Court File No. C69114

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE ESTATE OF JOHN HEMLOW, DECEASED

Applicant
(Respondent in Appeal)

- and -

CO-OPERATORS GENERAL INSURANCE COMPANY

Respondent
(Appellant)

FACTUM OF THE APPELLANT, CO-OPERATORS GENERAL INSURANCE COMPANY

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SmithValeriote Law Firm LLP
Barristers and Solicitors
105 Silvercreek Parkway North
Suite 100
Guelph, Ontario
N1H 6S4

Danielle Marks (LSO# 55895F)
dmarks@svlaw.ca

Robert W. Dowhan (LSO# 44118B)
rdowhan@svlaw.ca

Tel: 1-519-837-2100

Lawyers for the Respondent (Appellant),
Co-operators General Insurance Company

TO: **Sullivan Festeryga LLP**
Barristers and Solicitors
1 James Street South
11th Floor
Hamilton, Ontario
L8P 4R5

Curtis C. Zizzo (LSO# 56027P)
CZizzo@sfllp.ca
Tel: 416-863-1500

Lawyers for the Applicant (Respondent in Appeal),
The Estate of John Hemlow, Deceased

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PART I - IDENTITY OF APPELLANT, PRIOR COURT & RESULT

1. Co-operators General Insurance Company ("Co-operators") appeals to this Court from the Judgment of Justice Turnbull of the Superior Court of Justice ("the Application Judge") dated January 29, 2021, with reasons reported at 2021 ONSC 1797. On the application, the Estate of John Hemlow, Deceased ("the Estate") sought declarations that Co-operators has a duty to defend and a duty to indemnify the Estate under the Commercial General Liability Policy No. 1679203 (the "Policy") issued by Co-operators to John Hemlow, with respect to an action commenced by Rich Products of Canada Limited ("RPCL") on June 14, 2017 in the Superior Court of Justice in Toronto (Court File No. CV-17-577081) ("the RPCL Action"). The Estate also sought orders compelling Co-operators to defend the Estate.

2. Co-operators responded to the application on two grounds: first, that a determination of the duty to indemnify was premature, and second that the claims in the RPCL Action fall unambiguously in the total pollution exclusion endorsement in the Policy, thereby relieving Co-operators from any obligation to defend the Estate in the RPCL Action.

3. At the hearing of the application, Co-operators and the Estate agreed that the determination of Co-operators' duty to indemnify was premature and agreed to adjourn that part of the application *sine die*. Co-operators is not appealing that part of the Order.

4. With respect to the duty to defend, the Application Judge determined that the Total Pollution Exclusion clause in the Policy did not negate Co-operators' duty to defend and ordered Co-operators to defend the Estate in the RPCL Action.

5. Co-operators appeals to this Court to set aside that order and declare that Co-operators has no duty pursuant to the Policy to defend the Estate in the RPCL Action. This Court's intervention is required as the Application Judge's decision is based on ***five errors*** of law:

(a) The Application Judge failed to apply the primary interpretative principle in interpreting the Policy, and failed to give effect to the *unambiguous language* of the Policy and the Total Pollution Exclusion, reading the Policy as a whole.

(b) The Application Judge relied on what he called a "possible ambiguity" from the title of the exclusion clause and the colloquial meaning of the term "pollution", being what he referred to as "pollution of the natural environment" to justify the application of rules of contract construction.

(c) The Application Judge applied the doctrine of *contra proferentum*, to construe the Policy against Co-operators, despite making no finding that the rules of contract construction failed to resolve the fabricated "possible ambiguity".

(d) The Application Judge engaged in no analysis whatsoever of the nature of the claim in the RPCL Action, which is property damage arising from the release of pressurized ammonia, which RPCL itself describes as "a dangerous chemical." Rather, he found very simply that the statement of claim in the RPCL Action "does

not make mention of damage to the natural environment." The Application Judge further relied, in large part, on the extrinsic evidence of Jackie and Chuck Hemlow, which is contrary to the direct cautions of this Court and the Supreme Court of Canada.

(e) Finally, the Application Judge improperly applied the doctrine of nullification, after relying on a "possible ambiguity", rules of contract construction and *contra proferentum*. In essence, the Application Judge confused the doctrine of nullification as a one factor to consider on interpretation of the Policy rather than a final consideration to be made only where the exclusion clause at issue is clear and unambiguous on its face.

PART II - OVERVIEW - NATURE OF CASE AND ISSUES

6. In 2015, RPCL retained Wear-Check Canada Inc. ("Wear-Check"), a company that specializes in equipment oil and filter analysis, to sample and analyze oil from the mechanical and refrigeration systems at the RPCL processing facility located in Fort Erie, Ontario ("RPCL Facility").

7. Wear-Check subcontracted with John Hemlow to carry out the work under the retainer by RPCL.

8. Mr. Hemlow attended at the RPCL Facility on July 6, 2015. In the course of collecting oil samples from the ammonia compressors in the refrigeration systems, John Hemlow released pressurized gaseous ammonia into the room which caused significant damage to RPCL's Facility.

9. John Hemlow was killed by the ammonia, and RPCL brought the RPCL Action against his Estate for losses arising from the property damage caused by the release of pressurized ammonia, which RPCL refers to in its action as a "dangerous chemical."

Affidavit of Matthew Petch sworn on May 23, 2019 at para. 3
Exhibit Book, Tab 3, page 0097;

Statement of Claim issued on June 14, 2017, Exhibit "D" to Affidavit of Jackie Hemlow sworn on January 29, 2019
Appeal Book and Compendium, Tab 7 at page 52

10. The Estate sought a defence to the RPCL Action from Co-operators, pursuant to a commercial general liability policy issued by Co-operators to John Hemlow. Co-operators denied the Estate's claim on the basis that it is excluded on the operation of the Total Pollution Exclusion endorsement to the Policy.

11. The Policy affords coverage for sums that Hemlow is legally obligated to pay as compensatory damages for property damage, personal injury and bodily injury, but not if the property damage, personal injury or bodily injury arises out of an excluded act, occurrence or offence. One of the exclusions in the Policy is the Total Pollution Exclusion, which is an endorsement that Hemlow expressly considered and signed.

12. The Total Pollution Exclusion excludes coverage for property damage that arises out of the actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of "pollutants", being any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, odours, vapour, soot, fumes, acids, alkalis, chemicals and waste (which includes materials to be recycled, reconditioned or reclaimed.)

PART III - SUMMARY OF FACTS

The Parties and Relationships

13. Co-operators is an entity incorporated pursuant to the laws of the Dominion of Canada. Co-operators is an insurer duly licensed in accordance with the *Insurance Act*, R.S.O. 1990, c. I.8.

Affidavit of Matthew Petch, sworn on May 23, 2019 at para. 6
Exhibit Book, Tab 3, page 0097

14. John Hemlow is an individual who, prior to his death in July of 2015, resided in Hamilton, Ontario. At all material times, Co-operators insured John Hemlow pursuant to a policy of commercial general liability insurance.

15. John Hemlow worked in the oil analysis business as an oil sample technician under a sole proprietorship named “Hemlowco”. Mr. Hemlow attended industrial and commercial facilities and accessed oil and lubricating fluids from the manufacturing mechanics. Mr. Hemlow was aware that he worked in a field where pollution damage was a recognized concern.

Affidavit of Matthew Petch sworn on May 23, 2019 at para. 5
Exhibit Book, Tab 3 at page 0097;

Affidavit of Jackie Hemlow sworn on January 29, 2019 at para. 11,
Exhibit Book, Tab 1 at page 0007;

Affidavit of Chuck Hemlow sworn on January 29, 2019 at para. 4
Exhibit Book, Tab 2 at page 0092; and,

Transcript of Cross-Examination of Charles Hemlow held on December 11, 2019, at paras 183 – 1878
Appeal Book and Compendium, Tab 5 at page 48

16. The Estate of John Hemlow is represented by Jackie Hemlow, who was John Hemlow’s spouse.

Claim by Rich Products of Canada Limited

17. By Statement of Claim dated June 14, 2017, RPCL commenced an action against Wear-Check Canada Inc. (“Wear-Check”) and Hemlow at the Superior Court of Justice in Toronto, Ontario.

Statement of Claim issued on June 14, 2017, Exhibit “D” to Affidavit of Jackie Hemlow sworn on January 29, 2019
Appeal Book and Compendium, Tab 7 at page 52

18. RPCL claims general damages from Wear-Check and Hemlow, jointly and severally, in the amount of $3,000,000.00. RPCL’s claim is for nuisance, negligence and breach of contract

arising from the release of pressurized ammonia by Hemlow on July 6, 2015, which allegedly caused significant damage to the RPCL facility.

19. The Statement of Claim has a total of 16 paragraphs, and the particulars of the allegations relate to the release by Hemlow of pressurized ammonia, and expressly refer to ammonia as "a dangerous chemical".

20. The most relevant paragraphs of the Statement of Claim are paragraphs 9 to 11, in which RPCL alleges:

> 9. ***During the course of his work, Hemlow opened a valve to a pipe containing pressurized ammonia which was used in the mechanical and refrigeration systems at the Property, causing pressurized ammonia to escape and cause significant damage to the Property.***
>
> 10. The Plaintiff pleads that the aforementioned damage to the Property was caused by the negligence, want of care, and breach of duty of the Defendants, their contractors, sub-contractors, agents, employees or servants, for whom in law the Defendants are liable. In particular:
>
> a. they failed to carry out their work in a safe manner;
>
> b. they failed to carry out their work in accordance with the applicable codes, standards and regulations;
>
> c. ***they failed to pay heed to warnings and notices as to the presence of dangerous chemicals at the Property***;
>
> d. they failed to exercise reasonable skill and care when conducting work at the Property;
>
> e. ***they knew or ought to have known or with the exercise of reasonable diligence should have known that there was an inherent risk to opening a valve to a system containing pressurized ammonia***;
>
> f. they failed to take appropriate or any safety precautions prior to, and during their work;
>
> g. they failed to use adequate and/or proper tools when carrying out the work;
>
> h. ***they knew or ought to have known or with the exercise of reasonable diligence should have known that opening a valve to a system containing pressurized ammonia could cause damage to the Property***;

i. they failed to consider reasonable dangers and risks before conducting their work;

j. they failed to follow appropriate protocols when performing their work;

k. they failed to take any safety measures or any reasonable safety measures to protect the Property from damage;

l. they lacked the requisite experience in the work and therefore should not have undertaken the work at the Property; and,

m. they failed to consider the best interests of the Plaintiff.

Nuisance

11. The Plaintiff pleads that the release of ammonia, and resulting damage constitute an unreasonable interference with its use and enjoyment of the Property. As a result, the Defendants are liable in nuisance for the damage caused.

Statement of Claim issued on June 14, 2017 at paras. 9 to 11
Exhibit "D" to Affidavit of Jackie Hemlow sworn on January 29, 2019
Appeal Book and Compendium, Tab 7, pages 55 to 57

The Relevant Policy Provisions

21. Co-operators issued to Hemlow a policy of commercial general liability insurance bearing policy number 1679203 ("the Policy"). The relevant provisions of the Policy are set out below.

22. The Insuring Agreement for Coverage A, Bodily Injury and Property Damage Liability provides in relevant part:

1. INSURING AGREEMENT

a. We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage" to which this insurance applies.

Commercial General Liability Policy No. 001679203, issued by Co-operators General Insurance Company to John Hemlow, Exhibit "A" to the Affidavit of Matthew Petch sworn on May 23, 2019

Appeal Book and Compendium, Tab 8 at page 60

23. "Pollutants" is defined in the common definitions of the Policy as follows:

12. "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, odours, vapour, soot, fumes, acids, alkalis,

chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

Commercial General Liability Policy No. 001679203, issued by Co-operators General Insurance Company to John Hemlow, Exhibit "A" to the Affidavit of Matthew Petch sworn on May 23, 2019

Appeal Book and Compendium, Tab 8 at page 76

24. "Bodily injury" and "Property Damage" are also terms defined in the Policy:

3. "Bodily Injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

….

14. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property; or

b. Loss of use of tangible property that has not been physically injured.

Commercial General Liability Policy No. 001679203, issued by Co-operators General Insurance Company to John Hemlow, Exhibit "A" to the Affidavit of Matthew Petch sworn on May 23, 2019

Appeal Book and Compendium, Tab 8 at pages 74 and 76

25. The Policy includes a Total Pollution Exclusion endorsement, which provides:

TOTAL POLLUTION EXCLUSION

Attached to and forming part of Policy # 1679203

This endorsement modifies insurance provided under the Commercial General Liability Form No. D-1 Exclusion 1. Pollution Liability under Section 1 Coverages, Common Exclusions - Coverages A, B, C and D is deleted in its entirety and replaced with the following:

This insurance does not apply to:

Pollution Liability

"Bodily injury" or "***property damage***" or "personal injury" ***arising out of the actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of "pollutants"***.

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".

> Any fines, penalties, punitive or exemplary damages assessed against or imposed upon any Insured arising directly or indirectly out: of the actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of any "pollutants".
>
> Except as otherwise provided in this endorsement all terms, provisions and conditions of the Policy shall have full force and effect.
>
> **Affidavit of Matthew Petch sworn on May 23, 2019 at paras. 6 to 7 Exhibit Book, Tab 3, pages 0097-0098;**
>
> **Total Pollution Exclusion Endorsement to Commercial General Liability Policy No. 001679203, issued by Co-operators General Insurance Company to John Hemlow, Exhibit "B" to the Affidavit of Matthew Petch sworn on May 23, 2019**
> **Appeal Book and Compendium, Tab 9 at page 78**

26. John Hemlow signed the Total Pollution Exclusion on March 11, 2011.

27. The Certificate of Insurance for the Policy of Commercial General Liability Insurance issued to Hemlow as Policy 1679203 for the Policy Period February 2, 2015 to February 2, 2016, which was in force and effect at the time of the loss, clearly indicates that the Total Pollution Exclusion is part of the Policy and in full force and effect.

> **Certificate of Insurance, Exhibit "C" to Affidavit of Jackie Hemlow sworn on January 29, 2019**
> **Appeal Book and Compendium, Tab 10 at page 79**

The Exclusion and Pollution Coverage Were Expressly Considered by Hemlow

28. Co-operators is part of a larger group of companies known as the Co-operators Group of Companies. None of the entities in the Co-operators Group of Companies offer any specialized policy or rider to cover losses arising from the release of pollutants, or damages, injury or losses caused by the escape of pollutants or pollution, or the costs of remediating pollution, or any other such coverage related to pollutants. Rather, where customers request coverage for specialized insurance needs not covered by policies issued by the Co-operators Group of Companies, including pollution coverage, Co-operators' agents and representatives are directed to refer them to Federated Agencies Limited ("FAL"), a brokerage owned by the Co-operators, designed to

provide Co-operators' clients with insurance and financial products not offered by the Co-operators that compliment the offerings of its strategic business partners.

Affidavit of Matthew Petch sworn on May 23, 2019 at paras. 12 to 14
Exhibit Book, Tab 3 at page 0100

29. John Hemlow was referred by his agent, Matthew Donohoe of Ray Johnson & Associates Inc., to FAL for pollution coverage on February 2, 2011. Mr. Donohoe notes that Mr. Hemlow *said that the exposure for a pollution risk is "so remote".*

30. In the email, Mr. Donohoe writes:

> Hi John,
>
> Here's the Application, consent form and Checklist all in one File. I would just need your signature on page 9, 11, 13 and 15. I've also attached the EFT Authorization for monthly withdrawals. Could you fill in your Financial Institution address, Bank number, Transit number and Account number, then sign at the bottom of the page, please? Or you could just sign it and fax/E-mail a Void cheque. Is there a day of the month that you'd like the payments to come out? It can be between the 9th and the 29th.
>
> Then the downpayment [sic] of $185 (perhaps by VISA, over the phone?) and you're good and covered!
>
> ***Regarding the Environmental protection coverage, there's actually an exclusion on this policy for that, so pollution isn't covered. What I can do though, is look into getting that coverage through Federated, which is a brokerage that Co-operators owns, who can shop the market. <u>But as you said</u>, the exposure is so remote that it might not justify the premium. Up to you, I can find out the approximate premium though.***
>
> Thanks!! [emphasis added]

Email from Matthew Donohoe to John Hemlow dated February 2, 2011,
Exhibit "A" to Affidavit of Jackie Hemlow sworn on January 29, 2019
Appeal Book and Compendium, Tab 11 at page 108

31. To the knowledge of Co-operators, John Hemlow never obtained pollution coverage through FAL.

Affidavit of Matthew Petch sworn on May 23, 2019 at para. 15
Exhibit Book, Tab 3, page 0100

The Application Judge's Decision

32. In the Amended Reasons for Decision dated January 30, 2021, the Application Judge held that the Total Pollution Exclusion did not apply to negate Co-operators' duty to defend the Estate in the claims advanced in the RPCL Action. The most relevant paragraphs of the reasons are excerpted below:

> [58] Here, the insurer has attempted to exclude any act of emission of virtually any product that it has defined as an act of pollution. Pollutants are clearly defined in the Policy in the definitions section. Unfortunately, the term pollution is not defined in the Policy. It is this latter omission that leads to a ***possible ambiguity*** in the Policy.
>
> [59] In my view, the definition in the Policy of what constitutes a polluting act ***is overly broad*** and ***the insurer has inaccurately defined the exclusion***. It is a Total Emissions Exclusion, not a Total Pollution Exclusion. ***The use of the word Pollution in the heading of the exclusion document is misleading and confusing***. ***It may very well have caught the act that is alleged in the statement of claim,*** but, because of its ***inherent ambiguity***, it is ***possible*** that it did not meet the reasonable expectations of the insured. ***That is, the insured possibly, and reasonably, believed that the exclusions applied to pollution in the way normally understood by most people: pollution of the natural environment***.
>
> [60] In the present case, there is no evidence that John Hemlow was engaged in a business that carried with it an obvious and well-known risk of pollution, as for example in the Miracle case. The statement of claim does not make any mention of damage to the natural environment.
>
> [61] ***I find that the exclusion is possibly capable of more than one reasonable interpretation and that ambiguity dictates that it should be interpreted in favour of the applicant***.
>
> [62] In my view, the pollution exclusion clause is worded to protect the insurer from liability for environmental pollution and the improper disposal or contamination of hazardous waste. It would have taken very little for a clause to be added in the Total Pollution Exclusion document signed by Mr. Hemlow to state that the exclusion is not limited to environmental claims, but also includes all claims arising from any emission of any of the enumerated substances. The insurance industry has been gradually rewording these pollution clauses and exclusions over the years, as

evidenced by the cases provided to this court. However, Co-operators has failed to make its intentions clear and easily understandable in this Policy.

…

[64] On the evidence before this court, ***I find, for the following four reasons, that it was possibly within the objectively reasonable expectation of John Hemlow that he was insured***.

a) He was purchasing a General Liability Policy for his business. The nature of that business was within the knowledge of Co-operators, who had previously insured his brother, Chuck Hemlow. John reasonably expected coverage for foreseeable and ordinary tort claims that would arise out of his usual business activity.

b) Some of John's customers required him to carry liability insurance. The risk of an accidental and sudden event, like the one that occurred, would ordinarily fall within the policy. The cause of the loss in this litigation was not the result of an act of pollution, but as the result of a tort incidentally involving and/or accompanied by a potentially polluting substance.

c) His insurance agent checked out the cost of "Environmental protection coverage". That appears to reflect the agent's belief that pollution was related to damage to the environment, despite the fact that, under the Policy, the insurer had removed any reference to "environmental coverage".

d) The known risks in John's particular business of an environmental claim were relatively minimal and did not warrant the expense of pollution coverage.

[65] The definition used by Co-operators of "Total Pollution Exclusion" ***was misleading*** in that it not only included an exclusion of events which an average person would associate with pollution, ***but any accidental occurrence that caused any damage to the customer's property and which did not lead to environmental pollution as commonly understood***.

…

[69] It does not tax the imagination of most people that an exclusion entitled Total Emissions Exclusion (or something to convey exactly what was being excluded) could have been added for "Escape of Chemicals, gases, fluids, smoke or other Damaging products". ***It would have eliminated the confusion that the word 'pollution" imposes in the context of an exclusion intended by an insurer in a case such as the one before the court.***

[70] Given that the Total Pollution Exclusion is ***ambiguous*** and could have been clarified in at least two respects as suggested in this ruling to fulfill the objective realistic expectations of the insured, I am satisfied that Co-operators must defend this action on the merits on behalf of its insured, the late John Hemlow.

Amended Reasons on the Application of Turnbull J. dated January 30, 2021
at paras. 58 to 70
Appeal Book and Compendium, Tab 3 at pages 25 to 28

PART IV - STATEMENT OF ISSUES, LAW & AUTHORITIES

Issues on Appeal

33. There is one issue on this appeal:

(a) Did the Application Judge err in concluding that the Total Pollution Exclusion clause contained in the CGL Policy does not apply to exclude Co-operators' duty to defend the Estate in the RPCL Action?

34. Co-operators submits that the Application Judge made ***five errors*** in his analysis.

(a) The Application Judge failed to apply the primary interpretative principle in interpreting the Policy. In so doing, the Application Judge failed to give effect to the unambiguous language of the Policy and the Total Pollution Exclusion, reading the Policy as a whole, including the unambiguous definition of "pollutant". The Application Judge focused his analysis on the Total Pollution Exclusion separately from the Insuring Agreement and common definitions of the Policy, and conflated the established steps for the interpretation of insurance policies.

(b) The Application Judge applied rules of contract construction, and, in particular, the reasonable expectations doctrine, despite making no finding of ambiguity on the wording of the Policy; rather, the Application Judge fabricated what he called a "possible ambiguity" from the ***title*** of the exclusion clause and the colloquial meaning of the term "pollution".

(c) The Application Judge applied the doctrine of *contra proferentum*, to construe the Policy against Co-operators, despite making no finding that the rules of contract construction failed to resolve the fabricated "possible ambiguity".

(d) The Application Judge failed to determine the "substance and true nature of the claims" set out in the Action, taking the entire pleading into account. He engaged in no analysis whatsoever of the nature of the claim, which is property damage arising from the release of pressurized ammonia, which RPCL itself describes as "a dangerous chemical." Rather, he found very simply that the statement of claim in the RPCL Action "does not make mention of damage to the natural environment." The Application Judge further relied, in large part, on the extrinsic evidence of Jackie and Chuck Hemlow, which is contrary to the direct cautions of this Court and the Supreme Court of Canada.

Amended Reasons on the Application of Turnbull J. dated January 30, 2021 at para. 60,
Appeal Book and Compendium, Tab 3 at page 25

(e) Finally, the Application Judge improperly applied the doctrine of nullification, after relying on a "possible ambiguity", rules of contract construction and *contra proferentum*. In essence, the Application Judge confused the doctrine of nullification with one factor on the interpretation of the insurance policy; rather, the doctrine is a final consideration to be made only where the exclusion clause at issue is clear and unambiguous on its face.

Standard of Review

35. The correctness standard applies on appellate review of questions of law.

36. In disputes over contractual interpretation, extricable questions of law are reviewable on the standard of correctness. In *Creston Moly Corp. v. Sattva Capital Corp*., Rothstein J. explained

that extricable questions of law include: “the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor”.

> ***Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 at para. 53**

37. A central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute.

> ***Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 at para. 51**

38. Further, in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, the majority of the Supreme Court explained that consistency is particularly important in the interpretation of standard form insurance contracts, as both insurance companies and customers benefit from certainty and predictability. Appellate intervention is required to ensure consistency of result and certainty in the law.

> ***Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 40**

39. While the application of the exclusion clauses to the pleading in the RPCL Action would normally attract a more deferential standard, here, the Application Judge made extricable errors of law which attract the correctness standard.

The application judge erred in concluding that the Total Pollution Exclusion clause contained in the CGL Policy does not apply to exclude Co-operators’ duty to defend the RPCL Action

The Principles and Analysis on a Duty to Defend Application: The Interpretation of the Insurance Policy

40. In the recent case of *Family and Children’s Services of Lanark, Leeds and Grenville v. Co-operators General Insurance Company*, (2021), this Court clearly summarized the principles

applicable on a duty to defend application, including, first, the principles that govern interpretation of insurance policies:

> The relationship between an insured and an insurer is a contractual one governed primarily by the terms of the insurance policy.
>
> The language of the policy is construed in accordance with the usual rules of construction, ***rather than inferred expectations unapparent on a fair reading of the document***. ***This is particularly so in the case of commercial insurance policies involving sophisticated parties.*** The insurer must explicitly state the basis on which coverage may be limited.
>
> Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction and should prefer interpretations of the policy that are consistent with the reasonable expectations of the parties. Courts should avoid interpretations that would give rise to an unrealistic result or one that would not have been in the contemplation of the parties at the time the policy was concluded. ***However, these rules of contract construction do not operate to create ambiguity where there is none.***
>
> ***Family and Children's Services of Lanark, Leeds and Grenville v. Co-operators General Insurance Company*, 2021 ONCA 159 at paras. 54 to 56**

41. This Court then went on to reiterate and apply the process for interpreting an insurance policy, as established by the Supreme Court of Canada in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, which principles were summarized by this Court as follows:

(a) The primary interpretive principle is that **when the language of the policy is unambiguous, the court should give effect to that language, reading the policy as a whole**.

(b) **Where the language of the policy is ambiguous**, general rules of contract construction apply and the court should prefer interpretations of the policy that are consistent with the reasonable expectations of the parties. The court should avoid interpretations that would give rise to an unrealistic result.

(c) **Only when the rules of contract construction fail to resolve the ambiguity**, courts will construe the policy against the insurer which drafted the policy. This means that coverage provisions are interpreted broadly, and exclusion clauses narrowly [emphasis added].

***Family and Children's Services of Lanark, Leeds and Grenville v. Co-operators General Insurance Company*, 2021 ONCA 159 at para. 57, citing *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 S.C.C. 33, at paras. 22-24**

42. The final step in the analysis is to consider the doctrine of nullification: would giving effect to the clear language of an exclusion clause impermissibly nullify coverage under a policy?

43. In *Zurich Insurance Co. v. 686234 Ontario Ltd.* (2002), Borins J.A. explained that even a clear and unambiguous exclusion clause will not be applied where:

a) it is inconsistent with the main purpose of the insurance coverage;

b) the result would be to effectively nullify the coverage provided by the policy; and,

c) to apply the exclusion clause would be contrary to the reasonable expectations of the ordinary purchaser of the coverage.

***Zurich Insurance Co. v. 686234 Ontario Ltd.*, 2002 CanLII 33365 (Ont. C.A.), at para. 28, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 33**

44. In *G&P Procleaners and General Contractors Inc. v. Gore Mutual Insurance Co.*, this Court considered an appeal of a decision on a motion for summary judgment by an insurer to dismiss a coverage action on the basis that an "own work" exclusion clause applied to exclude coverage. The appellant insured asserted that if the court did not reverse the motion judge's finding and find a duty to defend, the coverage under the policy would be "illusory". The Court held:

> I disagree. Commercial general liability policies are generally intended to cover an insured's liability to third parties for property damage other than to the property on which the insured's work is being performed. They also cover consequential damage to parts of the property other than to the particular part of the property on which the work is performed. But they are not "all-risk" policies. They do not insure the manner in which the insured conducts its business. They do not generally cover the cost of repairing the insured's own defective or faulty work product.
>
> This is what the parties in the present case bargained for. To hold them to that bargain is entirely reasonable and does not render the coverage under the policy meaningless.
>
> ***G & P Procleaners and General Contractors Inc. v. Gore Mutual Insurance Co.*, 2017 ONCA 298 at paras. 24 and 25**

45. In *Family and Children's Services of Lanark, Leeds and Grenville v. Co-operators General Insurance Company*, this Court considered whether the application of a data exclusion clause would nullify the coverage under a Commercial General Liability Policy and a Professional Liability Policy, issued by Co-operators. This Court distinguished the case from *Zurich*, and held:

> First, unlike the decision in Zurich, ***the exclusion is entirely consistent with the main purpose of the insurance coverage, which is to provide compensatory damages for personal injury arising from the conduct of business except in accordance with specific exclusions under the policy***. The policies provide coverage for a range of services provided by Laridae and specifically, its provision of "Professional Services" to FCS. Only one of those services was to update and secure the FCS website.
>
> ***Second, given that the Co-operators policies provide coverage for a range of services which extend beyond the terms of this policy exclusion, the exclusion clause would not nullify the coverage provided under the policy.***
>
> ***Third, exclusion of these claims pursuant to the exclusion clauses would not be contrary to the reasonable expectation of the parties. The potential effect of the data exclusion clauses is apparent on the face of the policies.*** Unlike Zurich, where "a reasonable policyholder would expect that the policy insured the very risk that occurred", a reasonable policyholder in this case would expect that the data exclusion clause would exclude the dissemination of a sensitive Report over social media.
>
> ***Family and Children's Services of Lanark, Leeds and Grenville v. Co-operators General Insurance Company*, 2021 ONCA 159 at paras. 98 to 100**

The Principles and Analysis on a Duty to Defend Application: Analysis of the Pleading

46. Whether there is a duty to defend is determined by the allegations pleaded in the underlying action, which gave rise to the claim to the insurer, read together with the terms of coverage provided in the insurance policy.

> ***Family and Children's Services of Lanark, Leeds and Grenville v. Co-operators General Insurance Company*, *2021 ONCA 159 at para. 58***

47. 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. 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.

> ***Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada, 2010 SCC 33, at paras. 22-24***

48. In examining the pleadings to determine whether the claim falls within the scope of coverage, the parties to the insurance contract are not bound by the labels selected by the plaintiff. Rather, the court must try to ascertain the true nature and substance of the claim.

> ***Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, at paras. 22-24**
> ***Monenco Ltd. v Commonwealth Insurance Co.*, 2001 SCC 49, [2001] 2 S.C.R. 699, at paras. 34 and 35**

49. The insurer's defence obligation is not governed by facts outside of the pleaded allegations. Courts have been cautioned against referring to extrinsic evidence that is not explicitly cited by the parties in their pleadings, for fear of making findings binding on the parties that might be contrary to the evidence tendered on the full record at trial.

> ***Family and Children's Services of Lanark, Leeds and Grenville v. Co-operators General Insurance Company*, 2021 ONCA 159 at para. 60**
>
> ***Monenco Ltd. v Commonwealth Insurance Co.,* 2001 SCC 49, [2001] 2 S.C.R. 699, at paras. 36 and 37**

Application of the Duty to Defend Analysis in Cases with Similar Facts

50. In *699982 Ontario Ltd. v. Intact Insurance Co.,* the insured, 69982 Ontario Ltd., brought an application for a declaration that the respondent insurer was required to defend and indemnify it with respect to an underlying claim which alleged liability for property damage caused by pollutants from the operations of the insured's tenants, a dry cleaning business. This Court upheld the application judge's conclusion that the claims asserted against the insured ***were not within the scope of coverage and that the pollution exclusion clause unambiguously applied***.

***699982 Ontario Ltd. v. Intact Insurance Co.,* 9 CCLI (5th) 325 (Ont. S.C.J.)**

***699982 Ontario Ltd. v. Intact Insurance Co.,* 2012 ONCA 268, at para 4**

51. The application judge, Roberts J., as she then was, held that there was nothing ambiguous about the language of the pollution exclusion and it was therefore not necessary or appropriate for the Court to consider extrinsic evidence.

***699982 Ontario Ltd. v. Intact Insurance Co.,* 9 CCLI (5th) 325 (Ont. S.C.J.) , at para 10**

52. In the same decision, Justice Roberts echoed the comments of the Ontario Court of Appeal in *ING Insurance Co. of Canada v. Miracle* whereby the Court of Appeal rejected the applicant's argument that pollution exclusions in insurance policies should be restricted only to those parties engaged in an activity that necessarily results in pollution. In *Miracle,* Justice Sharpe, writing for the Court, noted that to hold otherwise would run contrary to the general principles of insurance law that only fortuitous or contingent losses are covered by liability policies.

***699982 Ontario Ltd. v. Intact Insurance Co.,* 9 CCLI (5th) 325 (Ont. S.C.J.), at para 11;**

***ING Insurance Co. of Canada v. Miracle,* 2011 ONCA 321 at para 23**

53. In *699982 Ontario Inc.,* the Court ultimately held that there was a clear connection between the dry-cleaning operation of 6999892's tenants and the alleged pollution. As such, the pollution exclusion should have been within the objectively reasonable expectations of 699982 at

the time that it entered into the policy of insurance and that there is nothing unfair about holding the insured to its contractual bargain:

> 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**(Ont. C.A.)) or the unexpected escape of coal dust from a school's coal bed (*Palliser Regional Division No. 26 v. Aviva/Scottish & York Insurance Co.*, **[2004] A.J. No. 1356** (Alta. Q.B.)), **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. Whether or not 699982's dry cleaner tenants in fact used PCE in their businesses or their businesses caused the pollution and property damages complained of is not the question. It is common ground that, for the purpose of determining whether the policy covers the claims and there is a duty to defend, I must take the allegations in the claims as if they are true: *Monenco Ltd. v. Commonwealth Insurance Co.*, [2001] 2 S.C.R. 699 (S.C.C.).
>
> The "Pollution Exclusion" of the subject policy clearly extends to the operations of tenants that carried on dry cleaning operations for which 699982, as landlord, is responsible. This exclusion should have been within the objectively reasonable expectation of 699982 at the time that it entered into the policy of insurance in issue. ***Pollution liability is not the only risk covered by the insurance policy in this case or the only risk faced by the insured. By denying coverage for pollution liability, the Court does not deprive the policy of protection for the other risks that the policy does cover. There is nothing unfair about holding 699982 to its contractual bargain.*** [Emphasis Added]
>
> ***699982 Ontario Ltd. v. Intact* at paras 12 – 15**

54. In *Palliser Regional (School) Division #26 v. Aviva Scottish & York Insurance Co. Limited,* the Court of Queen's Bench of Alberta held that the respondent insurer could not rely on the pollution exclusion to deny coverage. In reaching the decision, Justice Park found it particularly important that the pollution complained of *did not result from the normal business activities of the insured* and made it clear that the decision rendered would have been different had the insured been involved in an industry with "possible polluting side effects or by-products":

> …However, Palliser is not involved in pollution arising in consequence of its activities. Its activities on this property involve the operation of a school. Here 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. …
>
> If an insured is involved in a business which could lead to or possibly lead to the pollution of the environment, then both the insurer and insured in taking out a comprehensive general liability insurance policy would direct their minds to the coverage sought, the risk involved and the probability of that risk. ***No insurer would take on that risk of pollution in a comprehensive general liability policy if the insured was involved in an industry with possible polluting side effects or by-products. Hence the reason by the insurer to include in such a comprehensive general liability policy, an exclusion clause denying coverage for pollution*****.** Instead in a case involving an insured possibly polluting the environment arising from its business activities, the insured could address its mind to the pollution risk and obtain a specific policy covering the risk of pollution without a pollution exclusion clause… [Emphasis Added]
>
> ***Palliser Regional Division No. 26 v. Aviva Scottish & York Insurance Co. Limited*****, 2004 ABQB 781 at paras. 39 to 40**

55. In *O'Byrne v. Farmers' Mutual Insurance Co.,* (2014)*,* this Court considered an action by an insured for coverage under an all-risks property insurance policy. The insurer denied coverage on the basis of two exclusions: mechanical or electrical breakdown and a pollution exclusion. With respect to the pollution exclusion, at trial, the insureds argued, as in this case, that the pollution exclusion should apply to "traditional environmental contamination only". This Court disagreed, and asserted that the interpretation of a pollution exclusion depends upon a reading of the policy and the language of the exclusion:

> I do not necessarily agree with some of the trial judge's other conclusions regarding the policy that are premised on the *Zurich* case. ***For example, he found that the pollution exclusion should be read as applying only to "traditional environmental contamination" and that the exclusion would not operate because the oil spill was contained within the building and had not spread to the natural environment outside the building.*** The extent to which the policy provides coverage for pollution damage depends on a reading of the pollution exclusion as well as the indemnity and exclusion provisions…[emphasis added]
>
> ***O'Byrne v. Farmers' Mutual Insurance Co.,* 2014 ONCA 543, at para 53**

Application of the Duty to Defend Analysis to this Case

56. As in *Family and Children's Services of Lanark, Leeds and Grenville v. Co-operators General Insurance Company*, the first step in the analysis is to review the Policy to determine whether it is ambiguous.

57. The relevant provisions, as excerpted above, are the insuring agreement, set out under Coverage A, Bodily Injury and Property Damage Liability, the common definitions for "pollutants" and "property damage", and the Total Pollution Exclusion.

58. As the Total Pollution Exclusion forms part of the Policy, and expressly modifies Coverage A in the Insuring Agreement, the common definitions clearly and unequivocally apply.

59. On examination of the relevant policy provisions, when the Policy is read as a whole, the relevant coverage may be summarized as follows: coverage is afforded for compensatory damages for property damage, being physical injury to tangible property, including all loss use of that property, *but not* if the property damage arises out of the *actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of "pollutants", being* any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, odours, vapour, soot, fumes, acids, alkalis, chemicals and waste (which includes materials to be recycled, reconditioned or reclaimed.)

60. There is no ambiguity whatsoever in the language of the Policy.

61. The next step in the analysis is to examine the Statement of Claim in the RPCL Action. In particular, what is the ***substance and true nature*** of the claims in the RPCL Action?

***Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49 (S.C.C.) at para. 35**

62. The allegations in the RPCL Action clearly and unequivocally pertain to "property damage" arising out of the release by Hemlow of the pressurized ammonia, and to the cost of remediating the damage. The claim expressly alleges that Hemlow "opened a valve causing pressurized

ammonia to escape and cause significant damage to the property." The true nature and substance of the claim is damage caused by pressurized ***ammonia***, which RPCL expressly refers to in the claim as a "dangerous chemical".

63. On a plain reading of the definition of "pollutants" in the Policy, pressurized ammonia is clearly a ***solid, liquid, gaseous or thermal irritant or contaminant***, including smoke, odours, vapour, soot, fumes, acids, alkalis, chemicals and waste (which includes materials to be recycled, reconditioned or reclaimed). Gaseous ammonia and ammonia dissolved in water are expressly listed on the *Toxic Substances List*, set out in Schedule 1 to the *Canadian Environmental Protection Act, 1999*.

> ***Toxic Substances List*,**
>
> **Schedule 1 to the *Canadian Environmental Protection Act, 1999*,**
> **Schedule B to this Factum**

64. As the language of the applicable policy is clear and unambiguous, there is no basis to move to the next step of the analysis to resolve ambiguity as set out by the Supreme Court in *Progressive Homes.*

65. As there is no exception to the exclusion clause in the Policy, the only remaining consideration is whether giving effect to the exclusion would nullify the coverage under the policy in its entirety.

66. As in *G & P Procleaners*, and *Family and Children's Services of Lanark, Leeds and Grenville v. Co-operators General Insurance Company*, the Policy issued by Co-operators to Hemlow is a commercial general liability policy, not an all-risks policy as in *Zurich*.

67. Unlike the decision in *Zurich*, based on an all-risks policy, and, like the decision in *Family and Children's Services of Lanark, Leeds and Grenville v. Co-operators General Insurance Company* based on ***the same commercial general liability policy issued by Co-operators***, the Total

Pollution Exclusion is entirely consistent with the main purpose of the insurance coverage, which is to provide coverage for compensatory damages for personal injury, bodily injury and property damage arising from the conduct of Hemlow's business except in accordance with specific exclusions under the Policy.

68. Second, given that the Policy provides coverage for a range of occurrences that extend beyond the terms of the exclusion, the exclusion clause does not nullify the coverage provided under the Policy.

69. Third, application of the Total Pollution Exclusion is not contrary to the reasonable expectations of the parties. The potential effect of the Total Pollution Exclusion is apparent on the face of the Policy, and Hemlow expressly turned his mind to the effect of the exclusion, and the resulting risks. He signed the exclusion, the offer of pollution coverage was expressly made, and, according to the email from the insurance agent, Mr. Donohoe, Hemlow explicitly told him that he thought that the risk was remote.

70. Accordingly, to hold the Estate to Hemlow's bargain with Co-operators is consistent with the provisions in the Policy, it does not nullify the effect of the Policy and it accords with the reasonable expectations of the parties.

PART V - ORDER REQUESTED

71. Co-operators respectfully requests an Order:

(a) Setting aside the Judgment of Turnbull J. dated January 29, 2021;

(b) Declaring that Co-operators General Insurance Company has no duty to defend the Respondent in Appeal, the Estate of John Hemlow, Deceased, in the action commenced by Rich Products of Canada Limited in the Superior Court of Justice at Toronto bearing court file number CV-17-577081; and,

(a) Requiring the Respondent in Appeal, the Estate of John Hemlow to pay Co-operators' costs of the appeal, and Co-operators' costs of the application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of March 2021.

Danielle Marks

SmithValeriote Law Firm LLP
Barristers and Solicitors
105 Silvercreek Parkway North
Suite 100
Guelph, Ontario
N1H 6S4

Danielle Marks (LSO# 55895F)
dmarks@svlaw.ca

Robert W. Dowhan (LSO# 44118B)
rdowhan@svlaw.ca

Tel: 1-519-837-2100

Lawyers for the Respondent (Appellant),
Co-operators General Insurance Company

Court File No. C69114

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE ESTATE OF JOHN HEMLOW, DECEASED

Applicant
(Respondent in Appeal)

- and -

CO-OPERATORS GENERAL INSURANCE COMPANY

Respondent
(Appellant)

CERTIFICATE

I estimate that one hour will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Guelph, Ontario this 26th day of March, 2021.

Danielle Marks

SV:01432598-3

SmithValeriote Law Firm LLP
Barristers and Solicitors
105 Silvercreek Parkway North
Suite 100
Guelph, Ontario
N1H 6S4

Danielle Marks (LSO# 55895F)
dmarks@svlaw.ca

Robert W. Dowhan (LSO# 44118B)
rdowhan@svlaw.ca

Tel: 1-519-837-2100

Lawyers for the Respondent (Appellant),
Co-operators General Insurance Company

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Creston Moly Corp. v. Sattva Capital Corp*., 2014 SCC 53 (S.C.C.)

2. *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.,* 2016 SCC 37 (S.C.C.)

3. *Family and Children's Services of Lanark, Leeds and Grenville v. Co-operators General Insurance Company*, 2021 ONCA 159 (Ont. C.A.)

4. *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 S.C.C. 33

5. *Zurich Insurance Co. v. 686234 Ontario Ltd*., 2002 CanLII 33365 (Ont. C.A.), leave to appeal to S.C.C. refused

6. *G & P Procleaners and General Contractors Inc. v. Gore Mutual Insurance Co*., 2017 ONCA 298 (Ont. C.A.)

7. *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49 (S.C.C.)

8. *699982 Ontario Ltd. v. Intact Insurance Co*., 9 CCLI (5th) 325 (Ont. S.C.J.)

9. *699982 Ontario Ltd. v. Intact Insurance Co*., 2012 ONCA 268 (Ont. C.A.)

10. *ING Insurance Co. of Canada v. Miracle,* 2011 ONCA 321 (Ont. C.A.)

11. *Palliser Regional Division No. 26 v. Aviva Scottish & York Insurance Co. Limited*, 2004 ABQB 781 (A.B.Q.B.)

12. *O'Byrne v. Farmers' Mutual Insurance Co.,* 2014 ONCA 543 (Ont. C.A.)

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

1. List of Toxic Substances, Schedule 1 to *Canadian Environmental Protection Act, 1999*, R. S.C. 1999, c. 33

53. Ammonia dissolved in water

…

60. Gaseous Ammonia, which has the molecular formula NH3(g)

THE ESTATE OF JOHN HEMLOW, DECEASED
Applicant
(Respondent in Appeal)

v.

CO-OPERATORS GENERAL INSURANCE COMPANY
Respondent
(Appellant)

Court File No. C69114

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE RESPONDENT (APPELLANT), CO-OPERATORS GENERAL INSURANCE COMPANY

SmithValeriote Law Firm LLP
Barristers and Solicitors
105 Silvercreek Parkway North
Suite 100
Guelph, Ontario
N1H 6S4

Danielle Marks (LSO# 55895F)
dmarks@svlaw.ca

Robert W. Dowhan (LSO# 44118B)
rdowhan@svlaw.ca

Tel: 1-519-837-2100

Lawyers for the Respondent (Appellant),
Co-operators General Insurance Company