

CITATION: City of Thunder Bay v. Ontario Municipal Insurance Exchange et al, 2025
ONSC 3412
COURT FILE NO.: CV-17-0235-00
DATE: 2025-06-09

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:)
)
The Corporation of the City of Thunder Bay) *L. Theall and C. Jordann*, for the Plaintiff
)
)
)
Plaintiff)
)
- and -)
)
)
)
Ontario Municipal Insurance Exchange, Royal) *M. Snowden and S. Kamayah*, for the
& Sun Alliance Insurance Company of) Defendants
Canada and Catlin Canada Inc.)
)
Defendants)
)
)
) **HEARD:** March 11, 2025
) In Thunder Bay, ON

Regional Senior Justice W.D. Newton

Decision on Coverage Motion

Overview

[1] In 2012, a heavy rainstorm and subsequent flood damaged the City’s wastewater pollution control plant (the “plant”).

[2] Both parties have brought motions to interpret an insurance policy.

[3] The only issue between the City and the defendant insurers is the coverage of increased repair costs required as a result of building code or other similar requirements introduced since the plant's initial construction ("code upgrades").

[4] The insurers argue that code upgrades are subject to a \$10 million sub-limit. The City argues that the sublimit does not apply and submits that the insurers' position would result in an uninsured loss of millions of dollars on a plant that had an insured value of over \$180 million.

The Policy

[5] The following provisions of the policy are relevant.

[6] The Declarations state as follows:

LIMIT OF LIABILITY:

The Limit of Liability expressed herein shall be the Insurer's limit in any one loss, casualty or disaster including salvage charges or other expenses or all combined (unless a Section contains a sub-limit or an additional amount of insurance on any item).

\$300,000,000 any one loss, casualty or disaster on Property of Every Description, subject to Aggregate Limits of \$884,442,762 applicable to Earthquake and Flood.

[7] The Declarations set out several "Sub-Limits", including the following:

Demolition and Increased Cost of Construction \$10,000,000

[8] Following the Declarations pages are these words:

This Policy Contains a Clause(s) that may limit the amount payable.

[9] Section I sets out the following Declarations and Conditions:

Insuring Agreement

This Policy, subject to the conditions and limitations as herein set forth, insures the property and/or interest described herein, against direct loss or damage caused by the perils insured hereunder occurring during the term of this Policy.

...

Demolition And Increased Cost of Construction

In the event of loss or damage under this Policy that causes the enforcement of any law, bylaw or similar ordinance regulating the construction or repair of damaged facilities, the Insurer(s) shall be liable for:

(a) the cost of demolishing the undamaged facility- including the cost of clearing the site;

(b) the proportion of that value of the undamaged part of the facility bears to the value of the entire facility prior to loss;

(c) the increased cost of repair or reconstruction of the damaged and undamaged facility, on the same or another site, but liability is limited to the minimum requirements of such law or ordinance regulating the repair or reconstruction of the damaged property on the same site. However, the Insurer(s) shall not be liable for any increased cost of construction loss unless the damaged facility is actually rebuilt or replaced.

(d) any increase in the business interruption, extra expense or rental value loss or any combination thereof, arising out of the additional time required to comply with said law or extra expense or rental value insurance is afforded Policy. [Emphasis added].

[10] Section II of the policy sets out the basis of loss settlement:

Basis Of Loss Settlement

In the event of loss to Property covered by this Policy, settlement shall be based on Replacement Cost (as described below) unless otherwise stipulated by the Insured and described herein.

Replacement Cost is defined as the cost to repair, rebuild or replace the Property (whichever is the least) with new materials of like kind and quality, on the same or another site, and shall be subject to the following provisions:

a) The repairs, replacement or reconstruction must be executed with the due diligence and dispatch of the Insured.

b) If repairs, replacement or reconstruction with material of like kind and quality is restricted or prohibited by any by-law, ordinance or law, settlement shall be based on the increased cost of repair, replacement or reconstruction due thereto, limited to the minimum requirement of any such law, by-law, or ordinance and to the cost of repairing, replacing or reconstructing the entire property, of like height, floor area and style and for like occupancy. Furthermore, coverage extends, without increasing the limit of liability as stated, to cover:

(i) the value of the undamaged portion of the property which must be demolished;

(ii) the cost of all site clearing.

c) Until the repair, replacement or reconstruction has been effected, the amount of liability under this Policy in respect to the loss shall be limited to the actual cash value of the property at the time loss or damage occurs.

(d) The Insured shall be allowed to rebuild at any site and/or repair loss or damage to property insured hereunder with one more suited/functional to current designs/conditions which may mean different construction use or occupancy. The Insured recovery hereunder, shall in no event exceed what it would have cost to repair or replace the damaged property at the same site with new of like kind and quality, plus any reduction in value of repaired items. [Emphasis added.]

Positions of the Parties

The City

[11] The City asserts that the Demolition and Increased Cost of Construction (“DICCC”) provisions offer distinct coverage that is different from the replacement cost code upgrade

provisions. The City argues the DICC provisions relate to upgrades to buildings or portions of building that were undamaged by the flood, or to required changes to building size or configuration. The City argues that the code upgrade provisions under replacement cost relate to the damaged property and the DICC to the increased cost of the damaged and undamaged property.

[12] The City argues that the grant of code upgrade coverage, as set out under replacement cost, is clear, and that the onus then shifts to the insurers to prove a limitation on that coverage, which must be clearly and unambiguously expressed.

[13] The City argues that the insurers have admitted that the DICC coverage is an extension, which means that it provides something more than the policy's basic coverage.

[14] The City argues that its interpretation is consistent with the reasonable expectation of the parties, as the insurance was marketed as providing broad, industry leading coverage.

The Insurers

[15] The insurers acknowledge that they have the onus to establish that the \$10 million sub-limit applies to upgrade costs.

[16] They submit that, reading the policy as a whole, there is no ambiguity and all code compliance costs are capped by the \$10 million sub-limit.

The Law

[17] The parties do not disagree on the principles of interpretation of insurance contracts, which are well established.

[18] In *Progressive Homes v. Lombard General Insurance Company of Canada*,¹ the Supreme Court of Canada summarised the applicable principles:

[22] The primary interpretive principle is that when the language of the policy is unambiguous, the court should give effect to clear language, reading the contract as a whole.

[23] Where the language of the insurance policy is ambiguous, the courts rely on general rules of contract construction. For example, courts should prefer interpretations that are consistent with the reasonable expectations of the parties, so long as such an interpretation can be supported by the text of the policy. Courts should avoid interpretations that would give rise to an unrealistic result or that would not have been in the contemplation of the parties at the time the policy was concluded. Courts should also strive to ensure that similar insurance policies are construed consistently. These rules of construction are applied to resolve ambiguity. They do not operate to create ambiguity where there is none in the first place. [Citations omitted].

[19] As the Ontario Court of Appeal recently stated in *Trillium*, all parts of a policy should be given meaning,² provisions granting coverage should be construed broadly and provisions excluding coverage construed narrowly,³ and endorsements to an insurance policy should be read together with the other policy provisions.⁴

[20] A Court turns to interpretive principles only when the policy wording is not clear.⁵

¹ 2010 SCC 33, [2010] 2 S.C.R. 245, at paras. 22–23 (*Progressive*); see also *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at paras. 49–50 (*Ledcor*) and *Trillium Mutual Insurance Company v. Emond*, 2023 ONCA 729, at para. 39 (*Trillium*) (Leave to appeal to Supreme Court of Canada granted. Appeal heard and reserved March 8, 2025).

² *Trillium*, at para. 40.

³ *Trillium*, at para. 41.

⁴ *Trillium*, at para. 42.

⁵ *Progressive*, at para. 23; see also *Ledcor* at para. 50.

Analysis

[21] The policy clearly states that the *Limit of Liability* is subject to sub-limits.

[22] The *Declarations* set out a sub-limit of \$10 million for *Demolitions and Increased Cost of Construction*.

[23] Following the *Declarations* are the words “*This Policy Contains a Clause(s) that may limit the amount payable*”.

[24] The *Insuring Agreement* provides that the Policy is “*subject to the conditions and limitations as herein set forth*”.

[25] The *Declarations* and *Conditions* set out the wording of the Demolition and Increased Cost of Construction sub-limit, which is clear and unambiguous:

Demolition And Increased Cost of Construction

In the event of loss or damage under this Policy that causes the enforcement of any law, bylaw or similar ordinance regulating the construction or repair of damaged facilities, the Insurer(s) shall be liable for:

(a) the cost of demolishing the undamaged facility- including the cost of clearing the site;

(b) the proportion of that value of the undamaged part of the facility bears to the value of the entire facility prior to loss;

(c) the increased cost of repair or reconstruction of the damaged and undamaged facility, on the same or another site, but liability is limited to the minimum requirements of such law or ordinance regulating the repair or reconstruction of the damaged property on the same site. However, the

Insurer(s) shall not be liable for any increased cost of construction loss unless the damaged facility is actually rebuilt or replaced.

(d) any increase in the business interruption, extra expense or rental value loss or any combination thereof, arising out of the additional time required to comply with said law or extra expense or rental value insurance is afforded Policy.

[26] The fact that the Basis of Loss Settlement set out that there is coverage for code upgrades does not mean that the sub-limit does not apply. This case is similar to *Trillium*, when the policy had a Guaranteed Rebuilding Cost Endorsement and a Building By-Law and Code Compliance Coverage Endorsement, which negated an exclusion for code upgrades but only up to \$10,000.

[27] Accordingly, read as a whole, I find that the policy is not ambiguous, and there is therefore no need for recourse to the general rules of contract construction to resolve ambiguities.

[28] The City argued that the *Trillium* case had a policy that included Code Upgrades in the definition of Replacement Cost and no relevant exclusions. In this case, the City had no exclusion, but a sub-limit on coverage

[29] As part of the City's argument that the DICC Condition adds to coverage, the City relied on certain American sources, including *New Appleman on Insurance*.⁶ On the Demolition and Increased Cost of Construction supplemental coverage, the author states as follows:

Bringing a grandfathered building into compliance with current codes can be very expensive, and such coverage generally is not included in standard first-party property insurance policies; code compliance costs are excluded either by

⁶ Jeffery E. Thomas and Nathaniel S. Shapo, eds, *New Appleman on Insurance Law Library Edition*, 5th ed., (LexisNexis: United States, Release No 37, May 2024) at S. 45.

a specific exclusion or by a limit on repair costs that caps such costs at the amount it would cost to repair or replace the damaged material with material of like kind or quality, with no allowance for the cost of complying with code.

...

Coverage for such costs, however, is available, usually through an endorsement bearing the heading "Demolition and Increased Cost of Construction" or "Ordinance and Law". In some instances, this coverage has limits co-extensive with those of the policy as a whole; in other instances, this coverage has a low sub-limit.[Emphasis added.]

[30] A sub-limit is what is present in this policy.

[31] At paragraph 45 of its factum, the City argues as follows:

45. The additional coverage provided by the DICC can also be understood based on recognized distinctions in the insurance industry. It provides limited coverage for circumstances where undamaged property must also be brought up to code because of the insured loss, and for mandated changes to the property's size or configuration.

[32] However, in the City's policy, the DICC wording applies to "the increased cost of repair or reconstruction of the damaged and undamaged facility" (emphasis added). I see no basis for the City's contention that this is different coverage. The DICC clause, as the insurers argue, mirrors, and to a limited degree expands on, the replacement cost clause, recording a mutual insuring intent to grant code compliance cost coverage, up to a stated sub-limit, achieving restricted betterment.

[33] Accordingly, the draft order filed by the insurers at Case Center Master B-1-3683 shall issue.

Costs

[34] The insurers seek partial indemnity costs of over \$66,000 without HST. The City filed a cost outline claiming over \$72,000 inclusive of HST if it was successful.

[35] On examination, the bill of costs filed by the insurers contains entries that appear unwarranted. For example: over 36 hours to prepare a three-page affidavit; over 54 hours to prepare a compendium; almost 10 hours to prepare a draft order and motion confirmation; and 92 hours for legal research. I appreciate that the issues were important to the parties, but the amount claimed for this motion is well beyond what is reasonable. I fix the costs payable by the City to the insurers at \$25,000 inclusive of disbursements and HST.

“Original signed by”
The Hon. Mr. Justice W.D. Newton, R.S.J.

Released: June 9, 2025

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Plaintiff

- and -

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Defendants

DECISION ON COVERAGE MOTION

R.S.J. W.D. Newton

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