

CITATION: His Majesty the King in Right of Ontario v. Royal & Sun Alliance Insurance Company of Canada et al., 2025 ONSC 5670
COURT FILE NO.: CV-21-00670801-0000
DATE: 20251006

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: HIS MAJESTY THE KING IN RIGHT OF ONTARIO, represented by the Minister of Transportation for the Province of Ontario, Applicant

-AND -

THE ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA and AVIVA INSURANCE COMPANY OF CANADA, Respondents

Court File No.: CV-23-00701941-0000

AND RE: ROYAL & SUN ALLIANCE INSURANCE COMPANY OF CANADA, Applicant

-AND -

AIG INSURANCE COMPANY OF CANADA and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Respondents

Court File No.: CV-23-00701911-0000

AND RE: AVIVA INSURANCE COMPANY OF CANADA, Applicant

-AND -

AIG INSURANCE COMPANY OF CANADA and ST. PAUL FIRE AND MARINE INSURANCE COMPANY, Respondents

BEFORE: L. Brownstone J.

COUNSEL: *Nick Poon*, for HMK in right of Ontario
Avi Sharabi and *Thomas Russell*, for Aviva Insurance Company of Canada
Cameron L. Foster and *Shernaz C. Patel*, for Royal & Sun Insurance Company of Canada
Sébastien A. Kamayah, for AIG Insurance Company of Canada
Andrew A. Evangelista and *Avi Cole*, for St. Paul Fire and Marine Insurance Company

HEARD: July 23-24, 2025

REASONS FOR DECISION

Introduction

[1] On February 23, 2018, a dump truck was crossing a bridge spanning Catfish Creek in Elgin County when the bridge collapsed. Two lawsuits ensued in which Ontario is named as a defendant or third party. Three applications are before this court to address the obligation of various insurers to defend the lawsuits on Ontario's behalf.

[2] The bridge was designed and constructed in 1964. In March 1997, Ontario, by order in council, transferred to Elgin County jurisdiction and responsibility for the highway that included the bridge.

[3] When the bridge collapsed, the Corporation of the County of Elgin sued Ontario and various engineering and technical companies (“the Elgin County litigation”). Elgin County alleges that Ontario and the other defendants are responsible for the costs of replacing the bridge, including costs associated with removing debris from the collapse, as well as other damages from loss of use of the bridge such as installing and monitoring new traffic controls. Ontario has denied liability.

[4] In the second lawsuit, Ron Mervin Jones and Ron Jones Construction Ltd., the owners and operators of the dump truck that was crossing the bridge at the time it collapsed, sued the county of Elgin. In response, Elgin County started a third-party claim against Ontario and many of the other defendants it had named in the Elgin County action (“the Jones litigation”).

[5] Ontario applies to this court for orders requiring Aviva Insurance Company of Canada and Royal & Sun Alliance Insurance Company of Canada to pay for the defence of both the Elgin County litigation and the Jones litigation, and to share equally in the costs with any other insurer that has a duty to defend, subject to re-apportionment after trial. Ontario takes the view that because Aviva and RSA were insurers during the 1964-1997 time period, they are obligated to defend both actions and share equally in the defence costs.

[6] Aviva and RSA argue they are not obligated to defend either of the actions. In the alternative, if they have any duty to defend, the percentage of their defence obligation is to be determined based on a “time on risk” calculation.

[7] In the further alternative, if they are obligated to defend and to share defence costs on an equal basis, they each bring an application seeking orders that AIG Insurance Company of Canada and St. Paul Fire and Marine Insurance Company contribute equally to those defence costs.

[8] AIG and St. Paul resist the relief sought against them.

[9] Because the second set of applications (those by Aviva and RSA against AIG and St. Paul) are entirely dependent on the results in the first application (Ontario against Aviva and RSA), I

will start with the first application, that of Ontario. That application requires resolution of the following issues:

- i. Do Aviva and/or RSA owe Ontario a duty to defend the Elgin County litigation and/or the Jones litigation?
- ii. If there is a duty to defend the Elgin County and/or the Jones litigation, should the defence costs be allocated equally or on a “time on risk” basis? If on a time on risk basis, what is the appropriate allocation?

[10] The Aviva and RSA applications against AIG and St. Paul are only advanced if the court finds that Aviva and RSA have a duty to defend and that defence costs are to be allocated equally.

Issue One: Do Aviva and RSA owe Ontario a duty to defend the Elgin County litigation and/or the Jones litigation?

a) Governing law

General interpretive principles

[11] When the language of an insurance policy is unambiguous, the court should give effect to that language in the context of the contract as a whole. If the language is ambiguous, the court should resort to the general rules of contractual construction. That is, the courts should interpret the policy in a manner that is consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the text of the policy. The court should not interpret the policy in a manner that would lead to an unrealistic result, or one that was not within the parties’ contemplation: *Progressive Homes*, 2010 SCC 33, [2010] 2 S.C.R. 245.

[12] If ambiguity remains after the court applies the general rules of contractual interpretation, the courts will construe the policy *contra proferentem* against the insurer. The corollary of this is that coverage provisions are interpreted broadly, and exclusion clauses narrowly: *Progressive Homes* at paras. 22-24.

[13] The onus is on the insured to show that the allegations in the pleadings fall within the initial grant of coverage: *Progressive Homes* at para. 29.

[14] If the insured satisfies this requirement, the onus shifts to the insurer to show that coverage is barred by an exclusion clause: *Progressive Homes* at para. 51.

Duty to defend

[15] An insurer owes an insured a duty to defend where the facts alleged in the pleadings, if proved at trial, would require the insurer to indemnify the insured. This is assessed on the basis of a mere possibility of coverage, based on a reasonable reading of the pleadings that considers the substance and true nature of the claim. That is, a mere possibility that a claim falling within the policy may succeed is enough to trigger the duty to defend: *Nichols v. American Home Assurance*

Co., [1990] 1 S.C.R. 801 at p. 810; *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49, [2001] 2 S.C.R. 699 at paras. 28-35.

[16] Wide latitude should be given to the allegations in the pleading, but not so wide as to amount to a fanciful reading of the claim: *Nichols* at p. 812; *Monenco* at para. 32.

[17] The duty to defend is broader than the duty to indemnify. Any doubt about whether the claim falls within the policy is to be resolved in favour of the insured: *Monenco* at para. 31.

[18] If there is no possibility of the insurer being required to pay under the policy, there is no duty to defend. The claim for damages must fall within the scope of the policy: *Nichols* at p. 808

[19] Exclusions will negate a duty to defend if, on a reasonable reading of the pleadings, coverage is unambiguously and clearly excluded: *Nichols* at p. 808. In cases of ambiguity, exclusion clauses are narrowly interpreted. The onus is on the insurer to establish that an exclusion applies.

[20] There is a three-step process to determining the duty to defend. First, the court determines the true nature of the claims pleaded. Second, the court determines if any claims are entirely derivative. Third, the court determines whether any of the properly pleaded non-derivative claims could trigger the duty to defend: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551 at paras. 50-52.

[21] In this case, there is no allegation of derivative claims and therefore no second step.

[22] Thus, the court must start by considering the substance of the claims against the insured and must determine whether any of the claims could trigger the duty to defend under the wording of the insuring agreements.

b) Do the policies' grants of coverage capture the damage alleged?

[23] To answer these questions, I must consider the coverage granted by the policies, the substance of the claims against Ontario, and the policies' exclusionary clauses.

i) The coverage granted by the insuring agreements

[24] Each of Aviva and RSA (or entities of which they are successors) issued Comprehensive General Liability policies to Ontario. The RSA policy was in effect from April 7, 1975-March 31, 1981, and the Aviva policy from March 31, 1981, to March 31, 1984.

[25] The relevant portions of the Aviva and RSA insuring agreements are virtually identical. I note in parentheses below the additional words present in only the Aviva policy.

Insuring Agreement

BODILY INJURY AND PROPERTY DAMAGE

To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed by law upon the Insured or assumed by the Insured under contract for damages because of:

... (b) property damage (as defined herein - Aviva) caused by accident.

DEFINITIONS

Accident: Wherever used in this Policy, other than in the Pollution exclusion, the word "accident" includes continuous or repeated exposure to conditions which results in property damage neither expected nor intended from the standpoint of the Insured.

Property Damage: "Property Damage" means:

(a) injury to or destruction of tangible property which occurs during the Policy period, including loss of use thereof at any time resulting therefrom, or

(b) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an accident occurring during the Policy period.

[26] Aviva provided coverage for 3 of the 54.2 years of the bridge's lifespan; RSA for 6 of those years. Ontario also had other insurance coverage:

- i. AIG issued road liability policies that were in effect from March 31, 1990, to March 30, 1998;
- ii. St. Paul issued a CGL policy that was in effect from March 31, 1998, to March 30, 2003;
- iii. From 1984-1990 Ontario was insured by a corporation that is now bankrupt.

[27] For the remainder of the 54.2 years, Ontario was self-insured.

ii) The nature of the claims the insurers are asked to defend

The allegations in the claims

[28] The statement of claim in the Elgin County litigation alleges the following in respect of Ontario:

- i. Ontario was responsible for the design and construction of the bridge.
- ii. Ontario was responsible for the inspection, maintenance, and repair of the bridge from its construction until March 31, 1997.

- iii. At or around the time of the transfer of the bridge to Elgin County, Ontario made various representations to Elgin County regarding the design, construction, maintenance, repair, general condition, and lifespan of the bridge.
- iv. The bridge collapsed due to structural defects within the bridge, including corrosion and fatigue damage to the anchor rods, leading to the anchor rods' failure.
- v. Ontario was negligent in the design and construction of the bridge, including by having designed and constructed the bridge in a manner that raised a reasonably foreseeable risk of the anchor rods being damaged or failing, and being concealed from inspection.
- vi. At the time of its unilateral transfer of the bridge to Elgin County, Ontario was in a better position to know of any defects, latent or otherwise, in the bridge. Yet Ontario failed to alert Elgin County of the potential for serious structural defects within the bridge that could not be detected by any reasonable inspection.
- vii. At the time of transfer, Ontario negligently misrepresented to Elgin County that the bridge was in good condition, had no significant structural problems, and would have a substantial lifespan.

[29] The Elgin County pleading claims Elgin County has sustained various damages. First, the collapse rendered the bridge totally unusable, requiring Elgin County to demolish it. Second, Elgin County must rebuild the bridge to ensure access to Port Bruce. Third, the collapse required Elgin County to incur additional costs including costs of removing and demolishing the bridge's remnants, installing and maintaining new traffic controls, and installing a temporary bridge.

[30] The statement of claim in the Jones litigation alleges that Elgin County, negligently and in breach of its statutory duties, failed to maintain the bridge in a safe manner, leading to the accident of February 23, 2018. The claim includes an allegation that Elgin County failed to use reasonable care and skill in designing the bridge.

[31] The Jones pleading claims damages for the loss of the truck, towing and storing costs, costs related to the removal of debris, remediation, and environmental clean-up, as well as out of pocket expenses and business interruption loss.

[32] In its third-party claim in the Jones litigation, Elgin County claims contribution and indemnity from Ontario (and other third parties). The allegations in the third-party claim mirror those in the statement of claim in the Elgin County litigation.

Positions of the parties on the nature of the claim

[33] Ontario argues that the true nature of the claims against it refers to events that occurred between 1964 and 1997, that is, negligence related to the design, construction, and maintenance of the bridge that led to corrosion damage to the anchor rods in that time period. Ontario describes this as a typical "long-tail" construction claim that may lead to damages many years in the future.

[34] Ontario reads the claim and the third-party claim as alleging that the corrosion and fatigue damage to the anchor rods occurred between 1964, when the bridge was constructed, and 1997, when Ontario transferred the bridge to Elgin County. Ontario acknowledges that, according to the pleadings, the corrosion and fatigue damage to the anchor rods could have happened at any time from 1964-2018, but submits that allegations of negligence against Ontario relate only to the period of 1964-1997. Ontario's view is that the post-1997 allegations in the claims are against other parties, not Ontario.

[35] With respect to the Jones litigation, Ontario argues that the same allegations are made against Ontario, triggering the same duty to defend. The pleading specifically alleges that it was reasonably foreseeable that users of the bridge, such as a dump truck or any other vehicles, would be damaged if there was loss of use of the bridge.

[36] Furthermore, Ontario argues that because the two claims are being litigated together, it is impossible to separate the defence of one claim from the other. There has been common documentary discovery, common examinations for discovery, and an order for a common trial.

[37] Aviva acknowledges that the court could determine, on a broad reading of the Elgin County claim and the Jones third party claim, that the allegations are that the corrosion and fatigue of anchor rods occurred between 1964 and 2018.

[38] RSA, on the other hand, argues that the true nature of the claim is not for property damage that occurred during the policy period. RSA argues that the claim is for damage that occurred in 2018. RSA argues the claim does not seek compensation for corrosion that might have occurred prior to 2018; it says the claim seeks compensation only for property damage that occurred when the bridge collapsed in 2018.

[39] Aviva and RSA both argue that, even if they are responsible for defending the Elgin County litigation, they do not have a duty to defend the Jones litigation. That claim is a contribution and indemnity claim for damage to the Jones plaintiffs' truck, not to the bridge or the anchor rods.

[40] RSA argues that to require it to respond to the Jones action would be a commercially absurd result, given that the main claim in that action is limited to damage to the truck that occurred in February 2018.

[41] Aviva acknowledges that the third-party claim in the Jones litigation is virtually identical to the main claim in the Elgin County litigation.

Analysis – The nature of the claim

[42] I find that the substance of the claims against Ontario includes a claim for property destruction of the anchor rods and consequent loss of use of the bridge. That is, the claim specifically alleges problems with the bridge's construction and structure and alleges that the bridge's collapse was the result of the anchor rods' failure due to corrosion and fatigue damage to the anchor rods.

[43] I find that the claim, read as a whole, alleges that this corrosion occurred between the time the bridge was constructed in 1964 and the time the bridge collapsed in 2018. While the claim alleges that Ontario's negligent conduct occurred between 1964 and 1997, it alleges that the property damage continued throughout the lifespan of the bridge and the loss of use occurred in 2018 owing to the failed anchor rods, which, it alleges, failed throughout the lifespan of the bridge.

[44] I find that the reading of the claim proposed by RSA (and by St. Paul, in the secondary application), that the claim is for damages occurring in 2018 only, is too narrow a reading of the claim. The damage to the bridge is alleged to include, as well as to be caused by, damage to the anchor rods. That damage is alleged to be corrosion which, by its nature, is a process that occurs over time.

[45] At the time of pleading, it is not expected that Elgin County would have isolated the precise timing of the corrosion damage. At this stage, it is too early to say whether precise timing will be known once all the expert evidence has been adduced and assessed at trial. However, at this stage I am assessing the nature of the claim, not the nature of the evidence.

Positions of the parties on the coverage granted by the insuring agreements

[46] Ontario argues that the coverage grants in the policies include property damage during the policy period, and loss of use of the property that occurs at any time from property damage, as defined, that occurred during the policy period.

[47] Ontario argues that the loss of use of the property may occur at any time – even long after the policies are no longer in effect, as is the case here. If the damage occurred during the policy period, the insurer must defend for loss of use whenever it occurs. Here, the claimed loss of use occurred in 2018.

[48] Aviva stresses that these are not negligence policies. If anything triggers coverage, it is the property damage – the corrosion and fatiguing of anchor rods that occurred during the policy periods. This could constitute property damage caused by accident under the policy, triggering coverage for Aviva between 1981 and 1984, subject to the exclusion clauses. (Aviva argues that this could trigger similar coverage for all four insurers, but Ontario has not sought an order that St. Paul be obligated to defend. AIG has agreed it has a duty to defend, but the basis for and extent of the duty remains an open question between it and Ontario).

[49] Aviva disagrees with Ontario that the property damage coverage extends to loss of use that occurs outside the policy period. The policy does not cover pure economic loss. The loss of use must be temporally connected to the property damage.

[50] RSA argues that Ontario is seeking a defence for a negligence, not property, claim. Negligence is not covered by the policy. Further, RSA argues that any property damage for which Ontario seeks coverage occurred in 2018, well outside of the policy period. RSA agrees with Aviva's interpretation that the loss of use portion of any claim must occur during the policy period to attract coverage.

Analysis – The agreements extend to the property claims pleaded

[51] The insuring agreements require the insurers to pay for property damage caused by accident. Accident is defined as including “continuous or repeated exposure to conditions which results in property damage neither expected nor intended from the standpoint of the Insured.” The claims against Ontario do not allege intentional acts. The corrosion would have occurred by accident, as accident is defined in the policies and set out at paragraph 25 above.

[52] Property damage is defined to include “injury to or destruction of tangible property which occurs during the Policy period, including loss of use thereof at any time resulting therefrom”.

[53] As I have noted above, I find that the true substance of the claim alleges injury to or destruction of property that occurred during the policy period, being the damage to the anchor rods. On this basis, coverage is triggered by the first portion of the property damage clause (“injury to or destruction of tangible property which occurs during the Policy period”).

[54] Ontario argues that the grant of coverage is broader than that, because the grant includes loss of use of the property at any time, which includes loss of use once the bridge collapsed. Aviva and RSA deny that the coverage extends to any damage beyond the policy period.

[55] Because the extent of coverage will be relevant to the interpretation of the exclusion clauses, I will consider whether the later loss of use of the property also falls within the coverage grant.

[56] Aviva and RSA argue that, reading the first paragraph of the property damage definition as a whole, it is clear that coverage extends only to the policy period. First, the use of the word “thereof” in the first paragraph of the property damage definition (“injury to or destruction of tangible property which occurs during the Policy period, including loss of use **thereof** at any time resulting therefrom”) refers back to the initial clause – injury or destruction that occurs during the policy period.

[57] This may be true, but the addition of the words “at any time resulting therefrom” must be given meaning. Aviva and RSA argue that the meaning must be limited to any time during the policy period. Ontario argues that the plain meaning of the words contains no such temporal limit.

[58] Aviva and RSA also argue that reading the first and second paragraph of the definition together demonstrates that the policy was only intended to cover damage that occurred during the policy period.

[59] I disagree. I find that the clauses contemplate damage that occurs in the future, outside of the policy period. The phrase “at any time” is not restricted in any way. It does not say “at any time during the policy period”. The plain language of the clause includes loss of use at any time, which includes future loss of use.

[60] However, that loss of use must be from injury or destruction of the property that occurs during the policy period. Thus, the corrosion that occurred between March 31, 1981, and March

31, 1984, in Aviva's case, and between April 7, 1975 and March 31, 1981, in RSA's case, would have to be found to have resulted in the loss of use in 2018. It is possible this finding will be made.

[61] I therefore find that the grants of insurance cover the allegations in the claim related to the property damage within the policy period. It is possible that such a claim will succeed. This is sufficient to find that an obligation to defend arises: *Nichols*.

[62] Given that the third-party claim against Ontario in the Jones litigation is essentially identical to the statement of claim in the Elgin County litigation, I find no basis upon which to separate the duties to defend and my findings apply to both lawsuits.

[63] That obligation, however, only exists if coverage is not excluded elsewhere in the policy.

iii) Is there an operative exclusion clause that releases the insurers from coverage and therefore from their duty to defend?

The exclusion clauses

[64] The Aviva and RSA policies contain very similar exclusion clauses. I have identified Aviva's wording differences in parentheses below.

EXCLUSIONS

3. This insurance does not apply to:

(a) Property damage to

(1) property owned or occupied by or rented to the Insured...

(2) property used by the Insured (Aviva policy only); or

(3) property in the care, custody or control of the Insured or property over which the Insured is for any purpose exercising physical control, ...

...

(c) property damage to work performed by or on behalf of the Named Insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith. (Aviva policy only)

This insurance does not apply to claims arising out of: ...

(f) Defects in maps, plans, designs or specifications provided by or for any Consulting Engineer and/or Consulting Architect, but this Exclusion shall only apply to such Engineer and/or Architect. (Aviva policy only)

Positions of the parties

[65] Because the onus to demonstrate that an exclusionary clause applies rests with the insurers, I will begin with their positions.

[66] Aviva and RSA argue that, regardless of whether Ontario owned the bridge during the policy period, it occupied the bridge by virtue of exercising jurisdiction over it. They also argue that Ontario certainly had care, custody, or control of the bridge during this policy period, and the care, custody, or control exclusion therefore applies.

[67] Ontario argues that it is uncertain whether Ontario ever owned the bridge. It acknowledges that it had jurisdiction over the bridge from 1964-1997. Even if it did own the bridge until 1997, it did not own the bridge in 2018 when the collapse occurred.

[68] Ontario relies on *Hector v. Piazza*, 2012 ONCA 26, 108 O.R. (3d) 716, and *Aitken et al. v. Unifund Assurance Company*, 2012 ONCA 641, 112 O.R. (3d) 391 for the proposition that the ownership exclusions are ambiguous in that they can be interpreted as either present or past tense.

[69] Ontario argues that it is premature to determine whether the care, custody, and control exclusion applies because the pleadings do not plead when the damages actually occurred. It is possible that the damage occurred between 1997 and 2018, a period during which Ontario did not have care and control of the bridge.

Analysis – The exclusion clauses do not clearly exclude potential coverage

[70] As noted above, exclusions must be clear and unambiguous to be effective in denying coverage. Any ambiguity is to be resolved in favour of the insured.

[71] There is some uncertainty as to whether Ontario owned the bridge prior to 1997, and therefore it is not clear whether the first exclusion (property owned, occupied by, or rented to the Insured) applies.

[72] In determining whether the second exclusion, “property in the care, custody or control of the Insured or property over which the Insured is for any purpose exercising physical control” applies, the time frame to be applied is of critical importance.

[73] There is no doubt that the bridge was within the care, custody, or control of Ontario before 1997. Equally, there is no question that the bridge ceased to be within the care, custody, or control of Ontario after the order-in-council took effect at the end of March 1997.

[74] Aviva argues, and RSA agrees, that the pleading must be read consistently as making allegations against Ontario either for the lifespan of the bridge, or for the shorter period of 1964-1997. Aviva and RSA argue that Ontario’s position is inconsistent. That is, Ontario characterizes the claims against it as referring only to the 1964 to 1997 period. However, Ontario then claims that the care, custody, and control, exclusion does not apply because Ontario did not have care, custody, and control in 2018 when the bridge collapsed. Aviva and RSA argue that it is improper to read the claim one way for purposes of analyzing the coverage grant and another way for analyzing the exclusions.

[75] I agree. I do not read the claim as Ontario does. As noted above, I read the claim as alleging that the corrosion of the anchor rods was a process across the lifespan of the bridge, from 1964-2018. This includes damage both within and outside of Aviva and RSA's policy periods. It is the loss of use (from the damage that occurred during the respective policy periods) that is alleged to have occurred beginning in 2018. At that time, the bridge was no longer in the care, custody, or control of Ontario.

[76] As noted above, reading the grant of coverage broadly as I am required to do, I have found that it covers loss of use of the property at any time, including in 2018. The claim alleges that Elgin County had to, for example, install and maintain new traffic controls as a result of the loss of use of the bridge. That loss of use is alleged to tie back to property damage that occurred, at least in part, during the policy periods in question.

[77] The exclusions, read in this light, do not clearly and unambiguously exclude coverage. The loss of use as a result of, in part, the property damage that occurred during each respondent's policy period, is alleged to have occurred at a time when Ontario no longer had care, custody, or control of the bridge (and certainly when it no longer owned the bridge, if indeed it owned the bridge pre-1997). The care, custody, and control exclusion therefore does not clearly and unambiguously exclude coverage.

[78] Aviva relies on *Mori-Vines Inc. et al. v. Northbridge General Insurance Corporation*, 2017 ONSC 5718, aff'd 2018 ONCA 452, for the proposition that the allegation against it must be that property damage occurred during the policy period, at which time Ontario had care, custody, and control of the bridge. The care, custody, and control exclusion must therefore apply. However, I have found that the damage alleged in this case includes the loss of use "at any time" from the corrosion during the policy period. The finding is grounded in the specific words of the policies in this case, which differs from those in *Mori-Vines*.

[79] Ontario argues the professional liability exclusion has no application because it expressly applies only to the engineer or architect. This exclusion was not pursued by Aviva in oral argument, and I agree with Ontario that it does not apply.

[80] There is another exclusion that appears only in the Aviva policy, the "work exclusion". Aviva's policy excludes "property damage to work performed by or on behalf of the Named Insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith".

[81] Courts have recognized that a CGL policy is not intended to cover the insured's own defective product or work: *Alie v. Bertrand* (2002), 62 O.R. (3d) 345 (C.A.) at para. 35. Here, the basis for possible coverage, and therefore a duty to defend, is the allegation of damages for loss of use at a time Ontario did not own or control the bridge, because of damage occurring at the time the policies were in effect. The claim is not limited to damages for only repairing the defective anchor rods or for pure economic loss, but also for damages for, for example, installing and maintaining new traffic controls. At this time, it is not clear that the exclusion applies to any or all of the damages claimed.

[82] In my view, the coverage sought by Ontario, based on the claims against it, is not merely for repairing defective components but is for consequential damage: *Progressive Homes* at para. 63. Therefore, at this stage, when decisions are made on the basis of the pleadings, this exclusion does not assist Aviva.

[83] I therefore find that Aviva and RSA owe a duty to defend the claim.

Issue two: What is the proper allocation of defence costs between Aviva and RSA?

Positions of the parties

[84] Both Aviva and RSA argue that *Loblaw Companies Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2024 ONCA 145, leave to appeal refused, [2024] S.C.C.A. No. 41246 mandates that, if they are to provide defence costs, they must be allocated on a *pro rata* “time on risk” basis. Such an allocation is based on the period of time in which an insurer offered coverage in proportion to the time during which the damage occurred.

[85] They state that *Loblaw* has determined that time on risk is the correct approach to allocating defence costs in Ontario for long-tail claims that span multiple policy periods. They argue this is a commercially sensible result. On the contrary, applying an all-sums approach would be commercially unreasonable, and might result in coverage for years where an insured opted to forego insurance.

[86] Ontario argues the insurers that have a duty to defend must share equally in the defence costs. This obligation would be subject to their right to seek a reallocation of costs after the litigation concludes. At that time, it can be determined, for example, when the corrosion damage occurred, and the extent of the corrosion damage during each policy period.

[87] Ontario, relying on *Alie*, argues that where there is no principled or practical way to allocate defence costs, the insurer is required to defend all the claims, subject to reallocation after the litigation is concluded.

[88] Ontario argues that, unlike the situation in *Loblaw*, in this case it cannot be determined when the damage occurred, so a time on risk approach would be arbitrary. It would amount to a determination that corrosion occurred in equal amounts every year during the lifespan of the bridge. Because the litigation is at an early stage, and because there is no way to determine at this point when the damage occurred, there is no reasonable or practical means of allocating defence costs.

Analysis – Time on risk allocation

[89] This is a case of alleged progressive injury that spans consecutive rather than concurrent coverage periods, as was the case in *Loblaw*. The duty to defend clauses in this case require a defence for claims for any occurrence covered by the policies. Here, it is alleged that there was damage during the policy period that caused a later loss of use. I have found that while the loss of

use need not occur during the policy period, it must tie back to damage caused during the policy period in order for coverage to be triggered.

[90] The court at para. 85 of *Loblaw* reaffirmed the principle it had articulated in *Tedford v. TD Insurance Meloche Monnex*, 2012 ONCA 429, 112 O.R. (3d) 144 at para. 24 that an insurer should not bear costs that are “disproportionate to the extent of its potential liability for the covered claims”.

[91] Because this is a duty to defend case and not a post-trial duty to indemnify case, we do not know the extent of damage, if any, that occurred during each policy period that led to later loss of use. However, that does not make apportionment using the relative percentage of time each insurer provided coverage arbitrary. The risk taken on by each insurer is the risk of loss of use that is occasioned by damage that occurred during their respective policy periods.

[92] The insurers contracted to be at risk only for damage that occurs in the future because of damage that occurred during their policy periods. These are the time limits set out in the policies, for which the parties bargained. Applying the “all sums” approach would place Aviva and RSA in the position of defending for corrosion that occurred outside the time frame of their respective policies.

[93] This is a case of consecutive, not concurrent, coverage periods. While the policies provide coverage for future damage, it is only for future damage that ties back to their policy periods. The insured and the insurers agreed to limit the insurers’ risk in this way.

[94] Corrosion is a gradual process. Ontario does not contend that corrosion occurred only during Aviva, RSA, and AIG’s policy periods until 1997, and that all future damage arose from those coverage periods. This is clearly not what is alleged in the pleadings. The pleadings allege damage between 1964 and 2018, all of which resulted in the collapse of the bridge and other damages in 2018.

[95] I therefore find that it would be arbitrary, and grossly disproportionate, to require the insurers to bear the burden of the duty to defend for the entire length of the damage alleged. The years “on risk” as a proportion of the total number of years for which the bridge existed and is alleged to have suffered damage leading to its ultimate collapse provide a clear and reasonable formula for the division of responsibility. The formula may not be perfect given that the litigation is at an early stage, but it is not arbitrary. It is tethered to the pleading and to the policy periods that ground the duty to defend.

[96] The fact that Ontario was self-insured for a portion of the time to which the allegations relate does not change the analysis or the fairness of the time-on-risk or *pro-rata* allocation of defence costs: *Loblaw* at paras. 107-110; *Goodyear Canada Inc. v. American International Companies*, 2013 ONCA 395, 115 O.R. (3d) 728.

[97] I therefore find defence costs should be allocated based on RSA and Aviva’s time on risk. According to the table prepared by RSA and agreed to by all insurers, this requires Aviva to pay 5.5% of defence costs and RSA 11.1%.

Remaining issues

[98] Aviva and RSA seek contribution to defence costs from AIG and St. Paul only if the court, applying an “all sums” and not “time on risk” approach, requires Aviva and RSA to share the defence costs equally between them.

[99] Because I have determined that the defence costs are to be shared on a “time on risk” basis in accordance with *Loblaw*, the preconditions for these two applications do not exist and there is nothing to decide.

[100] As a separate matter, Aviva in oral argument invited the court to determine that St. Paul should be required to contribute to defence costs. Ontario, even if the court allocated defence costs based on time on risk, did not seek this relief. Regardless of whether the reasoning in this decision does or does not support such an outcome, it is not appropriate for the court to consider this relief, not sought by the applicant, in these circumstances.

[101] Similarly, the court was not asked to determine the parameters of AIG’s duty to defend, which is the subject of discussion between AIG and Ontario. I make no findings in this regard.

[102] Finally, RSA asked for certain orders requiring independent counsel to be appointed in the event it was required to defend the action. The matter was not fully argued, and Ontario appeared to agree with at least some of the orders sought in this regard. Should the parties require the court’s assistance with these ancillary matters, they may contact my judicial assistant to arrange an attendance before me.

Disposition

[103] Ontario’s application is allowed in part. Aviva and RSA have an obligation to defend the two claims in the percentages of 5.5 for Aviva and 11.1 for RSA. Aviva and RSA’s secondary applications are dismissed as moot.

[104] Ontario, AIG, and St. Paul may make cost submissions of no more than four pages each, plus any offers to settle, by October 20, 2025. Aviva and RSA may provide responding submissions with the same page limits November 3, 2025. There will be no reply submissions without leave. Submissions may be sent to my judicial assistant at katie.ray@ontario.ca.

L. Brownstone J.

Date: October 6, 2025