Citation: Sher-Bett Construction (Manitoba) Inc v The Co-operators General Insurance Company, 2021 MBCA 10
Date: 20210211
Docket: AI19-30-09391

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Madam Justice Karen I. Simonsen
Madam Justice Lori T. Spivak

BETWEEN:

SHER-BETT CONSTRUCTION (MANITOBA) INC.	)	***M. G. Finlayson*** *and* ***G. C. Lisi*** *for the Appellant*
(Plaintiff) Appellant	)	
	)	***D. E. Thera, Q.C.***
- and -	)	*for the Respondent*
	)	
THE CO-OPERATORS GENERAL INSURANCE COMPANY	)	*Appeal heard:* ***August 24, 2020***
	)	
(Defendant) Respondent	)	*Judgment delivered:* ***February 11, 2021***

On appeal from 2019 MBQB 148

SIMONSEN JA

[1] This appeal concerns the interpretation and application of an exclusion clause in a builders' risk broad form insurance policy issued by the defendant (the Policy).

[2] The Policy insured against "all risks of direct physical loss of or damage to the Insured Property", subject to a number of exclusions. It specifically excluded loss or damage "caused directly or indirectly . . . by frost or freezing . . . unless caused directly by a peril not otherwise excluded in this Form" (the freezing exclusion). The words "unless caused directly by a peril

not otherwise excluded" (the exception) constituted an exception to the freezing exclusion.

[3] A claim was made under the Policy for damage to a relatively freshly poured concrete floor (the floor), which occurred after the plaintiff, a general contractor, applied a de-icing chemical (the de-icer) to the floor. The trial judge found that the application of the de-icer led to a freeze-thaw cycle that caused the damage. As a consequence, he concluded that the loss was excluded under the freezing exclusion and denied the plaintiff's claim.

[4] At the appeal hearing, both counsel confirmed that, although the Policy also contained a faulty workmanship exclusion, this appeal relates solely to the freezing exclusion. (Under the faulty workmanship exclusion, the cost of "making good" faulty or improper workmanship was excluded; however, "Resultant Damage" to the property was insured.)

[5] During oral submissions, counsel for the plaintiff conceded that the freezing exclusion applies because freezing was a concurrent direct cause of the damage to the floor, such that the loss was "caused directly or indirectly" by freezing. However, the plaintiff asserts that the trial judge erred by failing to consider and apply the exception. The plaintiff says that the loss falls within the exception because it was also "caused directly" by the application of the de-icer, which is a peril not otherwise excluded under the Policy; the application of the de-icer was a continuing, concurrent direct cause of the freeze-thaw cycle that damaged the floor. As such, coverage is to be afforded under the Policy.

[6] The defendant does not contest that the application of the de-icer is an insured peril not otherwise excluded, but argues that the trial judge did not

err in concluding that there was no coverage because the freezing exclusion applied. According to the defendant, the trial judge considered the applicability of the exception, and made no error in finding that freezing was the only direct cause of the loss such that the exception did not apply. The defendant submits that freezing was the only direct cause of the loss because it immediately preceded the damage to the floor and was the mechanical cause of the damage; the application of the de-icer was not a direct cause because it did not lead immediately to the damage.

[7] Given the positions of the parties, the focus of this appeal is on the interpretation and application of the words "caused directly" in the exception.

The Facts

[8] In 2016, the owner of a property near Pine Falls, Manitoba (the owner) engaged the plaintiff as the general contractor for the construction of a new building for its business (the Project). Prior to the commencement of construction, the owner purchased the Policy for the Project, as a condition of financing.

[9] As part of the Project, a subcontractor of the plaintiff poured the floor on November 4, 2016.

[10] In November 2016, the weather was generally quite mild for that time of year, with daily low temperatures dipping just below freezing on only a few days. Into December, the weather became considerably colder with freezing temperatures prevailing, frequently reaching low temperatures in the mid-20 degrees below Celsius.

[11] On about December 20 or 21, 2016, the principal of the plaintiff, James Schuerbeke (Mr. Schuerbeke), noticed that the floor was slippery for workers who were installing roof trusses above it. He, or one of the plaintiff's employees at Mr. Schuerbeke's direction, applied the de-icer to the floor to ensure that those workers would be safe. Neither Mr. Schuerbeke nor any of the plaintiff's employees read the warning on the bag that: "All deicers increase the number of freeze-thaw cycles which can accelerate surface damage to concrete." The warning went on to say that even properly formulated, cured, placed, air-entrained concrete must be more than one year old prior to the application of the de-icer. It was only after the de-icer was applied that Mr. Schuerbeke realised his error.

[12] On about December 23, 2016, Mr. Schuerbeke noticed surface damage to the floor where the de-icer had been spread, but no damage to the areas where the de-icer had not been used. In an attempt to remediate the situation, Mr. Schuerbeke, or one of the plaintiff's employees, threw snow onto the floor to try to dilute the de-icer. He also applied windshield washer fluid and then squeegeed the de-icer, windshield washer fluid and melted snow toward the floor drain. These efforts were unsuccessful.

[13] The owner was advised, and it made a claim under the Policy for the damage to the floor.

[14] The defendant's adjuster inspected the property weeks later and engaged an engineer, Derek Mizak (Mr. Mizak), of Crosier Kilgour & Partners Ltd., to address the cause of the damage. Mr. Mizak opined that there were three possible causes: improper finishing of the concrete; inadequate curing of the concrete; and the application of the de-icer.

[15] The defendant denied the owner's claim based on the freezing exclusion, stating in its letter dated July 5, 2017:

> . . .
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> With the concrete having been poured late into the season, adequate time was not provided for it to properly cure. As a result, the slab froze. Once ice melt was introduced, moisture was drawn out of the concrete causing the surface to spall.
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> . . .

[16] The plaintiff then retained an engineer, Dr. Norbert Becker (Dr. Becker), who disagreed with Mr. Mizak that finishing practices or inadequate curing played any role in the damage. He concluded that the application of the de-icer "is the probable cause of the shallow surface scaling of the concrete floor slab".

[17] The owner arranged for the floor to be repaired, held back payment from the plaintiff, and the plaintiff sued the defendant, asserting that the loss was covered under the Policy. At the appeal hearing, counsel confirmed that no issue was raised with respect to the plaintiff's standing to bring the action or this appeal.

[18] Both experts testified at the trial.

The Trial Judge's Decision

[19] The trial judge's assessment of the testimony of Mr. Mizak and Dr. Becker informed his determination as to the cause of the damage.

[20] He rejected Mr. Mizak's evidence regarding the first two possible causes that he had suggested, finding that "the concrete was of the proper formula, the pour was proper, the ambient temperature was correct, the application of sealant was proper, the saw cuts occurred within an acceptable time range and the concrete was air-entrained" (at para 95). The trial judge stated that the freeze-thaw cycle was "the only direct or proximate cause" (at para 96) of the loss. He also wrote that "[t]he concrete would not have spalled if the de-icing salt, snow and windshield washer fluid had not been applied and squeegeed in the direction of the floor drain" (at para 98).

[21] He then went on to state "[w]hat remains is the answer to 'what is the direct or proximate cause of the loss in the circumstances'?" (at para 99). Accepting Dr. Becker's testimony, he stated that "[t]he application of de-icing salt introduces the freeze-thaw cycle. The freeze-thaw cycle in newly poured concrete occurs when it is exposed to de-icing salt. The freeze-thaw cycle causes damage to newly poured concrete" (at para 101).

[22] The trial judge determined that "no matter the care taken at the time of the pour, the formula of the concrete, the ambient temperature, the sealant application, air-entrained and cured, the application of the de-icing salt would have resulted in the damage to the concrete" (at para 103). He also found that "the increase in the number of freeze-thaw cycles as testified to by Dr. Becker . . . is the direct cause of the loss" (at para 104). He concluded that "[t]he multiple times the concrete slab froze in the freeze-thaw cycles bring [the freezing exclusion] into effect" (at para 105).

[23] He added (at para 106):

> In applying ***Lodge*** [*Lodge et al v Red River Valley Mutual Insurance Company et al*, 2017 MBCA 76] and ***Canevada*** [*Canevada Country Communities Inc v GAN Canada Insurance Co*, 1999 BCCA 339], and the remaining cases cited by counsel to these fact circumstances, I find the "chain of events" began with the first freeze in the freeze-thaw cycle. It continued with additional freeze-thaw cycles until the spalling occurred. It was the freeze/thaw cycles that caused the damage and the loss is excluded due to the freezing exclusion.

The Positions of the Parties

[24] Neither party challenges the trial judge's factual finding that the cause of the damage was the freeze-thaw cycle. As I have said, the issue on this appeal relates to the interpretation of the exception and its application to the facts.

The Plaintiff

[25] The plaintiff contends that the trial judge erred in law by failing to give any consideration to the possible application of the exception, including the meaning of "caused directly".

[26] It further submits that, properly interpreted, the exception is applicable because the application of the de-icer to the floor was a direct cause of the damage. According to the plaintiff, a direct cause is one that is "proximate in efficiency" or "effective or dominant", or "what is in substance the cause" (*942325 Ontario Inc v Commonwealth Insurance Co*, 2005 CarswellOnt 2605 at para 18 (Sup Ct J) (adopting the comments of Ritchie J in *Co-operative Fire & Cas Co v Saindon*, [1976] 1 SCR 735 at 747-48, quoting *Leyland Shipping Company v Norwich Union Fire Insurance Society*, [1918] AC 350 at 369 (HL (Eng))), aff'd 2006 CarswellOnt 1389 (CA)).

[27] The plaintiff argues that the application of the de-icer was a direct cause of the loss because it played an important continuing role in causing the freeze-thaw cycle and, hence, the damage. The expert testimony indicated that, because of the application of the de-icer, the water in the concrete thawed even at temperatures below zero degrees Celsius. While the damage may have occurred at the freezing point in the cycle, the freeze-thaw cycle would not have occurred without the thaw which resulted from the application of the de-icer. Quite simply, without the application of the de-icer, there would have been no freeze-thaw cycle and, therefore, no loss.

[28] Consistent with that analysis, the plaintiff argues that this is not a "chain of events" case, as held by the trial judge (at para 106). This is a case of concurrent, not sequential, causation based on the factual findings that were made. Furthermore, even if it were a "chain of events" case, the chain of events began with the application of the de-icer, not the first freeze in the freeze-thaw cycle as found by the trial judge—and the application of the de-icer, again, was a direct cause of the loss (see *Lodge et al v Red River Valley Mutual Insurance Company et al*, 2017 MBCA 76).

[29] The plaintiff contends that coverage under a builders' risk insurance policy is to be interpreted broadly and exclusion clauses narrowly (see *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para 51). The reasonable expectations of the parties to this kind of policy are that the negligence of an employee would be covered (see paras 66, 70-71).

The Defendant

[30] The defendant acknowledges that there can be two direct causes of a loss—and that, if there were two concurrent direct causes of the damage to the floor, there would be coverage under the Policy. However, it says that this is not a case of concurrent causation.

[31] The defendant also says the trial judge considered the meaning of "caused directly" in the exception, and made no error in concluding that freezing was the only direct cause of the loss. It was the physical mechanism of the damage in that the experts agreed that, in a freeze-thaw cycle, the water in the concrete expands with freezing and causes damage.

[32] The defendant relies on authorities which provide that a direct cause is one that leads immediately to the result (see *Canevada Country Communities Inc v GAN Canada Insurance Co*, 1999 BCCA 339; and *Wynward Insurance Group v MS Developments Inc*, 2016 BCCA 513). According to the defendant, this interpretation affords consistent, predictable results such that not every case will entail the possibility of a trial on the issue of causation. To say otherwise would be to make an indirect cause direct.

[33] The defendant says that, at best, the application of the de-icer was an indirect cause of the loss, as part of a chain of events. Both experts agreed that de-icer itself can never damage concrete. There has to be freezing. Freeze-thaw cycles are no different than freezing; freezing is simply part of the cycle. What the application of the de-icer did was create conditions for the freeze-thaw cycle within a particular range of temperatures.

[34] The defendant further argues that a court must only consider the intention of the parties if there is ambiguity in an insurance policy, and there is no ambiguity here.

Standard of Review

[35] In *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, the Supreme Court of Canada established that, absent an extricable question of law, contractual interpretation is an issue of mixed fact and law, which is to be reviewed on a deferential standard of palpable and overriding error (see paras 50-55).

[36] However, subsequently in *Ledcor*, the Supreme Court of Canada held that the interpretation of standard form contracts, where the issue is of significant precedential value and there is no meaningful factual matrix specific to the parties, is a question of law subject to a correctness standard of review. This is because it is undesirable for courts to interpret identical standard form provisions inconsistently (see paras 39, 43, 46; see also *Corydon Village Mall Ltd v TEL Management Inc et al*, 2017 MBCA 8 at paras 30-48; and *JW v Canada (Attorney General)*, 2019 SCC 20 at para 110).

[37] In this case, there is no contest as to the applicable standard of review. The parties agree that the freezing exclusion (including the exception) is a standard form provision in insurance policies and that the issue of interpreting that clause, specifically the words "caused directly" in the exception, is a question of law, reviewable on a standard of correctness.

[38] On the other hand, a judge's findings of fact in contractual interpretation cases are entitled to deference absent palpable and overriding

error (see *Hercules Moulded Products Inc v Foster*, 2017 ONCA 445 at para 23; and *Brown et al v Boon et al*, 2018 MBCA 14 at para 12). The application of a contractual provision to the facts also attracts deference, and is to be reviewed for palpable and overriding error (see *Ferro v Weiner*, 2019 ONCA 55 at para 12).

Analysis

Did the Trial Judge Err by Failing to Consider and Interpret the Exception?

[39] The defendant argues that the trial judge implicitly considered the exception and, in particular, the meaning of "caused directly" when he found that the freeze-thaw cycle was "the only direct or proximate cause" (at para 96) of the loss. However, nowhere in his reasons did the trial judge address the exception. He did not analyse the meaning of "caused directly". Nor did he specifically consider the possibility of there being more than one direct cause of the loss, as contemplated by the freezing exclusion and the exception. I am satisfied that he erred by failing to consider and interpret the exception.

What is the Proper Interpretation of the Freezing Exclusion and the Exception, in Particular, the Words "Caused Directly" in the Exception?

Framework of Analysis/Exceptions to Exclusion Clauses/ Governing Principles

[40] Preliminarily, it is important to keep in mind the proper framework for analysis of the plaintiff's claim. As outlined in *Ledcor*, an insured has the onus of first establishing that the damage or loss claimed falls within the coverage provided by a builders' risk insurance policy. The onus then shifts

to the insurer to establish that an exclusion to coverage applies. If the insurer succeeds, then the onus shifts back to the insured to prove that an exception to the exclusion applies (see para 52).

[41] Exceptions to exclusion clauses in insurance policies clearly limit the impact of exclusion clauses. As stated in *Progressive Homes Ltd v Lombard General Insurance Co of Canada*, 2010 SCC 33, "Exceptions also do not create coverage — they bring an otherwise excluded claim back within coverage, where the claim fell within the initial grant of coverage in the first place" (at para 28).

[42] As for the approach to be taken in the interpretation of standard form insurance contracts, the Supreme Court of Canada, in *Ledcor*, outlined the guiding principles. Those principles were summarised in *Sabean v Portage La Prairie Mutual Insurance Co*, 2017 SCC 7 (at para 12):

> In [*Ledcor*], this Court confirmed the principles of contract interpretation applicable to standard form insurance contracts. The overriding principle is that where the language of the disputed clause is unambiguous, reading the contract as a whole, effect should be given to that clear language [citations omitted]. Only where the disputed language in the policy is found to be ambiguous, should general rules of contract construction be employed to resolve that ambiguity [citation omitted]. Finally, if these general rules of construction fail to resolve the ambiguity, courts will construe the contract *contra proferentem*, and interpret coverage provisions broadly and exclusion clauses narrowly [citation omitted].

[43] General rules of contractual interpretation that are to be employed when a policy's language is ambiguous include that the interpretation should be consistent with the reasonable expectations of the parties. As stated in

Ledcor, the 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, and it should be consistent with the interpretations of similar insurance policies" (at para 50).

[44] With respect to the purpose of builders' risk insurance policies, which is central to determining the parties' reasonable expectations, the Supreme Court of Canada, in *Ledcor*, when considering the applicability of a faulty workmanship exclusion, stated (at paras 66, 70):

> 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. In my view, the purpose of broad coverage in the construction context is furthered by an interpretation of the Exclusion Clause that excludes from coverage only the cost of redoing the work itself — in this case, the cost of recleaning the windows.
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> Despite these qualifiers, builders' risk construction policies are the norm, if not a requirement, on construction 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 [Eric A Dolden, "All Risk And Builders' Risk Policies: Emerging Trends" (1990-91) 2 CILR 341], at pp. 345-46. . . .

"Caused Directly"

[45] Historically, recovery under an insurance policy has been limited to circumstances where the "proximate cause" of the loss is an insured peril, and "proximate cause" has been treated as synonymous with "direct cause". As stated in Herbert Broom, *A Selection of Legal Maxims*, 10th ed by RH Kersley (London, UK: Sweet & Maxwell, 1939) (at p 139):

> . . .
>
> It is a well-known rule, that in order to entitle the assured to recover upon his policy, the loss must be a direct and not too remote a consequence of the peril insured against; and that if the proximate cause of the loss sustained be not reducible to some one of the perils mentioned in the policy, the underwriter is not liable. . . .

See also *Price v Dominion of Canada General Insur Co*, [1938] SCR 234, where the Supreme Court of Canada confirmed that direct cause means proximate cause (see p 243 of Crocket J's dissent, agreeing with the majority on this point).

[46] In *Can Rice Mills Ltd v Union Marine & Gen'l Ins Co*, [1941] 1 DLR 1 (PC), the Judicial Committee of the Privy Council cited the key case of *Leyland* as establishing that "*causa proxima* [proximate cause] in insurance law does not necessarily mean the cause last in time but what is 'in substance' the cause, per Lord Finlay at p. 355, or the cause 'to be determined by commonsense principles,' per Lord Dunedin at p. 362" (at p 11).

[47] In *Leyland*, Shaw LJ of Dunfermline wrote most extensively on the issue of causation (at p 369):

. . .

> To treat proxima causa as the cause which is nearest in time is out of the question. Causes are spoken of as if they were as distinct from one another as beads in a row or links in a chain, but—if this metaphysical topic has to be referred to—it is not wholly so. The chain of causation is a handy expression, but the figure is inadequate. Causation is not a chain, but a net. At each point influences, forces, events, precedent and simultaneous, meet; and the radiation from each point extends infinitely. At the point where these various influences meet it is for the judgment as upon a matter of fact to declare which of the causes thus joined at the point of effect was the proximate and which was the remote cause.
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> What does "proximate" here mean? To treat proximate cause as if it was the cause which is proximate in time is, as I have said, out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed.
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> . . .
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> [emphasis added]

[48] In *Boiler Inspection Co v Sherwin-Williams*, [1951] 3 DLR 1 (PC), the Judicial Committee of the Privy Council again confirmed the principles in *Leyland*, stating, "Whatever meaning the word 'direct' may have in qualifying the word 'result' it does not imply that there can be no step between the cause and the consequence" (at p 9).

[49] This definition of proximate cause was widely adopted, including by the Supreme Court of Canada in *Saindon*, where it accepted the words of Denning LJ in *Gray v Barr*, [1971] 2 All ER 949 at 955 (CA), commenting

on what was said about proximate cause by Shaw LJ in *Leyland* at 369 (at p 748):

> . . .
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> Ever since that case in 1918 it has been settled in insurance law that the 'cause' is that which is the effective or dominant cause of the occurrence, or, as it is sometimes put, what is in substance the cause, even though it is more remote in point of time, such cause to be determined by common sense: . . .
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> . . .

[50] This Court too has followed the same approach. In *Filkow v Gore Mutual Ins Co* (1966), 55 DLR (2d) 258 (Man CA), a dairy farmer's barn burned down. The cattle were evacuated, but ran at large and became diseased and damaged. The farmer made a claim under his fire insurance policy, which provided coverage for "direct loss or damage" by fire. As for the use of the word "direct", Schultz JA opined as follows (at p 260):

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> . . . The word "direct", in qualifying "result", does not imply that there can be no step between the cause and the consequence. The cause of the loss has to be determined by common sense principles and by ascertaining what in substance is the cause. See *Leyland Shipping Co., Ltd. v. Norwich Union Fire Insurance Society, Ltd.*, [1918] A.C. 350. Definitions of proximate cause afford little assistance; the question is one of fact to be decided in the light of the circumstances.
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> . . .

In the result, the farmer was entitled to recovery of these losses under his fire insurance policy.

[51] The plaintiff relies on *942325*, an Ontario Court of Appeal decision which, again, came to a similar conclusion regarding the meaning of direct cause when interpreting an exception to an exclusion. The insured owned a chain of grocery stores. Due to a widespread power outage, it suffered significant losses of perishable inventory. The issue was whether the loss was covered by its all-risk policy. The policy excluded loss or damage caused directly or indirectly by changes of temperature, but the exclusion did not apply to loss or damage caused directly by a peril otherwise insured and not otherwise excluded. In a brief *per curiam* decision, the Court agreed that "the blackout was the proximate cause of the loss" (at para 3). Although it was not closest in time, the blackout was the effective cause of the loss. The exception to the exclusion applied because the power outage was a peril otherwise insured and not otherwise excluded.

[52] The defendant relies on a line of authorities from British Columbia where a different approach has been taken with respect to the meaning of "directly caused", again in the context of an exception to an exclusion. In *Canevada*, the British Columbia Court of Appeal considered a claim in connection with a construction project which was insured by an all-risk policy. One of the exclusions provided that "loss or damage, unless directly caused by a peril not otherwise excluded herein, caused directly or indirectly by . . . freezing" (at para 13) was not covered. Sprinkler pipes ruptured due to freezing, discharging water and extensively damaging the project. The insurers/appellants contended that the exception to the exclusion did not apply because freezing (as opposed to discharge of water) was the direct cause of the loss. In support of this position, it argued that direct cause should be treated as synonymous with proximate cause and that "both terms should be

taken to refer to the 'direct, dominant, operative and effective cause of the loss or damage'" (at para 26). The majority of the Court rejected this submission, instead accepting the argument of the insured/respondent (at paras 27-29):

> The problem with the interpretation for which the appellants contend, becomes evident when one considers the use of the phrase "directly or indirectly" in paragraph 6(b). Paragraph 6(b) states that the policy does not insure "loss or damage . . . caused directly or indirectly by rust or corrosion, frost or freezing" (emphasis added). If "directly" and "proximately" are synonymous, the term "indirectly", as the antonym of "directly", must presumably refer to a minor cause which operates in some indirect or ineffective fashion. That reading would lead to the nonsensical conclusion that the policy does not insure loss or damage where rust, corrosion, frost, or freezing constitutes even a minor or "indirect" cause of the loss or damage. The appellants' reading of "directly" as "proximately" appears to me to be strained, given the pairing of the word "directly" with its antonym "indirectly".
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> The respondent, on the other hand, argues that "direct cause" and "proximate cause" deal with wholly different concepts. The respondent submits that the word "proximate" and its antonym "remote" are concerned with the quality of the closeness of a particular cause, whereas the word "direct" and its antonym "indirect" are concerned with the degree to which an event leads straight or immediately to its consequence.
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> In my view, the interpretation of "direct cause" advanced by the respondents is clearly preferable. Taken in context, the terms "directly" and "indirectly" are intended to capture the sense in which an event leads straight or immediately to its consequence.

Using this interpretation, and because the discharge of water was interposed between the freezing and the loss, the loss fell within the exception to the exclusion.

[53] The defendant says that, applying this reasoning to the case at bar, because the application of the de-icer occurred before the freezing, the freezing exclusion would apply and the exception would not, as the application of the de-icer would not be a direct cause of the loss.

[54] The defendant also refers to *Wynward*, where the British Columbia Court of Appeal was called upon to apply its earlier ruling in *Canevada.* In *Wynward*, the insurance policy excluded losses "caused directly or indirectly" by freezing, with an exception for loss or damage caused directly by the rupture of pipes. The loss arose when a drain line froze and then burst. As a result, water escaped from the drain line and froze, causing the damage. Following *Canevada*, the Court concluded that the loss was caused indirectly by the initial freezing, such that the exclusion clause applied. The Court also determined that the exception to the exclusion did not apply because the damage was not caused directly by the rupture to the pipes, as the second freezing happened after the rupturing. It stated that "the ultimate freezing which caused the damage was not a direct result of the initial pipes bursting but an indirect result" (at para 29). Notably, the facts of *Wynward* are different from the present case in that freezing was both the initial event and most immediate cause of the loss.

"Caused Directly or Indirectly"

[55] Although the plaintiff concedes the applicability of the freezing exclusion on the basis that the damage to the floor was "caused directly or indirectly" by freezing (while maintaining that the loss comes within the exception), it is helpful, in my view, to briefly consider how the phrase "caused directly or indirectly" has been interpreted—to explain the legal

framework for the defendant's concession and to contrast the meaning of "directly or indirectly" with and, therefore, understand the meaning of "caused directly".

[56] Scrutton J (as he then was) reasoned in the early case of *Coxe v Employers' Liability Assurance Corporation Limited*, [1916] 2 KB 629 (HCJ (Eng)), as follows (at pp 633-34):

> . . . I start with the consideration that to all policies of insurance, whether marine or accident, the maxim causa proxima non remota spectatur is to be applied if possible. . . .
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> . . .
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> . . . But the words which I find it impossible to escape from are "directly or indirectly." There does not appear to be any authority in which those words have been considered, and I find it impossible to reconcile them with the maxim *causa proxima non remota spectatur*. . . . I am unable to understand what is an indirect proximate cause, and in my judgment the only possible effect which can be given to those words is that the maxim causa proxima non remota spectatur is excluded and that a more remote link in the chain of causation is contemplated than the proximate and immediate cause.
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> . . .
>
> [emphasis added]

[57] In *Consolidated-Bathurst v Mutual Boiler*, [1980] 1 SCR 888, the majority of the Supreme Court of Canada observed that "when the draftsman wished to exclude consequences from an event, the words 'directly or indirectly' were employed" (at p 898).

[58] More recently, the British Columbia Court of Appeal's decision in *Catalano v Canadian Northern Shield Insurance Co*, 2000 BCCA 133, while not factually similar to the present case, also considered the phrase "directly or indirectly". Mackenzie JA (writing for the Court) commented that the words "directly or indirectly" "typically are intended to broaden the ambit of causation between the peril and the loss and avoid a rigid and narrow proximate cause analysis" (at para 16).

[59] This Court addressed the meaning of "directly or indirectly" in *Minox Equities Ltd et al v Sovereign General Insurance Co*, 2010 MBCA 63, which involved consideration of a broad form, all-risk policy of insurance in the context of mould remediation and prevention in an apartment complex. A few years after it was built, the complex began experiencing a variety of moisture problems, which continued for over 20 years. The insurance policy contained a number of exclusion clauses, including for seepage, rain and humidity, with some exceptions. The focus of the appeal was whether the trial judge had erred in concluding that, for the exclusions to apply, the insurer was required to establish not only that seepage, rain and humidity caused the loss, but that they would inevitably have done so. This Court concluded that the trial judge had so erred, and that the damage was "caused directly or indirectly" by seepage, rain and humidity, such that the exclusions applied and there was no coverage. This Court commented (at para 50):

> Therefore, the use of the phrase "directly or indirectly" generally connotes that both the direct and consequential losses of an event are captured. Thus, as long as the evidence in the present case indicates that mould was a direct or consequential result of the seepage, rain and humidity, then the exclusion clauses would apply, absent other issues. . . .

Concurrent Causes

[60] In the leading decision of *Derksen v 539938 Ontario Ltd*, 2001 SCC 72, the Supreme Court of Canada took a different approach when deciding an issue of coverage under a comprehensive general liability policy. Faced with two concurrent causes of a loss (as the plaintiff characterises this case), the Court shifted its focus from the concept of proximate cause to a consideration of the impact of concurrent causes, both in regard to insuring agreements and exclusion clauses. The Court also addressed the potential effect of the words "directly or indirectly" in an exclusion clause, in the context of concurrent causation.

[61] The facts in *Derksen* involved an employee of a contractor removing a sign assembly and putting the base plate, unsecured, on the back of a truck. While he was driving, the base plate flew through the windshield of a school bus, killing one child and seriously injuring three others. The Court agreed with the motion judge that the loss was the result of two concurrent causes: negligent clean-up of a work site; and negligent operation of a motor vehicle. The insurance policy under consideration excluded coverage for loss arising from the use or operation of a motor vehicle. One of the issues was whether coverage was excluded on the basis that the proximate cause of the loss was the use or operation of the vehicle. (The Court was not dealing with an exception to this exclusion.) Citing the decision of McLachlin J (as she then was) in *CCR Fishing Ltd v British Reserve Insurance Co*, [1990] 1 SCR 814, the Court questioned the utility of the doctrine of proximate cause, stating that "it is undesirable to attempt to decide which of two concurrent causes was the 'proximate' cause" (at para 36) of a loss.

[62] In *Derksen*, the insurer's alternate argument was that, if there were two concurrent causes, one of which was excluded, there would be no coverage. In addressing that issue, the Court clarified that its decision in *Ford Motor Co of Canada Ltd v Prudential Assurance Co Ltd et al*, [1959] SCR 539 does not stand for the proposition that "if a loss is caused by concurrent causes, one covered by the policy and the other excluded by an exclusion clause, and the excluded peril is essential to the chain of causation leading to the loss, there is no coverage" (at para 39). In *Derksen*, the Court rejected that general proposition (see para 40). Instead, it explained that "[t]he exclusion clause in *Ford* expressly provided that all coverage would be excluded if liability were due to an excluded peril even if the loss was also due to another covered peril" (*ibid*). Thus, "[w]hether an exclusion clause applies in a particular case of concurrent causes is a matter of interpretation" (at para 49).

[63] As for language that would operate to exclude coverage in a situation involving concurrent causes, it is of interest how the Court in *Derksen* dealt with the decision in *Pavlovic v Economical Mutual Insurance Co*, 1994 CarswellBC 536 (CA), where the British Columbia Court of Appeal addressed an insurance dispute involving a combination of causes. An exclusion clause excluded coverage for damage "caused by seepage or leakage of water" (at para 7). Finch JA (as he then was) commented that "the loss was caused by the whole chain of events, of which leakage of water underground was a contributing or indirect cause, and that the chain of events was set in motion by the rupture or failure of the water service line from an unknown cause" (at para 22). The insured argued that "if the insurer had intended to exclude losses caused by a combination of events, it should have said so in express terms" (at para 16). Finding the clause to be ambiguous,

Finch JA construed it against the insurer and found in favour of the insured. He specifically noted the absence of the words "directly or indirectly" (at para 23) in the exclusion clause. *Pavlovic* was cited with approval in *Derksen*, with the Court noting that a phrase such as "directly or indirectly" shows it is "possible for the insurer to choose language which would not have left the meaning of the exclusion clause open to doubt" (at para 47).

[64] I again turn to the decision of this Court in *Minox*. As I have stated, this Court concluded that there was no coverage in that case, finding that the exclusion clauses for damage "caused directly or indirectly" by seepage, rain and humidity applied. Citing *Derksen*, this Court stated, with respect to concurrent causes, "Thus, in this case, even if the mould was the result of concurrent causes [insured and uninsured], the use of the phrase 'directly or indirectly caused' in the exclusion clauses, allows the exclusion clauses to apply" (at para 52).

[65] However, I note that, in *Minox*, this Court was not called upon to, and did not, address the applicability of the exceptions to the exclusion clauses which tempered the effect of the exclusions—subject to perhaps leaving the door open based on its comment that the exclusion clauses applied, "absent other issues" (at para 50).

[66] A case that is somewhat factually analogous to the one at bar, and where the Court did address the applicability of an exception to an exclusion clause in a situation involving a loss resulting from a number of causes, is *PCL Constructors Canada Inc v Allianz Global Risks US Insurance Company*, 2014 ONSC 7480. The wording of the policy was very similar to the freezing exclusion. It provided that "[l]oss or damage caused directly or indirectly by

rust or corrosion, frost or freezing, pollution or contamination unless caused directly by a peril not otherwise excluded herein" (at para 10) was excluded.

[67] In *PCL*, a contractor was retained to construct and install an aluminium frame to support the outer wall of a building, which was to be comprised mostly of windows. The frame pieces in which the windows were to sit (the mullions) became corroded due to exposure to a corrosive liquid, specifically, water containing salt and urea used for snow and ice melting, that became trapped in sealed mullions, causing damage to them. The defendants/insurers denied liability under the policy due to exclusions for loss or damage caused by corrosion and faulty workmanship. The parties agreed that the unusual corrosion of the mullions was caused by a combination of factors, including the contractor using a mixture of water and urea to melt snow and ice on upper slabs of the building under construction. Myers J concluded that "the peril in this case was caused in whole or in part by faulty workmanship" (at para 22). He went on to determine that the faulty workmanship exclusion was not an exclusion at all, but rather, a deeming clause that provided special treatment of losses or damage caused by faulty workmanship (see para 23). That is, the insurer did not need to pay the cost that would have been incurred to have the work done right the first time; the exclusion expressly reserved coverage for damage that was "Resultant Damage" (at para 10). He concluded that the loss was caused by faulty workmanship that was not otherwise excluded (see paras 23-24, 28). Therefore, there was coverage. Although, as I have said, the parties on the present appeal have indicated that the faulty workmanship exclusion is not before the Court, there is no dispute that the application of the de-icer is an insured peril not otherwise excluded.

Decision Regarding Interpretation

[68] The governing jurisprudence in this province with respect to the phrase "caused directly or indirectly" in an exclusion clause supports the plaintiff's acknowledgement that the freezing exclusion applies.

[69] As for the meaning of "caused directly" in the exception, I am satisfied, as a consequence of my review of the authorities, and as I will further explain, that there is no ambiguity.

[70] Despite the caution in *Derksen* about the utility of the doctrine of proximate cause in the context of insuring provisions and exclusion clauses where there are concurrent causes, I am of the view that the meaning of "caused directly" in the exception continues to invoke that concept—as was found, post-*Derksen*, in *942325*. In *942325*, the Ontario Court of Appeal held that the exception to the exclusion clause applied, and that the words "caused directly" in the exception meant proximate cause. The Court further stated that "[p]roximate" does not mean "closest in time" (at para 3); it agreed with the trial judge that the blackout was the proximate cause of the loss. The trial judge, adopting comments made in *Leyland*, as affirmed in *Saindon*, found that a proximate cause is one which is "proximate in efficiency", "the effective or dominant cause . . . what is in substance the cause, even though it is more remote in point of time, such cause to be determined by common sense" (at para 18).

[71] The British Columbia Court of Appeal's ruling in *Canevada*, where direct cause was interpreted to mean the cause immediately preceding the loss, is not in accord with the interpretation generally adopted in the case law. I

also note that the analysis undertaken in *Canevada* led to a favourable result to the insured, on the particular facts of that case. Furthermore, in light of *Ledcor*, caution has recently been expressed about *Canevada*, albeit in a different context, by the Alberta Court of Appeal in *Condominium Corporation No 9312374 v Aviva Insurance Company of Canada*, 2020 ABCA 166 at paras 34-37.

[72] I am also satisfied that rejecting the approach in *Caneveda* makes sense. While the words "directly or indirectly" in an exclusion clause may well result in such a clause applying more broadly, the language of "caused directly" in an exception balances this out and brings back under coverage losses proximately caused by insured perils. In my view, interpreting "directly" in an exception to mean "immediately" preceding the loss could lead to arbitrary results that may make insurance coverage illusory. If this interpretation presents difficulty for insurers, they could resort to clearer language in the wording of exclusion clauses, particularly in the context of all-risk policies.

[73] Even if there was ambiguity in the meaning of "caused directly" in the exception, my conclusion about its interpretation is supported by the reasonable commercial expectations surrounding builders' risk insurance policies. It was not within the reasonable contemplation of the parties at the time that they contracted that the freezing exclusion would apply in this type of a case, where the damage is clearly linked to the actions of one of the plaintiff's employees. In fact, it is exactly these types of incidents that are intended to be insured by builders' risk insurance policies (see *Ledcor* at paras 66-71, 79). As stated in *Ledcor* (at para 79):

> As already discussed above, the interpretation advanced by the Insureds in these appeals best fulfills the broad coverage objective underlying builders' risk policies. These 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. In this commercial reality, a broad scope of coverage creates certainty and economies for both insureds and insurers. . . .

[74] Moreover, were there an ambiguity that could not be resolved by the general rules of construction, my conclusion is also supported by the *contra proferentem* principle, which provides that I am to construe the Policy against the defendant, which drafted it.

[75] To recap, the doctrine of proximate cause has been employed to determine questions of causation in insurance cases. The use of the phrase "caused directly" invokes the proximate cause doctrine and the words "directly or indirectly" are intended to oust the application of that doctrine. In *Derksen*, the Supreme Court of Canada stepped away from a proximate cause analysis and held that, where one concurrent cause is covered by a policy and one not, there will be coverage, subject to wording that provides otherwise. In both *Derksen* and *Minox*, the courts indicated that the words "caused directly or indirectly" in exclusion clauses can capture concurrent causes and thus exclude coverage in such circumstances. An exception to an exclusion clause, like the one in this case with the words "caused directly", re-introduces the concept of proximate cause and brings back within coverage a loss resulting from a direct or proximate cause—namely, a dominant or effective cause, or what is in substance a cause from a common-sense perspective.

How Does the Proper Interpretation of the Freezing Exclusion and the Exception, in Particular, the Words "Caused Directly" in the Exception, Apply to the Case at Bar?

[76] Applying the correct interpretation of "caused directly or indirectly" in the freezing exclusion to these facts, I agree with the parties that the freezing exclusion is applicable.

[77] In order to apply the correct interpretation of "caused directly" in the exception to this case, I first consider the trial judge's findings of fact. As previously noted, there is no dispute with his finding that the freeze-thaw cycle caused the loss.

[78] In finding that the freeze-thaw cycle was "the only direct or proximate cause" (at para 96) of the loss, the trial judge accepted Dr. Becker's evidence. Dr. Becker testified that the application of de-icer traps water inside the concrete and prevents it from evaporating; de-icer lowers the temperature at which the water in concrete will freeze such that there can be freeze-thaw cycles despite the temperature never going above zero degrees Celsius; and, once the damage starts from a freeze-thaw cycle, it will become worse with more cycles, even without the addition of more de-icer. He also testified that the fact that there was damage only in the areas where the de-icer had been applied was "very telling evidence with regards to the probable cause."

[79] In the context of these specifics of Dr. Becker's evidence, the trial judge's acceptance of his testimony, particularly the trial judge's comments that "the increase in the number of freeze-thaw cycles . . . is the direct cause of the loss" (at para 104) and that the initial freeze-thaw cycle "continued with additional freeze-thaw cycles . . . that caused the damage" (at para 106),

indicate that he accepted the important ongoing role of the application of the de-icer as a cause of the loss. Essentially, his findings of fact lead to the conclusion that there were two concurrent, interdependent causes of the damage to the floor: freezing; and the application of the de-icer. These two causes came together to cause the loss where each on its own would not have done so.

[80] Although the application of the de-icer by itself would not have caused damage to the floor (freezing temperatures were required in order for it to cause damage), the trial judge's finding about the important ongoing role of the de-icer and the fact that the parts of the floor where the de-icer was not applied sustained no damage, make apparent the significance of the application of the de-icer in damaging the floor.

[81] Applying a proper interpretation of "caused directly" to the facts, I am satisfied that the plaintiff has proven that the damage to the floor was "caused directly" by the application of the de-icer. The application of the de-icer was, in substance, a cause of the loss; it was an effective or dominant cause without which the damage to the floor would not have been suffered. Therefore, the exception is applicable.

[82] Given my conclusion, I need not address the plaintiff's alternate argument that this is a "chain of events" case.

Conclusion

[83] For the foregoing reasons, I conclude that the trial judge erred by failing to consider the exception and the meaning of "caused directly" in the exception. Applying the proper interpretation of those words to the factual

findings made by the trial judge, the exception is applicable because the loss was "caused directly by a peril not otherwise excluded".

[84] In the result, I would allow the appeal, declare that coverage is afforded to the plaintiff under the Policy for the damage to the floor and order the defendant to indemnify the plaintiff for the loss. The plaintiff shall have costs in this Court in accordance with Tariff C and, unless agreed otherwise, costs in the Court below.

JA

I agree: JA

I agree: JA