

Interpretation of Insurance Contracts in the Context of Insurance and Indemnity Clauses

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INTRODUCTION

In business contracts, it is common to see one party agree to provide indemnity and insurance for another party. The indemnity is generally limited in scope, for example to occurrences in a certain location or arising out of the specified operations. As an example, a snow removal contractor may agree to indemnify the owner of a parking lot for personal injury claims “arising out of” that contractor’s work on the parking lot.

There are two parts to an agreement to indemnify and insure: first, the indemnifying party agrees that it will be liable to account for the other party’s liability to a third party in tort and second, the indemnifying party agrees to secure insurance to cover that liability. The exact scope, of course, is defined by the language of the agreement.

Indemnity and insurance clauses are found in a wide variety of contracts. They are nearly always found in real estate leases, service provider agreements, and agreements with subcontractors.

An example of an insurance and indemnity clause is as follows. This clause was taken from a service agreement:

Indemnification

The Service Provider will, both during and following the term of this Agreement, indemnify and save harmless the [Indemnified Party] from all costs, losses, damages, judgments, claims, demands, suits, actions, complaints or other proceedings in any manner based upon, occasioned by or attributable to anything done or omitted to be done by the Service Provider, its directors, officers, employees, agents, subcontractors or volunteers in connection with services provided, purported to be provided or required to be provided by the Service Provider pursuant to this Agreement.

Insurance

The Service Provider will obtain and maintain in full force and effect during the term of this Agreement, general liability insurance (the “Liability Insurance Policy”) acceptable to the [Indemnified Party] in an amount of not less than five million dollars (\$5,000,000.00) per occurrence in respect of the services provided pursuant to this agreement. Without limiting the generality of the foregoing, the Liability Insurance Policy shall:

- (a) be placed with a reputable insurer which is licensed to carry on business in Ontario and which is acceptable to the [Indemnified Party];
- (b) include as an additional insured [the Indemnified Party] and its representatives and employees;

- (c) include bodily injury, property damage, and personal liability coverage;
- (d) contain a separation of insureds and cross-liability clause;
- (e) provide that it will not be cancelled or materially altered without at least sixty (60) days prior written notice to the [Indemnified Party] delivered to the persons and addresses listed . . . below.

Within 10 days of the execution of this Agreement, the Service Provider is required to provide the [Indemnified Party] with a certificate of insurance confirming that the Liability Insurance Policy is in force. Within 30 days of the execution of this Agreement, the Service Provider is required to provide the [Indemnified Party] with a copy of the Liability Insurance Policy.

For ease of reference, this paper will refer to the party agreeing to provide the indemnity and insurance the “indemnitor” and the party receiving the indemnity and insurance the “indemnitee”.

This paper will consider the following issues:

- Common pitfalls in dealing with insurance and indemnity agreements;
- Recent Ontario cases;
- Dealing with coverage under more than one policy; and
- Can the court consider the scope of the indemnity when interpreting the insurance contract?

COMMON PITFALLS

Pitfall #1: The failure to distinguish between insurance and indemnity obligations

An agreement to indemnify is different from an agreement to insure. An agreement to indemnify is an agreement to repay for tort liability. An agreement to insure is an agreement to provide insurance to cover tort liability.

An indemnity obligation requires no further action to come into force – the indemnitor agrees to indemnify. An agreement to insure requires that the indemnitor take steps to ensure that the indemnitee is protected under the insurance policy.

There are two basic ways in which an indemnitee can be added to the indemnitor’s insurance policy:

1. The policy provides an expansive definition of “insured”; or

2. The indemnitee is added as an additional insured or additional named insured by way of endorsement to the indemnitor's policy.

The most common liability policy wordings in Ontario do not include indemnitees in the definition of "insured". Certain manuscript liability policies broaden the definition of "insured" beyond the common wordings to provide blanket coverage for indemnitees. Such a provision might state as follows:

This policy also insures all persons and entities for whom the Insured has agreed to obtain, or has the responsibility for placing, insurance.

Unless the indemnitor's policy has an expansive definition of "insured" such as the foregoing, the indemnitor needs to take steps to add the indemnitee to its insurance policy. If the indemnitor fails to do so, the indemnitee has no privity of contract with the insurance company. The indemnitee would only have recourse against the indemnitor for breach of contract (failing to fulfil its covenant to obtain insurance as required by the business contract).

Pitfall #2: The failure to consider the policy language when adding an additional insured to a policy

The policy language must be considered when adding an indemnitee to a policy. The insurance broker should review the scope of the indemnity to ensure that proper coverage is obtained. Canadian courts have made it clear that it is the policy language that governs.

Another issue is whether the indemnitee being added as an additional insured or an additional named insured. Insurance policies can confer different rights depending on whether a party is covered as an insured or a named insured. Both have direct recourse against an insurer, but a named insured generally has more extensive rights and obligations under the policy. Usually, the proper approach is to have the indemnitee added as an "additional insured", and not as an "additional named insured".

Consider as well how the exclusions in the policy operate against the additional insured. For example, an indemnity may be given for any loss arising out of the operations of the indemnitor. There could be an automobile injury arising out of the indemnitor's operations, for which the indemnitee would be indemnified. However, if the insurance policy contains an exclusion for automobile-related injuries, there will be no insurance for that loss. The indemnitee can sue the indemnitor, but has no coverage under the insurance policy.

Consider also the conditions of the policy. Would the indemnitee have any direct reporting obligations to the insurer under the policy? The indemnitee should be aware of any potential obligations under the insurance policy before a loss occurs. Failure to comply with reporting conditions in a policy can result in forfeiture of the coverage.

The scope of the additional insured endorsement must also be reviewed to ensure that proper coverage is provided. Common wording states that the indemnitee is added as an additional insured, “but only with respect to liability arising out of the Named Insured’s operations.” Even this common wording may create problems. Is the indemnitee covered for its own independent negligence in connection with the indemnitor’s operations? What if the liability arises out of the operations of the indemnitor’s subsidiary?

Pitfall #3: The failure to ensure that an additional insured endorsement is placed on the policy if necessary

If there is a covenant to insure an indemnitee, the indemnitee often needs to be added as an additional insured on the indemnitor’s policy.

In more cases than one would expect, a certificate of insurance is issued by the broker listing the indemnitee, but no change is made to the actual policy. The certificate generally states that it confers no rights and does not modify the wording of the policy.

If the broker is an agent of the insurer, and the insurer is bound by the broker’s acts, providing a certificate of insurance might bind the insurer. However, if the broker is independent of the insurer, as many are, then the certificate of insurance may not bind the insurer. The indemnitee would then be left with a breach of contract claim against the indemnitor and a potential negligence claim against the broker.

How to protect your client

If you are acting for an indemnitee, you can protect your client by requiring that a copy of the indemnitor’s insurance policy and a copy of the endorsement adding your client as an additional insured. It will probably be easier to get a copy of the latter than the former. Some businesses will not be willing to provide copies of their insurance policies. If the reasons for the request are fully explained, they may reconsider their positions. Whether you will be able to negotiate for production of the indemnitor’s insurance policy will depend on the relative strength of your bargaining position.

If your client has a strong bargaining position, consider adding something akin to the following to the insurance and indemnity agreement:

Within 10 days of the execution of this Agreement, [the Indemnitor] is required to provide [the Indemnitee] with a certificate of insurance confirming that the policy is in force. Within 30 days of the execution of this Agreement, [the Indemnitor] is required to provide [the Indemnitee] with a full copy of the policy, including the additional insured endorsement naming [the Indemnitee] as an additional insured.

When you review the additional insured endorsement, ensure that the endorsement provides the breadth of coverage agreed to in the indemnity and insurance agreement. Review all terms of the policy, and whether there are exclusions or conditions that are relevant. It is not enough to count on a promise to provide insurance, or even to rely on a certificate of insurance. These may not provide direct recourse against the insurer.

If your client has a powerful bargaining position, you may be able to change or influence the wording in the certificate. For example, some indemnitees require that the certificate of insurance specifies that the indemnitor's policy is primary and that the indemnitee's policy is excess. This should avoid costly litigation arising from the existence of overlapping coverage, which is discussed later in this paper.

If your client is providing the indemnity, it is also in your company's best interest to ensure that the indemnitee is properly covered under the insurance policy. Why? Because if the indemnity your client provides is broader than the insurance purchased to protect the indemnitee, your client could be liable for the shortfall.

RECENT ONTARIO INSURANCE AND INDEMNITY CASES

There have been numerous Ontario cases determining the extent of insurance coverage for additional insureds in the last several years. Certain cases interpret the extent of the coverage broadly, while others interpret the extent of the coverage narrowly.

LaCombe v. Don Phillips Heating Ltd., 2005 CarswellOnt 4386 (S.C.J.) is one of the cases that interpreted "arising out of" the operations of the named insured very broadly. In *LaCombe*, the court considered a situation in which a company hired to replace an oil furnace hired a subcontractor to install the furnace. An insurance certificate was sent to the subcontractor which stated the following:

This is to certify that the Assured set forth below is insured by insurance companies as noted below, which insurance is described as follows: [description of policy]

There was no indication in the certificate of insurance that the additional insured provision in the policy actually limited the subcontractor's coverage by providing coverage "solely with regard to liability arising out of" the operations of the contractor.

The subcontractor argued that because of the broad certificate of insurance and the fact that the full policy wordings were never provided to the subcontractor, the insurer ought to be estopped from arguing that coverage was "solely with regard to liability arising out of" the operations of the contractor. The court held that the argument was not available, as there was no evidence of detrimental reliance on the part of the subcontractor. Therefore, that issue was not resolved.

The court ultimately found for the subcontractor despite the narrower wording of the insurance policy. It interpreted the words "arising out of" in the insurance policy very broadly:

Second, the term "arising out of" has a broader significance than "caused by". In *Amos v. Insurance Corp. of British Columbia*, [1995] 3 S.C.R. 405, at para. 21, the Supreme Court of Canada held that the words "arising out of" have been said to mean "originating from," "having its origin in," "growing out of," "flowing from," "incident to," or "having connection with." So long as Francis' liability has any connection to the actions of Phillips, coverage will be available.

Despite the fact that it was arguably the subcontractor's own negligence, there was some connection to the actions of Phillips and the court therefore determined that it was covered.

In *Harris v. Memorial Boys' & Girls' Club Inc.*, [2008] O.J. No. 2750 (S.C.J.), the coverage was also interpreted broadly. The City of London attempted to recover its share of a settlement paid to a plaintiff who was injured by a horizontal bungee amusement at a ribfest in one of its parks. Both the operator of the bungee amusement and the Memorial Boys' & Girls' Club (the event organizers) were contractually obligated to add the City as an additional insured on their liability policies. The organizers provided the certificate and added the City as an additional insured "but only with respect to their interest in the operations of the named insured." The operator provided the City with a certificate but did not actually obtain the insurance. The insurer was not a party to the proceeding. The operator was noted in default but presumably did not have insurance or assets.

Justice Rady found that the plaintiff's injury was causally connected to the activities being carried out by the organizer and by the operator. The injury of the plaintiff was "closely connected" to the activity that the organizer's insurer had agreed to insure. The plaintiff would not have been injured but for the decision of the organizer to put on the ribfest. Based on the foregoing, Justice Rady concluded that there was a right to indemnity. However, Justice Rady distinguished the cases which were determined after

trial where there was a finding of an independent cause of action against the party seeking indemnity.

Riocan Real Estate Investment Trust v. Lombard General Insurance Co. (2008), 91 O.R. (3d) 63 (Ont. S.C.) is a slip and fall case in which the contractor agreed to add *Riocan* as an additional insured for losses suffered in connection with the snow removal operations at its properties. There were several underlying actions to the duty to defend application. The statement of claim made some allegations that were arguably independent allegations against *Riocan* (for example, failing to have a system of inspection). However, the judge found as follows:

Notwithstanding the multiple theories pleaded by the plaintiffs, the fundamental issue raised in each of the actions is that the plaintiffs' slip-and-fall on the ice covered parking lot occurred because of the failure of the owner to keep the parking lot free of ice. The true nature of the claim is that the defendant was negligent in failing to maintain an ice-free parking lot and as a result the plaintiffs fell and sustained injuries. It will be up to the trial judge to determine firstly if there were conditions in the parking lot which caused the plaintiffs to fall and if so whether these conditions arose because of the work performed or not performed by the contractor or whether the landowner bears some or all of the responsibility under the Occupiers' Liability Act. It is also possible that the trial decision will not cleanly apportion the fault as between the contractor and RioCan. In any event, it is impossible at this stage to determine where fault may lie for the plaintiffs' injuries.

The judge therefore held as follows:

I am of the view that in most situations where there is a duty on an insurer to defend some, or only one, of the claims made against an insured and that claim embodies the true nature of the claim, a duty to defend the entire claim arises. This is so even where the pleadings include claims that may be outside the policy coverage. Conflict issues can be addressed in a number of ways. Counsel did not request me to deal with this issue.

In *Waterloo (City) v. Economical Mutual Insurance Co.*, [2006] O.J. No. 5252, the insurer's duties were considered to be narrower. The Ontario Superior Court considered whether Economical had a duty to defend a personal injury action brought against the applicant, the City of Waterloo. The plaintiff in the underlying action was injured by a train passing nearby while watching the Kitchener-Waterloo annual Oktoberfest parade. The parade was conducted by a corporation called K-W Oktoberfest Inc.

The City of Waterloo had been added as an additional insured on K-W Oktoberfest's insurance policy with Economical. The Certificate of Insurance indicated that the City was added as an additional insured to the policy, "but only insofar as their legal liability arises *vicariously* out of the negligent operations of the Named Insured". Justice Flynn noted that the Certificate stated on its face that it was only issued as a matter of information and conferred no rights on the holder. The policy itself did not mention the words vicarious liability. The additional insured endorsement stated:

This insurance applies to those stated on the declarations as “additional insureds”, but only with respect to liability arising out of the operations of the named insured.

Justice Flynn noted that by the very terms of the certificate itself, the certificate was subordinate to the terms, conditions and exclusions of the policy. The policy language was considered paramount.

In determining that there was no duty to defend, Justice Flynn stated as follows:

In my view this is a common, clear and unambiguous limitation of coverage. The words “arising out of” have been interpreted in the cases to include such meanings as “originating from”, “growing out of”, “flowing from”, “incident to”, or “having connection with”.

These words define the pertinent liability for which coverage is provided. The pleadings on their face do not allege facts in support of liability “flowing from” or “incident to” the operations of K-W Oktoberfest Inc. And the plaintiffs have not sued K-W Oktoberfest Inc.

The K-W Oktoberfest parade was merely the site or occasion of the Hepditches unfortunate accident with the train.

...

All of the allegations of negligence against the City stand alone and are neither expressly or by necessary inference derivative of or arising out of the operations of K-W Oktoberfest Inc.

Tinkess v. N.M. Davis Corp., [2007] O.J. No. 1026 (S.C.J.) also interpreted the words “arising out of” narrowly. That case involved a slip and fall in which the party to whom snow removal was subcontracted had been added on the policy of the parking lot operator. The court considered an indemnity and insurance agreement in which the snow removal subcontractor agreed to indemnify the parking lot operator for liability in any “manner arising out of, any of [the subcontractor’s] acts or failures to act “. The judge held that the subcontractor was only liable for its own liability and that there was no indemnity or insurance obligation with respect to the parking lot operator’s independent negligence. Justice Belobaba held that since there was no indemnity or insurance obligation under the business contract, there was no need to consider whether the parking lot operator had even been added to the snow removal subcontractor’s insurance policy. There was some indication that the parking lot operator had not actually been added, despite the fact that there was a certificate of insurance.

D’Cruz v. B.P. Landscaping Ltd., 2007 CarswellOnt 4385 (S.C.J) involved a slip and fall on an icy patch located on property owned by Peel Housing, one of the defendants. Peel Housing had a contract with B.P. Landscaping Ltd. according to which B.P. Landscaping agreed to indemnify Peel Housing and to name Peel Housing as an additional insured on B.P. Landscaping’s insurance policy. B.P. Landscaping was insured by Citadel.

The contract between Peel Housing and B.P. Landscaping provided that B.P. Landscaping would provide general liability insurance coverage, “with coverage including the activities and operations conducted by the vendor and those for whom the vendor is responsible for in law”. Peel Housing was to be named as an additional insured.

The Certificate of Insurance stated:

The Regional Municipality of Peel and/or Peel Housing Corporation – O/A Peel Living have been added as additional insureds, but only with respect to their interest in the operation of the named insured.

In an unusual decision, the judge held that the allegations that were relevant to B.P. Landscaping’s involvement were already being defended by Citadel, incidental to its defence of B.P. Landscaping. She further held that there were separate and distinct claims of liability made against Peel Housing that were unrelated to the allegations against B.P. Landscaping, such as duties arising from its status as an occupier of the property on which the incident occurred. She stated that those allegations were no doubt covered by Peel Housing’s own policy of insurance.

Atlific Hotels & Resorts Ltd. V. Aviva Insurance Co. of Canada, 2009 CarswellOnt 2697 (Ont. S.C.) provided narrow coverage, and distinguished the *RioCan* case discussed above. In *Atlific*, the Court considered an agreement in which a resort was named as an additional insured under the Aviva policy of a snow removal contractor, but only with respect to liability arising out of the contractor’s operations. There were allegations in the statement of claim of negligence on the part of all defendants relating to snow and ice removal, negligence on the part of the resort in the operation and management of the hotel, and occupier’s liability.

The court held that Aviva did not have to defend the entire action. Rather, it had to defend only the snow and ice removal claims (the first of the three categories of allegations outlined above). *Riocan* was distinguished because in that case, the court was able to find that a claim potentially within coverage captures “the true nature of the overall claim.” In *Atlific*, there were three categories of negligence and the two that were unrelated to snow and ice removal could stand on their own.

The writer prefers the *Riocan* decision to the decision of *Atlific Hotels*. Given the decision in *Hanis v. Teevan*, [2008] O.J. No. 3909 (C.A.), the writer has difficulty in seeing how the duty to defend could be split so early in the proceedings. Presumably, in defending the snow and ice removal claims, there would be substantial overlap in the defence of the other claims.

DEALING WITH COVERAGE UNDER MORE THAN ONE POLICY

A party that is an additional insured under one policy often has its own insurance that covers the same loss. Both policies may respond to the loss, and questions will arise as to how defence and indemnity costs should be divided amongst the overlapping insurance policies.

Overlapping Coverage

The Supreme Court considered this issue in *Family Insurance Ltd. v. Lombard Canada Inc.*, [2002] 2 S.C.R. 695. The court noted that two policies (or more) contribute to a loss if the following conditions are met:

- 1 All the policies concerned must comprise the same subject-matter.
- 2 All the policies must be effected against the same peril.
- 3 All the policies must be effected by or on behalf of the same assured.
- 4 All the policies must be in force at the time of the loss.
- 5 All the policies must be legal contracts of insurance.
- 6 No policy must contain any stipulation by which it is excluded from contribution.

In that case Lesley Young was sued by a plaintiff who had been injured in a fall from a horse. Young was covered by two policies – a homeowner’s liability policy issued by Family Insurance, and a commercial general liability (“CGL”) policy issued by Lombard to members of the Horse Council of B.C.

At issue was which insurer had to pay the defence costs. Both policies applied to the loss. Each insurer argued that its policy was excess and that the other policy was primary. The B.C. Court of Appeal went outside of the policy wordings and considered the surrounding circumstances (such as the premium payable, the type of policy, the insurers’ presumed intent, etc.). All of these surrounding circumstances led the court to hold that the Family policy was primary, and the Lombard policy was excess.

However, the Supreme Court reversed. It held that each insurer had to pay 50%. The Supreme Court noted that it is necessary to determine the intentions of each insurer *vis-à-vis* the insured. If it is a contest between two insurers, then the court cannot go outside of the policy to consider surrounding circumstances. If it is a contest between the insured and the insurers, then the court may consider surrounding circumstances to resolve ambiguity.

Primary or Excess Insurance?

The first question is whether one of the policies is excess to another. This can be determined through the insuring agreements (i.e. one policy says it will apply once primary insurance is exhausted) or through the “other insurance” clauses of the contract.

In the situation we are considering, there will likely be two policies that are primary according to their insuring agreements. The question is, therefore, whether the “other insurance” provisions of the contract change that and make one excess to the other.

An “Other Insurance” clause is a condition in a liability insurance policy which stipulates what happens when there is other insurance *at the same level*. In other words, “Other Insurance” clauses are used when there are two primary policies, or two excess policies.

Basically, there are three types of “Other Insurance” clause:

- *Primary or pro rata clause*. This type of clause typically states that if there is other primary insurance, then the policy contributes with the other primary policy on a *pro rata* basis.
- *Excess clause*. An excess clause states that, if there is other valid and collectible insurance, the policy is excess.
- *Escape clause*. An escape clause states that, if there is other valid and collectible insurance, the policy does not apply whatsoever.

The general rule is that the courts will give effect to the “Other Insurance” clauses if they can be reconciled: *Family Insurance Ltd. v. Lombard Canada Inc.* For example, if one policy states that it is primary, and the other states that it is excess, then there is no problem – the court will hold that the first policy is primary and the second policy is excess.

How the policies will interact will depend on the interpretation of the “Other Insurance” clauses. For example:

- If both policies are primary, they will contribute to defence costs. The method of sharing will depend on the policy language.
- If both are excess, and there is no primary insurance, then the excess clauses cancel each other out. Both become primary, and they will usually share equally. (See *Family Insurance Ltd. v. Lombard Canada Inc.*).

- If one is primary, and one has an escape clause, then only the primary policy will apply.

If there is no way to reconcile the “other insurance” clauses in the two policies, they will both share in equal parts up to one of the party’s limits and after that, the party with the higher limit will bear the remainder of the loss.

CAN THE COURT CONSIDER THE SCOPE OF THE INDEMNITY AGREEMENT WHEN INTERPRETING THE INSURANCE CONTRACT?

The business contract between the indemnitor and indemnitee is not part of the insurance contract between the additional insured and the insurer. It is properly understood as extrinsic evidence. Any attempts to use the language in the business contract to interpret the insurance policy must be made in the context of the rules on introducing extrinsic evidence.

Justice Winkler, as he then was, provided an extensive analysis of introducing extrinsic evidence in a non-insurance context in *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, [2008] O.J. 2637 (Ont. S.C.), affirmed (1999), 178 D.L.R. (4th) 634 (Ont. C.A.). Justice Winkler summarized the parole evidence rule as follows at paragraphs 403-405:

The aim of the court, in construing a written agreement, is to determine the intentions of the parties to the agreement, and in this regard, the cardinal presumption is that the parties have intended what they have said. Their words must be construed as they stand. See: Chitty on Contracts Volume 1, General Principles, 27th ed. (1994) at 580.

Where the agreement has been reduced to writing, the parole evidence rule operates to prohibit the introduction of extrinsic evidence to vary the written contract. This rule of interpretation is enunciated in G.H.L. Fridman, *The Law of Contract in Canada*, 3rd ed. (Toronto: Carswell, 1994) at pp. 455-456:

The fundamental rule is that if the language of the written contract is clear and unambiguous, then no extrinsic parole evidence may be admitted to alter, vary, or interpret in any way the words used in the writing.

See also: *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515 per Judson J.

This is consistent with the principle that where a document purports on its face to be the final and conclusive expression of the parties' agreement, the document will be taken to be a reliable record of the parties' latest agreement, and evidence of the negotiations leading up to it will not be admissible. See: S.M. Waddams, *The Law of Contracts* (3rd ed.) (Toronto: Canada Law Book, 1993) at 210. . . .

In short, the general rule is that where the contract is not ambiguous, external evidence is not admissible.

There is some wiggle room, as extrinsic evidence can be introduced to attempt to show the “factual matrix” in which the policy was made. A court is not restricted to simply reviewing the terms of the policy without any consideration of the commercial context in which it is made. According to *Leigh Instruments*, the court “may admit evidence of the surrounding circumstances, including evidence of the commercial purpose of the contract, the genesis of the transaction, the background, the context, and the market in which the parties were operating.” The subjective intention of the parties is not admissible; the evidence is admitted to show what “reasonable persons in the position of the parties” would have intended in that context.

The “factual matrix” can unearth a “latent ambiguity” in the contract. A contract that is clear on its face may be ambiguous in light of its commercial context. Further evidence can then be admitted to ascertain, objectively, the intention of the parties.

The Ontario Court of Appeal recently upheld the parole evidence rule in an insurance coverage context. In *Lombard Canada Ltd. v. Zurich Insurance Co.*, [2010] O.J. No. 1645 (Ont. C.A.), the panel determined that the motion judge had erred by using a fleet report which did not form part of an insurance policy in interpreting that insurance policy. In that case, Choice Rental leased a car from Tracmount. The car was involved in an accident and the driver and Tracmount were sued. Choice Rental was insured by Zurich, but failed to list the particular car on its reports to Zurich. Zurich refused to defend. Lombard had issued a contingent lessor's liability insurance policy to Tracmount, in case a lessee (such as Choice Rentals) failed to procure insurance as required. Lombard brought an application for a declaration that Zurich had an obligation to cover the vehicle.

The applications judge found that Zurich had no such obligation. In so finding, she relied on four documents: the policy; the fleet endorsement; Tracmount's certificate as additional insured; and a monthly fleet report provided by Choice to Zurich.

The Court of Appeal held that the applications judge ought only to have considered the policy and the fleet endorsement that formed a part of that policy. Tracmount's certificate was not a part of the policy between Choice and its insurer. The monthly fleet report was certainly not part of the policy. According to the Court of Appeal, the policy and fleet endorsement were determinative.

The Court of Appeal summarized the principles of evidence in interpreting insurance policies at paragraphs 32-35:

The foundation for the relevant principles and process for the interpretation of an insurance contract is *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980]

1 S.C.R. 888. At pp. 899 - 901 of that case, Estey J., writing for the majority, explains the two phases of the analysis for the interpretation of any contract, including an insurance contract.

The first is the interpretive phase based on the guidelines for construction. Subjective intention is irrelevant at this stage of the process, although the words used may be "possibly read in light of the surrounding circumstances which were prevalent at the time": see *Eli Lilly*, at para. 54. If the meaning is plain on the face of the contract, it is unnecessary to proceed further: see *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551, at para. 71. However, if the interpretive phase results in two equally reasonable interpretations, the contract is ambiguous. In those circumstances, the court turns to the second phase of the inquiry. At this phase, the court may consider extrinsic evidence: see *Eli Lilly*, at para. 55. As well, the court may consider the applicability of *contra proferentem*: see *Consolidated Bathurst*, at p. 901.

In the interpretive phase, the onus is upon the insured to show that the loss is covered by the policy in question. Once the insured has done so, the burden shifts to the insurer to show otherwise, including by reason of the operation of an exclusion or limitation in the insurance contract: see *Continental Insurance Co. v. Dalton Cartage Co.*, [1982] 1 S.C.R. 164; *Canadian National Railway Co. v. Royal and Sun Alliance Insurance Co. of Canada*, [2008] 2 S.C.R. 453, at para. 34; *Co-Operators Life Insurance Co. v. Gibbens*, [2009] 3 S.C.R. 605, at para. 51; Denis Boivin, *Insurance Law* (Irwin Toronto: Irwin Law, 2004) at p. 190. In interpreting a provision, the court will also recognize that coverage provisions are "construed broadly and exclusion clauses narrowly": see *Reid Crowther & Partners Ltd. v. Simcoe & Erie General Insurance Co.*, [1993] 1 S.C.R. 252, at p. 269; *Scalera*, at para. 70.

With this onus in mind, the court turns to the first phase, the interpretive phase, the purpose of which is to discern the intention of the parties as gathered from the plain words used in the contract. In doing so, the court considers the contract as a whole and in the "commercial atmosphere in which the insurance was contracted:" *Consolidated Bathurst*, at p. 901.

Consistent with other Ontario insurance coverage cases, the policy language is of paramount importance. There is no need to consider extrinsic evidence unless the policy language is ambiguous, either on its face or in the commercial context. The reasoning in *Lombard* would apply to preclude consideration of the wording of the underlying business contract in interpreting the breadth of the additional insured coverage. This intuitively seems fair to the writer, given that the insurer is not a party to that contract. It is therefore critically important, as outlined in the Introduction section to this paper, not to rely only on the language in the business contract, but to ensure that appropriate coverage is actually obtained from the insurer.