability policies and often concerned the insurer's duty to defend. Although the essential principles of the interpretation of insurance contracts still apply, I think the cases must be read with some caution.

[6] With that background, let me turn to the language of this particular policy.

[7] The "all risks" property coverage in the comprehensive insurance policy that BCAA issued to Mr. Corbould provides, in the section of the policy dealing with property coverage, at Section 1.7:

> **Perils Insured**
> You are insured against ALL RISKS OF DIRECT PHYSICAL LOSS OR DAMAGE subject to the exclusions and conditions in this policy.

[8] The insurer says that although the loss would otherwise be covered under the Policy, coverage for it is excluded by Section 1.8 of the Policy, which contains a list of exclusions. In its relevant parts it provides an exclusion that the insurer says is clear and unambiguous:

> We do not insure:
>
> …
>
> 8) loss or damage caused by contamination or pollution, or the release, discharge or dispersal of contaminants or pollutants.

[9] The term "pollutants" as it appears in Section 1.8 is defined in Section 5 of the Policy as

> "Pollutants" means any solid, liquid, airborne, gaseous or thermal irritant or contaminate, including smoke, vapour, soot, fumes, acid, alkalis, chemicals and waste. Smoke, within this definition of Pollutants means, smoke caused from agricultural smudging or industrial operations.

The terms and phrases "contamination," "pollution," "release, discharge or dispersal," and "contaminants" are not defined in the Policy.

[10] I note that in the general liability part of the Policy, to which this claim does not pertain, Mr. Corbould is not insured for "(10) bodily injury or property damage arising out of the release or escape of pollutants at any premises owned, rented or occupied by any person insured by this policy".

[11] The plaintiff says that, properly interpreted, the Policy provides coverage for the loss that has occurred. The plaintiff says that he is a non-commercial, residential home owner who is not in the business of generating contaminants and was operating a heating system as he had advised his insurer. The plaintiff says that in the circumstances the pollution exclusion, properly interpreted, does not apply to the loss in question. The plaintiff says the key issue is that the plaintiff was not involved in business activities that could lead to the pollution of the environment.

[12] The plaintiff says that the so-called pollution exclusion clause does not exclude liability for the unintended results of the normal operation of the heating system. Moreover, the plaintiff says that to interpret pollutants to include something

that occurred during the intended and normal use of the insured's dwelling heating system fails the common sense test for determining what is "pollution".

[13] The plaintiff also argues that the particular language of the pollution exclusion is, applying proper principles to the construction of insurance policies, not sufficient to bar the plaintiff's claim for indemnity.

[14] In the alternative, the plaintiff argues that coverage for this type of loss would be within the reasonable expectations of the parties at the time the contract of insurance was made, and even if the exclusion clause is clear and unambiguous, it should not apply.

[15] The defendant disagrees. The exclusion, it says, covers this type of loss.

[16] The insurer argues that the proper principles of interpretation of contracts of insurance require that effect be given to the intention of the parties based upon the words in the contract in their plain and ordinary meaning, read in the context of the contract as a whole. The insurer says that if the exclusion clause is plain and unambiguous, effect must be given to the exclusion. Although the insurer acknowledges that coverage provisions are generally construed broadly and exclusion clauses narrowly, where there is no ambiguity the words in the policy and the exclusions must be given their normal meaning.

[17] The defendant points out that Mr. Corbould admitted that his property was contaminated, that the spill was reported, that it was remediated after retaining an environmental consultant, that it was done to the standards of the *Contaminated Sites Regulation*, B.C. Reg. 375/96, guidelines, that contaminated soil was excavated and removed, and that the cost was considerable (approximately $200,000).

[18] The defendant says that the escape of fuel oil into the property is clearly within the plain and ordinary meaning of contamination and/or pollution as referred to in the Policy and there is no room for operation of either the *contra proferentem* rule or the so-called reasonable expectations of the parties. It says the latter

doctrine requires consideration of the reasonable expectation of both parties and has application only when there is ambiguity in the language of the policy; the plaintiff cannot use his interpretation of the reasonable expectations of the parties to find an ambiguity and interpret the Policy when, in fact, there is no ambiguity to be found. The defendant argues that the Canadian approach is that the reasonable expectations doctrine is not superimposed on the policy of insurance, but is a tool to resolve ambiguities if they exist and must be applied with regard to the expectations of both the insured and the insurer.

[19] The defendant says that this oil spill is clearly contamination or pollution and asks, if the exclusion clause does not apply in this incident to what circumstances does the exclusion clause apply?

FACTS

[20] The facts in this matter are essentially not in dispute.

[21] The plaintiff, Brian Corbould, is a retired barrister who practiced for many years in New Westminster. He lives in Port Coquitlam and has a vacation property in the village of Anglemont, on 7184 Lucerne Beach Road, which he has owned for many years. That is the property that is the subject of this claim.

[22] In June 2006, Mr. Corbould bought and installed an above-ground tank to store the fuel for his oil-fired furnace that provided the heat to his home. He purchased the tank from the Armstrong Co-operative Society and agreed with them for initial and twice yearly delivery of fuels.

[23] By a comprehensive “all risks” Policy of insurance dated October 7, 2006 issued by the defendant, the BCAA Insurance Corporation, to the plaintiff, the defendant agreed to indemnify the plaintiff against loss or damage to the lands and premises. In the declaration in the Policy, the plaintiff advised the insurer that the principal heating would be by oil furnace.

[24] In November 2008, while the Policy was in effect, Armstrong Co-op made its regular fuel delivery and, within a matter of days, Mr. Corbould's next door neighbour noticed an odour around the plaintiff's dwelling and notified Mr. Corbould at his home in Port Coquitlam. For some reason unknown to Mr. Corbould the tank had sprung a sudden, unexpected, and unintended leak, and the bulk of the fuel oil escaped and dispersed into the ground, including under his dwelling. The fuel used as home heating fuel is a light distillate, technically known as No. 1 Diesel. It comes from an oil refinery. The plaintiff had no warning that the tank was defective or leaking, nor had the plaintiff previously experienced a leak with his tank or the below-ground tank it replaced in 2006.

[25] The plaintiff reported the leak to the Provincial Emergency Program and engaged SLR Consulting (Canada) Ltd. of Kelowna to inspect the land. The Ministry of Environment did not require a certificate of compliance to be provided but apparently expected that the project would be completed following common environmental and engineering practices. Mr. Corbould has independently undertaken remediation of his property at substantial cost.

[26] In December 2008, Mr. Corbould gave notice of the loss to the defendant insurer seeking that it indemnify him for the loss occasioned to his lands by the leak, and the subsequent fuel spill, as well as the cost of remediation done pursuant to the independent remediation provisions of the *Environmental Management Act*, S.B.C. 2003, c. 53, and the costs occasioned by removal and reinstallation of parts of his dwelling that had to be demolished to permit access for the backfilling and re-landscaping of his grounds.

[27] On February 3, 2009, the defendant insurer denied coverage.

[28] The only relevant exclusion, and the only one relied on by the defendant, is the exclusion at subparagraph 8 of Section 1.8 on page 9 under the heading "Loss or Damage Not Insured". The Policy says:

> We do not insure:
>
> …
>
> 8) loss or damage caused by contamination or pollution, or the release, discharge or dispersal of contaminants or pollutants.

DISCUSSION

[29] As this claim is advanced in an "all risks" policy, the burden is on the plaintiff to show that the loss is covered without considering the exclusion clause. That is admitted in this case.

[30] The issue in this case is whether the exclusion in this Policy, properly interpreted, excludes liability for this type of loss. The burden is on the insurer on that issue: *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164.

[31] The starting point is a consideration of the general principles to be applied in construing a policy of insurance.

Principles of Interpretation for Insurance Contracts

[32] The leading case is *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 SCR 888 [*Consolidated Bathurst*]. Some general principles governing the interpretation of insurance policies were set out by Estey J. at p. 901:

> Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. …

[33] In *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252 [*Reid Crowther*], McLachlin J. (as she then was) said (at p. 269):

> … In each case, the courts must interpret the provisions of the policy at issue in light of general principles of interpretation of insurance policies, including, but not limited to:
>
> (1) the *contra proferentum* rule;
>
> (2) the principle that coverage provisions should be construed broadly and exclusion clauses narrowly; and
>
> (3) the desirability, at least where the policy is ambiguous, of giving effect to the reasonable expectations of the parties.
>
> See C. Brown and J. Menezes, *Insurance Law in Canada* (2nd. ed. 1991), at pp. 123-31, and *Brissette Estate v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87.

[34] With respect to the reasonable expectations of the parties McLachlin J. noted, at p. 271, that:

> 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: *Wigle v. Allstate Insurance Co. of Canada* (1984), 49 O.R. (2d) 101 (C.A.), leave to appeal to S.C.C. refused, [1985] 1 S.C.R. v. The insured's reasonable expectation is, at a minimum, that the insurance plan will provide coverage for legitimate claims on an ongoing basis. …

[35] In *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21 [*Jesuit Fathers*], the Court said, at paras. 27-29:

> Insurance policies form a special category of contracts. As with all contracts, the terms of the policy must be examined, in light of the surrounding circumstances, in order to determine the intent of the parties and the scope of their understanding. Nevertheless, through its long history, insurance law has given rise to a number of principles specific to the interpretation of insurance policies. These principles were recently reviewed by this Court in *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551, 2000 SCC 24. They apply only where there is an ambiguity in the terms of the policy.
>
> First, the courts should be aware of the unequal bargaining power at work in the negotiation of an insurance contract and interpret it accordingly. This is done in two ways: (1) through the application of the *contra proferentem* rule; (2) through the broad interpretation of coverage provisions and the narrow interpretation of exclusions. These rules require that ambiguities be

> construed against the drafter. In most policies, the drafter is the insurer and the insured is essentially required to adhere to the terms set out by the insurer. ….
>
> Second, the 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 nor anticipated at the time of the contract" (*Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 S.C.R. 888, pp. 901-902; *Non-Marine Underwriters*, at para. 71).

[36] In interpreting insurance policies the Court should not create ambiguities where none exist. In *Riordan v. Lombard Insurance Co.*, 2003 BCCA 267, the court explained, at para. 20:

> Before leaving these reasons, I think it is significant to bear in mind what was said by this Court in *Pacific Rim Nutrition Ltd. v. Guardian Insurance Company of Canada* (1998), 54 B.C.L.R. (3d) 111 (C.A.), at para. 22:
>
> > With respect I cannot agree with this submission. I think this submission falls into the category of searching for or creating an ambiguity where none exists. I agree with the court in the *American Commerce Insurance Brokers Inc.* [*v. Minnesota Mutual Fire & Casualty Company* (1996), 551 N.W. 2d 224] case when it said:
> >
> > > The language of an insurance policy will be held ambiguous only if it is more reasonably subject to more than one interpretation. *Columbia Heights Motors v. Allstate Ins. Co.*, 275 N.W. 2d 32, 34, 36 (Minn. 1979). If an ambiguity exists, the court construes the language against the insurer. Id. However, the courts must "fastidiously guard against the invitation to 'create ambiguities' where none exist."

[37] Does the application of these principles in this case result in a conclusion that there is coverage for this type of loss?

Canadian Cases Interpreting Pollution Exclusion Clauses

[38] No similar case involving this clause, a property damage claim, and the leakage from an oil tank used to heat a residential property was shown to me. As I understand it, although there have been a number of cases that interpret the clause in the context of a commercial general liability policy, this is the only one that has dealt with a property claim in an “all risks” residential policy. Nevertheless, these

cases are useful to my consideration of the proper meaning of the exclusion clause in this case.

Zurich Insurance Co. v. 686234 Ontario Ltd.

[39] The leading case on the question of the scope and application of a similar clause does arise out of a commercial general liability policy case: *Zurich Insurance Co. v. 686234 Ontario Ltd.* (2002), 62 O.R. (3d) 447 (C.A.) [*Zurich*]. Counsel for both the plaintiff and the defendant invoke *Zurich* as support for their preferred interpretation of the exclusion clause. The underlying issue in the case was described this way by Borins J.A. at para.1:

> The issue is whether the exclusion bars coverage for damages caused by carbon monoxide poisoning. In two underlying proposed class actions brought against the respondent, the nominal plaintiffs allege that they suffered injuries from breathing carbon monoxide which leaked from the respondent's furnace. Against the respondent they allege negligence in maintaining the furnace and in failing to keep it in good working condition, as well as failing to properly inspect repair work they say had been performed negligently by the company hired by the respondent to repair it, which is a defendant in one of the actions.

[40] The Court described the parties' positions in *Zurich* as follows, at paras. 5-6:

> It is Zurich's position that the language of the exclusion is clear and unambiguous, and in accordance with its plain meaning, it applies to the underlying claims against the respondent. It argues that any injury or damage caused clearly falls within the exclusion as there was a "discharge, dispersal, release or escape" of carbon monoxide, a "pollutant", "at or from premises owned" by the respondent. As the emission of carbon monoxide fumes from the furnace constituted the "release" of a "gaseous ... irritant or contaminant", any "bodily injury" or "property damage" resulting from such emission is excluded from coverage.
>
> The respondent's position is that the purpose of the exclusion is to bar coverage only for damages resulting from the pollution of the natural outdoor environment resulting from industrial, commercial or large scale pollution, and not for damages resulting from indoor pollution due to routine commercial hazards such as a faulty heating system. The respondent relies on four arguments in support of its position:
>
> > (1) As the exclusion is inherently ambiguous as to whether it applies to indoor or outdoor releases, the ambiguity is to be resolved in favour of the insured.
> >
> > (2) The historical purpose of the exclusion, which was drafted by the insurance industry, demonstrates that its drafters intended to

> exclude only damages resulting from releases to the natural environment.
>
> (3) The terms used in the exclusion, such as "discharge, dispersal, release or escape of pollutants", "handling, storage, disposal, processing or treatment of waste", "transported, handled, stored, treated, disposed of or processed as waste" and "monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants" are terms of art in environmental law that are generally used in environmental protection legislation in reference to damage or injury to the natural outdoor environment caused by improper disposal or containment of hazardous materials.
>
> (4) Even if it is found that the exclusion is unambiguous, it should nevertheless be interpreted in favour of the respondent on the ground that the reasonable expectation of the owner of an apartment building who has sought and paid for CGL insurance would be that the insurance policy protects it through coverage and indemnity for precisely the type of claims advanced in the underlying actions - claims for damages for bodily injury and property damage incurred by its tenants from carbon monoxide poisoning resulting from a faulty furnace.

[41] Borins J.A. concluded, at paras 36-39:

> The American authorities that have interpreted the absolute pollution liability exclusion in cases involving claims arising from carbon monoxide poisoning have not reached a uniform interpretation. One line of cases, as exemplified by *Essex Insurance Company*, has construed the exclusion literally and held that it bars claims arising from common business hazards such as carbon monoxide poisoning claims not normally viewed as pollution. Another line of cases, as exemplified by *Koloms* and *Stoney Run*, has held that the exclusion does not bar such claims. In reaching this result, these cases have declined to focus hyperliterally on the text of the exclusion, and have applied various interpretative approaches including finding ambiguity in the exclusion, considering the history of the exclusion clause and its environmental context, the purpose of the CGL policy, and the objectively reasonable expectation of the parties. As I have pointed out, these are the essential grounds relied on by the respondent and, generally, applied by the application judge, for construing the exclusion against Zurich.
>
> I find the second line of American cases to be more persuasive than the line of cases that has literally interpreted the exclusion. In my view, in construing contracts of insurance, dictionary literalism is often a poor substitute for connotative contextual construction. When the full panoply of insurance contract construction tools is brought to bear on the pollution exclusion, defective maintenance of a furnace giving rise to carbon monoxide poisoning, like related business torts such as temporarily strong odours produced by floor resurfacing or painting, fail the common sense test for determining what is "pollution". These represent claims long covered by CGL insurance policies. To apply an exclusion intended to bar coverage for claims arising from environmental pollution to carbon monoxide poisoning from a faulty

> furnace, is to deny the history of the exclusion, the purpose of CGL insurance, and the reasonable expectations of policyholders in acquiring the insurance.
>
> 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.
>
> [Emphasis added]

[42] Counsel for the plaintiff relies on *Zurich*, arguing that its warning against interpreting contractual language “hyperliterally” should guide the construction of the exclusion clause. He argues that a “connotative contextual construction” of the exclusion clause will show that the plaintiff’s expectation that unintended results of a normal operation of his heating system would be covered is reasonable by any objective measure.

[43] Mr. Kent argued for the defendant, however, that the court’s concern expressed in *Zurich* at para. 28 is not applicable in the case at bar:

> From *Weston Ornamental Iron Works* it is clear that this court has concluded that even though an exclusion clause may be clear and unambiguous, it will not be applied where: (1) it is inconsistent with the main purpose of the insurance coverage and where the result would be to virtually nullify the coverage provided by the policy; and (2) where to apply it would be contrary to the reasonable expectations of the ordinary person as to the coverage purchased. …

[44] Mr. Kent argued that the exclusion is clear and unambiguous and, to apply it does not virtually nullify the coverage in the Policy.

[45] Furthermore, he argued that the *Zurich* case contains *obiter dicta* concerning the application of the reasonable expectations doctrine, a doctrine the insurer says is a tool of construction when the court is faced with ambiguity but does not allow the court to ignore an exclusion clause in the absence of an ambiguity. That, he says based on the Supreme Court of Canada cases I cited, is the current state of the jurisprudence. In fact, the defendant says that *Zurich* supports the insurer's position in the case at bar as it suggests that when the claim deals with spent fuel and the like into the natural environment, it is caught by this type of exclusion.

[46] I now turn to a review of cases that have considered versions of the pollution exclusion clause, including an earlier version of the clause that did not exclude coverage if the dispersal was "sudden and accidental". The "sudden and accidental" dispersal exception is not in the language of the Policy, but some of these cases have aspects that are instructive on the proper interpretation of the exclusion clause in this case.

Cases Where Coverage Was Excluded

[47] There are indeed a number of Canadian cases where insurers have been successful in arguing that a pollution liability exclusion clause precludes coverage.

[48] In *Zatko v. Paterson Springs Service Ltd.*, [1985] 14 C.C.L.I. 251 (Ont. H.C.J.), an underground oil tank on property occupied by Paterson Springs Service Ltd. had leaked, with the oil migrating onto the property of their neighbours, the Zatkos. The parties reached a settlement and the Zatkos signed a release. The oil

contamination subsequently recurred on the Zatkos' property and they sued Paterson a second time. Paterson sought indemnity from its insurer for any further damages it may owe if it were unsuccessful in defending the suit.

[49] Mr. Justice Holland found at p. 258, with "no doubt" in either instance, that "the oil that escaped was a contaminant or pollutant within the meaning of the exclusion" and that "the original escape of the oil was sudden and accidental". That the original escape was undetected for a lengthy period of time did not necessarily mean it was not "sudden and accidental". The difficulty came in determining whether the subsequent damage could also be called sudden and accidental. Since he had already concluded that the subsequent damage was as a result of a continuing leak from the same oil tank and Paterson did nothing to prevent the additional damage Holland J. concluded the continuing leak could not be considered sudden and accidental.

[50] *BP Canada Inc. v. Comco Service Station Construction & Maintenance Ltd.* (1990), 73 O.R. (2d) 317 (H.C.J.), is another older duty to defend case that turns on the interpretation of the "sudden and accidental" exception to the exclusion clause. BP Canada Inc. had commenced an action against the operators of a BP retail gasoline outlet where a leak had been discovered. BP carried out the necessary cleanup, then claimed for damages against the operators of the station who, in turn, sought to invoke their insurer's duty to defend.

[51] Coverage was denied to the policyholder based on the fact that the leak, which had apparently persisted for over a decade, could be considered neither "sudden nor accidental". Since Mr. Corbould's Policy with BCAA does not contain this exception to the pollution exclusion clause that appears in his policy this is not directly relevant for our purposes. What may be relevant however is that Sutherland J. held at p. 323 that there could be "little doubt that the gasoline which leaked in this case was a 'contaminant' or 'pollutant'".

[52] The petitioner in *Pier Mac Petroleum Installation Ltd. v. Axa Pacific Insurance Co.*, (1997), 41 B.C.L.R. (3d) 326 (S.C.), was a contractor that had constructed a

gas bar in Alberta that developed leaks in its underground tanks and pipelines. Pier Mac was sued by the owner of the gas bar for the damage caused by the leak and sought a declaration that its insurer was obligated to defend it. The insurer invoked the pollution liability clause to preclude coverage. Mr. Justice Drossos took a literal approach to interpreting an absolute pollution exclusion clause to apply to deny coverage. He found at para. 29 that "it is clear that the gasoline or petroleum products ...are pollutants as that word is defined in the policy."

[53] The plaintiff in the case at bar submitted that Drossos J. interpreted the exclusion clause in *Pier Mac* without reference to *Consolidated Bathurst* or any cases specifically interpreting pollution liability exclusion clauses. The observations on this point of Drossos J. appear to be *obiter dicta* as he had already found that a separate "Products Hazard" clause wholly precluded coverage.

[54] The most recent consideration of a pollution liability exclusion clause in this court is *Dave's K. & K. Sandblasting (1988) Ltd. v. Aviva Insurance Company of Canada*, 2007 BCSC 791. The policyholder, K. & K., was the defendant in an underlying action where they were sued by their former landlord, Del Equipment Ltd., for leaving concentrations of antimony and chromium on Del's property that K. & K. had used for a sandblasting operation at the end of their lease.

[55] K. & K. claimed to have valid defences in the underlying suit, however this is not relevant to the duty to defend analysis, which only considers whether the claim would be covered under the insurance policy if successful. At para. 26, Goepel J. cited *Zurich* for the proposition that the exclusion "was intended to preclude coverage for the cost of environmental cleanup under existing and emerging legislation making polluters liable for damage to the natural environment". Given the nature of K. & K.'s business activities, which are likely to cause pollution, the claim fell directly under the terms of the pollution exclusion and the reasonable expectations of the parties, therefore coverage was denied.

Cases Where Coverage Was Not Excluded

[56] I have been referred to more cases where pollution liability exclusion clauses have been found to be inapplicable than where they have been found applicable. Narrow readings of the exclusion clause have been accomplished through several methods. Initially, the "sudden and accidental" exception to the exclusion clause was frequently given a broad interpretation that favoured policyholders. Since insurers developed the absolute pollution liability exclusion clause that deletes the "sudden and accidental" exception, courts have often adopted an approach that generally accords with Borins J.A.'s adoption of a "connotative contextual construction" in *Zurich*. This frequently involves an analysis of the nature of the alleged pollutant and the policyholder's business activities to determine whether the parties would have expected coverage for the alleged damage from pollution from the activity when they entered the insurance contract.

[57] *Murphy Oil Co. v. Continental Ins. Co.* (1981), 33 O.R. (2d) 853 (Co. Ct.), is the earliest Canadian case I was referred to interpreting a pollution liability exclusion clause, albeit the earlier version with a "sudden and accidental" exception. Oil had leaked from the underground storage tanks and pipes of the plaintiff, Murphy Oil Co., onto the property of its neighbour, Mrs. Peacock, and poisoned her well. Murphy had already settled the underlying suit with Mrs. Peacock and now sought to recover from the defendant insurer the amount they had paid out to Mrs. Peacock in damages. The defendant relied upon the policy's exclusion clause, claiming that the leak clearly constituted pollution for the purposes of the exclusion clause and was not sudden and accidental.

[58] However, Fogarty Co. Ct. J. found, despite the length of time it may have taken for the damage to Mrs. Peacock's property to occur, the leak was both sudden and accidental. He stated at p. 857 that he could not bring himself "to believe that a leak in a pipe is caused in any other way than 'suddenly.'" In essence, at some point the pipe was working properly, then, suddenly, it was not. In a similar manner, the leak was "accidental" as the plaintiff did not intend it. Though not particularly relevant to the interpretation in the case at bar of Section 1.8, which lacks a "sudden

and accidental" exception, *Murphy* is an example of interpreting pollution liability exclusion clauses narrowly in accordance with the usual principles for interpreting insurance contracts.

[59] The exclusion clause in *Grace Farms Ltd. v. Big A Tank* (1984), 6 C.C.L.I 136 (B.C.S.C.), also included the "sudden and accidental" exception, but this does not appear to be a significant factor in McKenzie J.'s decision. The defendant, Big A Tank, had contracted with the plaintiff, Grace Farms Ltd. to dispose of pig manure that had accumulated on its hog farm. Big A deposited the manure in what it did not realize was a creek bed, as it was covered with ice and snow. The manure flowed into the creek and befouled it for 3/4 of a mile downstream. Grace Farms sued Big A to recover the $30,000 clean-up cost; Big A added its insurer as a third party, seeking indemnity if it was found liable. The insurer in turn attempted to invoke the pollution liability exclusion clause to preclude coverage.

[60] Mr. Justice McKenzie determined that the pollution liability exclusion clause did not apply on these facts. The key fact in *Grace Farms* was that the only hazard listed in the policy's schedule of hazards was the operation of the manure spreader. Given this, McKenzie J. ruled at p. 143 that the insurer knew contamination or pollution by manure would be "the most obvious, and substantial risk" of Big A's operation. At p. 144, he concluded that allowing the insurer to rely on the exclusion clause "would be to hold the defendant purchased no coverage for what was the pervasive and obvious risk in its business."

[61] He found support for this conclusion in both Estey J.'s judgment in *Consolidated Bathurst* and the judgment of Lacourciere J. of the Ontario Court of Appeal in *Weston Ornamental Iron Works Ltd. v. Continental Insurance Co.*, [1981] I.L.R. 477]. He summarized the principle established by Estey J. in *Consolidated Bathurst* at p. 143: "an exclusion clause should not result in a substantial nullification of coverage under the policy of insurance". He also referred to the following passage from p. 479 of *Weston Ornamental*, as adopting and extending the principle in *Consolidated Bathurst*:

> The exclusion clause should not be interpreted in a way which is repugnant to or inconsistent with the main purpose of the insurance coverage but so as to give effect to it. Thus, even if the exemption clause were found to be clear and unambiguous it should not be enforced by the courts when the result would be to defeat the main object of the contract or virtually nullify the coverage sought for protection from anticipated risks.

[62] *Grace Farms* is the only British Columbia case that has followed, or even considered, *Weston Ornamental* and its explicit statement that in the absence of ambiguity, the exclusion clause should not be interpreted to defeat the main object of the contract or virtually nullify the coverage sought for protection from anticipated risks. The Supreme Court of Canada has yet to endorse this proposition in the absence of an ambiguity in the policy: see *Reid Crowther* at pp. 268-69 and *Jesuit Fathers* at para. 27-29.

[63] *Great West Development Marine Corp. v. Canadian Surety Co.*, 2000 BCSC 806, is another case where a policyholder sought to invoke the insurer's duty to defend. The underlying action concerned alleged damages to the property of a farm owner who had contracted to receive soil excavated from the policyholder's construction project. Mr. Justice Holmes found at para. 24 that the pollution liability exclusion clause did not apply, largely on the basis that the "gist of the petitioner's law suit is that she expected topsoil but received a mix of gravel, clay, stones and construction debris, and that whatever its proper description, it was not topsoil".

[64] Although the plaintiff in the underlying action had mentioned contamination from the construction debris in her pleadings, Holmes J. concluded that her primary concern was that the soil she received was not what she bargained for. Furthermore, based on the pleadings it was not clear that the "fill from the construction site could reasonably be considered a pollutant in the general sense of being harmful" (para. 27) and therefore the insurer could not meet the onus of establishing that the exclusion applies.

[65] In *Trafalgar Insurance Co. of Canada v. Imperial Oil Ltd.* (2001), 57 O.R. (3d) 425 (C.A.), aff'g *R.W. Hope Ltd. v. Dominion Canada General Insurance Co.* (2000) 20 C.C.L.I. (3d) 38 (Ont. S.C.J.), a spill of 800 litres of residential fuel oil had

contaminated a property and forced the homeowners, the Rudners, to move out temporarily. The Rudners sued the supplier of the fuel oil, Imperial Oil Ltd., who had provided the fuel oil. Imperial Oil subsequently cross-claimed against R.W. Hope Ltd., whom they had hired to remediate the spill alleging Hope had been negligent. When Hope sought a declaration that its insurer was obligated to defend it the insurer claimed the pollution exclusion clause precluded coverage.

[66] The majority of the Ontario Court of Appeal upheld the lower court's decision that the pollution exclusion clause did not apply and the insurer was obligated to defend Hope. The key fact in this case is that Hope had played no part in the original spill; it had only been hired to remediate it. Therefore, the majority held that Hope was not a polluter and that any damage related to its alleged negligence did not arise out of "escape, discharge, dispersal or release of a pollutant" as the oil was already present when Hope began its work. In a dissenting judgment, Osborne A.C.J.O. disagreed, and would have allowed the insurer's appeal on the basis that, although Hope had not caused it, the claim for damages still arose "out of the initial escape of the pollutant" (para. 52) and that the clean-up was therefore caught by the exclusion clause.

[67] I will note, however, there appeared to be no great controversy over whether fuel oil could be considered a pollutant, with Osborne A.C.J.O. stating at para. 42 that the fuel oil was "in my view, a liquid contaminant". Although he was in dissent it did not appear that the majority disagreed with his determination in that respect, as they felt it was not necessary to determine if oil was always a pollutant, but proceeded on the assumption that it was.

[68] In *Medicine Hat (City) v. Continental Casualty Co.*, 2002 ABQB 259, aff'd 2004 ABCA 199, several municipal employees sued the City of Medicine Hat, claiming in a class action that the conversion of the City buses to methanol and resulting exposure to both methanol and lubrizol, a fuel additive, resulted in "neurological problems and chemical sensitivity" (para. 9). The City's insurer initially split the costs of defending the underlying actions, however it later withdrew. In

response the City sought a declaration that the insurer owed them a duty to defend. This was denied by the insurer on the basis that the pollution exclusion clause excluded coverage.

[69] The court acknowledged that lubrizol and methanol are pollutants, but found that the insurer had a duty to defend nonetheless. This was based on the allegations in the pleadings in the underlying actions, which were framed as being related to "exposure" to methanol and lubrizol, which Foster J. found had a broader meaning that the "discharge, dispersal, release or escape" specifically excluded by the exclusion clause. As was recently explained by Rothstein J. in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, at para. 19:

> An insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim. It is irrelevant whether the allegations in the pleadings can be proven in evidence. That is to say, the duty to defend is not dependent on the insured actually being liable and the insurer actually being required to indemnify. What is required is the mere possibility that a claim falls within the insurance policy. Where it is clear that the claim falls outside the policy, either because it does not come within the initial grant of coverage or is excluded by an exclusion clause, there will be no duty to defend.

Since the duty to defend arises with "the mere possibility that a claim falls within the insurance policy" the possibility that "exposure" may fall outside the scope of the exclusion clause was sufficient to require the insurer to defend the City.

[70] The distinction between exposure and "discharge, dispersal, release or escape" turned on Foster J.'s conclusion at para. 27 that "discharge, dispersal, release or escape" was "the language of improper or unintended events or conduct." Therefore, the exclusion clause did not to apply to "intended use or consequences", but was "intended to exclude coverage only as it relates to environmental pollution and the improper disposal or contamination of hazardous waste."

[71] *Hay Bay Genetics Inc. v. MacGregor Concrete* (2003), 6 C.C.L.I. (4th) 218 (Ont. S.C.J.) was decided shortly after *Zurich*, and applied *Zurich* to give the pollution exclusion clause a restrictive interpretation. The facts of *Hay Bay Genetics*

are quite similar to *Grace Farms*: pig manure from a hog farm leaked into a nearby body of water and triggered liability under environmental legislation, the owner of the hog farm sued other parties to recover its own losses, the defendant in the underlying suit sought coverage, and the insurers invoked the pollution liability exclusion clause to preclude coverage. The policyholder in *Hay Bay*, MacGregor Concrete, had provided an underground septic tank to the plaintiff, Hay Bay Genetics Inc., which subsequently leaked.

[72] Mr. Justice Sheffield begins his assessment of the pollution exclusion clause at para. 28 by noting that "[c]ourts are moving away from literal readings of an insurance contract because often, it would bring about unrealistic results which have no correlation to the parties' expectations". He adopts Lacourciere J.'s reasoning in *Weston Ornamental* that even where an exclusion clause is clear and unambiguous it should not be enforced by the court where to do so would nullify coverage. At para. 37 Sheffield J. acknowledges that pig manure could be considered "waste" for the purposes of the exclusion clause, but notes that "'[w]aste' could cover just about every conceivable item" and that he would not interpret the exclusion clause "hyperliterally," as Borins J.A. put it in *Zurich*.

[73] Since installing septic tanks was a substantial portion of MacGregor's business, Sheffield J. reasoned that "MacGregor would not have taken out this insurance coverage if it were not to cover potential pollution risks" (para. 37). This created a possible ambiguity in the exclusion clause. Mr. Justice Sheffield appears to be using the reasonable expectations of the insured in acquiring the coverage to identify a possible ambiguity.

[74] The decision in *Hay Bay* was explicitly limited to determining that the insurer had a duty to defend, which arises when the pleadings reveal a mere possibility that a claim falls within the insurance policy. At para. 38 Sheffield J. notes that he is only finding a possibility that MacGregor may be covered and that "the interpretation of this exclusion clause should be dealt with at trial on the basis of evidence presented by all parties."

[75] In *Palliser Regional School Division No. 26 v. Aviva Scottish & York Insurance Co.*, 2004 ABQB 781, Palliser school board had been sued by a group of neighbouring residents who alleged that coal dust had blown off Palliser's property and caused damage to their property and persons. Palliser sought a declaration that its insurer was required to defend it; the insurer in turn invoked the pollution exclusion clause. The property had once been an active coal bed, but production ceased years before Palliser acquired the property and by the time an elementary school was built there it was covered with a layer of topsoil and vegetation. The parties apparently agreed at para. 1 that "Palliser played no role in the subsequent actions and activities which re-exposed the coal bed", although the judgment does not identity the "third parties" that exposed the coal bed.

[76] The exclusion clause was for "bodily injury," "property damage," or "personal injury" arising out of the "actual, alleged or threatened discharge, dispersal, release or escape of pollutants". Mr. Justice Park was satisfied that the coal dust met the definition of a pollutant in the exclusion clause, however he nevertheless found Palliser was covered. Coverage was established on the basis that the airborne coal dust was:

> not industrial pollution or pollution to which the Pollution Exclusion clause should apply. The Pollution Exclusion clause is not directed at occurrences outside of those reasonably contemplated by the insurer and the insured arising from the operations and activity of the insured in operating the elementary school. The release of coal dust from the coal bed is not an occurrence to be expected or intended to be excluded from coverage (para. 46). [Emphasis added.]

[77] In reaching this conclusion Park J. was "guided by the interpretative approach set out in" *Zurich*, which he quoted at length at para. 45. Rather than interpreting the clause literally, he turned his attention to the reasonable expectations of the parties. He did not base his decision on a distinction between active and passive polluters, Park J. found that Palliser simply was not a polluter at all: "it is not involved in pollution arising in consequence of its activities" (para. 39). Essentially, he found no difference "between the release of coal dust from an exposed coal bed in a field and dust or dirt being released from loose lying beds of silt, loess, loam, clay, sand, marl,

or earth in a field" (para. 47). Since the business activities of running a school had nothing to do with the alleged release of the coal dust, the clause did not apply.

[78] In assessing the reasonable expectations of the parties, however, Park J. does not describe what type of pollution the exclusion clause could have applied to. In fact, he appears to consider the exclusion clause of no effect as "it is not within anyone's reasonable expectation in the circumstances that the operation of the school could or would result in the release or discharge of coal dust from the coal bed". The case is an example of the application of the principle that a narrow interpretation should be given to an exclusion clause in an insurance contract.

ANALYSIS

[79] Does the exclusion clause, reading the contract as a whole, exclude liablity for this type of loss?

[80] The basic framework for the interpretation of contracts of insurance comes from *Consolidated Bathurst* and the cases that follow it such as *Reid Crowther*, *Scalera*, *Jesuit Brothers*, and, most recently, *Progressive Homes*. I have set out those principles above, however, the following passage by Rothstein J. from *Progressive Homes* provides a brief and effective summary:

> [22] The 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.
>
> [23] Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction. For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties, so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded. Courts should also strive to ensure that similar insurance policies are construed consistently. These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place.
>
> [24] When these rules of construction fail to resolve the ambiguity, courts will construe the policy *contra proferentem* — against the insurer. One corollary of the *contra proferentem* rule is that coverage provisions are interpreted broadly, and exclusion clauses narrowly. [Citations omitted.]

[81] The question in the case at bar is whether, after applying those principles to the insurance contract at issue, the insurer has demonstrated that coverage is excluded for the direct physical property loss that was incurred by Mr. Corbould.

[82] The exclusion clause in question reads:

> We do not insure:
>
> …
>
> 8) loss or damage caused by contamination or pollution, or the release, discharge or dispersal of contaminants or pollutants.

The defendant's argument starts with this central point on the language of the exclusion: "The escape of home heating fuel from the oil tank on the Plaintiff's property is clearly contamination and/or pollution as referred to in the Policy".

[83] Reading the exclusion clause narrowly, I nevertheless conclude that the plain and ordinary meaning of the words in the exclusion clause is that an oil leak of this magnitude on the plaintiff's property is damage to the property caused by contamination or pollution or amounts to the release, discharge or dispersal of contaminants or pollution on the plaintiff's property. A leak of heating oil into the ground appears on its face to fall squarely within the meaning of the exclusion in Section 1.8. I expect a reasonable informed person would consider a spill of approximately 950 litres of heating oil to constitute contamination or pollution. Although, as counsel for the plaintiff has pointed out, several of the terms used in the exclusion clause, such as "contamination", "pollution", and "contaminants" are not defined in the Policy, I find that the oil spill falls within the phrase contamination or pollution. The plaintiff's counsel made further arguments about deficiencies in the language of the exclusion clause that I will address towards the end of these reasons.

[84] I understand that the words of the exclusion should not be read hyperliterally to include things that might be said to be contamination or pollution but objectively could not be considered by the parties to be intended to exclude coverage. I do not consider interpreting contamination or pollution to include a large spill of fuel oil that

directly damaged the plaintiff's land and house to be a hyperliteral interpretation of the clause.

[85] I have not been referred to a case where residential heating oil was considered a pollutant in the context of a pollution exclusion clause in a residential "all risks" property policy. In one case involving the interpretation of a pollution exclusion clause in a commercial "all risks" insurance policy, both gasoline vapours and a gasoline spill were found to constitute contamination: *D.P. Murphy, Inc. v. Laurentian Casualty Co. of Canada* (1992), 99 Nfld. & P.E.I.R. 331 (P.E.I. S.C.). There are also several cases considering commercial general liability policies that identify residential heating oil as a contaminant or pollutant. I have already referred to A.C.J.O. Osborne's comment in his dissenting judgment in *Trafalgar* at para. 42 that fuel oil was "in my view, a liquid contaminant". I refer to the comments in *Zatko* and in *BP Canada* that there was little doubt that oil or gasoline were contaminants or pollutants within the meaning of the clauses in those cases.

[86] In the American context, a pair of recent cases from Massachusetts specifically find that residential heating oil is a pollutant within the meaning of a pollution liability exclusion clause. In the first, *McGregor v. Allamerica Ins. Co.*, [2007] 449 Mass. 400 (S.J.C. Mass.), the Supreme Judicial Court of Massachusetts found at p. 403 that a "policyholder reading McGregor's policy could reasonably expect that oil leaking into the ground constitutes a pollutant within the meaning of the policy". This finding was further supported by the language in the statute that had mandated remediation. A second case, *Nascimento v. Preferred Mut. Ins. Co.*, [2008] 513 F. 3d 273 (1st Cir. (Mass.)), relied on *McGregor* to determine, at p. 278, that "[l]eaked home heating oil constitutes a pollutant".

[87] In *Harvey's Oil v. Lombard General Ins.*, 2003 NLSCTD 158, Barry J. found in a coverage and duty to defend case at para. 54 that "[t]he fuel oil did not become a pollutant until it escaped from the fuel supply system". As the insured in this case was a fuel supplier whose policy denied coverage if he had "delivered" a pollutant, finding that it was not a pollutant upon delivery allowed coverage. This distinction is

not helpful to the plaintiff in the case at bar because, of course, we are only concerned in the case at bar with the leak of the oil, not the delivery.

[88] Although the language of the exclusion clause itself appears clear and the oil spilled here appears to be covered by the words contamination or pollution, is that the proper interpretation when the policy of insurance is interpreted as a whole and with consideration of the surrounding circumstances in which it was made?

[89] I think two questions arise. The first question is whether there is an ambiguity. In a number of the cases the court has found that the policy is ambiguous and the interpretation more favourable to the insured has been adopted. The second question is whether, in the absence of an ambiguity, the reasonable expectations of the parties are such that there should be coverage under the policy.

[90] Is there an ambiguity looking at the Policy as a whole?

[91] The plaintiff's counsel says that there is if I consider the purpose of the coverage, the history behind the absolute pollution exclusion, and the common sense definition of what amounts to pollution or contamination.

[92] The ambiguity, the insured says, arises because the loss occurred from the unintended consequences of the normal operation of the heating system or because the type of damage does not meet the common sense meaning of pollution.

[93] In some circumstances words and phrases in exclusion clauses such as "contamination", "pollutants", and "release, discharge or dispersal" may be found to be ambiguous.

[94] On the other hand, there are also cases where, as the plaintiff pointed out, a substance that might commonly be considered a pollutant was in the particular context not considered a pollutant. The case that seems to weigh most heavily in the plaintiff's favour in this regard is *Palliser*.

[95] I do not see in the language or the surrounding circumstances an ambiguity in the insurance coverage as it relates to this particular incident. I do not find that the

case at bar is similar to *Palliser*. The finding in *Palliser* was that the coal dust was in no way related to the activities of the insured in the operation of a school. Is there a similar type of ambiguity that could be said to exist here? In the case at bar, Mr. Corbould obviously intended to bring the heating oil onto his property and would use it to heat his home. I am also unable to find an ambiguity like that found in *Zurich* where the court found it to be ambiguous because the exclusion there focused on the act of pollution rather than the resulting personal injury or property damage and because the historical context of the exclusion suggests that its purpose was to bar coverage for environmental pollution, not a faulty furnace that resulted in a leak of carbon monoxide.

[96] In this case, the oil that was spilled was clearly contamination or a pollutant, according to the exclusion clause. Reading the Policy as a whole in light of the surrounding circumstances, I do not see an ambiguity as to whether the Policy was intended to cover the unintended consequences of using fuel oil if it contaminated the property or an ambiguity as to whether the intention of the Policy was to cover something that met the common sense definition of pollution. Even so, the spill of oil into soil meets the common sense definition of pollution. Accordingly, absent an ambiguity, the exclusion clause must be given its plain and ordinary meaning.

[97] The insurer submits that the exclusion clause must have meaning and asks, if the exclusion is not read to cover a fuel spill or a leak of a tank on the insured's property, what is it intended to cover? That argument has merit.

[98] The plaintiff's argument, however, is also put this way: that considering the reasonable expectations of the parties it could not have been intended that the exclusion would apply to an unintended leak from the normal operation of the heating system, or at least there is an ambiguity in that respect. Counsel for the plaintiff argues that the reasonable expectation of the policyholder was that the unintended results of the normal operation of the heating system would be covered.

[99] The reasonable expectations of the parties are difficult to ascertain other than by examining the terms of the contract and the surrounding circumstances. Unlike in

the United States, the current state of the law in Canada appears to be that the reasonable expectations of the parties is a tool to find the proper interpretation of an insured policy when there is an ambiguity. In the United States there is, at least in some jurisdictions, a free-standing reasonable expectations doctrine that allows the insured's reasonable expectations of coverage to trump otherwise clear contractual language.

[100] Although Estey J. discusses the importance of the reasonable expectations of the parties in *Consolidated Bathurst* at p. 901, it is used to resolve an ambiguity: "an interpretation of an ambiguous contractual provision which would render an endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided".

[101] The Ontario Court of Appeal went further in *Weston Ornamental* when the exclusion was repugnant to the main purpose of the insurance contract. After finding that the exclusion clause in question was ambiguous, Lacourciere J.A. nevertheless went on to hold, in *obiter dicta* at pp. 479-80, that:

> The exclusion clause should not be interpreted in a way which is repugnant to or inconsistent with the main purpose of the insurance coverage but so as to give effect to it. Thus, even if the exemption clause were found to be clear and unambiguous it should not be enforced by the courts when the result would be to defeat the main object of the contract or virtually nullify the coverage sought for protection from anticipated risks. [Emphasis Added.]

Grace Farms is the only case in British Columbia where this passage from *Weston Ornamental* has been relied on.

[102] *Weston Ornamental* has been cited more frequently in Ontario, notably in *Zurich*, where Borins J.A. said at para. 28 that :

> it is clear that this court has concluded that even though an exclusion clause may be clear and unambiguous, it will not be applied where: (1) it is inconsistent with the main purpose of the insurance coverage and where the result would be to virtually nullify the coverage provided by the policy; and (2) where to apply it would be contrary to the reasonable expectations of the ordinary person as to the coverage purchased.

Although the plaintiff relies on the *Zurich* case, the court did not actually apply the suggested approach in that case. The policy in that case was interpreted in favour of the insured only after the court found that there was an ambiguity, which I have not found in this case.

[103] Moreover, the Supreme Court of Canada has declined opportunities since *Weston Ornamental* to apply the reasonable expectations doctrine in the absence of an ambiguity. Mr. Justice Cory considered the American version of the doctrine at length in *Brissette Estate v. Westbury Life Ins. Co.*, [1992] 3 S.C.R. 87 at pp. 102-06. He did not do so with "any intention of slavishly following them", however. After discussing the American approach, he went on to describe a Canadian approach that relied on a finding of ambiguity. In 1993 McLachlin J. (as she then was) said the following in *Reid Crowther* at p. 271: "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". More recently, in *Scalera*, Iacobucci J. stated at para. 71:

> Where a contract is unambiguous, a court should give effect to the clear language, reading the contract as a whole. Where there is ambiguity, this Court has noted "the desirability . . . of giving effect to the reasonable expectations of the parties."

Finally, in *Progressive Homes* at para. 23, Rothstein J. explained that "courts should prefer interpretations that are consistent with the reasonable expectations of the parties, so long as such an interpretation can be supported by the text of the policy."

[104] The current scope of the reasonable expectations doctrine in Canada is summarized in Gordon Hilliker, Q.C.'s text, *Liability Insurance Law in Canada*, 4th ed. (Markham: Butterworths, 2006) at 37:

> It is submitted that, properly applied, the doctrine should be no more than an alternate expression of the principle propounded by the Supreme Court of Canada in *Consolidated Bathurst Export v. Mutual Boiler Insurance*, namely, that the policy should be construed liberally so as to give effect to the purpose for which it was written. On this basis the doctrine would be helpful in the interpretation of vague or uncertain policy wording. The doctrine could not be used to override clear and unambiguous terms unless the failure to do so would defeat the main object of the insurance contract.

[105] I have not found there to be an ambiguity in whether the exclusion clause applies to this particular loss.

[106] However, even if I accepted that the reasonable expectations doctrine could be applied in the absence of ambiguity, I would still find that Mr. Corbould's claim fails. This is for two reasons. First, application of the exclusion clause to deny coverage in this case does not virtually nullify Mr. Corbould's insurance coverage overall. The application of the pollution exclusion clause here does not, in the words of Estey J. from *Consolidated Bathurst* at p. 901, "render the endeavour on the part of the insured to obtain insurance protection nugatory". The plaintiff is still insured against loss from such perils as fire, wind damage, theft, and vandalism. The case at bar is distinguishable from a case such as *Grace Farms* where application of the pollution clause to an accident involving manure would have made a manure spreader's insurance practically worthless.

[107] Second, the Canadian version of the reasonable expectations doctrine, to the extent that it may be applicable independent of ambiguity, requires, I think, consideration of the expectations of both parties. This was explicitly stated by Binnie J. in *Citadel General Insurance v. Vytlingam*, 2007 SCC 46 at para. 4: "Insurance policies must be interpreted in a way that gives effect to the reasonable expectations of both insured *and* insurer". Although the application of the pollution exclusion clause to exclude coverage may not meet the expectations of Mr. Corbould, the same cannot be said for the defendant. A spill of heating oil seems to be exactly the kind of case where the insurer would have expected the clause to apply.

[108] The final argument of the plaintiff is that the language of the exclusion clause is deficient in that it itself creates an ambiguity that must be resolved against the insurer. Mr. Winstanley points out that the insurer has not defined the words contamination, pollution and contaminants and thereby made it impossible for anyone to explain the intended scope of the exclusion.

[109] The insured says that this is overly broad and not effective unless the insurer is aided by the definition of "pollutants" in the Policy. That term is defined in the

Policy to mean any liquid, gaseous irritant or a “contaminate”. The plaintiff argues that the insurer has not met the onus of showing the loss fell within the exclusion as an incorrect word “contaminate” rather than “contaminant” is used. Moreover the plaintiff says that exclusion itself speaks of contaminants and no one is alleging the discharge of more than one contaminant.

[110] I find I must also reject these arguments. I do not think that the exclusion is overly broad. Properly interpreted, it applies to ordinary environmental pollution such as oil spills. The fact that the exclusion clause uses the plural of contaminants or pollutants is not relevant on the facts of this case, as the evidence, I find, is that the oil is made up of multiple contaminants in any event. I agree with Mr. Kent, counsel for the insurer, that the proper interpretation of the clause is that there is an exclusion for coverage for one or more contaminants or pollutants. Finally, the apparent misspelling of “contaminant” as “contaminate” in the definition of “pollutants” is an obvious misspelling and can be taken to be corrected by the context.

CONCLUSION

[111] I find that under the Policy, properly interpreted, subparagraph (8) of Section 1.8 excludes coverage for this loss. Accordingly, the plaintiff’s claim for a declaration of coverage is dismissed.

“J.S. Sigurdson J.”
The Honourable Mr. Justice J.S. Sigurdson