IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *The Dominion of Canada General Insurance Company v. Viking Fire Protection Inc.*, 2019 NLCA 13
Date: March 6, 2019
Docket Number: 201701H0065

BETWEEN:

THE DOMINION OF CANADA GENERAL INSURANCE COMPANY	APPELLANT

AND:

VIKING FIRE PROTECTION INC.	FIRST RESPONDENT

AND:

TEAM MECHANICAL CONSTRUCTION LIMITED	SECOND RESPONDENT

AND:

MARCUS CONTRACTING LIMITED	THIRD RESPONDENT

AND:

YMAN CONSTRUCTION LTD.	FOURTH RESPONDENT

Coram: Green, Welsh and O'Brien JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador (G) 201201G4408, 201201G4868, 201301G0431, 2017 NLTD(G) 102

Appeal Heard: March 16, 2018
Judgment Rendered: March 6, 2019

Reasons for Judgment by: O'Brien J.A.
Concurred in by: Green J.A.
Dissenting Reasons by: Welsh J.A.

Counsel for the Appellant: Bridget S. Daley
Counsel for the First Respondent: Jorge P. Segovia
Counsel for the Second Respondent: Robert B. Andrews Q.C.
Counsel for the Third Respondent: F. Geoffrey Aylward Q.C.
Counsel for the Fourth Respondent: Twila E. Reid

O'Brien J.A.:

Overview

[1] When water inadvertently escapes from a sprinkler system during construction, the law of gravity will determine its flow. The law of contract will determine whether property which is damaged as a result of the flowing water is insured under a policy of insurance.

[2] This appeal involves the application of contract law principles in order to interpret an insurance policy in this context.

[3] In 2011, a construction project involving renovations was undertaken at a hospital complex in St. John's, Newfoundland and Labrador.

[4] Team Mechanical Construction Limited (the second respondent in this appeal) was hired as the main contractor. A number of subcontractors were also hired to work on the project, including a plumbing subcontractor, Viking Fire Protection Inc. (the first respondent), Marcus Contracting Limited (the third respondent), and YMAN Construction Ltd. (the fourth respondent).

[5] The project required that a specific type of property insurance, known as Builders' Risk insurance, be obtained. A Builders' Risk insurance policy was purchased from The Dominion of Canada General Insurance Company (the appellant in this matter). The policy insured certain property, referred to in the policy as the "property insured", which might be damaged in the course of construction.

[6] During construction, when work on the project was almost complete, water escaped from a sprinkler system being worked on by Viking, causing flooding.

[7] Water damaged the new property and building materials which had been incorporated into the project before the flooding occurred (the "new property"). As a result, much of the work which had been completed before the flooding took place needed to be redone, using additional building materials and at increased cost. There was consensus that the new property, which was damaged, would be considered "property insured" under the policy.

[8] However, the flooding damage was not confined to the new property which had been incorporated into the project. Water also spilled into other areas of the hospital complex, including nearby rooms and hallways where no construction was taking place, causing damage to existing property located in those areas (the "pre-existing property").

[9] An application was brought in the Supreme Court of Newfoundland and Labrador to determine, as a question of law, whether the insurance policy covered damage to the pre-existing property. The applications judge held that it did.

[10] This appeal focuses on the same issue, namely whether the policy coverage extends beyond damage to the "new property" (which was directly used in and incorporated into the construction project), and also includes damage to "pre-existing property" in the hospital complex which was unrelated to the project.

[11] Based on the language of the insurance policy and a consideration of the case authorities on Builders' Risk insurance, I would conclude that it does not.

[12] Rather, for the reasons which follow, I would conclude that the term "property insured" in the present Builders' Risk policy covers loss or damage to new property related to the construction project only, and does not cover loss or damage to pre-existing property not directly involved in the project.

[13] As a result, I would allow the appeal.

Background

[14] The factual basis for the application in the Supreme Court was summarized by the applications judge in his decision, as follows:

> 1. On May 22, 2017, Viking Fire Protection Inc. filed an application under Rule 38 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, seeking a ruling on a point of law. The point of law is the interpretation of a Builders Risk Insurance Policy (the "Policy"), and specifically, whether the coverage under the Policy allowed indemnity for some or all property damage that was caused by a water escape. The damage occurred in the course of a renovation project at the Health Sciences Complex (the "Complex") in St. John's. The project involved installation and connection of deionized water treatment systems on the first and fourth floors of the Complex. Viking was one of several subcontractors on the project. As part of its subcontract, Viking had to relocate, and reconnect, pipes that formed part of a sprinkler system on the first floor of the Complex. A pipe connection installed by Viking failed, resulting in water escape and substantial property damage. Part of the property damage occurred in an area of the Complex where the renovation activity was occurring, and part occurred in an adjacent area of the Complex, as the escaping water flowed with gravity.
>
> 2. The General Contractor repaired the property damage at a cost of approximately $343,978.73 and then sought reimbursement from Viking, alleging that its negligence caused the loss. As an unnamed insured under the Policy, Viking requested that the insurer respond to the claim and reimburse the General Contractor for the property damage. The insurer was Dominion of Canada General Insurance Company. It declined to reimburse the loss, advising that the damages to pre-existing property (i.e. property that was not part of the project) was not covered.
>
> …
>
> 6. The limit of coverage under the Policy is $688,961, which is an amount approximately 1.1 times the contract price for the renovation project.
>
> 7. … Dominion submits that nearby offices and hallways where water damage occurred are outside the renovation area, are not "property in course of construction, installation, reconstruction or repair", and are not caught by the Policy definition of "Property Insured".

Issue

[15] The issue to be determined on this appeal is whether the term "property insured", in the Builders' Risk policy, includes pre-existing property at the hospital complex and whether the coverage under the policy extends to damage or loss to this pre-existing property.

Standard of Review

[16] The insurance policy under consideration is a standard form contract providing Builders' Risk coverage.

[17] In *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, a majority of the Supreme Court of Canada decided that the interpretation of a standard form contract of this kind is generally a question of law, and that a judge's interpretation of such a contract should ordinarily be reviewed on a correctness standard.

[18] The majority of the Court expressed this general proposition, that the standard of review is correctness, at paragraph 46, stating:

> Where, like here, the appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix specific to the particular parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

[19] The majority in *Ledcor* also noted that the interpretation of a standard form contract may, in certain circumstances, be regarded as a question of mixed fact and law, thereby warranting a more deferential standard of review on appeal.

[20] Examples of circumstances where this more deferential standard of review would be appropriate include situations where "the factual matrix of a standard form contract that is specific to the particular parties assists in the interpretation", or where "the parties negotiated and modified what was initially a standard form contract, because the interpretation will likely be of little or no precedential value" (*Ledcor* at paragraph 48).

[21] However there is nothing to suggest that special circumstances exist with respect to the policy in the present case. There is nothing specific or distinctive about the factual matrix, and the Builders' Risk standard form policy was not

significantly amended through negotiation. The policy remained in the standard form, and its interpretation has precedential value.

[22] As such, in accordance with *Ledcor*, the interpretation of the policy by the applications judge will be reviewed on a correctness standard.

Analysis

Principles of Interpretation

[23] The Supreme Court in *Ledcor* considered the proper approach to the interpretation of a Builders' Risk insurance policy.

[24] The Court, at paragraphs 49-51, summarized the governing principles of interpretation in this context, as had been set out in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245.

[25] The first principle is that, where the policy language is unambiguous, effect should be given to the clear language, reading the contract as a whole (*Ledcor* at paragraph 49).

[26] The second principle is that, where the policy language is ambiguous, general rules of contract construction are to be used to determine the meaning. The Court indicated that the interpretation should be consistent with the reasonable expectations of the parties, provided such an interpretation is supported by the policy language. Further, the Court noted, the interpretation should not lead to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted. Finally, the interpretation should be consistent with the interpretations of similar insurance policies (*Ledcor* at paragraph 50).

[27] Third, only where ambiguity remains after the application of the first and second principles is it appropriate to use the *contra proferentem* rule, whereby any remaining ambiguity in the policy language would be construed against the drafter, typically the insurer (*Ledcor* at paragraph 51).

[28] The above principles will be applied in interpreting the policy language in this case.

[29] Before doing so, the function of Builders' Risk insurance, as articulated by the Supreme Court of Canada, must be considered. This is because any contractual interpretation, and especially with respect to a standard form

contract which may have precedential value, must be undertaken within the context of the type and purpose of the policy under consideration.

Builders' Risk Insurance

[30] Builders' Risk insurance is a specific type of property insurance commonly used in construction projects. The Supreme Court of Canada has previously discussed its function.

[31] In *Commonwealth Construction Co. Ltd. v. Imperial Oil Ltd.* 1976, [1978] 1 S.C.R. 317, at 328, the Supreme Court stated the function of Builders' Risk insurance is to "provide to the owner the promise that the contractors will have the funds to rebuild in case of loss and to the contractors the protection against the crippling cost of starting afresh in such an event, the whole without resort to litigation in case of negligence by anyone connected with the construction, a risk accepted by the insurers at the outset" (emphasis added).

[32] The above excerpt from *Commonwealth Construction* is also included in the majority decision in *Ledcor*, at paragraph 68. In *Ledcor* the majority added that a Builders' Risk policy "… ensures construction projects do not grind to a halt because of disputes and potential litigation about liability for replacement or repair amongst the various contractors involved" (paragraph 66, emphasis added).

[33] At paragraph 71, the Court in *Ledcor* noted that *Commonwealth Construction* "… emphasized that these policies exist to account for the fact that work of different contractors overlaps in a complex construction site and 'there is ever present the possibility of damage by one tradesman to the property of another and to the construction as a whole'" (emphasis added).

[34] Further, at paragraph 79 in *Ledcor* the Court observed that Builders' Risk policies "… are commonplace on construction projects, where multiple contractors work side by side and where damage to their work or the project as a whole commonly arises from faults or defects in workmanship, materials or design" (emphasis added).

[35] Several points emerge from the Supreme Court's analysis of the function of Builders' Risk insurance.

[36] First, a Builders' Risk policy covers damage or loss to specific property. Namely, it insures property added by tradespersons to a project under

construction which is damaged or destroyed in the course of the construction, up to and including damage or loss to the construction project as a whole.

[37] This is consistent with the references above, in paragraphs 71 and 79 of *Ledcor*, to the effect that Builders' Risk insurance covers "damage by one tradesman to the property of another and to the construction as a whole", and "damage to [multiple contractors'] work or the project as a whole".

[38] A construction project typically involves numerous tradespersons (working for a main contractor, subcontractors, sub-subcontractors etc.) who, in the course of construction, may damage not only their own work and the property they have added to the project, but also the work and property of other tradespersons, or the project as a whole. Builders' Risk insurance covers damage or loss to this work, and insures new property added to an ongoing project by any of the tradespersons before completion, while the project is still a work in progress. Provided the new property is related to the project, it is encompassed under Builders' Risk coverage, regardless of which tradesperson added it to the project.

[39] Second, Builders' Risk insurance is aimed at ensuring that sufficient funds are available so that a construction project can continue in the face of unexpected damage or loss to the project's property or work product, which (in the absence of sufficient insurance funds available to allow the project to continue) might otherwise derail the project or make completion impossible.

[40] If there is damage or loss to property related to the project, in the course of construction, the Builders' Risk policy responds to that loss, thereby allowing the project to carry on. In this way, the insurance furnishes "funds to rebuild" any lost work (*Commonwealth Construction* at 328), and to replace any new property incorporated into the project which was damaged or destroyed during the construction process. By so doing it "provides protection against the crippling cost of starting afresh in such an event" (again see *Commonwealth Construction* at 328). This recognizes the shared interest of the owner, contractor, and various subcontractors in getting the project completed.

[41] As a result, a project need not be unduly set back or abandoned altogether due to lack of funds to rebuild that which had been built, but which was subsequently damaged or destroyed before the project was completed. The availability of insurance funds arising from Builders' Risk coverage thereby benefits the contractors and tradespersons working on the project, as well as the project's owner.

[42] Third, Builders' Risk insurance also creates stability and certainty. It reduces the likelihood of litigation among tradespersons arising out of any loss or damage to the project property while the project is under construction. Closely related to the previous point (that a Builders' Risk policy provides funding to ensure that a project does not derail), the policy also "ensures construction projects do not grind to a halt" due to "litigation about liability for replacement or repair amongst the various contractors involved" (*Ledcor* at paragraph 66, emphasis added).

[43] If there is loss or damage to property within the project, the Builders' Risk policy can respond, eliminating the need for litigation among the contractors. This is because, as decided by the Supreme Court in *Commonwealth Construction*, all tradespersons working on a project are insured under a Builders' Risk policy with respect to damage to property related to the project. The key distinction here is that this avoids litigation with respect to loss or damage to property within the project, not to pre-existing property outside of and unrelated to the project. This distinguishes Builders' Risk insurance from a general liability policy.

[44] Therefore, if there is damage or loss caused by one tradesperson to the property added to the project by any other tradesperson, or damage to the project as a whole, the Builders' Risk policy would be expected to respond. This avoids potentially significant delays impacting the continuation or completion of a project which might otherwise be occasioned by litigation among the tradespersons, to determine liability issues for damage to property connected to the project.

[45] The focus is always on providing insurance coverage (and financial compensation) to ensure the project continues on to completion, and that it doesn't get mired down in litigation or otherwise abandoned due to lack of funds to continue.

[46] To summarize, a review of the Supreme Court's discussion of the function of Builders' Risk insurance suggests that it is intended to cover loss or damage to new property which has been incorporated into a construction project, thereby ensuring that insurance funds are available to allow completion of the project when loss or damage to this property occurs, and consequently reducing the risk of litigation among tradespersons working on the project.

[47] Finally, the Supreme Court also observed in *Ledcor* that the purpose of Builders' Risk insurance is to *"provide broad coverage"* (paragraph 66, emphasis added).

[48] It is important to consider what the phrase "provide broad coverage" denotes in terms of how Builders' Risk policies are to be interpreted.

[49] In doing so, it is instructive to consider the context in which this phrase was used in *Ledcor*. The Court stated:

> [66] Therefore, in my view, the purpose behind builders' risk policies is crucial in determining the parties' reasonable expectations as to the meaning of the Exclusion Clause. In a nutshell, the purpose of these polices is to provide broad coverage for construction projects, which are singularly susceptible to accidents and errors. This broad coverage — in exchange for relatively high premiums — provides certainty, stability, and peace of mind. It ensures construction projects do not grind to a halt because of disputes and potential litigation about liability for replacement or repair amongst the various contractors involved. …
>
> (Emphasis added.)

[50] From this, the term broad coverage is referenced within the context of "construction projects", in order to ensure "construction projects do not grind to a halt". In my view, it does not extend this broad coverage to loss or damage beyond the construction project. Considered in context, the notion of "broad coverage" complements the functions of Builders' Risk insurance, as discussed above.

[51] It is also important to consider what the phrase "provide broad coverage" likely does not entail.

[52] My colleague, Justice Welsh, states that *Ledcor* "… emphasized that recovery for damages under a builders' risk policy should be *broadly construed* (emphasis added)."

[53] In my view, interpreting a Builders' Risk policy to ensure it provides "broad coverage" does not permit interpreting the policy so expansively as to disregard or do violence to the policy's language and ordinary meaning. It does not displace the requirement to apply accepted principles of contract interpretation. It does not permit an interpretation which ignores the parties' expectations or leads to outcomes that would be unrealistic or that the parties' would not have contemplated.

[54] Further, and relevant to the present case, in my view the phrase "provide broad coverage" does not mandate that a Builders' Risk policy should be so "broadly construed" (to use my colleague's term) that all pre-existing property is held to be insured, where the policy language does not support such an interpretation.

[55] Informed by the Supreme Court's analysis and conceptual orientation to the function of Builders' Risk insurance, it is essential to consider the actual words of the policy.

The Policy Language

[56] Key terms in the policy include the indemnity agreement (clause 1), the perils insured (clause 4), and most importantly the property insured (clause 2).

[57] The indemnity agreement in clause 1 states:

> Indemnity Agreement
>
> 1. In the event that any of the property insured be lost or damaged by the perils insured against, the Insurer will indemnify the insured against the direct loss so caused to an amount not exceeding whichever is the least of:
>
> (a) the "replacement cost" value of the property at the time of loss or damage but in no event to exceed the amount necessarily expended for replacement;
>
> (b) the interest of the Insured in the property;
>
> (c) the amount of insurance specified in the "Declarations" in respect of the property lost or damaged. …

[58] The perils insured under the policy are stated in clause 4:

> Perils Insured
>
> 4. This Form, except as herein provided, insures against all risks of direct physical loss of or damage to the property insured.

Clause 2 – "Property Insured"

[59] The most important term for this appeal is clause 2 of the policy, which defines "property insured". Clause 2 is reproduced below, with significant portions highlighted in bold.

[60] Clause 2 states:

> Property Insured
>
> 2. **This Form**, except as provided in this Form, **insures the following property at the "project site"** for the amount of insurance specified in the "Declarations" for the Project Site:
>
> (a) **property in course of construction, installation, reconstruction or repair** other than property described in 2(b):
>
> (i) owned by the Insured;
>
> (ii) owned by others, provided the value of such property is included in the amount of insurance;
>
> **all to enter into and form part of the completed project including expendable materials and supplies,** not otherwise excluded**, necessary to complete the project;**
>
> (b) landscaping, growing trees, plants, shrubs or flowers all to enter into and form part of the project provided the value of such property is included in the amount of insurance;
>
> (c) **temporary buildings, scaffolding, falsework, forms, hoardings, excavation, site preparation and similar work**, provided that the value thereof is included in the amount of insurance and then only **to the extent that "replacement" or restoration is necessary to complete the project.**
>
> (Emphasis added.)

The project site

[61] The policy indicates that the project site is the *"Janeway Children's Health & Rehabilitation Centre, St. John's, Newfoundland and Labrador"*, which is a children's hospital where the construction took place.

[62] However, while construction occurred exclusively within this hospital, the parties agreed that the "project site" encompassed much more than just one hospital.

[63] According to the parties, the project site was actually an entire St. John's hospital complex known as the Health Sciences Centre, which incorporated the children's hospital, along with an adult hospital, a Medical School, a Nursing

School, and various other constituent components and buildings (the hospital or hospital complex).

The term "Property Insured" does not include all property at the "Project Site"

[64] There is an important distinction, made in the language of clause 2, between property insured and all property at the project site. They are clearly not the same.

[65] Clause 2 does not insure all property at the project site. Rather, the policy language in clause 2 differentiates between "property insured" and "property at the project site".

[66] It does so in the opening words of clause 2, which indicates that insurance coverage is provided only to a particular subset of property at the project site; that is, the policy does not insure *all property* at the project site, but rather *"the following property at the project site"*.

[67] The policy, in clause 2(a) and (c), goes on to define what is meant by the term *"the following property at the project site"*, thereby delineating with some precision what property is insured.

[68] The relevant portions of that definition, in clause 2(a), restrict the term *"the following property at the project site"* to mean:

> Property "in course of construction, installation, reconstruction or repair …" (clause 2(a)); and
>
> Property "to enter into and form part of the completed project …" (clause 2(a)).

Clauses 2(a) and (c) provide examples of what property is insured. These include:

> "expendable materials and supplies … necessary to complete the project" … (clause 2(a)); and
>
> "temporary buildings, scaffolding … site preparation and similar work … to the extent that "replacement" or restoration is necessary to complete the project." (clause 2(c)).

[69] A plain reading of the language of clause 2 reveals the following with respect to the meaning of "property insured":

1. It does not include all property located at the hospital complex site, but rather only specific property ("the following property at the project site") which is "in course of construction, installation, reconstruction or repair"; that is, property directly involved in the ongoing construction project.

2. It has a specific characteristic or purpose, namely it is property which is intended "to enter into and form part of the completed project". This would not encompass pre-existing property, unrelated to the project.

3. It includes property such as "expendable materials and supplies", but only provided they are "necessary to complete the project".

4. It also includes such property as "temporary buildings, scaffolding … and similar work" … but again only in certain circumstances; that is, "only to the extent that their "replacement" or restoration is necessary to complete the project".

[70] An interpretation of the policy language must not conflate "property insured" (property in course of construction, installation, repair etc. which forms part of the completed project, including materials and supplies necessary to complete the project) with other pre-existing property at the project site (i.e. the hospital complex).

The First Principle of Interpretation in *Ledcor*: Where the policy language is <u>unambiguous</u>, effect should be given to the clear language, reading the contract as a whole

[71] The policy language is instructive in its clarity and precision. "Property insured" is property actually being constructed, installed, repaired, etc. as part of a construction project, while the project is a work in progress ("in course of construction"), in circumstances where the property is intended to be incorporated into the project ("all to enter into and form part of the completed project"), and includes property required for project completion ("expendable materials and supplies" … and "temporary buildings, scaffolding" etc. … necessary to complete the project ").

[72] It is the loss or damage to this property – this "new property" actually used or being incorporated into the new construction – that is insured. If this property is damaged during construction, then it is to be replaced or repaired, to enable the project to continue to completion.

[73] It is not damage to pre-existing property – in this case, for example, property down the hall, or in an adjacent office, or property elsewhere in the hospital complex, totally unrelated to the construction project – that is insured by the Builders' Risk policy.

[74] That is because pre-existing property in an adjacent hallway, for example, is not intended to "enter into and form part of the completed project". Property in a nearby office, unrelated to the construction project, is not property "in course of construction, installation, reconstruction or repair". Property elsewhere in the hospital complex (whether nearby or in some far-flung building in the complex) cannot be said to include "materials and supplies … necessary to complete the project".

[75] The fact that pre-existing property happens to get damaged during construction does not mean this property was intended to have been covered by the Builders' Risk policy. Damage to property, *per se*, does not trigger coverage. This is because, as noted above, the policy language does not cover damage or loss to all property at the hospital complex, but only damage or loss to a specific subset of property, as identified in the policy language in clause 2(a) and (c).

[76] The policy language in this instance is focused on property directly involved in the construction project, with a view to covering loss or damage to this particular property, thereby facilitating the continuation of the project to completion.

[77] Insuring specific property, so that the project can be completed, is contemplated in the language of clause 2(a), wherein "expendable materials and supplies" are insured provided they are "necessary to complete the project".

[78] Similarly, in clause 2(c), loss or damage to property used in the construction process (for example scaffolding, temporary buildings etc.) which would not be incorporated into the project, is nonetheless covered, but only "to the extent that replacement or restoration" of these items "is necessary to complete the project". For example, if one tradesperson's scaffolding is damaged by the work of another tradesperson, this would constitute "property

insured" under the policy, provided that its repair is necessary to complete the project when the damage occurs. If not, the damage is not covered.

[79] This interpretation of the policy language in clause 2 is consistent with the function of Builders' Risk insurance, as articulated by the Supreme Court in *Ledcor* and *Commonwealth Construction*.

Two potential sources of ambiguity

[80] Before concluding on the first principle of interpretation in *Ledcor*, two potential sources of ambiguity must be considered. These are:

(i) The absence of a specific exclusion clause in the policy, relating to pre-existing property; and

(ii) The fact that the policy does not define "property insured" based on delineated areas or physical locations within the hospital complex**.**

(i) The absence of a specific exclusion clause in the policy relating to pre-existing property <u>does not create an ambiguity</u>

[81] It was submitted, both on the application and on appeal, that to exclude pre-existing property from the scope of the term "property insured" would require an exclusion clause explicitly stating that pre-existing property is not covered, and also that the absence of an exclusion clause may create an ambiguity in the policy language.

[82] The applications judge agreed that the failure to provide specific exclusionary language created an ambiguity, stating at paragraph 18 of his decision:

> "If the insurer wanted to limit its exposure to property in defined areas, or to newly installed property, then it should have included a limitation or special wording. <u>Instead the insurer left an ambiguity.</u>
>
> (Emphasis added.)

[83] As well, my colleague Justice Welsh also considered the failure of the insurer to specifically exclude certain property from coverage to be significant.

[84] With respect, this appears to be approaching the issue of interpretation from the wrong starting point. The language of clause 2 of the policy defines what property <u>is insured</u> under the Builders' Risk policy. That is the proper starting point for interpretation.

[85] The relevant excerpts from the policy language, defining "property insured" in clause 2, are as follows:

> *"Property in course of construction, installation, reconstruction or repair … all to enter into and form part of the completed project, including expendable materials and supplies … necessary to complete the project… temporary buildings, scaffolding … and similar work… to the extent that "replacement" or restoration is necessary to complete the project. "*

[86] If pre-existing property does not fall within this definition of "property insured", then damage to pre-existing property is not covered. It would be redundant to specifically exclude pre-existing property in a separate clause.

[87] An exclusion clause is used to exempt property which would otherwise be included in the definition of property insured. Pre-existing property is not otherwise included.

[88] As the Supreme Court of Canada stated in *Progressive Homes Ltd.*:

> [27] … Exclusions do not create coverage — they preclude coverage when the claim otherwise falls within the initial grant of coverage. …

[89] Before deciding that an exclusion clause is required, to exempt certain property from coverage, there would first need to be a determination that the property in question falls within the definition of "property insured". Policy language need not explicitly exclude property from coverage if that property is not included in the first place.

[90] By way of an illustration, (albeit by analogy, using an example involving general property insurance as opposed to Builders' Risk property insurance), assume a scenario where A purchased property insurance and the "property insured" was A's residence.

[91] A fire occurred and A's residence was damaged, as was B's residence, which was adjacent. B would not be able to claim that B's residence is also insured under A's property insurance policy on the basis that it was not explicitly excluded from coverage under A's policy. The argument would be without merit.

[92] Rather, the analysis is better informed by considering what property A's policy <u>includes</u>, not what it excludes. That is, the policy is not required to explicitly exclude property that is not otherwise insured. Rather A need only

identify the property which is insured (and establish that B's residence is not included therein). There is no requirement to add exclusion clauses in order to define "property insured", in circumstances where that term is appropriately defined (as it is, in the present case, in clause 2 of the policy).

[93] On appeal, this Court was referred to the case of *University of Prince Edward Island v. Stevenson*, 2008 PESCTD 8, as an example of a case where there was an exclusion clause in a Builders' Risk policy to exempt damage to pre-existing property.

[94] The applications judge noted the following about this case:

> 10 There is one reported example where an insurer elected to include clear exclusionary language in a Builders Risk Insurance Policy. In *University of Prince Edward Island v. Stevenson*, 2008 PESCTD 8, an insurer issuing a Builders Risk Insurance Policy for a renovation project at the university, included clear exclusionary language. …

[95] However, the *University of Prince Edward Island* case dealt solely with a preliminary application seeking summary judgment. The Court determined that, as there were genuine issues for trial, it would be inappropriate to grant summary judgment.

[96] There was no adjudication on the merits relating to the issue of an exclusion clause in a Builders' Risk policy. The Court made no determination about whether such an exclusion clause was required, redundant, superfluous or otherwise. Nor did the Court find that, in the absence of an exclusion clause, "property insured" should be interpreted to include pre-existing property.

[97] The *University of Prince Edward Island* case does not stand for the proposition that an exclusion clause is required to exempt pre-existing property. The Court did not decide that issue. The Court actually declined to enter summary judgment on the issue of what was covered under a Builders' Risk policy.

[98] The case was submitted to this Court as an example of a situation where the language of a Builders' Risk policy might contain an exclusion clause relating to pre-existing property. That is, the Court was advised that it is possible to add such a clause to a Builders' Risk policy.

[99] In my view, that is not especially instructive. It would be similar to A, in the example above, obtaining property coverage for A's residence and adding a clause specifically excluding B's residence from coverage. The fact that A did

so (perhaps out of an abundance of caution or otherwise) does not require others, in A's situation, to also add an exclusion clause or risk having B claim that B's residence is insured.

[100] Indeed the presence or absence of explicit language relating to the coverage of pre-existing, adjacent property cuts both ways. As the Ontario Superior Court of Justice noted in *William Osler Health Centre v. Compass Construction Resources Ltd.*, 2015 ONSC 3959, if pre-existing property is intended to be covered under a Builders' Risk policy, it can be expressly included. The Court stated:

> [31] Had the covenant to insure been intended to cover adjacent property, it would have expressly included it.

[101] The fact that pre-existing property is not expressly excluded in the definition of "property insured" in the present case does not impact the coverage, and it does not result in pre-existing property becoming included and insured under the policy.

[102] The absence of an exclusion clause relating to pre-existing property in this context (where the language of clause 2 of the policy is clear regarding what property is insured) does not result in the presence of coverage.

[103] It was unnecessary to have specifically excluded pre-existing property, and the absence of an exclusion clause does not create ambiguity.

(ii) The fact that the policy does not define "property insured" based on delineated areas or physical locations within the hospital complex does not create an ambiguity

[104] The applications judge's decision, in concluding that pre-existing property is insured under the Builders' Risk policy, focused on the *specific areas, physical locations* or *defined envelopes of space* within the hospital complex where the property was situated, rather than focusing on the definition of "property insured" itself.

[105] The decision suggests that the lack of specific delineation, in the policy, relating to the precise physical location of the property, made it difficult to determine what property was included in the "property insured", and that this resulted in ambiguity. The applications judge stated, for example:

> 13 … How is one to precisely define, by reference to the Policy, the physical boundaries within the Complex for which property damage is covered? … It would be

> quite arbitrary for this court, or any person, to limit coverage to specific rooms or hallway in the Complex …
>
> 14 Property in course of construction, installation, reconstruction or repair at the "project site" is covered. … The definition is not limiting the "project site" to certain physical spaces …
>
> …
>
> 19 … Even if I was willing to refer to the construction contact in this matter, it does not define with precision an envelope of space within which insurance coverage exists, or guide me except in the most general way.
>
> 20 … Does the property insured include any part of pre-existing structures adjacent to the new equipment and pipes? Is all property within the general vicinity of renovation activity (i.e. anywhere a contractor or subcontractor might be present) part of the "Property Insured"? …
>
> …
>
> 22 … The Complex, in the broadest sense, is the property in the course of construction, and the description of project site in the Declarations does not limit the "Property Insured" to any specific space within the Complex. …
>
> (Emphasis added).

[106] My colleague, Justice Welsh, also indicates that this failure to define "property insured" based on the physical location of the property within the hospital complex creates ambiguity. Justice Welsh states:

> "As discussed by the applications judge, the failure to define an area within the Complex as the property in the course of construction, installation, reconstruction or repair results in ambiguity". …
>
> (Emphasis added).

[107] With respect, in light of the clear definition of "property insured" in the policy, this emphasis on the location of the property within the hospital complex is misplaced. The Builders' Risk policy insures specific property within the hospital complex, as defined in clause 2 of the policy. It does not insure specific locations or areas therein.

[108] The policy language need not define "an area" wherein property is insured, and failure to delineate such an area does not create an ambiguity in the policy language. As the Supreme Court noted in *Progressive Homes Ltd.,* while

the rules of contract construction are to be applied to resolve ambiguity, they do not operate to create ambiguity where there is none in the first place (paragraph 23). The language of clause 2 clearly defines "property insured"; no additional geographic delineation of space, location or area is required.

[109] Property, whether new or pre-existing property, is neither insured nor excluded from insurance based merely on where that property is located within the hospital complex. Such an approach to interpretation would disregard the clear policy language in clause 2.

[110] Delineating locations, areas or defined envelopes of space within the complex does not assist in determining what property was meant to be insured. Rather, even if loss or damage occurs to pre-existing property in close proximity to the property insured (i.e. in the same general area or sharing the same physical envelope of space with property insured), this still would not result in otherwise uninsured, pre-existing property becoming insured, because adjacency does not create coverage under the policy.

Conclusion on the First Principle of Interpretation in *Ledcor*: The policy language is <u>unambiguous</u>

[111] The first principle of interpretation in *Ledcor* indicates that where the policy language is unambiguous, effect should be given to the clear language, reading the contract as a whole (*Ledcor* at paragraph 49).

[112] The Supreme Court of Canada in *Sabean v. Portage La Prairie Mutual Insurance Co.*, 2017 SCC 7, [2017] 1 S.C.R. 121, emphasized the importance of the policy language when applying the principles of interpretation in *Ledcor*:

> [13] At the first step of the analysis for standard form contracts of insurance, the words used must be given their ordinary meaning, "as they would be understood by the average person applying for insurance, and not as they might be perceived by persons versed in the niceties of insurance law": *Co-operators Life Insurance Co. v. Gibbens*, 2009 SCC 59, [2009] 3 S.C.R. 605, at para. 21; see also *Ledcor*, at para. 27.

[113] The Court in *Sabean* also considered the meaning of "unambiguous" in the context of the first principle of interpretation in *Ledcor*, observing that the creation of ambiguity requires more than "a mere articulation of a differing interpretation":

> [42] The clear language of the provision, reading the contract as a whole, is unambiguous. There are no "two reasonable but differing interpretations of the policy": B. Billingsley, *General Principles of Canadian Insurance Law* (2nd ed.

> 2014), at p. 147; *Chilton v. Co-Operators General Insurance Co.* (1997), 32 O.R. (3d) 161, (C.A., at p. 169). The mere articulation of a differing interpretation does not always establish the reasonableness of that interpretation and does not necessarily create ambiguity.

[114] In applying the first principle in *Ledcor* to the present case, I would conclude that the Builders' Risk policy in this instance is unambiguous in respect of the meaning of "property insured".

[115] Having considered the policy language in its entirety, and especially in view of the definition of "property insured" in clause 2, I would conclude that no ambiguity exists in the clear language of the policy. As in *Sabean*, the "ordinary meaning" of the words used in clause 2 of the policy, as understood by the "average person applying for insurance" would, in my view, be unambiguous.

[116] As a result, I would conclude that pre-existing property at the hospital complex, unrelated to the construction project, is not "property insured" under the policy.

The Second Principle of Interpretation in *Ledcor*: Where the policy language is <u>ambiguous</u>, general rules of contract construction are to be used to determine the meaning

[117] While, in my view, the policy language is unambiguous, in the event that the language of the policy is considered to be ambiguous, the second principle of interpretation in *Ledcor* directs that the general rules of contract construction are to be used to determine the policy's meaning.

[118] The Supreme Court, at paragraph 50 of *Ledcor*, discussed the application of these general rules of contract construction in the context of insurance contracts.

[119] The Court noted that the interpretation of an insurance contract:

(i) "should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the language of the policy";

(ii) "should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted"; and

(iii) "should be consistent with the interpretations of similar insurance policies".

[120] Even if the present policy was to be considered ambiguous, I would conclude that, when these rules of construction are applied to the policy in this instance, the result would be the same; that is, the term "property insured" does not include pre-existing property at the hospital complex.

[121] The rules of contract construction, as set out in *Ledcor,* will be considered next.

(i) The first rule of contract construction: The policy interpretation should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the language of the policy

[122] In the present case, the policy language assists in discerning the parties' reasonable expectations.

[123] The policy's Declarations Page indicates that the policy limit was $688,961, with a $2,500 deductible and a $702 premium charged for this coverage.

[124] The construction contract between the project owner and Team Mechanical stipulated the amount of Builders' Risk insurance required for the project. The insurance to be obtained was to be 1.1 times the amount paid to the main contractor, Team Mechanical, for the total cost of completing all work on the project. The $688,961 Builders' Risk coverage represents this amount of 1.1 times the contract price.

[125] I would not view as coincidental the fact that the contract price and the Builders' Risk insurance coverage are approximately the same. Rather than a coincidence, it would be reasonable to conclude that the $688,961 insurance policy limit was chosen purposefully. The $688,961 limit, one might rationally conclude, was meant to reflect the parties' reasonable expectations that sufficient insurance be obtained to protect against a loss, including a loss up to the full value of the work being done in the project, but no more than that amount. This is consistent with the underlying function of Builders' Risk insurance, discussed earlier.

[126] The $688,961 insurance policy coverage, viewed in that context, would guarantee that enough funds are available to rebuild in case of loss to the "new

property", and to redo work which had already been done, but which was subsequently damaged or destroyed before project completion (see *Commonwealth Construction* at 328).

[127] Having sufficient insurance funds to completely cover the cost to redo work that had been completed, and replace property that had been destroyed during construction, provides security (to the owner as well as the tradespersons) that the project can be completed (see *Ledcor* at paragraphs 66 and 68). This is a key function of Builders' Risk insurance.

[128] A contractual requirement, as in the present case, that the amount of insurance be just marginally greater than the contract price (i.e. 1.1 times the contract price) achieves this, and ensures adequate insurance funds exist to complete the project.

[129] Conversely, this $688,961 insurance policy amount has no correlation whatsoever to potential loss or damage to pre-existing property at the hospital complex. This again suggests that the parties' reasonable expectations were that damage or loss to pre-existing property would not be covered under the Builders' Risk policy.

[130] The applications judge, at paragraph 23 of his decision, concluded that the policy covers *"all property in the Complex that suffered loss or damage as a result of the escape of water and, in particular, it covers loss or damage to property that pre-existed the new renovation work"* (emphasis added).

[131] In my view, this does not take into account the parties' intentions in setting the amount of insurance coverage required for the project at $688,961. This is because, if all pre-existing property in the hospital complex was intended to be insured, the $688,961 coverage under the Builders' Risk policy is clearly inadequate. As a consequence the property would be grossly underinsured.

[132] This conclusion, that the risk is underinsured, is unsatisfactory in that it would be inconsistent with the parties' reasonable expectations. Presumably the parties to an insurance contract, if their intentions were to insure all pre-existing property at a multi-million dollar hospital complex, would not be content to knowingly obtain inadequate insurance in the amount of $688,961.

[133] The Supreme Court observed in *Ledcor* that the purpose of Builders' Risk insurance is to offer "broad coverage, which benefits both insureds and insurers". The Court stated:

> [67] "The *raison d'être* of insurance is coverage": D. Boivin, *Insurance Law* (2nd ed. 2015), at p. 288. The purpose of builders' risk policies in particular is to offer broad coverage, which benefits both insureds and insurers …"

[134] In the present case, interpreting the policy language in a way which leads to a conclusion that the risk is significantly underinsured would not protect the insureds' interests, nor the interests of the owner of the hospital complex (who actually set the $688,961 amount of insurance required for the project).

[135] It challenges notions of common sense that this would be the parties' intentions. It would be like an owner of a personal residence knowingly insuring the property for a fraction of its value. Absent information that this was the parties' intention, an interpretation which avoids this result seems more reasonable.

[136] The other alternative (again if it was determined that that parties intended that <u>all property</u> in the hospital complex be insured under the Builders' Risk policy) would be for the parties to acquire sufficient insurance to cover the risk of damage or loss to all property.

[137] An expansion in insurance coverage to cover the risk of insuring all pre-existing property at the hospital complex would significantly increase the premium costs (perhaps inordinately so). Such a result would be unrealistic and would not have been contemplated in the commercial atmosphere in which the insurance policy was contracted.

[138] The Ontario Superior Court of Justice Court in *William Osler* noted the practical difficulty in obtaining insurance to cover <u>all property</u> in the context of a Builders' Risk policy, stating:

> [27] … it would be commercially unreasonable for Compass to obtain insurance for the entire Hospital. The Hospital insured itself to a limit of $162.5 million for a premium of $122,000. Compass' total profit for the job is likely to be around $60,000. It would make no commercial sense to expect Compass to obtain $122,000 worth of insurance to insure the entire Hospital in these circumstances.

[139] Similar commercial realities would apply in the present case, if the Builders' Risk policy was required to cover all property at an expansive hospital complex.

[140] The applications judge noted on this point that this was not a real concern, because the policy limit (in this case $688,961) would ensure the premium was affordable. He stated:

> 21 Dominion's counsel mentioned the practical concern that a Builders Risk Insurance Policy would become unaffordable to contractors if they are expected to purchase coverage for the entire building. That is not a legitimate concern because the limit of coverage under the policy will determine the premium amount. …

[141] My colleague Justice Welsh agrees with the applications judge on this point, concluding that the policy limit would address any concerns relating to an increase in the price required to insure all hospital property under a Builders' Risk policy, and that the "value of the entire facility is irrelevant" as a result. Justice Welsh states:

> Dominion submits that, if damage within the Complex as a whole was meant to be covered, the Policy's monetary limit would have to equal the value of the entire facility, which would be commercially unreasonable. The answer to that submission is that a builders' risk insurance policy has a monetary ceiling or limit, usually based on the value of the contract, in this case 1.1 times the value of the contract. The value of the entire facility is irrelevant to application of the Policy.

[142] In my respectful view this does not address the fundamental point that the property, on this analysis, will remain underinsured. The suggestion that the policy limit somehow assuages the concerns above, does not reflect the parties' reasonable expectations. It assumes that the parties would knowingly underinsure the risk of damage to all property at the hospital complex. Why would the parties to the policy cap coverage at $688,961, when the value of all pre-existing property at the hospital complex would be in the tens or hundreds of millions of dollars?

[143] Nor does this argument, that policy limits will keep premiums low, address the commercial difficulties which would result from including all pre-existing hospital property in the definition of "property insured". The risk would either continue to remain grossly underinsured or the cost of obtaining sufficient insurance to cover the actual risk to all pre-existing property would become prohibitive.

[144] In my view, this result would not have been within the reasonable expectations of the parties.

(ii) <u>The second rule of contract construction</u>: The policy interpretation should not give rise to results that are unrealistic or that the parties would not have contemplated in the commercial atmosphere in which the insurance policy was contracted

[145] Interpreting "property insured" to include pre-existing property would also lead to unrealistic results that would not have been contemplated in the commercial context in which the policy was created.

[146] The Supreme Court of Canada decisions in *Commonwealth Construction* and *Ledcor* both suggest that Builders' Risk insurance is directed at protecting property connected to a construction project, not property which is not connected.

[147] In this regard, and as discussed earlier, the functions of Builders' Risk insurance include providing funds to rebuild a project under construction, if needed, avoiding the crippling cost of starting the project afresh, and ensuring the project does not grind to a halt due to litigation relating to damage to property within the project.

[148] None of these functions would be furthered by requiring that a Builders' Risk policy respond to property losses that are not connected to the project in question.

[149] In the present case, during construction, a subcontractor (Viking) caused damage to property within the hospital complex which was not connected to the project construction – property in rooms and hallways adjacent to the property insured.

[150] The construction project would not be impacted by that damage. The Builders' Risk policy would not be engaged, as no insurance funds would be required to rebuild property related to the project, or repair damage to ensure completion of the project. The project's progress or completion would in no way be jeopardized, as there would be no damage to property within the project. As there is no damage to the "property insured", there is no claim payable under the policy.

[151] Indeed, if Builders' Risk insurance could be called upon to pay for damages to property not connected to the project, this could have a serious, negative impact on the project. It could result in the depletion or exhaustion of "funds to rebuild" the project (*Commonwealth Construction* at 328), which funds would otherwise be available in the event of damage to property actually related to the project, thereby potentially placing project completion at risk.

[152] Consideration of the "commercial atmosphere in which the insurance policy is contracted" includes an awareness of the different types of insurance typically present in a construction project setting. In this case, as is common in

many construction projects, the contract required two distinct insurance coverages be obtained by the main contractor, Team Mechanical: Builders' Risk insurance and commercial general liability insurance. This coverage would be in addition to property or liability insurance, if any, held by the hospital in the normal course, unrelated to the insurance obtained for this project.

[153] Of course, the presence or absence of commercial general liability insurance, or any other insurance, is not determinative of the issue of whether the Builders' Risk policy covers damage to pre-existing property in this instance.

[154] However, the distinction between property and liability insurance is relevant in this context in that Builders' Risk is property insurance, not liability insurance. As such, for coverage to obtain under the Builders' Risk policy, it is insufficient to simply prove that any property located at the hospital complex was damaged during construction; the property damaged must be the property described and insured in the policy.

[155] In contrast, the scope of a general liability policy is different, and generally broader. Liability insurance (subject of course to the specific policy language and any exclusions) would typically cover damage or loss to any property at the project site, including pre-existing property (not connected to the construction project), provided the loss or damage arises from the alleged negligence of a tradesperson.

[156] In the present case, damage to pre-existing property at the hospital complex is alleged to have been caused by the negligence of a plumbing subcontractor, Viking. In that circumstance, unless the property is "property insured" under the Builders' Risk policy, it would generally be expected that recovery for such a loss would be claimed under a liability policy.

[157] At the appeal hearing, counsel confirmed that the commercial general liability insurance policy acquired by Team Mechanical (and required by the project owner) responded to the loss related to pre-existing property. It was further noted, at the appeal hearing, that the Builders' Risk policy did not respond to the loss to pre-existing property, as the position was taken that this was not a loss to "property insured" in the policy.

[158] The damage to pre-existing property at the hospital complex was covered, but not by the Builders' Risk policy. Coincidentally, the same insurer, Dominion, provided coverage under both policies (Builders' Risk and

commercial general liability). The submission on appeal in this respect was as follows:

> This is not to suggest Team Mechanical is immune from a claim to make good a loss, only that the builders' risk policy does not respond to the loss. The responsible party is not relieved from having to make good the loss but of course the CGL [i.e. the commercial general liability] policy is available to respond to that type of loss.

[159] Interpreting the term "property insured" to mean new property, and not pre-exiting property, would, in my view, yield a result that is realistic and that would have been contemplated by the parties in the commercial atmosphere in which the insurance contract was made.

(iii) The third rule of contract construction: The interpretation of the policy should be consistent with the interpretations of similar insurance policies

[160] While the Supreme Court of Canada's decisions in *Ledcor* and *Commonwealth Construction* provide guidance on the interpretation of Builders' Risk insurance policies, neither case deals directly with whether pre-existing property is or is not included in the term "property insured".

[161] In *Ledcor*, a central issue on appeal concerned the interpretation of an exclusion clause.

[162] In *Commonwealth Construction*, a main issue was whether tradespersons involved in a construction project had an insurable interest in the work of other tradespersons, and in the project as a whole.

[163] However, whether "property insured" in a Builders' Risk policy includes pre-existing property has been considered in other cases.

Conflicting authorities and conflicting interpretive approaches

[164] The applications judge's decision refers to two decisions, a 2007 decision of the Alberta Court of Queen's Bench in *Medicine Hat College v. Starks Plumbing & Heating Ltd.*, 2007 ABQB 691, 461 A.R. 1, and a 2015 decision of the Ontario Superior Court of Justice in *William Osler Health Centre v. Compass Construction Resources Ltd.*, 2015 ONSC 3959.

[165] The decisions reach opposite conclusions; in *Medicine Hat* the Court held that a Builders' Risk policy insured new property under construction as well as pre-existing property which was damaged. In *William Osler*, the Court decided

that only new property was covered by a Builders' Risk policy and that pre-existing property, unrelated to the construction project, was not "property in course of construction" and was not "property insured" under the policy.

[166] The applications judge in the present case preferred the approach taken and conclusion reached in *Medicine Hat* to that of *William Osler*.

[167] As these conflicting decisions were the only direct authorities to which both the Applications Court and this Court was referred, a careful review is warranted.

[168] On review, I would conclude that the interpretation and analysis undertaken in *William Osler* better aligns with the law respecting the function of Builders' Risk insurance, as well as the policy language.

[169] The analysis in *William* Osler, in my view, also leads to an interpretation consistent with the parties' reasonable expectations, and produces a realistic result that the parties would have contemplated in the commercial atmosphere in which the insurance policy was contracted.

(a.) Medicine Hat College v. Starks Plumbing & Heating Ltd.

[170] *Medicine Hat* involved a construction project undertaken at a college. During construction, an explosion occurred which caused relatively little damage to the "new property" which was under construction. The main damage was to a pre-existing structure, a penthouse mechanical room, which was located on the roof of an existing building at the college, unrelated to the new construction.

[171] The insurer's position was that the damage to the penthouse mechanical room was not covered by the Builders' Risk policy, as it was damage to existing property; only damage to new property "... in the course of construction, installation, reconstruction or repair ..." would be covered by the Builder's Risk policy.

[172] The Court disagreed and held that the Builders' Risk policy covered damage to existing property in addition to new property under construction.

[173] The Court reached this conclusion by focusing on the issue of insurable interest. It first referred to the Supreme Court's determination, in *Commonwealth Construction*, that tradespersons had an insurable interest in the project in which they were working, stating:

> [48] The Supreme Court of Canada in *Commonwealth Construction* recognized that each trade and sub-trade on a project had an insurable interest in the entire project.
>
> …
>
> [54] In any event, regardless of who obtained the Builder's Risk Policy, once it has been obtained the law recognizes that each party working on a portion of the project has an insurable interest in the entire project.
>
> (Emphasis added.)

[174] The Court in *Medicine Hat* then extended this insurable interest to include pre-existing property as well, stating on this point:

> [62] I hold that all parties involved in the construction of this project had an insurable interest not only in the addition being undertaken to the existing structure but the existing structure itself. …

[175] The expansion of the insurable interest, beyond the principle decided in *Commonwealth Construction*, appears to have been based on the concept of foreseeability. That is, because damage to pre-existing property was foreseeable during the construction of new property, the Court in *Medicine Hat* held that tradespersons acquired an insurable interest in the pre-existing property.

[176] This was viewed as a "logical extension" (paragraph 49) of the insurable interest, which the Court in *Medicine Hat* held was warranted because "*… it is not difficult to envisage a situation where the negligence of a trade or sub-trade employed to do the new work, could easily have the effect of causing damage to all or at least a portion of the existing structure*" (paragraph 46, emphasis added).

[177] Having found that there was an insurable interest in pre-existing property, the Court then concluded that the Builders' Risk policy covered damage to the penthouse mechanical room, which was pre-existing property. It stated:

> [63] In conclusion, therefore, I hold that on the facts of this case, the loss in question is covered by the Builders' Risk Policy. In other words, the Plaintiff's penthouse mechanical room is included in the phrase "property in the course of construction, installation, reconstruction or repair".

[178] A few points arise from the Court's analysis and conclusion in *Medicine Hat*.

[179] First, the decision primarily stands for the proposition that a tradesperson has an insurable interest not just in property in an uncompleted construction project (as the Supreme Court had decided in *Commonwealth Construction*), but also in pre-existing property not connected to the project.

[180] While I have reservations about this proposition, in my view it is not necessary, for the purposes of this appeal, to accept or reject it. That is because, even if an insurable interest exists with regard to pre-existing property, this does not mean that the property automatically becomes "property insured" under a Builders' Risk policy.

[181] The existence of a potential insurable interest in property cannot be equated with an interest in property which has actually been insured under the terms of a Builders' Risk policy. The two are distinct. Having an insurable interest in property is not the same as having insurance on that property.

[182] The presence or absence of an insurable interest in property is not determinative, and does not create an obligation to respond to a claim under Builders' Risk insurance. The duty to respond must still be found in the language of the policy, keeping in mind the functions of Builders' Risk insurance (as considered by the Supreme Court) when interpreting the policy.

[183] Second, the concept of foreseeability of damage, on which the decision in *Medicine Hat* appears to be premised, does not determine the issue of whether property is insured. As Builders' Risk insurance is property insurance, and not liability insurance, the fact that one might easily "envisage a situation" (paragraph 46) where a tradesperson's negligence might damage pre-existing property (i.e. where damage to pre-existing property is foreseeable) does not mean that such property is covered under a Builders' Risk policy. That must be determined by the language of the policy. Foreseeability of damage does not, in itself, create an insured interest (as opposed to an insurable interest) in property.

(b.) William Osler Health Centre v. Compass Construction Resources Ltd.

[184] A different interpretive approach was taken in *William Osler*, which concerned a construction project at a hospital, specifically in the hospital's kitchen. During construction a water line separated, resulting in flooding that damaged not only the new construction (the property already incorporated into the kitchen renovations) but also other areas of the hospital, including areas adjacent to the kitchen.

[185] It was determined by the Court that damage to pre-existing property (property adjacent to the kitchen) could not be considered "property in course of construction, installation, reconstruction or repair…", and this damage was not covered by the Builders' Risk policy.

[186] The Court accepted the arguments of the general contractor, Compass Construction Resources Ltd. (Compass), many of which are also relevant to the present case. In both *William Osler* and the present case, the language used in the Builders' Risk policy is virtually identical. As similar arguments arise from the policy language and circumstances of both cases, it is instructive.

[187] The Court in *William Osler* outlined, and accepted, the arguments made by Compass as to why Builders' Risk insurance did not cover damage to pre-existing property.

[188] Relevant excerpts from the decision regarding these arguments are reproduced below. It is noted, in italicized and underlined text below, how the arguments and policy language referenced in *William Osler* are similar to the circumstances and policy language in the present case.

[189] The Court in *William Osler* stated:

> [24] In the case at bar, Compass only agreed to provide builders' risk insurance equivalent to the Insurance Bureau of Canada's standard policy (IBC 4042), which only covers property that is in the course of construction. It does not cover damage to adjoining or adjacent property.
>
> [25] According to Compass, there are a number of factors supporting the conclusion that the scope of the IBC 4042 and the scope of the covenant to insure do not encompass the entire Hospital.
>
> [26] First, this interpretation follows from the clear wording of the policy ("property in the course of construction, installation, reconstruction or repair").

(Notably, similar language is used in the present Builders' Risk policy.)

> [27] Second, it would be commercially unreasonable for Compass to obtain insurance for the entire Hospital. The Hospital insured itself to a limit of $162.5 million for a premium of $122,000. Compass' total profit for the job is likely to be around $60,000. It would make no commercial sense to expect Compass to obtain $122,000 worth of insurance to insure the entire Hospital in these circumstances.

(Similarly, the amount of Builders' Risk insurance required to be obtained in the present project, $688,961, is substantially less than the amount which would be required to insure the entire hospital complex).

[190] After reviewing the arguments, the Court in *William Osler* considered the decision in *Medicine Hat* and concluded that it was not determinative of the main issue to be decided:

> [34] With regard to *Medicine Hat*, Compass submits that this case was wrongly decided and, in any event, is not binding on an Ontario court. The determination that the policy covered the entire building was based on the court's decision that the contractor and subcontractors had an "insurable interest" in the existing structure. However, possessing an insurable interest does not determine the scope of coverage – it merely indicates whether a person is permitted to obtain insurance on the property.

[191] The Court in *William Osler* further considered the language of the Builders' Risk policy, as follows:

> [39] On a basic level, if Compass' insurance coverage were intended to insure the entire Hospital as a "property in the course of construction," the premiums and coverage limits stipulated in the covenant to insure would be much higher – they would more closely resemble the Hospital's own insurance coverage. It thus stands to reason that the covenant to insure was not intended by either party to cover damage done to the entire Hospital.
>
> [40] This interpretation is supported by the language used in the IBC 4042, which differentiates between the "property insured" and the "Project site":
>
> > This Form, except as provided in this Form, insures the following property at the "Project site" for the amount of insurance specified on the "Declarations Page" for the "Project Site":
> >
> > (a) property in the course of construction, installation, reconstruction or repair other than the property described in 2(b) […]
>
> (Underlining in original.)

(The above language is virtually identical to the policy language in clause 2 of the Builders' Risk policy in the present case).

> [41] Per the IBC 4042's definitions section, "project site" means "the site of a project described on the "Declarations Page." This definition clearly differentiates between a project and the location at which it takes place, i.e. between the kitchen renovation project and the rest of the Hospital.

> [42] The IBC 4042 also refers to the "property insured" in its indemnification provision:
>
> > 1. In the event that any of the property insured be lost or damaged by the perils insured against, the Insurer will indemnify the insured against the direct loss so caused to an amount not exceeding whichever is the least of:
> >
> > (a) the "replacement cost" value of the property at the time of loss or damage but in no event to exceed the amount necessarily expended for replacement;
> >
> > (b) the interest of the Insured in the property; […]
>
> (Underlining in original.)

(Clause 1 of the Builders' Risk policy in the present case contains the same language).

[192] The Court in *William Osler* considered the arguments relating to the interpretation of the Builders' Risk policy and concluded, at paragraphs 38 and 43, that the term "property insured" did not include pre-existing property at the hospital.

> [38] For all of the reasons argued by Compass, it would strain the interpretation of both the IBC 4042 and the contract between Compass and the Hospital if this court were to find that "property in the course of construction" included the entire Hospital. The covenant to insure covers the Project, but not the rest of the Hospital. …
>
> [43] This language makes it clear that the policy is intended to cover the "interest of the Insured" in the "property insured" at the Project Site only. The Alberta Court of Queen's Bench held in *Medicine Hat* that contractors have an insurable interest in an existing structure (or, using the terminology in this case, the "Project Site"). Whether or not this is true, it does not change the clear language of the policy by which it is stipulated that only the Insured's interest in the "property insured" will be covered by the policy. Any insurable interest the insured has in the Project Site as a whole, or property adjacent to the Place of the Work, is not insured by the all-risks builders' policy.

Conclusion on the conflicting authorities

[193] Having considered the conflicting authorities, and the respective analysis and conclusion in *Medicine Hat* and in *William Osler*, I am of the view that the interpretation in *William Osler* accords more directly with the functions of Builders' Risk insurance. The Court in *William Osler* also adopts an interpretation of the policy language that is consistent with the parties'

reasonable expectations, and produces a realistic result that the parties would have contemplated in the commercial atmosphere in which the insurance was obtained.

[194] At paragraph 22 of his decision, the applications judge adopted the reasoning of the Court in *Medicine Hat,* and outlined the basis for his conclusion as follows:

> I adopt the reasoning of McDonald, J. in the *Medicine Hat College* decision. An insurer issuing a Builders Risk Insurance Policy for an existing structure undergoing renovation, must be clear if "Property Insured" is limited to specific areas of the building, or is limited to new work only. In this case, I interpret the "Property Insured" to include other areas of the Complex impacted by the water escape. This interpretation flows from [the] plain reading of Policy which refers [to] property in course of construction, installation, reconstruction or repair at the project site. The Complex, in the broadest sense, is the property in the course of construction, and the description of project site in the Declarations does not limit the "Property Insured" to any specific space within the Complex. The property in the course of renovation is the entire Complex, even though works and work activity are occurring only in certain areas of the property.

With respect, and for the reasons provided in this decision, I am unable to agree with the applications judge's policy interpretation and conclusion.

Conclusion on the Second Principle of Interpretation in *Ledcor*: When the general rules of contract interpretation are applied, the term "property insured" does <u>not</u> include pre-existing property

[195] To conclude on this point, assuming ambiguity in the policy language, and applying the general rules of contract construction to the policy, (pursuant to the second principle of interpretation in *Ledcor*) I would interpret the term "property insured" to mean new property used and incorporated into the construction project, but not pre-existing property located at the hospital complex which was otherwise not connected to the project.

[196] Notably, the Supreme Court observed in *Ledcor* (paragraph 52) that "the insured has the onus of first establishing that the damage or loss claimed falls within the initial grant of coverage" (emphasis added).

[197] For the reasons provided above I would conclude that this onus, of establishing that damage to pre-existing property at the hospital complex falls within the grant of coverage provided under the Builders' Risk policy, has not been met.

The Third Principle of Interpretation in *Ledcor:* Use of the *contra proferentem* rule

[198] The Supreme Court in *Ledcor* indicated that where ambiguity remains after the application of the first and second principles of interpretation, it is appropriate to use the *contra proferentem* rule, whereby any remaining ambiguity in the policy language can be construed against the drafter.

[199] In my view, the *contra proferentem* rule is not applicable to this case because, as discussed above, there is no ambiguity in the policy language and, even if there was ambiguity in this instance, it can be resolved by applying the general rules of contract construction to the policy language.

Disposition

[200] In the result, based on a consideration of the policy language and the case authorities on Builders' Risk insurance, I would allow the appeal and conclude that the term "property insured" in clause 2 of the present Builders' Risk policy covers loss or damage to new property connected to the construction project only, and does not cover loss or damage to pre-existing property.

Costs

[201] The appellant, The Dominion of Canada General Insurance Company, and the first respondent, Viking Fire Protection Inc., were the main parties involved in this appeal. Both filed written materials and both made significant and detailed submissions at the appeal hearing. Both requested costs in the event they were successful on appeal.

[202] Dominion, having been successful on the appeal, is entitled to costs. I would order that costs of this appeal be paid by Viking to Dominion, on column 3 of the *Court of Appeal Rules*.

[203] The second respondent, Team Mechanical Construction Limited, the third respondent, Marcus Contracting Limited, and the fourth respondent, YMAN Construction Ltd., had limited involvement in the appeal. They did not submit written materials and their oral submissions at the appeal hearing were very brief

and limited in scope. I would make no order as to costs of this appeal with respect to the second, third, and fourth respondents.

_____

F. P. O'Brien J.A.

I Concur: _____

J. D. Green J.A.

Dissenting Reasons by Welsh J.A.:

[204] During a renovation involving the sprinkler system at the Health Sciences Complex in St. John's, substantial water damage was caused when a pipe connection installed by Viking Fire Protection Inc. failed. The main contractor, Team Mechanical Construction Ltd., had subcontracted a portion of the work to Viking. At issue in this appeal is the extent to which the damage was covered under the Builders' Risk Insurance Policy.

BACKGROUND

[205] Viking was contracted to relocate and reconnect water pipes that formed part of the sprinkler system in the Health Sciences Complex (the "Complex"). When a connection failed and water damage resulted, the insurer, the Dominion of Canada General Insurance Company ("Dominion"), took the position that not all the damage was covered by the Builders' Risk Insurance Policy (the "Policy").

[206] When Dominion refused to pay under the Policy, Viking filed an application in the Supreme Court seeking an interpretation of the Policy, "specifically, whether the coverage under the Policy allowed indemnity for

some or all property damage that was caused by a water escape" (decision of the applications judge, 2017 NLTD(G) 102, at paragraph 1). The judge explained:

> [7] … Viking identifies areas within the Complex where renovation work was occurring, and where contractors, subcontractors and suppliers achieved access to the Complex. The failed pipe connection, which was the source of the water damage, was located in Room 1304A of the Complex, and was within the renovation area. An unused elevator shaft above Room 1304A was being used in the renovation project to access the fourth floor of the Complex. Dominion agrees that all water damage inside this room should be covered, even though some part of the damage in this room relates to pre-existing property. Dominion does not agree that water damage outside this room should be covered. Dominion submits that nearby offices and hallways where water damage occurred are outside the renovation area, are not "property in course of construction, installation, reconstruction or repair", and are not caught by the Policy definition of "Property Insured".
>
> (Emphasis added.)

[207] The applications judge concluded that all the damage was, in fact, covered under the Policy:

> [22] … An insurer issuing a Builders' Risk Insurance Policy for an existing structure undergoing renovation, must be clear if "Property Insured" is limited to specific areas of the building, or is limited to new work only. In this case, I interpret the "Property Insured" to include other areas of the Complex impacted by the water escape. This interpretation flows from plain reading of [the] Policy which refers [to] property in course of construction, installation, reconstruction or repair at the project site. The Complex, in the broadest sense, is the property in the course of construction, and the description of project site in the Declarations does not limit the "Property Insured" to any specific space within the Complex. The property in the course of renovation is the entire Complex, even though works and work activity are occurring only in certain areas of the property.
>
> [23] The Policy covers all property in the Complex that suffered loss or damage as a result of the escape of water and, in particular, it covers loss or damage to property that pre-existed the new renovation work.

[208] Dominion accepts that, as an unnamed insured, Viking would be covered by the Policy to the extent that the Policy applies. Coverage under the Policy was limited to $688,961, approximately 1.1 times the contract price for the renovation project.

ISSUES

[209] At issue is whether the applications judge erred by concluding that coverage under the Policy extended to areas in the Complex where water damage occurred as a result of the failure of the pipe connection installed by Viking.

ANALYSIS

Principles of Law

[210] The approach to interpretation of builders' risk insurance policies, a type of standard form contract, is discussed in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23. Writing for the majority, Wagner J. recognized that standard form contracts are particularly common in the insurance industry and that consistency in their interpretation provides certainty and predictability which benefit insurers and insureds.

[211] In the result, Wagner J. concluded that correctness is the appropriate standard of review regarding the interpretation of a standard form insurance contract:

> [43] However, the interpretation of a standard form contract could very well be of "interest to judges and lawyers in the future". In other words, the interpretation itself has precedential value. The interpretation of a standard form contract can therefore fit under the definition of a "pure question of law" … . Establishing the proper interpretation of a standard form contract amounts to establishing the "correct legal test", as the interpretation may be applied in future cases involving identical or similarly worded provisions.

[212] Wagner J. then summarized an analytical approach to interpreting insurance policies:

> [49] … The primary interpretive principle is that where the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole … .
>
> [50] Where, however, the policy's language is ambiguous, general rules of contract construction must be employed to resolve that ambiguity. These rules include that the interpretation should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the language of the policy; it should not give rise to results that are unrealistic or that the parties would not have contemplated in the

> commercial atmosphere in which the insurance policy was contracted, and it should be consistent with the interpretations of similar insurance policies. …
>
> [51] Only if ambiguity still remains after the above principles are applied can the *contra proferentem* rule be employed to construe the policy against the insurer … . *Progressive Homes* [2010 SCC 33, [2010] 2 S.C.R. 245] provides that a corollary of this rule is that coverage provisions in insurance policies are interpreted broadly, and exclusion clauses narrowly.

[213] In addition, Wagner J. discussed the unique nature and purpose of builders' risk insurance policies:

> [66] … In a nutshell, the purpose of these policies is to provide broad coverage for construction projects, which are singularly susceptible to accidents and errors. This broad coverage – in exchange for relatively high premiums – provides certainty, stability, and peace of mind. It ensures construction projects do not grind to a halt because of disputes and potential litigation about liability for replacement or repair amongst the various contractors involved. …

Further:

> [70] … [B]uilders' risk construction policies are the norm, if not a requirement, on constructions sites in Canada. In purchasing these policies, "contractors believe indemnity will be available in the event of an accident or damage on the construction site arising as a result of a party's carelessness or negligent acts", which are *the most common* source of loss on construction sites: Dolden ["All Risk and Builders' Risk Policies: Emerging Trends" (1990-91), 2 C.I.L.R. 341], at pp. 345-46. … [Italics in original.]

[214] Wagner J. also commented on the relevance of the parties' intention and commercial realities:

> [78] In discussing the interpretation of insurance policies in *Consolidated-Bathurst* [[1980] 1 S.C.R. 888], at pp. 901-2, Estey J. stressed the need to avoid interpretations that would bring about unrealistic results or results that the parties would not have contemplated in the commercial atmosphere in which they sold or purchased the policy. The interpretation should respect the intentions of the parties and "their objective in entering into the commercial transaction in the first place", as well as "promot[e] a sensible commercial result" (p. 901). …

[215] Finally, in *Ledcor*, Wagner J. emphasized that recovery for damages under a builders' risk policy should be broadly construed, and that:

> [80] Furthermore, such an interpretation does not, in my view, transform the insurance policy into a construction warranty. It does not inappropriately spread risk,

> nor would it allow or encourage contractors to perform their work improperly or negligently.

[216] In this case, the applications judge and the parties relied on three decisions which I find to be of limited assistance, that is, *William Osler Health Centre v. Compass Construction Resources Ltd.*, 2015 ONSC 3959; *Medicine Hat College v. Starks Plumbing & Heating Ltd.*, 2007 ABQB 691, 461 A.R. 1; and *University of Prince Edward Island v. Stevenson*, 2008 PESCTD 8. These are all lower court decisions and, significantly, all pre-date *Ledcor*.

Application of the Law

[217] The analysis begins with a review of the relevant terms of the Policy. As set out above, where the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole. Only if the language is ambiguous is it necessary to proceed further with the interpretation analysis. Where there is ambiguity, the court will look to the reasonable expectations of the parties in the particular circumstances, and as supported by the language of the Policy.

[218] In this case, the indemnity agreement is set out in clause 1 of the Policy:

> In the event that any of the property insured be lost or damaged by the perils insured against, the Insurer will indemnify the Insured against the direct loss so caused to an amount not exceeding …

[219] The "property insured" is described in clause 2 of the Policy:

> This Form, except as provided in this Form, insures the following property at the "project site" for the amount of insurance specified in the "Declarations" for the Project Site:
>
> > (a) property in course of construction, installation, reconstruction or repair other than property described in 2(b): …
> >
> > (b) landscaping, growing trees, plants, shrubs or flowers …

[220] Perils insured are described in clause 4 of the Policy:

> This Form, except as herein provided, insures against all risks of direct physical loss of or damage to the property insured.

[221] Definitions of "Declarations" and "Project Site" are found in clause 15 of the Policy:

> (a) "Declarations" means the Declarations Page applicable to this Form;
>
> (b) "Project site" means the site of the project described in the "Declarations"; …

[222] In this case, the applications judge applied these definitions:

> [5] The Declarations do not limit the "Project site" to any specific area within the Complex. The Declarations refer to Janeway Children's Health and Rehabilitation Centre and Health Sciences Complex, St. John's, Newfoundland and Labrador. No limitation or exclusion is found in the Policy to confine the "Project site" to areas where contractors and subcontractors may be present, or to specific hallways and rooms in the Complex, or to areas sealed off by vapour barriers.

[223] Incorporating the language in the Declarations here into the language of the Policy leads to the conclusion that property in the course of construction, installation, reconstruction or repair at the Complex is insured under the Policy. As discussed by the applications judge, the failure to define an area within the Complex as the property in the course of construction, installation, reconstruction or repair results in ambiguity. Had Dominion intended to limit the insured area more restrictively, it could have described the "Location of the premises" in the Declarations with more precision. The applications judge rejected Dominion's submission that the insurance coverage was limited to room 1304A:

> [13] … The Policy does not provide clear guidance. It would be quite arbitrary for this court, or any person, to limit coverage to specific rooms or hallways in the Complex when the Policy is silent on this type of limitation.

[224] Further, when considering the reasonable expectations of the parties, the applications judge referenced the nature of the renovation which required the relocation of pipes intended to carry water:

> [18] On this specific project, water escape is perhaps the most obvious risk to the insurer. Escaping water moves with gravity and will inevitably impact other parts of the Complex. If the insurer wanted to limit its exposure to property in defined areas, or to newly installed property, then it should have included a limitation or special wording. Instead, the insurer left an ambiguity.

[225] It was open to Dominion to define the project site in the Declarations to include only specified physical spaces where work was actually being performed, rather than referring to the entire Complex as the project site.

Indeed, as submitted by Viking, clause 5 of the Policy excludes coverage for specific property, none of which would limit the Policy coverage to particular areas where work was being done in the Complex.

[226] An example in which the insurer included clear exclusionary language in a builders' risk insurance policy is found in *University of Prince Edward Island v. Stevenson, supra*. The renovation involved an existing building. The policy insured "property in the course of construction, installation, reconstruction, or repair". However, the insurer issued an Endorsement on the policy stating, "It is further agreed that coverage under this policy attaches only to section under renovation and not to existing structure."

[227] In the present case, in the language of *Ledcor*, at paragraph 50, what the parties would or would not "have contemplated in the commercial atmosphere in which the insurance policy was contracted", is addressed by the applications judge:

> [21] Dominion's counsel mentioned the practical concern that a Builders' Risk Insurance Policy would become unaffordable to contractors if they are expected to purchase coverage for the entire building. That is not a legitimate concern because the limit of coverage under the policy will determine the premium amount. … The cost of a renovation project may have no correlation to the value of the property within the narrow confines of a renovation site. Upgrading electrical wiring in a structure is a good example where every room and every part of a structure would be impacted, and the value of the contract would have no relationship to the value of the structure. …

[228] If, as in this case, the contractor is required to obtain builders' risk insurance coverage of 1.1 times the contract price for the renovation project, that amount will establish the extent of the insurer's exposure should a claim be made under the policy, and will provide the basis for an appropriate premium. The premium may, of course, reflect the nature of the risk, such as, in this case, damage that may result if water escapes. As discussed above, the parties may agree, using clear language, that coverage under the Policy will be restricted to a specified area.

[229] Dominion submits that, if damage within the Complex as a whole was meant to be covered, the Policy's monetary limit would have to equal the value of the entire facility, which would be commercially unreasonable. The answer to that submission is that a builders' risk insurance policy has a monetary ceiling or limit, usually based on the value of the contract, in this case, 1.1 times the value of the contract. The value of the entire facility is irrelevant to application of the Policy.

[230] For the above reasons, I would take a different approach than was adopted in *William Osler Health Centre v. Compass Construction Resources Ltd.*, *supra*. In that case, the rationale underlying Firestone J.'s decision is summarized:

> [39] On a basic level, if Compass' insurance coverage were intended to insure the entire Hospital as a "property in the course of construction," the premiums and coverage limits stipulated in the covenant to insure would be much higher – they would more closely resemble the Hospital's own insurance coverage. It thus stands to reason that the covenant to insure was not intended by either party to cover damage done to the entire Hospital.

In my view, Firestone J. failed to interpret the coverage provisions in the policy broadly, as referenced in *Ledcor*, which I recognize was released after the decision in *Osler*. In addition, the judge did not consider the onus on the insurer to make clear the extent of coverage under the policy or the option of limiting the scope of coverage as discussed above.

[231] Dominion also submits that the applications judge should have interpreted the Policy by reference to the construction contract. I agree with the applications judge in rejecting that submission:

> [15] … I accept that insurance contracts must be interpreted in a manner that reflects the reasonable expectations of the parties and accords with the commercial atmosphere. I do not accept that a court should look to a construction contract for which the insurer is not a party, and for which the insurer had no role, to interpret the meaning of "Property Insured" when that term is already defined in the Policy. They are separate contracts.

[232] As discussed above, the Policy is a comprehensive document, separate from the construction contract, in which it was open to the insurer to limit the application of coverage for the project site to an area within the Complex.

[233] In the result, the applications judge concluded that the water damage that occurred within the Complex was covered under the Policy, and that this was within the reasonable expectations of the parties in so far as the Policy was ambiguous. This conclusion followed from a plain reading of the Policy, considering the nature of the risk, the limitation on Dominion's liability based on the value of the contract, and the failure of Dominion to limit the area within the Complex for which coverage was provided. There is no basis on which to conclude that the applications judge erred.

SUMMARY

[234] Accordingly, I would dismiss the appeal with costs under column 3 of the scale of costs in the *Court of Appeal Rules*.

_____

B. G. Welsh J.A.