Memo To: All Lawyers
Folder: Alexsei Research Memo (Public)
Research ID: 400015248fe928
Jurisdiction: Ontario, Canada
Date: March 26, 2020
Regarding: Does Business Interruption Insurance Cover Losses Stemming From COVID19?

Issue

Will a business interruption insurance policy cover losses stemming from forced closures of certain businesses due to the COVID-19 crisis?

Facts

No additional facts were supplied.

Conclusion

The insurer-insured relationship is contractual and the parties are parties to an arm's-length agreement. The words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract. An insurance contract, like any other contract, should be construed in a manner that attempts to harmonize and make sense out of the various provisions contained in it and does not strain them. Ambiguities are to be resolved in favour of the insured. But ambiguity does not exist whenever the policy contains wording that could be open to two or more reasonable interpretations. Before resorting to the contra proferentem principle, an effort should be made to interpret the policy in a commercially reasonable fashion, and in a way that gives effect to the reasonable expectations of the parties (*Garneau v. Industrial Alliance Insurance and Financial Services Inc.*).

The general approach in the Canadian case law to contractual interpretation has changed over time. Canadian courts now recognize that the meaning of contractual terms is often derived from contextual factors, including the purpose of the agreement, the commercial background to the agreement, and the nature of the relationship to the agreement. This modern approach directs courts to apply principles of contractual interpretation to the words of the contract, considered in

light of the factual matrix or surrounding circumstances. The following principles relating to the interpretation of insurance contracts are well settled in Canadian law:

> (1) the court must search for an interpretation from the whole of the contract and any relevant surrounding circumstances that promote the true intent and reasonable expectations of the parties at the time of entry into the contract;
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> (2) where words are capable of two or more meanings the meaning that is more reasonable in promoting the intention of the parties will be selected;
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> (3) ambiguities will be construed against the insurer having regard to the reasonable expectations of the parties;
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> (4) an interpretation that will result in either a windfall to the insurer or an unanticipated recovery to the insured is to be avoided;
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> (5) coverage provisions are to be construed broadly, while exclusion clauses are to be construed narrowly;
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> (6) the contract of insurance should be interpreted to promote a reasonable commercial result; and,
>
> (7) a clause should not be given effect if to do so would nullify the coverage provided by the policy.

These principles are to be applied rigorously in the interpretation of insurance contracts (*MacDonald v. Chicago Title Insurance Company of Canada*).

Where the language of an insurance policy is unambiguous the Court should give effect to the clear language, reading the insurance contract as a whole. However, where the wording is ambiguous, Courts must prefer an interpretation drawn from the whole of the contract and any material surrounding circumstances that give effect to the reasonable expectations of the parties at the time of contracting, provided that such reasonable interpretation is supported by the language of the policy. The interpretative process should avoid an interpretation that will result in a windfall to the insured of unexpected coverage or a windfall to the insurer of less expansive coverage than the premium contemplated. The courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk, or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract (*Joroga Real Estate Ltd. v. State Farm Fire and Casualty Company*).

The question of whether insurance applies to a loss should not depend on metaphysical debates as to which of various causes contributing to an accident was proximate. It should be sufficient to bring the loss within the risk if it is established that, viewed in the entire context of the case, the loss is shown to be fortuitous in the sense that it would not have occurred save for an unusual event not ordinarily to be expected in the normal course of things. The primary interpretive principles for insurance policies is that a court should give effect to a policy's clear language, reading the contract as a whole. Words in an insurance policy should be construed as they would be understood by the average person applying for insurance, not as they might be perceived by a person experienced in insurance law. A court should be reluctant to depart from the authoritative judicial precedent interpreting the policy in a particular way where the issue arises subsequently in a similar context and where the policies are similarly framed. "Business activities", in a business interruption policy issued to a landlord, has been held to refer to the landlord's lease of the building to tenants for manufacturing purposes. "Necessary interruption" has been held to mean that there was an unavoidable and temporary discontinuation of business activities. If the application of the rules of construction cannot resolve an ambiguity, then the policy should be construed in favour of the insured by interpreting coverage provisions broadly and exclusion clauses narrowly (*224981 Ontario Inc. v Intact Insurance Company*).

A clause that nullifies coverage will not be enforced; an interpretation that would nullify coverage altogether should, therefore, be avoided. Surrounding circumstances may be taken into account in interpreting the contract if the circumstances are objective background that were or ought reasonably to have been within the knowledge of both parties at or before the date of contracting. The factual matrix is less relevant for standard form contracts because the terms are not negotiated: "the contract is put to the receiving party as a take-it-or-leave-it proposition". However, factors such as the purpose of the contract and the industry in which it operated should still be considered (*Nodel v Stewart Title Guaranty Company*, aff'd *Nodel v. Stewart Title Guaranty Company*, 2018).

Law

In *Garneau v. Industrial Alliance Insurance and Financial Services Inc.*, 2015 ONCA 234 (CanLII), the Court of Appeal briefly touched on the nature of insurance policies. As noted by the Court, the insurer-insured relationship is contractual, and the parties are parties to an arm's-length agreement. The words of one provision must not be read in isolation, but should be considered in harmony with the rest of the contract. An insurance contract, like any other

contract, should be construed in a manner that attempts to harmonize and make sense out of the various provisions contained in it and does not strain them. Ambiguities are to be resolved in favour of the insured. But ambiguity does not exist whenever the policy contains wording that could be open to two or more reasonable interpretations. Before resorting to the contra proferentem principle, an effort should be made to interpret the policy in a commercially reasonable fashion, and in a way that gives effect to the reasonable expectations of the parties:

> [12] The motion judge found that the respondent did not owe an ad hoc or situation specific fiduciary duty to the appellant. He cited this court's statement in *Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co.* (1994), 1994 CanLII 653 (ON CA), 18 O.R. (3d) 663 (C.A.), at p.669, para. 14: "The fact that a contract is one of utmost good faith does not however mean that it gives rise to a general fiduciary relationship ... The insurer-insured relationship is contractual, the parties are parties to an arm's-length agreement."
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> ...
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> [35] I would take the second approach since it best accords with the key principle of contractual interpretation that "the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract": *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at para. 64; see also *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, 1993 CanLII 145 (SCC), [1993] 1 S.C.R. 12, at pp. 23-24, [1993] S.C.J. No. 1, at para. 9. See also *Brissette Estate v. Westbury Life Insurance Co.; Brissette Estate v. Crown Life Insurance Co.*, 1992 CanLII 32 (SCC), [1992] 3 S.C.R. 87, [1992] S.C.J. No. 86, at para. 42.
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> [36] In *Solway v. Lloyd's Underwriters* (2006), 2006 CanLII 17254 (ON CA), 80 O.R. (3d) 401, Moldaver J.A. stated, at para. 43:
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> [A]n insurance contract, like any other contract, should be construed in a manner that attempts to harmonize and make sense out of the various provisions contained in it, and does not strain them. Ambiguities are to be resolved in favour of the insured. But ambiguity does not exist whenever the policy contains wording that could be open to two or more reasonable interpretations. Before resorting to the contra proferentem principle, an effort should be made to interpret the policy in a commercially

> reasonable fashion and in a way that gives effect to the reasonable expectations of the parties.
>
> I find these words to be especially apt for this case.

In *224981 Ontario Inc. v Intact Insurance Company*, 2016 ONSC 642 (CanLII) a fire destroyed a building leased by the plaintiff. At all material times, the plaintiff was covered by a property and business interruption insurance policy issued by Intact, and the owner was covered by a property insurance policy issued by Zurich. Zurich denied the owner's claim for loss of rental income. A controversy arose as to whether Zurich was entitled to deny coverage. Zurich took the position that the tenant was obligated to continue paying rent. The dispute centred around what amounts were payable for business interruption losses of the owner and of the tenant.

The Court considered whether the owner's loss of rent "resulted from" the necessary interruption of its business activities, as provided for in the policy. The primary interpretive principles for insurance policies is that a court should give effect to a policy's clear language, reading the contract as a whole. Words in an insurance policy should be construed as they would be understood by the average person applying for insurance, not as they might be perceived by a person experienced in insurance law. A court should be reluctant to depart from the authoritative judicial precedent interpreting the policy in a particular way where the issue arises subsequently in a similar context and where the policies are similarly framed. If the language of an insurance policy is ambiguous, a court should prefer interpretations that are consistent with the reasonable expectations of the parties so long as such interpretation can be supported by the text of the policy. If the application of the rules of construction cannot resolve an ambiguity, then the policy should be construed in favour of the insured by interpreting coverage provisions broadly and exclusion clauses narrowly:

> ISSUE #2: DOES THE OWNER'S LOSS OF RENT "RESULT FROM" THE NECESSARY INTERRUPTION OF ITS BUSINESS ACTIVITIES?
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> [24] The principles for interpreting an insurance policy can be summarized as follows. The primary interpretive principle for insurance policies is that a Court should give effect to clear to a policy's clear language, reading the contract as a whole.[7] Words in an insurance policy should be construed as they would be understood by the average person applying for insurance, not as they might be perceived by a person experienced in insurance law.[8] As well, a Court should be reluctant to depart from authoritative judicial precedent interpreting the policy in a

particular way where the issue arises subsequently in a similar context and where the policies are similarly framed.[9] If the language of an insurance policy is ambiguous, a Court should prefer interpretations that are consistent with the reasonable expectations of the parties so long as such interpretation can be supported by the text of the policy.[10] If the application of the rules of construction cannot be resolve an ambiguity, then the policy should be construed in favour of the insured by interpreting coverage provisions broadly and exclusion clauses narrowly.[11]

[25] Zurich issued a property insurance policy to the Owner for the period March 18, 2011 to March 18, 2012. The policy provides:

We will pay for the actual Business Income Loss you sustain during the "period of indemnity" resulting from the necessary interruption of your business activities occurring at a "premises" if the interruption is caused solely by direct physical loss of or damage to covered property (other than "finished stock") or covered objects caused by a "covered cause of loss" at the "premises". [Emphasis added]

[26] Except for the question of causation, Zurich admits that the Owner's loss of rental income is covered under its policy.[12]

The Court went on to consider specific terms. Among these, the Court held that "business activities" referred to the landlord's lease of the building to tenants for manufacturing purposes. "Necessary interruption" means that there was an unavoidable and temporary discontinuation of business activities:

"Business Activities"

[28] The Declarations Page of the Zurich policy purchased by the Owner states: "Location operations: Building owner – manufacturing tenants". In my view, the Owner's "business activities" was the lease of its building to tenants for manufacturing purposes.

"Necessary Interruption"

[29] The requirement for the "necessary interruption" of business activities means that there must be an unavoidable and temporary discontinuation of business activities.[13] It was agreed that the fire "destroyed" the building. The fire damaged 47,000 square feet of the building and left only a small area of 2,750 square feet, used

> as office space, undamaged by the fire. Repairs to the building were made and a new tenant was secured as of November 1, 2012. Further, paragraphs 12 and 13 of the Agreed Statement of Facts states that the building was substantially damaged by fire and, as a result of the fire, Eco-Lux stopped its manufacturing operations at the Property. In my view, the use of the building for manufacturing purposes was "necessarily interrupted" by the fire.

Concerning causation, the Court held that the question of whether insurance applies to a loss should not depend on metaphysical debates as to which of various causes contributing to an accident was proximate. apart from the apparent injustice of making indemnity dependent on such fine and contestable reasoning, such a test is calculated to produce disputed claims and litigation. It should be sufficient to bring the loss within the risk if it is established that, viewed in the entire context of the case, the loss is shown to be fortuitous in the sense that it would not have occurred save for an unusual event not ordinarily to be expected in the normal course of things:

> [33] The central coverage issue in this case is whether the loss of rent claimed by the Owner "resulted from" the interruption. I have dismissed Zurich's submission that Eco-Lux had a obligation to continue to pay rent to the Owner during the period of loss claimed and, accordingly, there is no basis for the assertion that the loss claimed arose from Eco-Lux's breach of its lease rather than from the fire.
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> [34] Even if Eco-Lux had an obligation to pay rent after the fire, it is my view that the loss of rent suffered by the Owner would not have occurred if the fire not occurred. The parties agreed that "[a]s a result of the fire, Eco-Lux stopped operations at the Property and ceased making rent payments to the Owner." There is no suggestion that the Eco-Lux would not have continued to pay rent for the building had the fire not occurred. In arriving at the conclusion that the loss claimed by the Owner resulted from the necessary interruption of its business activities I am guided by the following statement of the McLachlin, C.J.C. in *C.C.R. Fishing Ltd. v. Tomenson Inc.* 1990 CanLII 145 (SCC), [1990] 1 S.C.R. 814, at para. 23:
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> The question of whether insurance applies to a loss should not depend on metaphysical debates as to which of various causes contributing to the accident was proximate. Apart from the apparent injustice of making indemnity dependent on such fine and contestable reasoning, such a test is calculated to produce disputed claims and litigation. It should be sufficient to bring the loss within the risk if it is established that,

> viewed in the entire context of the case, the loss is shown to be fortuitous in the sense that it would not have occurred save for an unusual event not ordinarily to be expected in the normal course of things. [Emphasis added]

More recently, the Ontario Court of Appeal ruled on the principles of interpretation for insurance contracts in *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842 (CanLII), which was a case involving title insurance.

The Court held that the general approach in the Canadian case law to contractual interpretation has changed over time. Canadian courts now recognize that the meaning of contractual terms is often derived from contextual factors, including the purpose of the agreement, the commercial background to the agreement, and the nature of the relationship to the agreement. This modern approach directs courts to apply principles of contractual interpretation to the words of the contract, considered in light of the factual matrix or surrounding circumstances:

> [20] First, the general approach in the Canadian case law to contractual interpretation has changed over time. The restrictive rules of contractual interpretation have been loosened and Canadian courts now recognize that the meaning of contractual terms is often derived from contextual factors, including the purpose of the agreement, the commercial background of the agreement, and the nature of the relationship created by the agreement. This modern approach directs courts to apply principles of contractual interpretation to the words of the contract, considered in light of the factual matrix or surrounding circumstances. Justice Rothstein noted that determining the facts surrounding a contract is a critical part of the analysis and that the exercise of applying the principles of contractual interpretation to these facts and the words of the agreement is closer to a question of mixed fact and law than a question of law, as those terms are defined in *Canada (Director of Investigation and Research) v. Southam Inc*., 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, at para. 35, and *Housen*, at paras. 26 and 36.

The following principles relating to the interpretation of insurance contracts are well settled in Canadian law: (1) the court must search for an interpretation from the whole of the contract and any relevant surrounding circumstances that promote the true intent and reasonable expectations of the parties at the time of entry into the contract; (2) where words are capable of two or more meanings the meaning that is more reasonable in promoting the intention of the parties will be selected; (3) ambiguities will be construed against the insurer having regard to the reasonable expectations of the parties; (4) an interpretation that will result in either a windfall to the insurer

or an unanticipated recovery to the insured is to be avoided; (5) coverage provisions are to be construed broadly, while exclusion clauses are to be construed narrowly; (6) the contract of insurance should be interpreted to promote a reasonable commercial result; and (7) a clause should not be given effect if to do so would nullify the coverage provided by the policy. These principles are to be applied rigorously in the interpretation of insurance contracts:

> [66] The following principles of interpretation for insurance contracts cited by the appellants in their factum are well settled in Canadian law and are not disputed by Chicago Title:
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> • The court must search for an interpretation from the whole of the contract and any relevant surrounding circumstances that promotes the true intent and reasonable expectations of the parties at the time of entry into the contract;
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> • Where words are capable of two or more meanings, the meaning that is more reasonable in promoting the intention of the parties will be selected;
>
> • Ambiguities will be construed against the insurer having regard to the reasonable expectations of the parties;
>
> • An interpretation that will result in either a windfall to the insurer or an unanticipated recovery to the insured is to be avoided;
>
> • Coverage provisions are to be construed broadly, while exclusion clauses are to be construed narrowly;
>
> • The contract of insurance should be interpreted to promote a reasonable commercial result; and
>
> • A clause should not be given effect if to do so would nullify the coverage provided by the policy.
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> See e.g. *Amos v. Insurance Corp. of British Columbia, [1995] 3 SCR 405*, 1995 CanLII 66 (SCC), at para. 19; *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 SCR 551, 2000 SCC 24 (CanLII), at paras. 67-71; *Derksen v. 539938 Ontario Ltd.*, [2001] 3 SCR 398, 2001 SCC 72 (CanLII), at para. 49;*Zurich Insurance Co. v. 686234 Ontario Ltd.*, 2002 CanLII 33365 (ON CA), 62 O.R. (3d) 447 (C.A.), leave to appeal refused, 189 O.A.C. 197 (note), at paras. 23-28; *TS.T. and G.M. v. Lanark Mutual*, 2010 ONSC 3623 (CanLII), 86 C.C.L.I. (4th) 69, at para. 26;

and, *Sam's Auto Wrecking Co. Ltd. (Wentworth Metal) v. Lombard General Insurance Company of Canada*, 2013 ONCA 186 (CanLII), 114 O.R. (3d) 730, at para. 37.

> [67] Responsible consumers purchase insurance policies for indemnification. Canadian courts have developed these fundamental principles of interpretation as a means of ensuring that these consumers are treated fairly and that their reasonable expectations are protected. The principles are to be applied rigorously in the interpretation of insurance contracts. It is not sufficient, as the motion judge did in this case, to cite the principles and then move on to an interpretation of a contract of insurance that is free from any analysis of how the principles apply to the contract in issue.

More recently, see *Nodel v Stewart Title Guaranty Company*, 2017 ONSC 890 (CanLII) where the Court set out further principles applicable to interpreting insurance policies (aff'd *Nodel v. Stewart Title Guaranty Company*, 2018 ONCA 341 (CanLII)).

In particular, a clause that nullifies coverage will not be enforced; an interpretation that would nullify coverage altogether should therefore be avoided. Surrounding circumstances may be taken into account in interpreting the contract if the circumstances are objective background that were or ought reasonably to have been within the knowledge of both parties at or before the date of contracting. The factual matrix is less relevant for standard form contracts because the terms are not negotiated: "the contract is put to the receiving party as a take-it-or-leave-it proposition". However, factors such as the purpose of the contract and the industry in which it operated should still be considered

> [43] The principles that apply to the interpretation of an insurance policy are well-settled:
>
> (i) when the language of the policy is unambiguous, the Court should give effect to clear language, reading the contract as a whole;
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> (ii) when the language is ambiguous, the Court should rely on general rules of contract construction;
>
> (iii) in that regard, the contract of insurance should be interpreted to promote the reasonable expectations of the parties and a reasonable commercial result; and,

(iv) if there remain ambiguities, they are construed against the insurer − coverage provisions are interpreted broadly and exclusion provisions narrowly.

Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada, 2010 SCC 33, [2010] 2 S.C.R. 245, at paras. 22-24; *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842, at para. 66, leave to appeal dismissed, [2016] S.C.C.A. No. 39; *Amos v. Insurance Corp. of British Columbia,* 1995 CanLII 66 (SCC), [1995] 3 S.C.R. 405, 1995 CarswellBC 424, at para. 19; *Sam's Auto Wrecking Co. (c.o.b. Wentworth Metal) v. Lombard General Insurance of Canada*, 2013 ONCA 186, at para. 37.

[44] A clause that nullifies coverage will not be enforced. An interpretation that would nullify coverage altogether should therefore be avoided: *Sam's Auto Wrecking Co*., at para. 37; *MacDonald*, at para. 66; *Amos*, CarswellBC at para. 19; *Cabell v. The Personal Insurance Company*, 2011 ONCA 105 (CanLII), at paras. 14-17.

[45] Surrounding circumstances may be taken into account in interpreting the contract if the circumstances are objective background that were or reasonably ought to have been within the knowledge of both parties at or before the date of contracting: *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 SCR 633, 2014 SCC 53 (CanLII), at paras. 50, 58.

[46] The factual matrix is less relevant for standard form contracts because the terms are not negotiated: "the contract is put to the receiving party as a take-it-or-leave-it proposition": *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, [2016] 2 SCR 23, 2016 SCC 37 (CanLII), at para. 28. However, factors such as the purpose of the contract and the industry in which it operates should still be considered: *Ledcor*, at para. 31, citing *Sattva*.

In *Joroga Real Estate Ltd. v. State Farm Fire and Casualty Company*, 2019 ONSC 2730 (CanLII), the court held that where the language of an insurance policy is unambiguous the Court should give effect to the clear language, reading the insurance contract as a whole. However, where the wording is ambiguous, Courts must prefer an interpretation drawn from the whole of the contract and any material surrounding circumstances that give effect to the reasonable expectations of the parties at the time of contracting, provided that such reasonable interpretation is supported by the language of the policy. The interpretative process should avoid an interpretation that will result in a windfall to the insured of unexpected coverage or a windfall to

the insurer of less expansive coverage than the premium contemplated. The courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk, or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract:

> [51] This summary judgment motion involves a coverage dispute. Where the language of an insurance policy is unambiguous, the Court should give effect to the clear language, reading the insurance contract as a whole: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551 at para. 71. However, where the wording of the insurance contract is ambiguous, as the Plaintiff here contends, Courts must prefer an interpretation drawn from the whole of the contract and any material surrounding circumstances that gives effect to the reasonable expectations of the parties at the time of contracting, provided that any such interpretation is supported by the language of the policy: *Progressive Homes Ltd. v. Lombard General Insurance Company of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, at para. 23; *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co*., 1979 CanLII 10 (SCC), [1980] 1 S.C.R. 888 at p. 901; *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842, 127 O.R. (3d) 663 at para. 66.
>
> [52] The interpretative process should avoid an interpretation that will result in a windfall to the insured of unexpected coverage or a windfall to the insurer of less expansive coverage than the premium contemplated: *MacDonald*, at para. 66. As Estey J. stated in *Consolidated-Bathurst,* at pp. 901-902: "…the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract."

Authorities

224981 Ontario Inc. v Intact Insurance Company, 2016 ONSC 642 (CanLII)
Garneau v. Industrial Alliance Insurance and Financial Services Inc., 2015 ONCA 234 (CanLII)
Derksen v. 539938 Ontario Ltd., [2001] 3 SCR 398, 2001 SCC 72 (CanLII)
MacDonald v. Chicago Title Insurance Company of Canada, 2015 ONCA 842 (CanLII)
Amos v. Insurance Corp. of British Columbia, [1995] 3 SCR 405, 1995 CanLII 66 (SCC)
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S.T. and G.M. v. Lanark Mutual, 2010 ONSC 3623 (CanLII)
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Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co., [2016] 2 SCR 23, 2016 SCC 37 (CanLII)
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Joroga Real Estate Ltd. v. State Farm Fire and Casualty Company, 2019 ONSC 2730 (CanLII)