Court of King's Bench of Alberta

Citation: Paramount Resources Ltd v Chubb Insurance Company of Canada, 2023 ABKB 627

Date: 20231108
Docket: 1801 08113
Registry: Calgary

Between:

Paramount Resources Ltd

Plaintiff

- and -

Chubb Insurance Company of Canada, Lloyd's Underwriters, and Royal and Sun Alliance Insurance Company of Canada

Defendants

Reasons for Judgment

of the

Honourable Justice J.T. Eamon

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I Introduction

[1] The plaintiff Paramount, an oil and gas company, claims against the defendants, who are Paramount's pollution liability or excess insurers, for coverage under the insurance policies arising from a release of pollutants from a LVP (low vapour pressure) pipeline.

[2] The pipeline was part of the Resthaven facility near Grand Cache, Alberta, in which Paramount held a ½ interest. The facility included the Conoco Resthaven gas plant (or the 01-36 plant), the LVP pipeline, which ran from the 01-36 plant to another gas plant (known as the 08-11 plant), and sales tanks at the 08-11 plant where the pipeline output was held for sale.

[3] The other owner of the Resthaven facility, also holding a ½ interest, was ConocoPhillips (BRC) Partnership ("Conoco"). Paramount and Conoco agreed to terms of ownership and operation of the Resthaven facility under the Construction, Ownership and Operating agreement for the Resthaven facility dated October 1, 2005 ("CO&O").

[4] Conoco operated the Resthaven facility pursuant to the CO&O.

[5] The LVP pipeline was used to transport low vapour pressure condensate, a product derived from natural gas production in the Resthaven gas field that was received and partially treated at the Resthaven gas plant, to the sales tanks at the 08-11 plant.

[6] The parties to this action agree that there was an unexpected and unintentional discharge, release or escape of pollutants into or upon land from the LVP pipeline (the "release") that commenced on or about April 21, 2016. The pipeline was leaking condensate into the environment.

[7] The volumes of condensate entering and exiting the LVP pipeline were metered by highly accurate meters (known as Coriolis meters), which had been recently installed and became operational on April 21, 2016. Conoco became aware of volume data anomalies showing significantly less condensate was exiting the LVP pipeline than entering it. The pipeline is buried in the ground within the pipeline right of way for most of its run, so it could not be visually inspected for leaks. Conoco conducted a pressure test on the pipeline on May 6-7, 2016 to see if the LVP pipeline was leaking. The pipeline failed the test.

[8] The volume and pressure data anomalies, separately or together, would have led a reasonable operator to shut in the pipeline unless and until the anomalies could be clearly and readily attributed to some reason other than a leak in the pipeline. Conoco believed other explanations might account for the anomalies and continued to operate the pipeline. Conoco visually monitored the pipeline right of way for the appearance of hydrocarbons on its surface.

Conoco continued in this fashion while discussions and tests continued in an attempt to explain the ongoing data anomalies and troubleshoot the Coriolis meters.

[9] At 3:40 pm on June 9, 2016, Conoco personnel inspecting the pipeline right of way, saw a small patch of hydrocarbon staining thereon in a location where the pipeline right of way followed along a ridge or hilltop. Soon after, a Conoco supervisor who was called to the scene found extensive hydrocarbon contamination at the base of the slope and a nearby wetland off of the right of way. Conoco notified the Alberta Energy regulator ("AER") of the spill on June 9, 2016 and Paramount shortly thereafter. The parties agree that Conoco personnel observed the released substances on June 9, 2016.

[10] The LVP pipeline had released hundreds of thousands of litres of condensate into the environment. AER ordered Conoco to clean it up. Conoco called on Paramount under the CO&O to pay ½ the cost of the clean up expenses. Paramount refused.

[11] Conoco commenced arbitration proceedings under the CO&O to recover its claim against Paramount in May, 2017. Paramount defended. As time passed, Paramount's exposure to its alleged share of the clean up costs, with interest and Conoco's legal costs of the arbitration, exceeded $30,000,000. A few months before the scheduled hearing date, Paramount and Conoco settled the claim for a lesser amount.

[12] The defendants acknowledged that the commencement of the leak of the condensate from the LVP pipeline was an accidental release of contaminants, but denied coverage in December 2017 because the release was not "detected by any person" within 720 hours of the commencement of the release. This detection was a required element of coverage under their respective insurance policies. Additionally, Chubb as the primary insurer refused to defend Paramount in the arbitration.

[13] The insurers later refused to indemnify Paramount for the arbitration settlement. Paramount seeks judgment against the insurers for the amount of the settlement up to the available coverage under the insurance policies.

[14] The claim primarily turns on the meaning of "detected by any person" in the policies.

[15] Paramount argues that Conoco detected the release within 720 hours of the commencement of the release on April 21, 2016, therefore Paramount is entitled to coverage.

[16] The insurers respond that the release was not detected until Conoco personnel observed the hydrocarbon contamination and subjectively concluded the pipeline was leaking on June 9, 2016. The insurers submit that before that date, Conoco personnel were "blind" to the warning signs that the pipeline was leaking and therefore had not detected the release.

[17] The insurers submit the following additional arguments that they are not liable under the policies for the loss:

(a) They allege Paramount admitted in the arbitration with Conoco that Conoco had not detected the release until June 9, 2016 – long after the detection period expired. Paramount should be bound by that admission in this action. This argument primarily turns on the nature of the alleged admission and whether to give weight to it.

(b) They allege Conoco admitted on previous occasions in a regulatory investigation conducted by AER, that Conoco had not detected or discovered the leak until June

9, 2016. The insurers allege AER made a similar finding in the regulatory proceeding. They say these admissions and findings bind Paramount in this action, such that it cannot assert that Conoco detected the release at any time earlier than June 9, 2016. These arguments primarily turn on the insurers' argument that Conoco acted as Paramount's agent in the regulatory investigation and therefore Paramount is bound by representations by, and findings against, its agent.

(c) Paramount must prove that it would have been found liable for Conoco's claim in the arbitration, not merely that it settled the claim. Paramount has not proved this required element. Instead, it is taking positions on the key issues in the present insurance action that are contrary to the defences it asserted in the Conoco arbitration.

(d) In any event, Paramount's settlement of the claim was unreasonable.

(e) If Paramount is correct that Conoco detected the leak before June 9, 2016, then Conoco's negligent delay in failing to mitigate the loss should be attributed to Paramount, placing Paramount in breach of its obligations as an insured to mitigate the loss after it occurs. This argument also turns primarily on the agency argument that Conoco's acts as facility operator should be attributed to Paramount as a facility owner.

(f) A number of other related submissions dealt with under the heading Other Matters in these reasons.

[18] The parties agreed the claim was suitable for a summary trial.

[19] I am satisfied the issues are suitable for resolution in a summary trial.

[20] For the reasons set out herein, I allow Paramount's claim.

[21] These reasons comment adversely on Conoco's operation of the LVP pipeline. Conoco is not a party to this action, has not had an opportunity to respond, and my findings pertain only to the dispute between Paramount and its insurers.

II Background of the loss

[22] The Resthaven production field and the Resthaven gas plant are located in a remote area of Alberta. The right of way in which the LVP pipeline runs from the 01-36 plant to the 08-11 plant is about 10 or 11 km in length. The terrain is hilly or mountainous and forested. The leak in the pipeline occurred at a point where it runs along a ridge or hill top. An unnamed creek runs along the base of the slope in this area. This creek is a tributary of Webb Creek, which is itself a tributary of the Simonette River.

[23] The parties agree that in 2016 there was an unexpected and unintentional release of condensate from the LVP pipeline, that commenced "on or about" April 21, 2016.

[24] From April 21, 2016 through April 30, 2016, the Coriolis meters on the LVP pipeline generated consistent data indicating a significant shortfall from the amounts of condensate pumped into the pipeline at the 01-36 plant compared to the amounts received at the outlet at the 08-11 plant about 11 km distant. Conoco personnel became aware of these data anomalies when

they performed a meter reconciliation of data up to and including April 30th. Owing to concerns the pipeline could be leaking, on May 6, 2016 Conoco conducted a pressure test where the pipeline was pressured to 950 kPa and left overnight. On May 7, 2016 Conoco personnel observed that the pipeline pressure was 250 kPa, indicating a significant loss of pressure during the night.

[25] Conoco's personnel did not recognize the data anomalies as proof of a leaking pipeline. The Coriolis meters had been recently installed (April 17th) and proved on April 20, 2016. They thought there must be a problem with this new equipment. They suggested other explanations for the anomalies and continued to use the LVP pipeline to ship the hazardous condensate. The field staff were nervous that the pipeline could be leaking.

[26] Although Conoco did not shut in the pipeline, it stepped up the frequency of right of way inspections to monitor for leaks, consistent with Conoco's historical method of leak monitoring for this pipeline. Conoco believed that if the pipeline actually was leaking, hydrocarbons would appear on the right of way. There is no evidence in this summary trial (to which Conoco is not a participant) that Conoco had or did not have information about the sub-surface soil or other conditions that may inform one of where the hydrocarbons likely would seep or appear once released from the confines of the pipeline.

[27] The Coriolis meters continued to record anomalies between the inlet and outlet volumes of condensate in the LVP pipeline.

[28] During one of these right of way inspections, on June 9, 2016 at around 4 pm, Conoco employees observed a hydrocarbon stain on a small patch of the LVP pipeline right of way. Shortly after, a senior employee walked off the right of way and saw hydrocarbons at the base of the slope and adjacent waterway. Conoco commenced an emergency response plan and reported the matter to AER.

[29] Conoco did not tell AER or Paramount about the data anomalies or the issue whether the LVP pipeline was leaking before June 9, 2016.

[30] Post-leak investigations showed that the leak occurred in a portion of the pipeline running along the top of a ridge. Some of the escaping hydrocarbons migrated east from the point of the leak through the subsurface downhill about 90m to the unnamed creek at the base of the slope and eventually into Webb Creek. An entire low-lying area of Webb Creek dammed off by beavers was saturated with condensate, with heavy staining and pooling in the water and on the bed and shore. There was some evidence that small amounts of the condensate eventually entered the Simonette River. Software analysis indicated the affected area covered 2.8 million square metres. The release caused significant loss and damage to vegetation, wildlife, waterways, and public land.

[31] Conoco later determined, using various business records, that the released volume of condensate was approximately 379,400 litres. The cost to remediate the environment was in the tens of millions of dollars.

[32] Analysis of records and the failed portion of the pipeline indicated the failure was caused by gradual bacterial corrosion, which had slowly occurred over a period of many years. It was theorized that the bacterial contamination was introduced when the pipeline was pressured tested using untreated water in 2006 or 2007 and exacerbated by periods of inactivity in using the pipeline.

III The insurance policies

[33] The defendants each issued an insurance policy to the Plaintiff.

[34] Chubb's policy was the primary policy. The Lloyd's policy was excess to the Chubb policy, and RSA's policy was excess to the Chubb policy and Lloyd's policy.

[35] Pursuant to the Chubb policy, Paramount was covered for those sums that the insured becomes legally obligated to pay as compensatory damages because of "property damage" caused by a "pollution incident" (and subject to the other terms, conditions and exclusions set out in the policies). The conditions included that the insured's responsibility to pay damages must be determined in a "suit" (including an arbitration proceeding to which the insured must submit or submits with the insurer's consent) on the merits in the "coverage territory" (Canada) or in a settlement that the insurer agrees to. By endorsement, coverage was extended to clean up costs on property owned, rented or occupied by, loaned to or used by, or in the care, custody or control of the insured.

[36] The Chubb policy further undertook to defend any suit seeking those compensatory damages. Defence costs were included in the policy limits. Chubb could investigate and settle any claim or suit in its discretion. Chubb's obligation to defend ended when it used up the applicable limit of insurance.

[37] The Chubb policy definition of a "pollution incident" included a requirement that the "pollution incident" be detected within 720 hours after the commencement of the emission, discharge, release or escape of pollutants, as follows (the "Endorsement"):

> "**Pollution Incident**" means an unexpected and unintentional emission, discharge, release or escape of pollutants into or upon land, the atmosphere, or any watercourse or body of water, provided:
>
> (1) that such emission, discharge, release or escape results in "**environmental damage**";
>
> (2) that such emission, discharge, release or escape is detected by any person within 720 hours after commencement of such emission, discharge, release or escape;
>
> (3) that the insured mails or delivers to us notice, in writing, or such emission, discharge, release or escape not later than 2160 hours following the discovery of such emission, discharge, release or escape as described in paragraph (2) above. However, if the insured is a non-operator, such notice must be delivered to us not later than 2160 hours following notification to the Insured by the operator of such emission, discharge, release or escape; and
>
> (4) that such emission, discharge, release or escape does not occur in a quantity or with a quality that is routine or usual to the lnsured's operation.
>
> The entirety of any such emission, discharge, release, or escape shall be deemed to be one "**pollution incident**".
>
> [...]

> Pollutants mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapour, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.
>
> [...]
>
> As a condition precedent to our obligation under this policy, there must be strict conformance with the requirements specified above, regardless of whether we are prejudiced by the failure of these requirements to be met.
>
> (Emphasis in original).

[38] With respect to the definition of "pollution incident" the phrase "environmental damage" is defined by the policies as:

> **"Environmental damage"** means the injurious presence in or upon land, the atmosphere, or any watercourse or body of water of solid, liquid, gaseous, or thermal contaminants, irritants, or pollutants.

[39] The insurers' amended statement of defence and the parties' Agreed Statement of Facts provides:

> The Lloyd's Policy and the RSA Policy were at all times subject to the same terms, definitions, exclusions and conditions (except as to the amount of the premium, the amount of coverage, and the limits of liability) contained in the Chubb Policy.

[40] There are wording differences among the Chubb, Lloyd's and RSA policies, some of which might be significant. For example, the RSA policy contains two pollution liability exclusions that might or might not be important. The RSA policy also does not incorporate any obligation to defend from the Lloyd's policy, and contains a specific definition of loss slightly different than the Chubb policy.

[41] It is important to understand, that the defendants are sophisticated and competently represented, and there may be agreements or other circumstances among the defendants of which the Court is not aware that have led them to make the foregoing admissions in their pleadings and the Agreed Statement of Facts. I have proceeded to address the issues raised by the parties in this summary trial on the specific basis and finding in accordance with the Agreed Statement of Facts, that the terms of the Chubb policy (with the limited exceptions pled in the amended statement of defence and Agreed Statement of Facts) reflect the terms of the Lloyd's policy and the RSA policy.

IV The CO&O and Conoco's role as facility operator

[42] Conoco was the designated operator under the CO&O and was responsible for managing and operating the facility. The costs to remediate and repair were for the Joint Account. The contract obliged Paramount to bear ½ of these expenses. These expenses were not allocated under the Joint Account to the working interest owners in the event they were a direct result of or directly attributable to the gross negligence of the operator, or its affiliates, directors, officers, consultants, agents, contractors or employees. Gross negligence was a defined term under the CO&O. I set out greater detail of the CO&O's provisions supporting these conclusions, and pertaining to the parties' relationship, in the following paragraphs.

[43] The CO&O incorporates the template 1999 Petroleum Joint Venture Association Model Construction, Ownership and Operating Agreement including Operating Procedure, as modified by certain express elections and modifications made by Paramount and Conoco to the Operating Procedure.

[44] Pursuant to clause 601 of the CO&O, the Joint Owners designated Conoco as the Operator and Conoco accepted such designation. Under clause 603, the interests of the owners in the facility or its separate components are held in trust by the operator for the owners subject to the provisions of the CO&O.

[45] Pursuant to clause 201 of the Operating Procedure, the Joint Owners would form an Operating Committee composed of their duly appointed representatives. Under the CO&O modifications, the parties had equal votes on the committee and disputes would be resolved under the mediation and arbitration provisions of the CO&O.

[46] Pursuant to clause 203 of the Operating Procedure, the Operating Committee shall, in accordance with the terms of the CO&O, exercise overall supervision and control of and shall determine all matters of importance relating to Joint Operations (as defined in the Operating Procedure), except for those matters:

> (i) designated in the Operating Procedure to be within the exclusive jurisdiction and control of the Operator; or
>
> (ii) excluded in the Operating Procedure from the jurisdiction and control of the Operating Committee.

[47] Pursuant to clause 401 of the Operating Procedure:

> 401. Control and Management of Joint Operations
>
> Operator shall consult with the Operating Committee from time to time with respect to decisions to be made for the conduct of Joint Operations, and Operator shall keep the Owners informed in a timely manner with respect to important or significant Joint Operations. Operator is hereby delegated the management of the Facility on behalf of the Owners and shall, subject to the direction of the Operating Committee, conduct or cause to be conducted all Joint Operations diligently, in a good and workmanlike manner, in accordance with good oil field and environmental practice, the Regulations and the terms of this Agreement. In the absence of specific instructions from the Operating Committee, Operator shall conduct or cause to be conducted, all Joint Operations, as would a prudent operator under the same or similar circumstances. Without limiting the generality of any of the foregoing provisions of this Clause, Operator shall conduct and oversee all Joint Operations, and in particular shall:
>
> (a) make and file all reports as required by governmental authorities relating to Joint Operations;
>
> (b) maintain in the Province of Alberta complete and accurate accounts, books, records and documents in relation to the Facility and Joint Operations and provide each Owner with reasonable access thereto;

(c) provide Owners with reports as required and on a frequency and containing the information about Joint Operations as directed by the Operating Committee;

(d) on behalf of the Owners, complete all applications and obtain all licenses and approvals required by Regulations to conduct Joint Operations;

(e) promptly pay and discharge all expenses and taxes (other than income taxes) incurred in connection with Joint Operations and keep the Facility free and clear from all adverse claims and liens occasioned by Joint Operations, except claims or liens created under or pursuant to this Agreement or being contested in good faith;

(f) acquire and maintain all necessary surface rights, Material and services required to conduct Joint Operations and where Operator deems appropriate, use Its own equipment and facilities to serve such operations, subject to the Accounting Procedure;

(g) procure and maintain for the Joint Account the insurance set forth in the Appendix titled "INSURANCE" and use reasonable efforts to require contractors and subcontractors to procure and maintain such insurance as Operator deems necessary;

(h) comply with and, where applicable, require its agents, contractors and their sub contractors to comply with Regulations governing Joint Operations;

(i) subject to Clause 402, subcontract such portion of Joint Operations as Operator deems appropriate;

(j) furnish each Owner as soon as practicable with written notice of:

(i) physical damage to the Facility in excess of Operator's expenditure limit as provided in the Accounting Procedure; and

(ii) any environmental, health, safety or other occurrence which is required to be reported under any Regulation and which either requires remediation costs exceeding the single expenditure limit set forth in the Accounting Procedure or could result in a punishable offence under the Regulations;

(k) extend to each Owner, at that Owner's sole risk and expense, the right to examine and inspect the Facility at all reasonable times in the presence of a representative of Operator and after giving Operator reasonable notice, except for portions of the Facility which are proprietary to a licensor to the extent that such licensor expressly prohibits examinations and inspection by such Owner; and

(l) prepare and submit to the Operating Committee for approval the Forecasts provided for in Clause 605;

provided further that, during Initial Construction of the Facility or any Enlargement or Modification, Operator shall also:

(m) carry out or cause the construction of the Facility and any Enlargement or Modification;

> (n) contract with such Persons as Operator may deem appropriate for the performance of such work or undertaking, or any portion thereof;
>
> (o) supervise all work related to such construction;
>
> (p) acquire all Material required for such construction and the commencement and continuation of Joint Operations;
>
> (q) supervise and have direct charge of all matters regarding design, construction and installation of the Facility and any Enlargement or Modification; and
>
> (r) provide Owners with reports as required and on a frequency, and containing the information about construction, a Modification or an Enlargement as directed by the Operating Committee;

[48] Clause 404 of the Operating Procedure states that the Operator is an independent contractor in conducting the Joint Operations (as defined in the Operating Procedure). The Operator shall determine the number of employees and contractors respecting its operations, their selection, their hours of labour and their compensation thereunder. All employees and contractors used in the operations shall be the employees and contractors of the Operator.

[49] Clause 305 of the Operating Procedure contemplates the operator is in possession and control of the facility, funds, records and other materials and substances.

[50] Pursuant to clause 505 of the Operating Procedure, each of Paramount and Conoco are responsible for their proportionate share of environmental liabilities arising in relation to the Joint Operations.

[51] Pursuant to clause 601 of the Operating Procedure, Conoco would set up a joint account for administering costs and expenses incurred by Conoco in connection with the Joint Operations (as defined in the CO&O) of the Facility. Pursuant to clause 602 of the Operating Procedure, if a Joint Owner failed to pay any of the costs and expenses incurred for the joint account, Conoco may charge "compound interest, as computed monthly... at the rate of two percent (2%) per annum higher than the rate designated as the prevailing prime rate for Canadian commercial loans by the principal Canadian charted bank used by the Operator" on the unpaid amount.

[52] Pursuant to clause 503 of the Operating Procedure, except as set out in the CO&O, all liabilities and indemnities arising from Joint Operations would be for the joint account and would be borne by the Joint Owners in the proportion of their interest in the Facility (which was 50% for each of Conoco and Paramount).

[53] Pursuant to clause 501 of the Operating Procedure, Conoco would not be liable to the Joint Owners for any loss, expense, injury or damage except when and to the extent that such loss was "a direct result of or is directly attributable to the Gross Negligence of Operator or its Affiliates, directors, officers, consultants, agents, contractors or employees".

[54] Pursuant to clause 101(y) of the Operating Procedure, "Gross Negligence" is defined as follows:

> (i) a marked and flagrant departure from the standard of conduct of a reasonable person acting in the circumstances at the time of the alleged misconduct; or

(ii) such wanton and reckless conduct or omissions as constitutes in effect an utter disregard for harmful, foreseeable and avoidable consequences.

[55] Pursuant to clause 1102 of the Operating Procedure nothing therein shall be read or construed as creating a partnership between Paramount and Conoco and each their liabilities under the CO&O and Operating Procedure shall be several and not joint or joint and several.

[56] Insurer's counsel read in from the discovery of Paramount's former corporate operating officer, that Paramount expected Conoco, as a major oil and gas producer, to operate the facility consistent with the operating agreement and in accordance with good oilfield practice. Paramount did not, through the operating committee or otherwise, inquire into the maintenance or monitoring systems for the LVP pipeline. I accept this evidence.

[57] In submissions, counsel for the insurers were critical of Paramount's conduct as a member of the operating committee, effectively asserting it was complacent with respect to the operation of the LVP pipeline. To the extent they suggested Paramount itself was negligent in the operation of the pipeline for failing to oversee or supervise its operation, I do not accept their position.

[58] Paramount's reliance on Conoco was reasonable. Paramount did not know, and there was no circumstance by which it ought to have known, of the various operating deficiencies that came to light after June 9, 2016 or that Paramount later alleged in the arbitration proceedings against Conoco:

(a) Conoco is a major producer with extensive oil and gas operations. Conoco's personnel supervising the operation of the pipeline were long time and experienced employees. Paramount generally expected that Conoco would operate the facility with the necessary degree of prudence, as required under the CO&O and the extensive regulation of pipeline operations.

(b) There was no evidence of any corrosion issues in the Resthaven area generally or relating to the LVP pipeline. There was no evidence suggesting Paramount ought to have been aware of the deficiencies in Conoco's corrosion mitigation or monitoring practices.

(c) There was no evidence of any historical issues with the maintenance or operation of the LVP pipeline of which Paramount ought to have been aware, except that Paramount learned in December 2015 though receiving a mail in ballot to approve an expenditure on the LVP pipeline, that Conoco was proposing to install metering equipment to bring the pipeline into compliance with CSA Standard Z662 as required under Alberta law. Paramount agreed to the necessary expenditure to do so.

(d) Prior to April 2021, the pipeline was equipped with sufficient metering equipment to permit manual mass balancing (as defined in Part V below) to monitor for leaks. There is nothing that would have caused Paramount to inquire into whether Conoco was actually performing manual mass balancing in any structured way or at all.

(e) Although Paramount was surprised when it received the mail in ballot to learn that the LVP pipeline required additional metering equipment to bring it into compliance with the recently revised CSA Standard Z662, the solution proposed

by Conoco appeared normal and would not have provided any reason to inquire further into the leak detection systems or protocols.

(f) There is no evidence Paramount was aware or ought to have been aware of the various operating deficiencies which Paramount later alleged against Conoco or of any events that ought to have put it on inquiry into Conoco's operating or maintenance practices relating to the LVP pipeline.

V Regulatory regime

[59] The LVP pipeline was a liquid hydrocarbon pipeline regulated under the *Pipeline Act*, RSA 2000, c P-15. Pursuant to section 9 of the *Pipeline Regulation*, AR 91/2005 (the "*Regulation*"), the latest published edition of several codes or standards issued by the Canadian Standards Association (CSA) apply to pipelines.

[60] These codes include CSA Standard Z662, *Oil and Gas Pipeline Systems*, which sets out the minimum requirements for the design, construction, testing, operation, maintenance, repair and leak detection of pipelines (*Regulation*, section 9(3)). The leak detection requirements contained in Annex E of CSA Standard Z662 are mandatory for liquid hydrocarbon pipelines (*Regulation*, section 9(4)).

[61] Annex E requires the operator to develop, implement and periodically evaluate a leak detection strategy for its pipeline. The purpose of the strategy is to ensure methods are in place that will contribute to the certain and timely detection of a service fluid release in order to support and inform appropriate pipeline control and emergency response actions. The strategy "should" include a pipeline leak detection system with a continuous monitoring capability. The leak detection strategy and systems "should" be integrated into pipeline control and emergency response procedures (Annex E, para E.1.2).

[62] A leak detection system "shall" be implemented using one or a combination of various methodologies. An operating company "shall" evaluate applicable leak detection methodologies to determine their effectiveness for the pipeline under consideration and how various methodologies can complement each other. This evaluation "shall" be documented. (Annex E, para E.1.3).

[63] Where direct leak detection methods (a leak detection approach that uses one or more methods that directly sense leaked or leaking hydrocarbons) are used, the assessment "shall" include any factors that might impact the performance of the system, which "can" include the probable path of hydrocarbons, soil type, water content, depth of cover of the pipe, and type of product (Annex E, para E.3.2). Examples of direct methods are liquid sensing, vapour sensing, acoustic emissions sensing, and "visual methods" (Commentary to para E.3.2).

[64] In respect of computational leak detection methods (a method that relies on measurement of process variables from which an inference of a leak is drawn), the operator must establish leak detection thresholds based on expected hydraulic conditions that meet the sensitivity and reliability targets of the internal leak detection system (Annex E, para E.3.3.1). Leak detection thresholds "shall" be set to the lowest practical values having regard to the considerations outlined in Annex E, para E.3.3.2. Leak detection system performance and alarm limits must be appropriate for the characteristics of the individual pipeline or particular segment thereof (Annex E, para E.3.4.1).

[65] The leak detection system must provide clear alarms to alert the operator of a possible release. Further:

> A leak detection alarm shall result in initiation of a procedure to evaluate the leak condition and to determine the cause of the alarm. Leak alarm evaluation shall be integrated into pipeline control procedures. The leak alarm evaluation shall lead to control action to mitigate the leak (such as pipeline shutdown) unless such deviations can be clearly and readily explained.
>
> (Annex E, para E.3.4.2. underlining added).

[66] If the volume of product coming out of a hydrocarbon pipeline is less than the volume going in, the anomaly might indicate a leak. A small imbalance for a short period of time might not be material. I accept the Plaintiff's expert evidence (from Mr Scott) that Annex E requires operators to establish acceptable material balances based on normal operating conditions, and an imbalance above the threshold value should result in a shutdown unless the deviation can be readily and clearly explained. According to Annex E, para E.2 (Specific definitions), material balance is a mathematical procedure based on the laws of conservation of mass and fluid mechanics, which is used to determine if a release of service fluid has occurred on a pipeline system. This is also referred to as a mass balance.

VI The operation of the LVP pipeline and evidence of the release

[67] The main coverage issue in this case is whether the release was detected within 720 hours of its commencement.

[68] It is necessary to determine when the release commenced to ascertain the time frame in which it must have been detected, then to decide what Conoco knew or believed and when, in order to decide whether the insurance coverages apply.

(a) Date that the release commenced

[69] The insurers' counsel asserts in their brief, that the parties agree the release started "April 21, 2016, if not earlier". There was no elaboration of what was meant by "if not earlier".

[70] The insurers' evidence includes a report of a consulting engineer opining that the release began on April 9, 2016 and that the leak volume was about 1/3 greater than Conoco's historical estimates on which the parties and AER relied. Conversely, there is also evidence that Paramount had previously retained an expert who had calculated that the leak commenced on or about May 16, 2016.

[71] Paramount's counsel accurately described the parties' agreement in its brief, that the release of pollutants from the LVP pipeline commenced "on or about April 21, 2016".

[72] The parties did not address the duration contemplated by their agreement to a date "on or about" April 21, 2016. The usual, objective meaning of this phrase is that the date is approximate and usually suggests that the potential variance between the approximate date and actual date is immaterial.

[73] The pipeline was not active during March 2016 and through to either April 1, 2016 or April 9, 2016. The pipeline then became active until April 14, when the installation of the Coriolis meters commenced. Conoco again began using the pipeline for its ordinary purpose on

April 21, 2016. The insurers' engineering consultant prepared a report acknowledging a possibility that the corrosion developed into a leak during the period of inactivity and that up to about 4 M^3 could have leaked out during the period of inactivity. However, he discounted the reliability of such estimate. I do not accept this as evidence on the balance of probabilities that the pipeline began to leak during the period of inactivity.

[74] The same report opines that a steady imbalance of condensate - which is indicative of a leak – was first apparent (in hindsight) around April 9, 2016.

[75] There is contradictory evidence in the record. In addition to the competing expert reports that were prepared for the insurers or Paramount during the events leading up to the denial of coverage, Conoco had conducted a review in connection with AER's regulatory investigation. It reviewed data from various sources (such as facility condensate production, meters and tank levels, tank volumes, condensate transfer records, and trucking tickets), and concluded the leak commenced April 21, 2016.

[76] The phrase "on or about" can include periods before and after the specified date. Depending what the parties meant by using the phrase "on or about", the question could be whether the leak commenced:

(a) April 9, 2016 (therefore, outside detection date is May 8, 2016).

(b) April 21, 2016 (therefore, outside detection date is May 20, 2016).

(c) A few days before April 21, 2016.

(d) A few days after April 21, 2016.

[77] It is unlikely the parties objectively contemplated their agreement for litigation purposes to include April 9th, given the structure of their submissions and the various concerns expressed in the records whether a reliable inference could be drawn from the various meters and gauges installed prior to the provision of the Coriolis gauges. Objectively speaking, they probably agreed to April 21, 2016 to avoid the debate whether to rely on Conoco's estimate, the insurers' estimate, or Paramount's estimate.

[78] Consequently, I find that "on or about April 21, 2016" means April 21, 2016 and any variation therefrom is immaterial.

[79] In any case, if the parties did contemplate that the leak started as early as April 9th, the possible contradiction in the evidence would not hinder the summary trial.

[80] Paramount submits that detection requires only that a person has observed or is aware of information indicative of a release. The Insurers submit detection requires that a person subjectively concludes or is actually aware that a release occurred or is occurring. Another possible alternative, suggested by Paramount's counsel during oral submissions, might be a person ought to know that the information of which they are aware is indicative of a release.

[81] Given the information of volume discrepancies and pressure loss known to Conoco personnel by the end of May 7, 2016 and the lack of evidence that Conoco personnel had reason to believe before April 30, 2016 that a release was occurring, the possible variation in the exact date the leak commenced is immaterial for the purpose of establishing when Conoco detected the release or the nature of Conoco's negligence during the events in question.

(b) Date that Conoco concluded there was a release

[82] The LVP pipeline was constructed in 2006 by Conoco's predecessor. It was equipped with pressure instruments and flow meters, and was connected to tanks with level gauges, that would permit Conoco as an operator to perform a manual mass balance comparing the quantities of product entering and exiting the pipeline.

[83] Although Conoco could perform such calculations as part of a leak detection strategy, it did not regularly or frequently did so. Instead, Conoco was (in its words) "flying the pipeline every two weeks to ensure that there are not any spills". In other words, the historical leak detection strategy consisted of right of way inspections every two weeks.

[84] In late 2015, Conoco issued a mail in ballot to Paramount seeking approval under the CO&O to install measurement of the liquids leaving the Resthaven gas plant through the LVP pipeline and arriving at the riser to the sales tank at the 08-11 plant. Conoco stated the purpose was to bring the pipeline into compliance with CSA Standard Z662 Annex E. To accomplish the required leak detection, measuring for the liquids would be installed so that calculations could be done continuously to verify there were no pipeline leaks while pumping.

[85] The proposed measurement equipment consisted of devices called Coriolis meters and associated equipment (for example, remote data acquisition equipment). The installation of these meters at each end of the pipeline allowed any flow imbalance to be directly measured with a high level of accuracy. Coriolis meters are renowned for their accuracy and reliability.

[86] Apart from Conoco's acknowledgment that using visual right of way inspection as the leak detection method was not compliant with CSA Z662, Mr Scott opined during cross-examination that a visual right of way inspection cannot be the primary means of leak detection in Alberta pipeline operations. I accept his evidence that applicable operating standards in Alberta did not, by early 2016 at the latest, permit visual inspections as the primary means of leak detection in Alberta.

[87] The pipeline went out of service on April 14, 2016 to install the new Coriolis metering equipment. The installation was completed on April 17, 2016 (except for some remote data acquisition equipment). The meters were calibrated and proven on April 20, 2016 and recording accurate information as of April 21, 2016.

[88] At that time, the outlet meter was not yet connected to an automatic data acquisition system, so imbalances had to be calculated manually. There is no evidence that Conoco had set threshold values for data anomalies in the condensate volumes entering and exiting the pipeline, or if it had, whether it applied them. If there were such values, the evidence suggests they were not applied.

[89] The first attempt by Conoco personnel to reconcile the new Coriolis meters was on April 30, 2016. Conoco operators noted a discrepancy between the condensate shipped and received through the LVP pipeline on that day of 7.82 m^3. This discrepancy was 33% of the product shipped in a 24-hour period.

[90] One of the Plaintiff's experts, Mr Scott, is a professional engineer with over 23 years experience in liquid hydrocarbon pipelines in both technical and management positions and specializes in pipeline control, pipeline hydraulics, hydraulic simulation systems, and software based pipeline leak detection systems.

[91] He opined that the discrepancy was material and indicated, or constituted an easily recognizable and clear alarm of, a large leak that under prudent operating practices required the operators to shut down the pipeline for intense investigation following logical step by step procedures. The investigation should have continued until the reasons for the loss could be fully explained. In his cross-examination, he likened this information to a "deafening" alarm.

[92] Conoco's operators did not provide evidence in the summary trial. Their log notes and interview statements with AER investigators were in evidence in the summary trial. These record that the operators held various theories that could explain the measured shortfall and disbelieved the data provided by the meters. These meters were newly installed, and Conoco believed there was an issue with the new equipment.

[93] However, the evidence does not indicate the operators had eliminated the concern that the pipeline could be leaking. They recognized there was an issue. They arranged to pressure test the pipeline. On May 6, 2016, Conoco pressured up the pipeline to 950 kPa and shut it in for the night. This pressure was at or a little less than the normal operating pressure of the pipeline. Conoco recorded that on May 7, 2016, the line had "bled down" to 250 kPa.

[94] Mr. Scott observed that the pressure test was an independent means of checking pipeline integrity. Although the records he reviewed did not provide the rate of pressure decrease, the low line pressure at the end of the test would have required, under good practices, that operator shut down the line and investigate to explain the reasons for the failed test.

[95] Conoco continued to use the pipeline to transport condensate. The operators continued to question the data (now both metered volumes and pressure data from the test) and suggest alternative explanations that could (not would) explain why the meters were out of balance and why the pressure had dropped.

[96] On May 9, 2016, Conoco's operators recorded further failed meter reconciliations. The meters remained about 30% out of balance. The reason for the imbalances were apparently not understood by the operators, as clearly demonstrated by an email of that day from the area foreman to an operations leader:

> … Let me know what you would like to try next and we will proceed. This system has not balanced from Day 1 when we started it."

[97] The recipient responded the same day:

> The 7 day average is showing 29.7% variance. When the pump was started today it took 26 min and 3.9m^3 at 01-36 before we could see any flow at 08-11.

[98] Mr. Scott characterized the anomaly at this point as overwhelming evidence of a leak.

[99] On May 19th, Conoco operators recorded a similar anomaly. On this occasion, the operators also recorded and entered in their log, the increase in the sales tank volume at the 08-11 plant recorded by the tank level gauge. This value was very similar to that provided by the Coriolis meter at the outlet end of the LVP pipeline, providing strong evidence that the Coriolis meter at the outlet was accurate.

[100] Mr. Scott opined that each of these occurrences were strong leak "triggers". The May 19th result, taken with the previous anomalies and observations, was (in his opinion) conclusive evidence of a leak.

[101] Conoco's operators did not see the situation that way. Discussions continued. One note in evidence records that even as late as May 25th, in a Conoco meeting:

> May 25th leadership meeting working with all parties on the LVP balance issue. Felt confident the line was not leaking. Has been thoroughly inspected.

[102] During this period, Conoco continued to inspect the pipeline right of way and did not observe indications of hydrocarbons on the surface. Mr Scott stated that this approach was mistaken, because it is generally known that when a pipeline failure occurs the product might travel underground and surface at the bottom a slope.

[103] As noted, until June 9, 2016 Conoco personnel had not conducted an inspection of the lands or waterbodies adjacent to the right of way.

[104] Conoco's operations leader in the area, with years of experience, stated to AER in a post-loss interview shortly after the event, that they had never observed product travelling underground in this manner without coming to the surface.

[105] Under Annex E, a proper external inspection plan must assess the probable path of the hydrocarbons and subsoil conditions (Annex E, para E.3.3). There is little evidence in the record of the summary trial that Conoco personnel did or did not have information of the subsurface conditions.

[106] In post-leak proceedings against Conoco, AER found that Conoco did not have a leak detection manual, fully in effect and implemented, for the LVP pipeline and did not have an established and effective leak detection programme for the LVP pipeline. The parties included these findings in their agreed statement of facts. In the absence of a contrary agreement, I can (and do) take these statements as evidence of the truth of their contents.

[107] In doing so, I am mindful that Conoco's post-incident report indicated it lacked an effective leak detection manual for the LVP pipeline. Further, it noted conflicting information existed as to the intent and status of the manual that was located; some personnel regarded it as in effect and others regarded it as a draft. Conoco observed there was no control of the document.

[108] Conoco's report is hearsay. It appears in the records for the summary trial and neither side objected to its admissibility. Given that Conoco could not demonstrate to the regulator that it had an effective manual, I have no difficulty in accepting AER's findings on this point set out in the parties' Agreed Statement of Facts.

[109] In short, the Conoco operators did not have an organized, documented approach to assessing evidence of leaks for the LVP pipeline. They did not have or express a decisive explanation for the volume anomalies detected and observed commencing April 30th and in early May, the pressure loss observed in the test of May 6-7, 2016, or known anomalies thereafter. Conoco personnel questioned the metering and pressure test data and believed the pipeline was not leaking. In the meantime, they continued to operate the pipeline and thereby transport hazardous materials through and adjacent to a remote and environmentally sensitive landscape at great risk of significant environmental damage.

[110] By doing so, the evidence in this trial (to which Conoco is not a party) demonstrates that Conoco did not comply with the mandatory requirements of Annex E for leak detection in the period following the commencement of the leak through June 9, 2016. It had not established

threshold values for the LVP pipeline. It relied on visual inspection of the pipeline right of way as the primary method of monitoring for leaks. It did not shut in the pipeline or bring it to a safe state when faced with mounting data indicating a leak, which it could not explain (to the required standard) was due to other causes.

[111] It is implausible that Conoco would have continued to operate the pipeline if its personnel subjectively believed it was leaking. The only plausible explanation for Conoco's actions was as they stated: they remained in disbelief that the Coriolis meters, which had been recently installed, were accurately set up.

VII Whether the loss was detected within 720 hours

[112] The primary issue is: when did Conoco personnel detect the release? Was it when the known data indicated the possibility of a leak? The date when the operator was legally required to behave as if the pipeline were leaking, or when Conoco ought to have known or had reasonable grounds to believe the pipeline was leaking having regard to the known data? When Conoco personnel subjectively concluded the pipeline was leaking? When the evidence shows on the balance of probabilities that the pipeline was leaking? This requires the Court to discern the meaning of "is detected by any person" as used in the insurance policies.

[113] In addition, the insurers argue that Paramount previously admitted in the arbitration that Conoco did not detect the release until June 9, 2016 and is bound by that admission. The issues here are the nature of the admission and whether Paramount is bound by it.

[114] The insurers further argue that to the extent Conoco previously asserted or represented that Conoco was not aware of the leak until long after its commencement, Paramount is bound by such positions and cannot take a contrary position in the present litigation. The insurers advance a similar argument arising from AER's regulatory findings. The issues here are mainly whether Conoco acted as Paramount's agent so as to bind Paramount to these admissions and findings, and the nature of the admissions and findings and the context in which they were made.

(a) Policy interpretation principles

[115] The insured bears the onus of first establishing that the loss falls within the coverage grant of the policies (***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co***, 2016 SCC 37, [2016] 2 SCR 23 at para 52). I agree with the insurers that the coverage conditions are not interpreted as if exclusion clauses (***Bassett & Walker International Incorporated v Export Development Canada***, 2017 ONSC 618 at para 54).

[116] The parties are in agreement about the applicable principles of contract interpretation.

[117] The goal is to "ascertain the objective intent of the parties through the application of legal principles of interpretation" (***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53, [2014] 2 SCR 633 at para 49). To this end, "the exercise is not to determine what the parties subjectively intended but what a reasonable person would objectively have understood from the words of the document read as a whole and from the factual matrix" (***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2017 ABCA 157 at para 79). Determining the intention of the parties is a "fact-specific goal" that requires a trial court to "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract" (***Sattva*** at para 47; ***Ledcor*** at para 27).

[118] The primary interpretive principle is that "where the language of the insurance policy is unambiguous, effect should be given to that clear language, reading the contract as a whole" (***Ledcor*** at para 49; ***Sabean v Portage La Prairie Mutual Insurance Co***, 2017 SCC 7 at para 12).

[119] Where, however,

> ... the policy's language is ambiguous, general rules of contract construction must be employed to resolve that ambiguity. These rules include that the interpretation should be consistent with the reasonable expectations of the parties, as long as that interpretation is supported by the language of the policy; it 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.
>
> (***Ledcor*** at para 50; also see ***Sabean*** at para 12).

[120] Only if ambiguity still remains after the above principles are applied can the *contra proferentem* rule be employed to construe the policy against the insurer (***Ledcor*** at para 51; ***Sabean*** at para 12). A "corollary of this rule is that coverage provisions in insurance policies are interpreted broadly, and exclusion clauses narrowly" (*ibid*). Also, where an insurance policy is ambiguous, courts "strive to ensure that similar insurance policies are construed consistently" (***Ledcor*** at para 40).

[121] 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" (***Ledcor*** at para 79).

[122] Surrounding circumstances (or the factual matrix) in which the contract was made are important considerations (***Ledcor*** at para 27, 31). These are the facts that were known or ought to have been known by the parties at the time of contracting (***Sattva*** at paras 58, 60; ***IFP*** at para 83).

[123] Surrounding circumstances include the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates (***Ledcor*** at para 31; ***IFP*** at para 83). Surrounding circumstances may include the customary practices in the industry in which the insured operates (***Nexxtep Resources Ltd v Talisman Energy Inc***, 2013 ABCA 40 at para 35) and regulatory regime (***Nexxtep*** at para 33; ***Nodel v Stewart Title Guaranty Company***, 2018 ONCA 341 at para 55 - 56).

[124] While the surrounding circumstances are relied upon in the interpretive process, "courts cannot use them to deviate from the text such that the court effectively creates a new agreement" (***Sattva*** at para 57).

[125] When does an ambiguity arise? In ***IFP*** the Court stated at para 87:

> Mere difficulty in interpreting a contract is not the same as ambiguity: ***Paddon Hughes***, *supra* at para 29. A contract is ambiguous when the words are "reasonably susceptible of more than one meaning": ***Hi-Tech***, *supra* at para 18. An ambiguity in the contract also allows courts to consider evidence of the parties' subsequent conduct post-contract: ***Shewchuk v Blackmont Capital Inc***., 2016 ONCA 912 at paras 46, 56, 404 DLR (4th) 512; ***Hall***, *supra* at 83-85. But it

> must be understood that even under this ambiguity exception to the parol evidence rule, there are limitations as to what parol evidence is admissible. In this regard, evidence as to the parties' subjective intentions is generally inadmissible.

[126] Similarly, Strekaf JA dissenting in ***2102908 Alberta Ltd v Intact Insurance Company***, 2023 ABCA 34 described the jurisprudence as follows:

> [44] "An ambiguity exists where there are 'two reasonable but differing interpretations of the policy": Barbara Billingsley, *General Principles of Canadian Insurance Law*, 3rd ed (Toronto: LexisNexis, 2020) at 139-140, citing *Sabean* at para 42. "[M]ere articulation of a differing interpretation does not always establish the reasonableness of that interpretation and does not necessarily create ambiguity": *Sabean* at para 42. "Where more than one interpretation is supported by the text of a policy, the court is directed to consider the reasonable expectations of the parties, and to avoid an interpretation that would give rise to an unrealistic result or that would not have been in the contemplation of the parties": *Tien Lung Taekwon-Do Club v Lloyd's Underwriters*, 2015 ABCA 46 at para 25.
>
> [45] An ambiguity must be 'real'. "That is, the words of the provision must be reasonably capable of more than one meaning having regard to the entire context of the provision": *Cardinal v Alberta Motor Association Insurance Company*, 2018 ABCA 69 at para 11, citing *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 29.
>
> [46] "Whether or not a word is ambiguous involves the consideration of its use in its place and context. It is only when two or more different meanings are equally, reasonably and sensibly applicable that it can be said to be ambiguous": *Pentagon Construction (1969) Co Ltd v United States Fidelity & Guaranty Co*, 77 DLR (3d) 189 at 192, 1977 CanLII 1652 (BC CA), cited in Gordon G Hilliker, *Liability Insurance Law in Canada*, 7th ed (Toronto: LexisNexis, 2010) at 44, § 2.77 [Hilliker]. In other words, "[i]f the words of the exclusion are not reasonably capable of more than one meaning having regard to the entire context of the Policy, there is no ambiguity": *Condominium Corporation No 9312374 v Aviva Insurance Company of Canada*, 2020 ABCA 166 at para 14.

(b) Detection of the release

(i) Surrounding circumstances – insurance industry

[127] The insurers provided a report from a prominent and experienced insurance consultant. This report describes the history and evolution of pollution liability and insurance coverage in Canada and the United States. The consultant was asked to address in his report the purpose of detection and reporting cover in a pollution liability policy; the purpose of using the words "detected by any person" in such coverage; and the steps reasonably expected of an insured after a loss involving the escape of pollutants is identified.

[128] I agree with Paramount that the consultant's opinions of the meaning of "detect" or "discover" and whether Conoco's representatives detected the leak within 720 hours of its commencement, are not admissible.

(a) To the extent he provided the meaning of "detected" or "discovered", that is an insurer's subjective perspective. Throughout the discussion, the consultant does not ascribe any customary or accepted industry meaning to, or widespread understanding of, the word "detect".

(b) The objective meaning of the detection clause is a question of mixed law and fact for determination by the Court, and his opinions on this point do not meet the necessity requirement for admitting expert opinion evidence.

(c) His opinions that Conoco did not meet the requirement are applications of the meaning of "detected" to assumed facts. This is not a case where expert expertise is necessary to determine historical facts concerning Conoco's information and beliefs, or to apply the meaning of detection to those facts. This aspect of his opinion does not meet the necessity requirement.

[129] I pause to note that the insurers' engineering consultant also expresses opinions about the meaning of detection and discovery, Conoco's state of mind and beliefs, and whether Conoco detected or discovered the release. These aspects of his report are similarly inadmissible because they are beyond the scope of his expertise as an engineer and the necessity requirement for admission of expert evidence is not satisfied. I have not considered similar opinions in Paramount's affidavit evidence.

[130] The insurance consultant's description of the general historical evolution of pollution coverage is admissible as surrounding circumstances that were known or ought to have been known to the parties, including Paramount as a sophisticated insured assisted by an experienced insurance broker.

[131] According to the consultant, coverages written in the 1960's to cover accidents and occurrences became inadequate with the onset of increasingly expensive and unpredictable claims for contamination or environmental damage. Some insurers responded by curtailing the writing of coverage for pollution losses by attempting to exclude all cover for pollution liabilities. However, competitive pressures and demands from insureds for coverage led to evolution of coverage language so that pollution coverage could be made available. In this movement to curtail liability, the objectives were to remove ambiguity over the scope of coverage; differentiate between the environmental impact of catastrophic events as opposed to pollution arising from the ongoing daily operations of an insured; exclude the reckless and intentional polluters who failed to take reasonable steps to prevent pollution; and curtail liability which the industry felt was "excessive".

[132] This history mainly focussed on various attempts to re-write coverage and exclusion provisions. The consultant acknowledged that little was written about discovery clauses, but the general principles behind pollution coverage are helpful "in determining why a discovery clause is the critical "gatekeeper" to determine whether the policy will respond or not".

[133] The consultant summarized that insurers sought to limit their obligations so that they did not cover liabilities arising from escapes, spills or discharges which were "continual in the work product of the insured" and ensure that deliberate discharges and small leaks or escapes that were considered part of carrying on business of operating a pipeline or oil production facility were not covered.

[134] The consultant stated that the discovery and detection provisions were part of the industry's response to this problem of excessive liability and to clarify the intent to cover "catastrophic events, not ongoing continual pollution as a result of industrial operations". Further:

> ... While the commencement of the escape is a precise point in time, insurers except insureds to manage their operations in a manner that facilitates early detection of leaks and environmental threats. Put another way, the insurers assume the pollution risk only if the operation uses procedures, processes and machinery to monitor the flow so that any leakage resulting in environmental damage could be quickly detected, and preventative action taken.
>
> The reporting provisions try and bring the insurer into the event quickly enough so that the insurers can assist in monitoring and mitigating the remediation costs.

[135] Throughout his report, the consultant did not ascribe any customary or accepted industry meaning or widespread understanding to the word "detected" or the concept of detection generally. At one point, the consultant states:

> The insurance industry developed a response that, rather than focus on exclusions to the existing coverage, would define the risk narrowly. "Pollution incident" was the peril but to fall within the definition to claim under the peril, several conditions had to be met. Not only did the loss have to be unintended and unexpected from the standpoint of the insured, but the "discovery" and "detection" of the loss had to be within a certain number of days of escape. The insured must have become aware of the commencement of the escape within a certain number of days.

A footnote to the end of this passage states:

> This was intended to remove the "new" discovery of pollution that had been ongoing for years. For example, the recent discovery of open sewage going into Hamilton Harbour determined it had been ongoing for decades. The commencement of the spill was in the 1920s.

[136] This passage ascribes an intention to a collective of pollution liability insurers. However, surrounding circumstances do not include the subjective intentions of contracting parties.

[137] I take from the consultant's report only that the detection clause is part of the policy structure intended to limit exposure to accidents that are ongoing and unaddressed for a defined time period. Pollution cover was liable to result in exposure to expensive losses that accumulated over long periods of time without any reason to suspect their existence. The detection requirement was one means of controlling that risk.

[138] However, the history of these policies as related by the consultant does not assist in determining in the context of specific policy wording whether a loss is detected by a person (a) if they become aware of material or important evidence of a release or (b) only where a person subjectively believes or becomes aware that a release has occurred.

[139] The consultant noted in his report that the polices were drafted in the context of the insurance industry expectation that insureds would conduct their operations in a responsible way, in the words of the consultant "to manage their operations in a manner that facilitates early

detection of leaks or environmental threats" or use "procedures, processes and machinery to monitor the flow so that any leakage resulting in environmental damage could be quickly detected, and preventative action taken."

[140] This expectation is probably true of most regulated industries handling dangerous substances, and in my opinion would obviously have been in the minds of both parties. Both sides' proposed definition of the concept of detection is consistent with this expectation, because responsible and prudent operators will take credible evidence of a release as seriously as a belief that there is a release and commence the necessary further investigations and mitigating actions.

(ii) Surrounding circumstances – oil and gas industry

[141] The regulatory requirements for the safe and efficient operation of pipelines including the obvious need for effective leak detection requirements, were part of the context or surrounding circumstances in which the policies were made.

[142] Both insurers and insured ought to have known that the insured was operating in a highly regulated industry, where participants are expected to observe safe and efficient practices in the construction, operation, discontinuation and abandonment of pipelines including the control of pollution and conservation of the environment (*Pipelines Act*, RSA2000, c P-15, section 4), and required to adhere to detailed requirements for the design, construction and operation of pipelines (*Pipeline Regulation*, Alta Reg 91/2005). These standards include CSA Standard Z662, which had been modified shortly before the policies were issued to enhance detection and monitoring standards for hydrocarbon pipelines. Both knew or ought to have known that pipeline integrity and leak detection are extremely important in the oil and gas industry given the potential consequences of a leak of hydrocarbon substances into the environment.

[143] It is notable that according to mandatory industry standards under Alberta law in place when the policies were issued, a leak may be detected through direct (or external) methods or computational (or indirect methods) (CSA Standard Z662, Annex E, para E.2, E.3.1, E.3.2, and E.3.3). A leak detection system:

> ... shall provide clear alarms to alert the pipeline controller of a possible release. A leak detection alarm shall result in initiation of a procedure to evaluate the leak condition and to determine the cause of the alarm. Leak alarm evaluation shall be integrated into pipeline control procedures. The leak alarm evaluation shall lead to control action to mitigate the leak (such as pipeline shutdown) unless such deviations can be clearly and readily explained.
>
> (Underlining added).

[144] Further, the Z662 Standard requires an operator to presume a leak until the alarm is cleared. Para E.4.3.2 provides:

> Analysis of leak alarms shall determine the cause of the alarm. The leak alarm shall not be discounted and declared invalid without such analysis; all alarms shall be assumed to have a cause. Methods to determine the cause of the alarm shall be developed. The leak detection system analysis procedure shall state a maximum analysis period. If the cause of the leak alarm has not been declared within this period, the pipeline shall be brought to a safe state until the leak alarm cause shall be determined.

(Underlining added).

[145] The Z662 Standard also addresses the converse situation, where critical components are inoperative. A "critical process" is one upon which the leak detection methodology relies and which is essential for the operation of the leak detection system, and "critical data" is any data that drives the leak detection system application or is fundamental to the calculations (Annex E, para E.2, definitions of "Critical process" and "Leak detection system"). If critical data is missing or a critical process is inoperative, the pipeline controller shall determine whether the leak detection system is considered to be ineffective and the pipeline shall be shutdown, or an alternative leak detection method may be used, allowing the pipeline to remain in service (Annex E, para E.4.2.3).

This regulatory context lends some support to Paramount's definition of detected – a leak is detected where there is some evidence of a leak and that evidence has not been clearly and readily explained by some other cause.

(iii) Case law concerning similar provisions

[146] Both sides stated they could not find precedent case law interpreting the specific coverage grant in question.

[147] Paramount's counsel cites case law imposing an objective standard (whether a person of ordinary prudence would foresee that a claim would arise) for determining whether an insured had sufficient information to trigger its obligation to give notice of claim under an auto policy (***Hogan v Kolisnyk***, 1983 CanLII 1027 (AB KB) at paras 59 – 62 citing ***Marcoux v Halifax Fire Ins Co***, 1948 CanLII 41 (SCC), [1948] SCR 278).

[148] Paramount's counsel also provided a lengthy schedule of cases using the words "detect" and "discover" in various contexts. None address a similar case.

[149] The insurer's side cites three cases. However, none are directly on point.

[150] In ***Irving Oil Ltd v Institute of London Maritime Insurance Co***, 2000 NBCA 23, the policy required that the accident be identified as first commencing at a specific point in time during the term of the policy and "became known" to the insured within 180 days. The issue was whether coverage arose upon knowledge of the damage resulting from a leak of a pollutant or upon the commencement of the leak. In that case the Court observed:

> [15] We appreciate that sub-surface migrating petroleum is not often capable of being detected at the commencement of the original leak or discharge, or even at the moment of first escape from the property of the insured. However, the terms of the policy before us do focus on the initial commencement of pollution and it is that escape of pollutant that triggers liability coverage.

[151] The insured could not prove the leak commenced during the policy period, therefore its claim failed.

[152] In ***Compagnie d'assurance du Québec c. Groupe pétrolier Nirom inc,*** 1999 CanLII 13772 (QC CA) the Court considered a policy condition that the pollution incident begin or commence during the policy period and be discovered within 120 hours. The Court observed:

> If this were a pollution accident or disaster where the moment of occurrence could be established with accuracy, there would be no difficulty in calculating the

> period of 120 hours prior to discovery. If a fuel truck overturned spilling its contents into a field, for example, it would normally present no problem in fixing the time of the accident and determining whether it was discovered within 120 hours.
>
> But where the pollution is caused by a leaking underground tank with a defective solder, as was the case here, the exact moment of failure of the defective soldering work cannot be fixed with any precision. Nor should the insured be held to a delay when it was unaware of the occurrence of failure or the commencement of the leak. The moment for the commencement of the period between occurrence and discovery must be the moment when the insured can reasonably have acquired knowledge that there was a leak or failure. The failure causing the leak may well have occurred at a precise moment in January or February 1992, but it was not apparent at once. Quite obviously, it manifested itself gradually, probably over a period of several days.
>
> ...
>
> In the context of the present case, what this principle would mean is that the delay of 120 hours required under the insurance policy for the discovery of the pollution accident would only begin to run when the insured had knowledge, or should have had knowledge, that there was a leak or a failure in the underground fuel storage system. Commencing on the date of that knowledge, or presumed knowledge, the insured was then bound by a delay of 120 hours to discover the cause of the problem and the actual condition of the underground fuel storage equipment. Obviously that discovery required an excavation and physical examination of the fuel tanks, an operation that no insured would want to undertake unless there were reasonable grounds to believe a leak or failure had occurred.

[153] The policy in that case was differently worded than the present case because it did not specify the starting point of the 120 hour period. The question was, within 120 hours of what event? Further, it did not consider the meaning of "detected".

[154] Finally, the insurers cite ***Harvey's Oil v Lombard General Ins***, 2003 NLSCTD 158, where the Court quoted a passage from Lichty & Snowden, ***Annotated Commercial General Liability Policy*** on which the defendant insurer relied, as follows:

> [31] Lombard submits that the Pollution Liability Coverage Extension Endorsement, although commencing with language similar to an Absolute Pollution Exclusion, is not in fact an exclusion but rather is an endorsement extending the coverage of the CGL policy to certain specific circumstances. Lombard argues that the Endorsement accordingly should be interpreted in a manner consistent with the intention of the parties, that intention being to exclude some pollution incidents and at the same time to grant coverage in other specific circumstances. Lombard refers to **Lichty & Snowden, Annotated Commercial General Liability Policy**, at p. 31-25:
>
> > The insurance industry, while recognizing that it does not wish to assume the full brunt of a pollution risk, has come around to the view that it can underwrite limited exposures where the

> policyholder has sufficient monitoring and safety measures in place. The result is an endorsement which, although still excluding most risks, gives back certain time-limited coverage in the form of an exception clause or clauses.
>
> Known to some as '120 hour' detection and reporting cover, this endorsement is intended to pick up the truly accidental incident in an industrial setting, where the risk of loss and contamination is likely to be contained and dealt with prudently as part of an overall risk management program.

[155] The Court did not accept or reject this information, and instead decided the claim on a different coverage provision to which the "120 hour detection and reporting cover" did not apply.

[156] A more recent edition of the same publication, Lichty & Snowden, *Annotated Commercial General Liability Policy* (Thomson Reuters, looseleaf) at p 31-56, observes:

> ... Certain defined and limited coverage is available, by way of endorsement, added to the CGL policy. The limited coverage provided through such endorsement varies from insurer to insurer. Generally the endorsement, while continuing to exclude coverage for most loss arising from polluting events, provides certain time-limited coverage.
>
> The endorsement is sometimes referred to as a “120-hour detection and reporting cover”. There should be no misunderstanding. The terms of the cover can vary widely. The general intent is to provide limited defined coverage for truly accidental pollution events which are quickly detected by the policyholder’s management team. The insurer expects that a prudent risk management program will result in prompt detection of any leakage event. Containment efforts will be initiated promptly. In the circumstances, a typical endorsement requires early detection and prompt reporting to the insurer as a prerequisite to coverage.

[157] Interpreting the policies is not based on the insurer’s expectations alone, but considers both parties’ reasonable expectations. Both would reasonably expect that an insured would operate its business prudently and therefore detect and respond to releases promptly, but this expectation does not necessarily mean that coverage was not intended where data was mis-interpreted nor does the policy suggest that an operator must perfectly and correctly respond to a data alarm or other information to maintain coverage. Thus, the passage does not assist in resolving whether detection includes, or the parties reasonably expected detection to include, situations where data anomalies credibly indicating a leak were known during the detection period, or whether coverage is dependent on the operator correctly interpreting or correctly responding to a known data anomaly during the detection period. Either could meet the parties’ expectations that a prudent risk management programme (ie, a system) is in place.

(iv) The meaning of detection

[158] The detection and discovery provisions of the Endorsement are quoted in Part III above and include:

> ...

> (2) that such emission, discharge, release or escape is detected by any person within 720 hours after commencement of such emission, discharge, release or escape;
>
> (3) that the insured mails or delivers to us notice, in writing, or such emission, discharge, release or escape not later than 2160 hours following the discovery of such emission, discharge, release or escape as described in paragraph (2) above. However, if the insured is a non-operator, such notice must be delivered to us not later than 2160 hours following notification to the Insured by the operator of such emission, discharge, release or escape; and
>
> ...

[159] Paramount submits that "detected" means to become aware of indirect evidence of a possible release, whereas "discovery" means to become aware of evidence of a release in the land, water or air. The insurers submit that the words are synonyms. Further, to detect something means to become actually aware of it, not that the person ought to have been aware.

[160] Some dictionary definitions of "detect" refer to discovery or perception through the use of equipment. Other definitions refer to direct human observation of the event. The various dictionary definitions cited by Paramount do not clearly express the difference that Paramount suggests. Nor are they much help in deciding when a person can be said to have detected something in the context of the policy objectives and wording "detected by any person".

[161] Many industrial processes are monitored by equipment. CSA Standard Z662 recognizes both computational detection methods that infer a leak exists, and direct leak detection methods that utilize methods that directly sense leaked or leaking hydrocarbons (Annex E, para E.2, "Computational leak detection method" and "Direct leak detection method").

[162] In its ordinary sense, the word "detection" does not require a person to directly observe a spill or the existence a pollutant outside of where it is supposed to be contained. Detection in its ordinary meaning, particularly in the context of industrial processes where the integrity of equipment is commonly monitored using instruments, includes detection through the use of instruments and detection through the use of circumstantial evidence. To the extent the insurer's meaning would require direct, personal observation of the pollutant itself, that is not reasonably supported by the language of the policies.

[163] The use of the phrase "by any person" is notable. The background to the development of the detection provisions generally was that the parties do not intend to expose the insurers to ongoing releases that are unlikely to come to the insured's attention. However, the contract language does not require that the insured or its personnel detect the release. Anyone can detect it.

[164] Why is that? The best explanation is provided by the defendants' expert insurance consultant. He generally commented that the purpose was to cast the net widely in the expectation that the information would come to the insured's attention so that it would likely be addressed. The consultant stated:

> The rationale was that a reasonable prudent insured operator of a facility or pipeline should have processes and procedures in place to respond to a "pollution incident" discovered by anyone since the discovery should be communicated by anyone to management and appropriate authorities. An insured could not continue

> to operate the polluting system with the excuse that no one told them of a leak or pollution incident. This creates a positive responsibility to proactively conduct their business in a manner which would avoid or mitigate leaks by facilitating early recognition and shutdown.
>
> In this manner, the words "any person" would include more than any employee of the insured, regardless of the level of authority, and the risk manager or executive may not have been notified. A member of the public or a government authority detecting the environmental harm from a leak could "trigger" the policy.

[165] While I do not consider these comments as part of the surrounding circumstances, I conclude that the plain meaning of "any person", the objective of managing the risk of exposure to ongoing unknown releases, and the reasonable expectations of insurer and insured that industrial operations ought to be prudently conducted, point to the parties' expectation that where people see concerning evidence of pollution releases they are likely to report it to some responsible authority - be it government, fire department, 911, operator's field office, bylaw officer, or other responsible entities - who will act appropriately and follow up. In this way, the problem of exposure to ongoing undetected releases is controlled.

[166] However, the insurers suggest the coverage condition is that the "any person" contemplated by the Endorsement must go further and subjectively conclude there is a release of contaminants. Such a condition is unnecessarily stringent and introduces a significant degree of arbitrariness into the operation of the condition and consequently, the insured's eligibility for coverage.

[167] It introduces a significant element of arbitrariness to the coverage conditions because it bases an important condition to coverage – detection or what the defendants called the "gatekeeping function" – on the subjective opinion of "any person". The opinions of the person who observes evidence of a release could be reliable or reasonable, but also could be unreliable, incredible, mistaken, ill informed, hypersensitive or unreasonable. The parties would not objectively intend to introduce such arbitrariness into the operation of the policy. It is very likely they intended some standard of reasonableness to apply.

[168] It is an unnecessarily high standard because someone who sees credible evidence of a release is as likely to report their concerns to a responsible authority as a person who subjectively believes they have observed a release. What counts, in terms of risk management, is the circumstances in which they are likely to convey information to those who are expected to prudently deal with it. In circumstances where people are likely to report, the problem is likely to be assessed by prudent follow up. This mechanism controls the insurers' exposure to the spectre of liability for concealed unaddressed accidents.

[169] The surrounding circumstances strongly suggest that the parties also contemplated that energy company operations would frequently occur under tight regulatory requirements. The parties probably expected that regulatory requirements imposing standards for detection would be considered in deciding whether a release was detected.

[170] In the case of hydrocarbon pipelines in Alberta, the CSA Z662 Standard and industry operating practice require in the case of an alert of a possible release, that the operator implement "control action to mitigate the leak (such as pipeline shutdown) unless such deviations can be readily and clearly explained" (Z662, Annex E, para E.3.4.2). When the data anomaly cannot be

cleared, the operator is required to behave on the basis that a leak is detected – the leak must be "mitigated" (para E.3.4.2) or the pipeline brought to a "safe state" (para E.3.4.3.2).

[171] Effectively, the pipeline operator must assume there is a leak where material anomalies are detected, unless a clear and ready explanation is accepted that clears the anomaly. The parties would reasonably expect that if the anomaly is not cleared, the release is detected even though a conclusive opinion on the question whether the pipeline actually is leaking has not yet been reached.

[172] All of this suggests, in ascertaining the objective intentions of the parties, that detection was to have a wider meaning than the subjective conclusion of any person who observed or considered evidence of a leak, that a release in fact was occurring or had occurred.

[173] Therefore, the insurers' interpretation is too narrow.

[174] Equally, Paramount's interpretation is too wide. The Endorsement requires detection of the release, not detection of some evidence of a possible release by whatever standard. Imposing Paramount's standard is rewriting the contract.

[175] The insurers or insured could have negotiated or drafted either of those standards. They could have written the condition to be that any person "becomes aware" within the prescribed period, or any person becomes aware of any evidence of a possible release.

[176] However, the contracting parties to the policies under consideration did not utilize such explicit language. In my opinion, in the context in which the phrase "detected by any person" is used, the meaning is reasonably open to competing interpretations. This should be resolved with reference to the objective reasonable expectations of the contracting parties. The import of detection is that sufficiently significant information becomes known within the detection period that would likely trigger an appropriate inquiry and response.

[177] The parties must have intended, from the objective perspective, that "detected" means knowledge by the person concerned of credible information that, in the mind of a person of ordinary prudence, would provide reasonable grounds to believe that an emission, discharge, release or escape of pollutants may have occurred or be occurring. Reasonable grounds to believe is not speculation nor is it as high as the balance of probabilities. In the case of a pipeline, it is information that would normally require the pipeline under industry practices or CSA Standard Z662 to be shut in pending resolution of the anomalous information.

[178] In contrast, the discovery provision in the Endorsement governs the insured's obligation to provide notice. It requires notice within the prescribed period "following the discovery of such emission, discharge, release or escape as described in paragraph (2) above", unless the insured is a non-operator. The referenced paragraph 2 is the detection provision. In the case of a non-operating insured, the period does not depend on discovery but rather on the date when the insured was notified by the operator.

[179] In the context, the words "detected" and "discovery" are not synonyms because they serve different purposes. One limits the risk. The other is a reporting provision to the insurer. In the case of discovery, the parties expect the insured to act prudently. In the case where the operator is the insured, discovery means that a person of reasonable prudence would conclude the release has occurred or is occurring. It is a standard closer to confirmation of the release.

[180] If the meaning remained ambiguous after considering the context and reasonable expectations, then I would go further and adopt the interpretation more favourable to coverage. The interpretation I have found is the more favourable one reasonably available. I think Paramount's interpretation, to the extent it suggests any degree of possibility by any standard, goes too far and is not supported by the contract language.

(c) The insurer's argument that Paramount is bound by previous positions, representations and findings

[181] The insurers argue that Conoco and Paramount both represented outside of the present law suit that Conoco had not detected and was not aware of the leak until June 9, 2016. The insurers submit that Paramount is bound by these representations and cannot take a contrary position in this coverage action.

[182] The insurers further submit that AER found that Conoco was not aware of the leak until June 9, 2016 and that Paramount is bound by AER's findings.

(i) Paramount's position in the arbitration with Conoco

[183] Conoco initiated arbitration proceedings against Paramount on or around March 12, 2017, delivered a statement of claim on December 20, 2017 and delivered an amended claim on March 29, 2019. Paramount served a defence and counterclaim on June 20, 2018 and an amended defence and counterclaim on May 7, 2019.

[184] In its claim, Conoco alleged that it was the operator of the facility under the CO&O; on June 9, 2016, it observed and reported the spill; on June 14, 2016, AER ordered it to clean up the spill; and, it (or its eventual successor) incurred costs and expenses in doing so that were chargeable to the joint account under the CO&O that Paramount refused to pay.

[185] Paramount asserted in defence and by counterclaim (and repeated in substantially the same terms in its amended pleadings) that it was not liable to pay the clean up costs because they were incurred by Conoco's gross negligence, or alternatively if Paramount was liable to pay then Paramount was entitled to set off its greater losses which it suffered as a result of Conoco's gross negligence.

[186] In support of these positions, Paramount alleged that Conoco knew or ought to have known that under Paramount's insurance policies, the spill had to be discovered within 30 days (or 40 days under another policy that is not in issue in the present case) of the date the spill commenced; that Conoco was grossly negligent in failing to discover the spill within the discovery period under the policies and failing to disclose information to Paramount which would have led Paramount to conclude that there was a spill and inform both Conoco and Paramount's insurers of the spill. Paramount claimed that as a result, Paramount "may" have lost coverage under its insurance policies.

[187] In all these allegations, Paramount appears to have equated detection with discovery and asserted that Conoco failed to discover within the required period.

[188] Paramount delivered its submissions of fact and law in the arbitration on January 13, 2020 or shortly thereafter. In these submissions, Paramount submitted that the insurers denied coverage on the basis the release was discovered beyond the discovery periods, and that:

> [145] If the Leak had been detected within 30 days of April 21, 2016 (i.e. the date CPC had calculated after doing its mass balancing analysis), the Insurers would have had no basis to deny Paramount coverage.
>
> [146] As noted above, the evidence is overwhelming that CPC should have detected the Leak by, at the very latest, May 7, 2016, simply based on information of which it was aware (i.e. the pressure test results), which independently confirmed the readings from the Coriolis Meters.
>
> [147] In any case, but for CPC's Gross Negligence, the Leak would have been detected within the Insurance Discovery Periods. The Insurers would then have no basis to deny coverage, and Paramount would be fully reimbursed for the Remediation Costs.

[189] Paramount brought the coverage action in this Court on June 8, 2018. Paramount kept the insurers' counsel informed of developments in the arbitration including providing copies of the pleadings. Paramount's statement of claim in this action does not plead the date the leak was commenced, detected or discovered.

[190] The insurers submit that Paramount admitted in the arbitration that the leak was not detected until June 9, 2016 and the admission should bind Paramount in the present action.

[191] Paramount's counsel, who was also counsel on the arbitration, explained that the insurers clearly accepted that June 9 was the detection date. So, one of the arguments Paramount advanced was that there was an alternate way of calculating the start date of the release (the May 16th commencement date referenced earlier). Paramount and the insurers exchanged information. The insurers later denied coverage based on their expert's opinion that the release started much earlier (as described earlier in these reasons, as early as April 9). Paramount then pursued alternative arguments. Paramount submits there is nothing inappropriate in advancing alternative arguments or asserting the release was detected earlier.

[192] In respect of this explanation, the insurers' engineering report in this summary trial confirms the details about Paramount's position. Paramount presented its alternate calculation of the commencement date of the release to its insurers on June 5, 2017. Its calculated date (May 16, 2016) was within 720 hours of the date Conoco reported the leak. In December 2017, the insurers denied coverage, and observed that their consultant's analysis showed that the leak commenced on April 9 and in any event not later than April 23, 2016. The insurers contended the leak was not detected until June 9, 2016, and therefore the policies did not cover the loss.

[193] Admissions against interest in other proceedings (a so-called informal admission as opposed to a formal admission made in the pleadings in the action in which the admission is asserted) are admissible in this action. I have applied the following framework:

> [97] Madam Justice Romaine summarizes the applicable law of admissions in ***Gerling Global General Insurance Co v Canadian Occidental Petroleum Ltd***, 1998 ABQB 714 at paras 29-45, and approved in ***Becker v Alberta (Director of Employment Standards)***, 2000 ABCA 329 at para 18. Admissions are exceptions to the hearsay rule, and admissible to prove the truth of the matter admitted. The Court's main concern is that an admission must be made in a sufficiently formal manner to ensure that the party making the admission has considered its words carefully. Informal admissions are prima facie admissible, but that they may or

> may not be binding on the party that made them, depending on the circumstances under which they were made. A party may adduce evidence to contradict or explain an informal admission. The Court should consider whether an admission was made inadvertently or hastily; whether it was made with knowledge of the facts, and whether new facts have come to light since the admission was made. In a summary application, the admissions must be clear and unequivocal, without a need to weigh evidence.
>
> (***1808882 Alberta Ltd v Moderno Ventures Ltd***, 2018 ABQB 885 at para 97).

[194] I do not construe Paramount's defence and counterclaim as a binding admission that "detected" means a person actually observed the released substances. In this trial, I can decide what weight to place on the admission.

[195] This is not a case of Paramount changing an admission of fact. The meaning of "detected" in the insurance policies is a question of mixed fact and law, not fact alone. There is no evidence that the insurers relied on Paramount's positions taken in the arbitration to their detriment, or at all. There is no evidence suggesting Paramount misrepresented the coverage situation in the arbitration.

[196] Although Paramount's positions in the arbitration and this action are conflicting, it was faced with an unusual and difficult situation. The outcome of both the arbitration and coverage action were uncertain. On the arbitration side, Paramount faced an uphill battle in establishing gross negligence (as explained later in these reasons). On the coverage side, both Paramount and the insurers agree that there is almost no Canadian case law on the interpretation of the detection provision. Consequently, there was litigation uncertainty over the outcome of Paramount's coverage claim in this Court and its gross negligence defences and claims in the arbitration. The matters had to be pursued in separate forums, adding litigation management problems and the risk of inconsistent decisions of the Court and arbitration tribunal.

[197] So long as Paramount did not attempt to misrepresent the situation of the inconsistent claims in the arbitration and in this Court (and the insurers did not suggest or adduce evidence that Paramount or its counsel were not forthright on these matters), then I do not see mischief arising from its strategy. If the arbitrators had refused to find that Paramount actually lost coverage, then there would have been no inconsistency in Paramount continuing its coverage claim in this Court. If the arbitrators had accepted there was no coverage (whether or not they ultimately allowed a set off), then Paramount would be estopped from pursuing the issue against the insurers and the coverage claim would become an abuse of process if Paramount refused to drop it.

[198] The actual outcome was that the arbitrators did not determine the matter because the claim settled. There is no evidence that Conoco was misled in any way in negotiating a settlement or that the insurers have been misled.

[199] Given the circumstances, Paramount should not be precluded from asserting in the present action that the release was detected within the 720 hour period.

(ii) Insurers' position that Paramount is bound by Conoco's admissions

[200] The insurers submit that Conoco represented to AER that it did not detect, and could not detect, the leak until June 9, 2016 and that Paramount is bound by Conoco's representations as Paramount's agent.

[201] The insurers rely on Conoco's submissions to AER in the penalty phase of the investigation, where Conoco disputed AER's finding that Conoco ought to have been aware of the pipeline failure no later than May 7, 2016. Conoco stated to AER that it remained of the view that AER overlooked or inadequately considered mitigating factors, which it described in detail in its submission. Conoco stated that the date a reasonable operator would have or ought to have known of the leak was "roughly on or about the date ConocoPhillips actually discovered the leak on June 9, 2016".

[202] The insurers submit that Conoco was Paramount's agent in operating the facility. If Paramount had issues with Conoco's handling of AER's investigation it had the "right and obligation" to deal with that in the operating committee set up under the CO&O. They submit that Paramount is bound by its agent's representations made to AER and by AER's findings against Conoco.

[203] The insurers recognize that the provisions of the CO&O suggest that Conoco as operator was an independent contractor. They submit that contractual provisions defining a particular relationship are important to note but are not necessarily determinative (***Canadian Delhi Oil v Alminex Ltd***, [1968] SCR 775 at paras 47-49).

[204] Paramount cites ***Heikkila v Apex Land Corporation***, 2014 ABQB 589, app dism 2016 ABCA 126, a tort case dealing with vicarious liability, where the Court refused to find that the project managers and supervisors on a construction project were agents of the project developer and found that the developer was not liable for negligent acts by the supervisors that caused the claimant's injuries.

[205] Further, Paramount submits that the insurers' resort to vicarious liability principles are misplaced. It says that in a case where liability arises from a wrongful and unauthorized mode of doing some act authorised by the agent, only the liability is attributed from the wrongdoing agent to the non-blameworthy principal. The acts of the agent are not attributed to the principal. Paramount relies on decisions concerning liability of an employer for wrongful acts of an employee: ***Bluebird Cabs v Guardian Insurance Company of Canada***, 1999 BCCA 195; ***Harroun (Litigation guardian of) v Turriff***, 2000 CanLII 16810 (ON CA) at para 17 – 18; ***Anglin v Chief Electoral Officer***, 2020 ABCA 184 at para 15 – 16.

[206] The onus is on the third party to point to evidence that the agent is acting for the principal (***Shannon v Shannon***, 2023 ABCA 79). The insurers need to show that Conoco was Paramount's agent in making representations in the post-leak investigation.

[207] In ***Heikka***, on which Paramount relies, the trial judge described the legal framework for determining whether an agency relationship arises as follows:

> [147] Apex could also be found vicariously liable if the relationship is classified as an agency relationship. With respect to an agency relationship, G. Fridman in *Canadian Agency Law*, (LexisNexis Canada Inc, 2009) describes the relationship as follows at 4:
>
> > Agency is the relationship that exists between two persons, when one, called the agent, is considered in law to represent the other, called the principal, in such a way as to be able to affect the principal's legal position in respect of strangers to the relationship by the making of contracts or the disposition of property.

[148] Independent contractors are distinguished from agents by the test of control. An independent contractor is free from control on the part of his employer and is only subject to the terms of the contract. G. Fridman explains the difference as follows at 20:

> Both servants and independent contractors have been distinguished from agents by the test of control. An agent, it is said, is distinct from a servant in that an agent is subject to less control than a servant, and has complete, or almost complete, discretion as to how to perform the undertaking, although he must obey his principal's instructions. [citations omitted]

[149] In ***Swift v Eleven Eleven Architecture Inc*** 2014 ABCA 49, the Alberta Court of Appeal recently described an agency relationship as follows at para 22:

> An agency relationship arises when one person gives another the power to affect his or her legal relationships: *Rockland Industries v. Amerada Minerals Corp of Canada Ltd*, 1980 CanLII 188 (SCC), [1980] 2 SCR 2. Most agency relationships arise from an express contract between the agent and principal. Actual authority may be implied, but the implied authority is actual authority to perform "all subordinate acts which are necessary or ordinarily incidental to the exercise of ... express authority": see *Auer v. Lionstone Holdings Inc*, 2005 ABCA 78, 363 AR 84 at para 14, citing *McDonald v. Lawlor* (1908), 7 WLR 639 at 642 (Sask KB). Some courts have found the existence of implied authority in the absence of express authority (see, for example, *Williams (Litigation guardian of) v. BC Conference of the Mennonite Brethren Churches*, 2010 BCSC 791, [2010] BCJ No 1065).

[208] The control test described in the foregoing passage from Fridman may have been supplanted by the Supreme Court of Canada decision in ***671122 Ontario Ltd v Sagaz Industries Canada Inc***, 2001 SCC 59 in the context of vicarious liability (Fridman, *Canadian Agency Law* (3rd ed, 2017) at pp 24-25, 214). In ***Sagaz***, the Court accepted that the control test wears "an air of deceptive simplicity" (para 38), there is no one conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor (para 46), and:

> [47] ... The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[209] In the often-cited case of ***Swift,*** the Court of Appeal summarized the legal framework for ascertaining whether a relationship of principal and agent arises:

> [22] An agency relationship arises when one person gives another the power to affect his or her legal relationships: *Rockland Industries v Amerada Minerals Corp of Canada Ltd*, 1980 CanLII 188 (SCC), [1980] 2 SCR 2. Most agency relationships arise from an express contract between the agent and principal. Actual authority may be implied, but the implied authority is actual authority to perform "all subordinate acts which are necessary or ordinarily incidental to the exercise of ... express authority": see *Auer v Lionstone Holdings Inc*, 2005 ABCA 78, 363 AR 84 at para 14, citing *McDonald v Lawlor (1908)*, 7 WLR 639 at 642 (Sask KB). Some courts have found the existence of implied authority in the absence of express authority (see, for example, *Williams (Litigation guardian of) v BC Conference of the Mennonite Brethren Churches*, 2010 BCSC 791, [2010] BCJ No 1065). However, as noted by Fridman, "[w]here such an implication can be made, it is made on the basis that the principal has in fact consented to the agent's having authority to act in such a manner or as regards such a transaction. If there is evidence that the principal has not consented to this ... no implication of authority permitting the agent to act can be made" (GHL Fridman, *Canadian Agency Law*, 2d ed (Markham, Ont: LexisNexis Canada, 2012) at 70). Implied authority does not exist in a vacuum. In the absence of express authority, courts should be extremely reluctant to find implied authority unless there is clear unequivocal evidence that demonstrates that a principal has in fact consented to the agent's having authority to act on his or her behalf.
>
> [23] An agency relationship can also be apparent, arising from the impression of authority that the principal has created: see *Auer* at para 15 citing *Deer Valley Shopping Centre Ltd v Sniderman Radio Sales and Services Ltd* (1989), 1989 CanLII 3185 (AB KB), 96 AR 321 (QB). A finding of apparent authority arises when there is a representation by the principal to the third party and reliance on that representation by the third party: *Auer* at para 15 citing *Keddie v Horne*, 1999 BCCA 541 at para 28, 179 DLR (4th) 1.

[210] An admission by an agent can bind the principal, if the agent was acting in furtherance of the principal's business and within the scope of the agent's authority (Fridman at p 240 – 241).

[211] Although there may be certain duties that are conducted by an operator as agent for the working interest owners, that does not necessarily mean that the operator becomes an agent in discharging all its duties.

[212] In a work reproduced by the insurers in their book of authorities, Lilles, *The Statutory Liabilities of Joint Operators and Non-Participating parties* (Unpublished master's thesis, University of Calgary, 2017), the author observes, with reference mainly to the 2007 CAPL, that the operator may act in a number of different legal roles and relationships with non-operators, and the operator's role as an agent is dependent on the circumstances in which the operator is acting, the specific duty or responsibility involved, and the particular conduct the operator is engaging in (*ibid* at pp 44, 46, 58). The author notes the absence of developed Alberta case law on such relationships, outside of the question of fiduciary duties (*ibid* at p 58).

[213] I agree with these observations. It is well known that the relationship between operator and working interest owner under a typical agreement for ownership and management of an oil

and gas property does not give rise to a status based fiduciary relationship although some duties may be impressed with a fiduciary duty (for example, ***Canada Southern Petroleum Ltd v Amoco Canadian Petroleum Company Ltd***, 2001 ABQB 803 at paras 212 – 214). It is similarly so with agency.

[214] In resolving the matter, the Court must consider the relevant provisions of the CO&O (all of which are described or quoted in Part IV above, and most importantly: the trust provision; the control, management and supervision provisions; the independent contractor declaration; the no partnership clause; the declaration that the Owners' rights, obligations and liabilities under the CO&O and with respect to the subject matter generally, shall be several).

[215] In practice, the operating committee accepted Conoco as a competent, reliable and trustworthy operator. The parties agreed to the following facts:

(a) Paramount and Conoco Meetings of the operating committee were held ad hoc and not on a set schedule.

(b) Operating committee meeting minutes were occasionally generated but not always.

(c) Paramount received general updates about production at the facility, sales volume and joint interest billing.

(d) Pursuant to the CO&O, Paramount was not responsible for, among other things, the day-to-day operations of the facility, taking steps to control any leaks form the facility, or remediating any environmental issues caused as a result of a leak from the facility

(Agreed Statement of Facts, paras 40-46).

[216] The record further indicates that Conoco as operator was under investigation by AER, not Paramount as a facility owner.

(a) AER's initial regulatory response was to issue a remedial order to Conoco as the licensee of the pipeline, not to Paramount or facility owners.

(b) AER's investigation summary report describes the regulated party as Conoco as the licensee and sole operator of the pipeline.

(c) AER advanced regulatory contraventions or charges Conoco as the licensee and operator. Paramount was not charged with any offences. AER's reports do not make allegations against Paramount.

(d) AER issued an Administrative Director's Penalty Decision against Conoco as the licensee and operator, not against Paramount.

[217] The insurers bear the onus in establishing that Conoco was the agent of the owners in respect of the regulatory investigation against Conoco as operator and licensee.

[218] In this regard, I do not read the provisions of the Operating Procedure particularly clause 401 as authorizing Conoco to represent Paramount in administrative penalty proceedings. Clause 401 is limited, in terms of regulatory filings and communications, to routine filings and reports not sanction proceedings. In any event, Paramount was not the target of the regulatory proceeding.

[219] Further, I do not agree that the insurers have demonstrated that Conoco's functions in the day-to-day operation of the plant should be characterized as an agency relationship.

[220] The CO&O characterizes Conoco as an independent contractor, provides Conoco is responsible for deciding on the necessary employees and contractors and hiring and contracting them, and permits Conoco to use its own equipment and facilities to serve the operations subject to the Accounting Procedure.

[221] The Joint Account is operated in accordance with an Accounting Procedure. Pursuant to Appendix III of Exhibit "A" to the CO&O, the parties selected a template accounting procedure published by the Petroleum Accountants Society of Canada as their Accounting Procedure for the Joint Account. The insurers did not present evidence pertaining to the structure or application of the Accounting Procedure (eg, compensation if any to the operator for its effort or any recovery of portions of fixed overheads), nor even a copy of the procedure.

[222] The operator remains subject to direction of the operating committee. That is not surprising given they own the facility. The factor of control alone can have "an air of deceptive simplicity". In practice, this operating committee did not frequently direct the operator.

[223] Further, the insured and insurers contemplated that Paramount would have some properties where it was a non-operator (Endorsement, para (3)). The insurers should not be permitted to circumvent the insured's business structure, which includes that the operator is to be considered an independent contractor, and thereby reduce the insured's potential coverage by imposing the errors of an operator on their insured.

[224] The insurers have not demonstrated a persuasive reason or policy rationale to identify Paramount with Conoco's actions in the day-to-day operation of the pipeline.

[225] In summary, while some of Conoco's acts, such as filing routine regulatory reports required of owners, probably bind the owners, it was not the parties' intention under the CO&O that they be directly liable to third parties for Conoco's acts in conducting the day-to-day plant operations nor is this a case where the Court should circumvent their contractual intentions in favour of the insurers.

[226] In these circumstances, I see no reason to reject the parties' declaration of the operator's status as an independent contractor, so far as the matter relates to statements made by the operator in respect of an investigation against the operator's misconduct as a license holder.

[227] Consequently, the insurers have not proved that Conoco as operator had agency authority to make the alleged admissions on behalf of Paramount.

(iii) AER findings

[228] The insurers submit that Paramount is bound by a finding that Conoco did not detect the leak until June 9, 2016 (insurers' brief, para 201). Conoco submits Paramount is bound by this finding.

[229] I do not agree with this submission.

[230] First, AER found that Conoco ought to have been aware of the leak no later than May 7, 2016 but did not know of it or discover it until June 9, 2016. AER was not using the term "discover" in the context of any insurance policy. It simply accepted that Conoco was not aware of the leak until June 9, 2016.

[231] Consequently, AER did not make a finding of a discovery date or detection date under the policies. Whether or not Paramount is bound by the findings, they have no consequence for the present action where Paramount agrees that Conoco was not subjectively aware of the release until June 9, 2016.

[232] Second, Paramount is not bound by AER's findings. For the same reasons expressed with respect to Conoco's statements to AER in the investigation, Conoco was not Paramount's agent in an AER investigation into Conoco's misconduct.

[233] Finally, although the insurers did not argue that Conoco and Paramount were privies in the AER proceedings, I note there is no basis to think that Paramount was somehow Conoco's privy in an AER investigation into Conoco's misconduct.

(d) Conclusion

[234] I conclude that the leak and release of pollutants was detected by any person (Conoco personnel operating or supervising operation of the LVP pipeline who were aware of the data anomalies, or Conoco itself represented by these individuals) within 720 hours after commencement of the same.

[235] The pipeline operated under legal requirements and industry standards that the operator accept the implications of anomalies in the computational data unless and until it could clearly and readily explain that the data anomalies were attributable to some other circumstance.

[236] I find that by then end of April 30, 2016, Conoco personnel had not clearly and readily explained why the data should be discounted and had not declared the serious data anomalies invalid. To the contrary, Conoco personnel were worried and nervous about the data anomalies and continued to look for more evidence of leaks and explanations for the data anomalies.

[237] Their awareness easily meets the standard as I have defined it. The release was detected no later than the end of that day regardless of their subjective refusal to accept the implications of the data anomalies.

VIII The policy requirements that the insured is obligated to pay damages

(a) Introduction

[238] Paramount seeks to recover $11,000,000, the amount of its all-inclusive settlement with Conoco of the arbitration claims. Paramount does not seek its own investigation and defence costs and disbursements.

[239] Paramount submits that its damages for the insurer's breach of contract is the amount of its settlement with Conoco. It did not have to have to "stubbornly maintain a denial of liability all the way to judgment in order to obtain the protection of the policies" and was entitled to "buy peace at a reasonable price even where the insured might not have been liable at law for the claim" (citing ***Cansulex Ltd v Reed Stenhouse Ltd***, 1986 CanLII 898 (BC SC), discussed later in these reasons). Paramount submits that the settlement was reasonable.

[240] At para 255 and 256 of their brief, insurer's counsel acknowledges that Paramount accurately stated the law in circumstances where there is coverage under an insurance policy which the insurer has wrongfully denied, and asserts that a carefully considered denial of coverage is not wrongful. At para 284 – 287 of their brief, counsel submits (relying on a case

concerning a reinsurance policy) that Paramount must actually prove it would have lost the arbitration and that mere proof of a reasonable settlement is not sufficient.

[241] The insurers further submit that Paramount's settlement was unreasonable because Paramount was not liable to pay anything in view of Conoco's gross negligence in failing to respond to the data anomalies.

(b) Background facts

[242] Under the CO&O the Plaintiff and Conoco were obliged to equally share the costs of the repairs and remediation, unless caused by Conoco's gross negligence. In the arbitration, Conoco alleged its employees observed the condensate release on June 9, 2016, and immediately reported and commenced remediation of same. It claimed that the resulting clean up and repair activities were conducted for the joint account of the parties and claimed ½ of the cost (plus compound interest and costs of the arbitration) from Paramount under the CO&O.

[243] By December 2019, Paramount calculated its exposure to Conoco's claim as follows:

Item	Amount (CDN $)
Paramount's share of remediation costs plus compound interest under the CO&O	29,500,000
Conoco's estimated legal fees and disbursements	1,000,000
Paramount's estimated legal fees and disbursements, Dec 2019 to conclusion of arbitration	500,000
Arbitrators' fees	500,000
Total	31,500,000

[244] The arbitration was scheduled to commence in mid-2020 for 10 days of hearing time. Paramount expected an arbitration award would be issued by the end of 2020.

[245] Of the foregoing amounts, the remediation costs were $24,000,000 (The claims included ongoing remediation costs incurred by Conoco's successor under the CO&O after Conoco sold its interest in the facility to a third party. Conoco held an assignment of these claims. It is likely the assignment was made in connection with the sale and no one suggested there is any issue over the amount of the claims or the validity of the assignment of claims that Conoco held).

[246] Paramount's estimates were not disputed in the summary trial.

[247] The CO&O allowed Conoco to charge compound interest. I accept Paramount's calculation of the principal and interest for remediation costs.

[248] One of Paramount's witnesses deposed his understanding that if Paramount lost the arbitration, it was likely the arbitrators would award Conoco the full amount of its legal costs and disbursements of the arbitration. The CO&O required the parties to arbitrate under a specified arbitration institute. The Rules of the institute were not provided to me, but it is not unusual that arbitrators are empowered to award a full indemnity for reasonable legal fees rather than the partial indemnity that is the norm in King's Bench proceedings. I accept that Paramount's estimate of the costs exposure was reasonable.

[249] Both Paramount and Conoco were represented by senior counsel. There were three arbitrators, each charging $900 per hour. I accept that Paramount's cost estimates for legal fees and arbitrators' fees were reasonable.

[250] Thus, all of Paramount's estimates are reasonable and I accept them.

[251] In December 2019 Paramount and Conoco commenced settlement negotiations. On February 6, 2020, the parties agreed to settle the arbitration for $11,000,000. The formal agreement remained to be finalized.

[252] Paramount notified the insurers of the tentative settlement on February 18, 2020, offered to accept $3,500,000 to resolve the coverage claims, and advised the offer would be withdrawn on February 28, 2020 (the deadline for Paramount to complete its 2019 annual financial statements). Paramount informed the insurers that failing their acceptance of the offer, it would pursue the insurers for the approximate $12,000,000 it had incurred to date in respect of the leak, plus its costs of the action against the insurers.

[253] Paramount and Conoco signed the formal settlement agreement on April 7, 2020. Conoco's successor in interest also signed the settlement. The settlement included a release of all the claims arising from the spill including those of Conoco's successor in interest. Paramount paid the $11,000,000 settlement funds to Conoco on or about April 14, 2020.

[254] The insurers were kept apprised of the arbitration, and provided copies of the pleadings and Paramount's witness statements and expert reports.

[255] Paramount agreed to the settlement before the arbitration deadline for delivery of, and without receiving, Conoco's witness statements and export reports.

[256] Conoco had informed Paramount of the preliminary list of experts it proposed to call at the arbitration hearing – an expert in pipeline leak detection and related regulatory requirements, an expert in pipeline corrosion and integrity matters and regulatory requirements, and an expert in pipeline integrity practices and regulatory requirements. Conoco further advised it intended to call an expert on pipeline operating procedures and reserved the right to call additional experts following receipt of Paramount's expert reports in response to any matters outside the experience or expertise of Conoco's listed experts.

[257] Paramount provided in evidence the resumes of Conoco's three named experts. They appear to be well qualified individuals with extensive experience in the western Canadian energy industry in their proposed areas of expert qualification.

[258] The policies effectively undertake to pay amounts that the insured is legally obliged to pay provided the other conditions are met. The policy wordings are described in Part III above.

(c) What Paramount must prove

[259] An insurer's obligation to its insured resulting from a denial of coverage is to pay damages for breach of contract. An insured faced with denials of coverage may defend itself and, if reasonable, settle the claims without a determination of liability by a Court, arbitral tribunal or other adjudicator in a "suit" as defined in the policy (***Shore Boat Builders Limited v Canadian Indemnity Company***, 1974 CanLII 1152 (BC SC); ***Cansulex Ltd v Reed Stenhouse Ltd***, 1986 CanLII 898 (BC SC) at para 147 - 15, 156 – 157, 161; ***McMurachy v Red River Valley Mutual Insurance Co***, 1994 CanLII 10984 (MB CA) at para 2, 29; ***Aviva Insurance Company of Canada v l'Eveque catholique romain de Bathhurst***, 2018 NBCA 64 (leave to appeal to SCC refused, 2019 CanLII 45266) at para 7, 34 - 50; ***Royal & Sun Alliance Insurance Company of Canada v Community Electric Ltd***, 2020 SKCA 17 at para 65). Most of the cases pertain to policies containing a defence obligation, but one decision holds that the same principles apply in appropriate cases regardless of whether the policy obliges the insurer to defend (***Cansulex*** at para 149).

[260] In ***Cansulex***, the Court stated:

> [150] The liability of Cansulex has never been determined judicially and the insurers should not be condemned to pay any amount except in accordance with their policy obligations unless the law provides otherwise. On the other hand, the law would fit Mr. Bumble's characterization if, after a denial of coverage, Cansulex is required to prove itself liable to Bibby in order to recover a reasonable amount paid to buy peace when it has spent 33 days and over $2,000,000 in a foreign court asserting the opposite.
>
> [151] In my view, an insured in the position of Cansulex is entitled to settle any insured claim brought against it on any reasonable basis and for any reasonable amount, and to recover such amount from its insurers not necessarily as indemnity, as such may only be payable in discharge of a liability which may not have existed, but as damages for breach of contract. In this connection it is my view that an insured who has been abandoned by his insurer is entitled to buy peace at a reasonable price even though he denies his liability. The fact that he pays the claimant $"X" and pays his solicitors $"Y" does not make the two payments intrinsically different. They are amounts he must pay in order to defend and protect himself from greater loss or expense. These amounts, if reasonable, are payments which the insurers might themselves have paid if they had not wrongly repudiated their liability to the insured, and they cannot insist as a condition of indemnity or reimbursement that the insured stubbornly maintain a denial of liability all the way to judgment in order to obtain the protection of the policies which has been wrongly denied.

[261] Similarly in ***Aviva***, the Court held:

> [34] In my view, an insurer's obligation to its insured resulting from a wrongful denial of coverage is a simple matter of contract law and is not dependent on the actual legal liability the insured may or may not have incurred for the claims brought against it. The test is a simple one. It is whether the insured, having been denied coverage and left to its own devices, acted reasonably in the resolution of the claim(s) that should have been defended by the insurer and

> for which the insured would have been indemnified if it were found the insured was at law liable for the damages claimed.
>
> ...
>
> [48] An abandoned insured is left entirely vulnerable when he or she must proceed in the absence of coverage. The abandoned insured faces possible protracted litigation and high legal fees, and risks a judgment obligating him or her to pay a significant amount of damages. Allowing an insurer to escape liability because an insured settled a claim, rather than force it to judgment, would have the effect of encouraging insurance companies to deny coverage in hopes the insured settles for the sake of expediency, cost effectiveness or simply to avoid the risks associated with litigation. Such conduct by insurers must be prevented. This is accomplished by principles of law pursuant to which an insurer assumes a risk when it denies coverage. If an insurer wants to stand on the leg that is the wrongful denial of coverage, then it must accept the reasonable consequences of such a denial. This includes the obligation to pay damages that include any reasonable settlement the insured paid out to extricate itself from the situation created by the wrongful denial of coverage. Any party to an insurance contract would reasonably contemplate that such damages would necessarily arise from a breach of the contract.
>
> [49] I summarize the rights of the insured upon wrongful denial of coverage as follows: an insured who has been wrongfully denied coverage may be excused from defending a claim to trial and has the right to "buy peace at a reasonable price" even where the insured might not have been liable at law for the claim. As an alternative to defending an action or actions, an abandoned insured is free to engage in a settlement process, and/or agree to a settlement, that is reasonable considering the factual matrix at play. Correspondingly, such an insured may recover the amount of a reasonable settlement as damages for breach of contract when it is shown coverage had been wrongfully denied.
>
> [50] In determining a claim by an insured to recover as damages for breach of contract against an insurer for the amounts paid out in settlement of an underlying claim, and inspired by *Cansulex*, I would adopt the following test: (1) did the underlying claim(s) fall within the scope of coverage under the policy of insurance; (2) did the insurer wrongfully deny coverage for the claim(s); and (3) was the settlement reasonable?

[262] As mentioned, the insurers suggest that ***Cansulex*** and like cases do not apply because they did not wrongfully deny coverage. Rather, they carefully considered the matter before denying coverage (written brief, para 257 - 258). They provided an expert report of an insurance consultant expressing his own opinion of the meaning of detection and opining that Chubb's denial of coverage was "appropriate within industry standards".

[263] The insurers cite a reinsurance case, ***Swiss Reinsurance Company v Camarin Limited***, 2015 BCCA 466 at para 98, for the proposition that the reinsured was obliged to prove the probable outcome of the claim had it proceeded to court, so as to prove the insured, in turn, had a legal obligation to pay.

[264] In ***Swiss Reinsurance***, the reinsurance claim arose from claims against the insured (MB) for defective roofing tiles in a class action. MB's insurer (AIG) had issued a policy of commercial general insurance, that included typical language undertaking to pay amounts the insured was legally liable to pay as damages:

> To pay on behalf of the Insured that portion of the ultimate net loss in excess of retained limit as hereinafter defined, which the Insured shall become legally obligated to pay as damages for liability imposed upon the Insured by law, or liability assumed by the Insured under contract...

[265] AIG settled MB's coverage claim under an umbrella layer of commercial general liability insurance. Camarin had agreed to reinsure AIG for 50% of AIG's limits, under a contract of reinsurance (for which the Court provided at para 89 the following working definition: "a contract of indemnity through which one party (the "reinsurer") indemnifies another party (the "reinsured") against any or all loss or liability that arises by reason of a risk the other party (the "reinsured") assumed under separate insurance policy (as an original insurer)".

[266] Swiss Reinsurance had entered a similar contract of reinsurance covering Camarin, except that the policy did not include a follow the settlements clause. Camarin paid its share of the claim under its follow the settlements clause and, in turn, advanced a claim against Swiss Reinsurance. The latter refused to pay because its policy did not include such a clause and therefore it was not bound by the settlement.

[267] The Court held that Swiss Reinsurance was not bound absent a follow the settlements clause, so the reinsured must prove that it was legally liable to pay:

> [110] The principles arising from the foregoing cases may be summarized as follows: a reinsured must prove its loss in the same manner as the original insured; and, in the absence of a follow the settlements clause, there must be a judicial determination on liability under the policy. It follows that in order for Camarin to prove its loss in the same manner as the original insured (MB), Camarin would need to demonstrate that MB/Cemwood was subject to a "liability imposed by law" that fell legally within the coverage of the policy. Camarin would need to show that MB/Cemwood would have been liable in the Richison Class Action, for damages insured under its policy. These principles are sensible. The fact that a settlement may be reasonable to a primary insurer cannot be determinative because the primary insurer may well settle for reasons that are extraneous to the merits of claim - for instance (as was the case here) to avoid exposure to a bad faith claim.

[268] The Court's reasons for judgment indicate that there was a denial of coverage by AIG, and a claim by Swiss reinsurance to rescind its policy on the basis of misrepresentation. Nevertheless, it is apparent from the trial judgment (2012 BCSC 1006) and the Court of Appeal's reasons that the Courts did not consider or apply the principles from the ***Cansulex*** and ***Aviva*** line of cases and that these principles were not in issue. The issue before the Court of Appeal was simply whether a reinsurer is obligated to pay a settlement in the absence of a follow the settlements clause. I do not read ***Swiss Reinsurance*** as inconsistent with ***Cansulex*** and ***Aviva***.

[269] The law that governs the primary and excess policies in the present case, cited and quoted above, is well established. The exhaustive review of case law set out in ***Aviva*** (para 33 – 51) and

the Court's conclusion that the insurer wrongfully denied coverage on the facts of that case (para 59) makes clear that the term "wrongful" in this context simply means that the insurers repudiated their contractual obligations.

[270] A breach of contract case does not require proof of negligence. The fact the insurers might have carefully repudiated a fundamental aspect of their contractual obligations does not change the measure of the insured's loss and should not deprive the insured of the opportunity to buy peace for a reasonable price without defending the underlying claim to the bitter end with potentially unpredictable or crippling financial consequences.

[271] Therefore, it is not necessary for Paramount to prove it would have been held liable in the arbitration. Quoting again from ***Aviva***:

> [51] In the present case, the trial judge did not subject the matter to such a test. Instead, the judge asked himself "whether it has been established that the Diocese was obligated to pay the claims by reason of liability imposed upon it by law" (para. 127). He concluded that, because this had not been established, the payments made through the conciliation process were in the nature of voluntary payments and were not recoverable from Aviva. With respect, the governing principles allow for the reasonable settlement of claims by an abandoned insured even in cases where the insured would not have incurred any liability imposed by law. The question is simply whether, in the circumstances, the settlement was reasonable. In my view, the judge erred in not subjecting the diocese's settlements to the proper test.

[272] Consequently, I do not agree that Paramount must prove, in the present case where the insurers repudiated their obligations by denying coverage, that either (a) it would have been held liable in the arbitration, or (b) the insurers did not act carefully in denying coverage.

[273] In coming to these conclusions, I am mindful that the RSA policy wording departs somewhat from the language of the Chubb policy (see para 40 – 41 above). Both in pleadings and in submissions, the insurers contended that the words of the primary policy govern and did not draw any distinctions among the specific policies. Counsel for the insurers in oral submissions also characterized the policies as follow form policies. RSA did not submit it should be treated any differently on this issue. The parties are sophisticated and are entitled to conduct their case on this basis. As mentioned earlier, I have proceeded on the assumption that the policies contain the same material terms (apart from policy limits and the like).

[274] In any event, like the ***Cansulex*** case, the fact one of the policies may not contain a defence obligation should not change the outcome in the present case. The settlement actually reached is, per the ***Cansulex*** case, a reasonable measure of Paramount's damages.

(d) Whether settlement reasonable

[275] I do not agree with Paramount's submission in its written brief that the Defendants must prove Paramount's settlement was unreasonable.

[276] Paramount is obliged to prove its damages and cannot escape its onus by characterizing the basis of its damage quantification as a mitigation issue. It asserts the damages are $11,000,000 based on its settlement with Conoco. Therefore, it must prove its settlement was reasonable.

[277] Paramount submits that it was faced with a difficult claim in the arbitration and was able to make a favourable settlement that was reasonable in the circumstances.

[278] The insurers submit Paramount "had a very viable path available to it to avoid liability" in the arbitration. The insurers characterize Paramounts's decision to settle at $11,000,000 as surprising, given the "very strong defences" available based on Conoco's alleged gross negligence.

[279] The insurers further submit Paramount must prove it would have lost the arbitration. As discussed above, I have rejected this aspect of the insurers' argument on the basis it does not represent Canadian law.

[280] As mentioned, Paramount alleged in the arbitration that that Conoco was grossly negligent in failing to detect the leak or inform Paramount of the leak during the required 720 hour period. Paramount filed numerous expert reports for use in the arbitration, opining that Conoco was grossly negligent in the operation of the LVP pipeline and failing to detect the leak and shut in the pipeline well before June 9, 2016.

[281] Paramount faced exposure to Conoco of $31,000,000 leaving aside Paramount's own defence costs. The outcome of the arbitration generally turned on whether Conoco was or was not grossly negligent. If it was grossly negligent, Paramount would have a complete defence, pay nothing to Conoco, and potentially receive 100% of its reasonable solicitor and client defence costs. If Conoco was not grossly negligent, then Paramount would pay about $31,000,000 to Conoco (including 100% of the arbitrators' fees) and absorb its own defence costs.

[282] There was no reasonable financial outcome between these polar opposites. Paramount had investigated whether the remediation costs would have been reduced had Conoco shut in the pipeline by May 7th rather than June 10th, but after considering the matter abandoned this defence before it delivered its arbitration case to Conoco. A member of Paramount's senior management team who considered the settlement proposal deposed that Paramount had no evidence to suggest the remediation costs would have been minimal or very significantly reduced if the pipeline had been shut in earlier. The affidavits filed in the present action by Paramount's current Director of Asset Management, Paramount's expert remediation cost consultant, and the insurers' expert consulting engineer demonstrate the significant uncertainty associated with trying to develop alternative remediation cost scenarios.

[283] What were the risks facing Paramount in defending on the basis of gross negligence?

[284] Gross negligence has often been described in two ways: a sufficient magnitude of departure from standards of care, or a particular state of mind of the insured. Either suffices to find gross negligence. Case law defines gross negligence as follows:

> [55] It is evident from this discussion that Hunt Oil was negligent, but was it grossly negligent? The case law directs that gross negligence amounts to "very great negligence": ***Kingston (City) v. Drennan*** (1897), 1897 CanLII 2 (SCC), 27 S.C.R. 46 at 60. It has been described as "conscious wrongdoing" or "a very marked departure" from the standard of care required: see ***McCulloch v. Murray***, 1942 CanLII 44 (SCC), [1942] S.C.R. 141 at 145; ***United Canso Oil & Gas Ltd. v. Washoe Northern, Inc.*** (1991), 1990 CanLII 5600 (AB KB), 121 A.R. 1 at para. 345 (Q.B.). In ***Holland v. City of Toronto***, 1926 CanLII 10 (SCC), [1927] S.C.R. 242, 59 O.L.R. 628 at 634, Anglin C.J.C. described "the character and the

> duration of the neglect to fulfill [the] duty, including the comparative ease or difficulty of discharging it" as "important, if not vital, factors in determining whether the fault (if any) ... is so much more than merely ordinary neglect that it should be held to be a very great, or gross, negligence". Conscious indifference equates to gross negligence: ***Missouri Pacific Ry. Co. v. Shudford***, 72 Tex. 165, 10 S.W. 408 at 411.
>
> (***Adeco Exploration Company Ltd v Hunt Oil Company of Canada, Inc***., 2008 ABCA 214 at para 55).

[285] Pursuant to clause 101(y) of the Operating Procedure, "Gross Negligence" is similarly defined under two branches:

> (i) a marked and flagrant departure from the standard of conduct of a reasonable person acting in the circumstances at the time of the alleged misconduct; or
>
> (ii) such wanton and reckless conduct or omissions as constitutes in effect an utter disregard for harmful, foreseeable and avoidable consequences.
>
> (Underlining added).

[286] This definition imposes very high standards.

[287] The first branch of the test is focussed on the nature of the departure from the standard, whatever the operator's state of mind. The word "marked" connotes something very obvious, while "flagrant", according to ordinary dictionary definitions, connotes something so obviously inconsistent with what is right or proper as to appear to be a flouting of law or morality or something conspicuously or obviously offensive.

[288] The second branch of the test requires proof that the person simply did not care or acted intentionally (wanton) amounting to utter (or great) disregard for the consequences.

[289] Satisfying either branch suffices to find gross negligence.

[290] Paramount assembled an impressive array of expert reports criticizing the conduct of Conoco's operators. The insurers rely heavily on these reports to assert that Paramount would have won the arbitration.

[291] Before turning to the evidence, I will mention that the insurers also quote extensively from Paramount's in house counsel's emails to his counterpart at Conoco during the negotiations. In these emails, in house counsel exuded great confidence in Paramount's position. I note that Conoco's in house counsel replied with equal expressions of confidence in Conoco's position. Such displays are typical in settlement negotiations, and I do not place weight on them for the present purpose.

[292] What were the merits of Paramount's defences? In my view, not nearly as good as the insurers contend.

[293] Conoco had not delivered its evidence before the settlement was made, but the records in this action provide a picture of what Conoco would have to say about its conduct as operator. These include:

(a) The new Coriolis meters were not generating accurate data. The failure to reconcile the Coriolis meters on the first attempt (April 30, 2016) was not an "unexpected outcome". It was expected it would be challenging to balance the meters due to the rises and drops in the profile of the terrain over which the pipeline passed and the intermittent batch use of the pipeline.

(b) The loss of pressure on the May 6-7 test occurred slowly and may have been caused by a leaking isolation valve at 01-36 or another valve on the outlet end.

(c) Temperature changes in the condensate during the pressure test may have affected the results.

(d) The fact there was not a complete loss of pressure on the test indicated a meter error, not a leak. (In contrast, reports after the fact opined that the pipeline did not lose all its pressure because the condensate would remain in some sections crossing the hilly terrain due to gravity).

(e) The pumping time on start up before flow was detected on the outlet end could be a result of gas pockets in the pipeline.

(f) Additional work such as ordering new pipeline pigs, checking drive gain on the meters, and installing a back pressure regulator at 08-11 were considered in the ongoing effort to troubleshoot the matter.

(g) There was no history of pipeline corrosion issues in the Resthaven field.

(h) Conoco tested for commonly found corrosive bacteria as part of the pipeline operation and did not identify any such bacteria.

(i) There was no visible mechanical damage to the pipeline.

(j) The historical method of monitoring this pipeline for leaks was right of way inspections. Conoco continued this method while troubleshooting the new Coriolis meters continued.

(k) Conoco operators believed if there was a leak it would appear on the right of way.

[294] It would have been difficult to show that Conoco's errors in respect of corrosion mitigation would constitute gross negligence.

[295] AER characterized Conoco's negligence in corrosion mitigation practices, by assuming corrosion was not a concern in this pipeline due to the type of product being transported, as an "error in judgment". Arbitrators have a wide discretion in admitting evidence. This regulatory determination might have assisted Conoco in arguing, in the context of industry standards, that its conduct did not rise to the level of gross negligence, or assisted Conoco in cross-examining experts to see if they would disagree with a prominent regulator or to acknowledge that people could differ in their opinions or perceptions without being grossly negligent.

[296] Reports after the incident opined that the leak was caused by microbial induced corrosion, that probably commenced shortly after the pipeline was placed into service by Conoco's predecessor. The reports theorized that the bacteria may have been introduced into the pipeline by using untreated water from a nearby creek for hydrostatic testing of the pipeline two decades earlier or failing to apply a corrosion inhibitor after dewatering the pipeline. Conoco may have been negligent in failing to review the old records to assess risk factors for the

pipeline, but this is not likely to be characterized as a marked and flagrant departure or wanton and reckless conduct.

[297] The evidence also indicates that Conoco did not use a corrosion inhibitor during those periods when the pipeline was inactive. It may be challenging to establish gross negligence, given Conoco's error in judgment that corrosion was not a concern in this pipeline due to the nature of the product transported in it.

[298] It also may have been difficult to argue that the failure to shut in the pipeline immediately after the first failure to reconcile the new Coriolis meters was gross negligence.

[299] AER opined that a reasonable time in which Conoco ought to have checked the failed meter reconciliation against other data sourced from the existing field capture data system was 7 days. That calculation together with the evidence of the failed pressure test would have indicated the leak. Conoco ought to have known of the leak on May 7, 2016 and should have taken the pipeline out of service to conduct testing to verify the leak such as a standard pipeline hydro test. Again, the AER's comments might have assisted the arbitrators in deciding what was negligence and what was gross negligence.

[300] It also was open to the arbitrators to find that Conoco's errors shortly after the meter reconciliation issue arose were not so egregious to constitute gross negligence.

[301] Unlike an alarm generated by an existing leak detection system, the Coriolis meters were brand new and recently installed. There could well be problems with a newly installed system notwithstanding best efforts to the contrary. CSA Standard Z662 permits an operator to utilize an alternative monitoring system in the event critical data is missing or a critical process is inoperative, in order to continue operating the pipeline.

[302] Conoco could argue that its decision to temporarily use its historical method of right of way inspection was imperfect and negligent compliance with the exception in Standard Z662 permitting continued operation of the pipeline but given the absence of corrosion or other historical issues with the LVP pipeline, did not amount to gross negligence.

[303] A further problem was that Paramount had no evidence that remediation costs would have been significantly reduced if Conoco had shut in the pipeline earlier than it actually did so, therefore attempts to show Conoco to be grossly negligent in continuing to operate the pipeline were not likely to substantially reduce Paramount's liability under the CO&O.

[304] Paramount's evidence was that it considered developing alternative clean up cost scenarios but after discussing the matter with its consultants, decided not to pursue the matter. The insurers have not articulated an argument that Paramount was unreasonable in its decision not to attempt to obtain such evidence for use in the arbitration.

[305] Paramount's second defence was that Conoco committed gross negligence in failing to detect the leak within 30 days (720 hours) of April 21, 2016 and thereby destroyed Paramount's claim for insurance coverage.

[306] Pursuing this strategy was risky and the outcome was unpredictable.

[307] Again, it would be reasonable to consider, in deciding to agree to the proposed settlement, that establishing gross negligence by Conoco in the period of 720 hours commencing some time on April 21, 2016 would be challenging. Evidence was mounting, but Conoco could argue that it strongly believed the pipeline was not subject to corrosion issues, was not leaking,

and that the historical practice of right of way inspections would be adequate until the issue could be determined.

[308] In addition to proving gross negligence, Paramount would need to prove causation -- that it had lost insurance coverage as a result of Conoco's failure to accept the pipeline was leaking. It would need to either persuade the arbitrators that the insurer's denial of coverage was correct or, obtain a judicial determination that that Paramount was not covered.

[309] The Conoco claims and the insurance claims were proceeding in different forums and likely to be resolved at different times. Consequently, Paramount was exposed to the risks of inconsistent determinations of coverage. Paramount was trying to keep its options open in pleadings, but would have to decide before the arbitration hearing commenced, whether it was actually going to argue against its own meritorious coverage claim in the arbitration, to the potential prejudice of its coverage claim in Court. A settlement was likely perceived as having the benefit of finally ending these litigation management problems.

[310] The insurers observe these risks are ones Paramount must accept when adopting fundamentally different positions in separate proceedings involving the same facts.

[311] I do not agree with this submission. Paramount was forced into this position because the CO&O required it to arbitrate with Conoco while its insurance claims could only be pursued separately, in a Court. Paramount's attempts to manage the situation were reasonable, and a settlement would help move these intertwined matters toward resolution with reasonable certainty and less risk.

[312] Paramount considered the issues, took legal advice, and considered the matter with its senior management. Conoco and Paramount were far apart in their settlement proposals but were able to arrive at a mutually agreeable proposal after a series of offers. Paramount settled before it saw Conoco's evidence but was well informed from the AER proceedings of Conoco's factual response and could have no assurance if it did not settle at the relatively favourable number of $11,000,000 on the table, that it would do as well or better later on.

[313] In the circumstances, Paramount acted reasonably in settling the claim at $11,000,000 and thereby buying peace and certainty for a reasonable price. This settlement is the measure of Paramount's loss.

IX Whether Paramount failed to mitigate the loss

[314] The insurers submit that if Paramount is correct that Conoco detected the leak within 720 hours of its commencement, then the Court should find that Conoco would have failed in its obligation to mitigate the loss because it failed to shut in the LVP pipeline. They submit that Paramount must be identified with Conoco's failings in this scenario, because Conoco acted as Paramount's agent.

[315] Paramount responds that any negligence on the part of Conoco cannot legally be attributed to Paramount. Also, breach of the duty to mitigate only reduces recovery under the policies but does not impair coverage.

[316] It is not disputed that an insured is obliged in the event of loss or damage to property to take all reasonable steps to prevent further loss and damage, both at common law and by statute (***Hartford Fire Insurance Co v Benson & Hedges***, 1978 CanLII 37 (SCC), [1978] 2 SCR 1088).

[317] The parties did not make extensive submissions as to the scope of this duty and how it would interact with an objectively based assessment of detection under the Endorsement. It is not necessary to fix a date, as I explain in the following paragraphs.

[318] As mentioned earlier, these energy industries pollution liability policies were issued in the context that the insured, an oil and gas company, could be either an operator or a non-operator of its interests. The recognition in the Endorsement that a different reporting period applies where the insured was not the operator, make this clear.

[319] For the reasons expressed earlier (Part VII(c)(ii)) above), I do not read the operating procedure as constituting Conoco an agent of the facility owners in the day-to-day facility operations, nor have the insurers demonstrated a persuasive reason or policy rationale to identify Paramount with Conoco's actions in those operations.

[320] Consequently, as between insured and insurers, I refuse to find that Paramount is identified with Conoco's errors and omissions.

[321] Even if Paramount were considered to have authorized Conoco to conduct the daily operations of the facility as Paramount's agent, the insurers have not proved the amount by which the negligent delay in responding to evidence of the release increased the quantum of the losses.

[322] The insurer's consulting engineer opined, with reference to Paramount's possible cost remediation scenarios:

> A more rigorous analysis would be required to establish that remediation costs would have been significantly different had the leak been detected and remediated earlier. In lieu of any real analysis, Paramount has instead opted to speculate with no evidence supporting any of their conclusions.

[323] The insured's consultant is indeed correct that Paramount's remediation scenarios were speculative estimates. They were submitted to show the difficulties facing Paramount in pursuing such allegations against Conoco during the arbitration, to help demonstrate that its decision to settle the claim with Conoco was reasonable.

[324] The onus lies on the insurers, not Paramount, to prove the loss arising from alleged failure to mitigate. Absent the analysis their own consultant says is necessary, and considering the defendants had a fair opportunity to file evidence and provide submissions on this point, I find they have not proved any reduction that would be appropriate in the event Conoco's failure to mitigate the release should be attributed to Paramount.

X Other matters

[325] Coverage requires that there be "bodily injury" or "property damage" caused by a "pollution incident" that commences on or after the Retroactive Date shown in the Declarations (being July 1, 2013). The "pollution incident" must be from an "insured site" or "waste facility" in the "coverage territory".

[326] The loss constituted "property damage" from an "insured site" in the "coverage territory". The insurers admitted these requirements were met in their denial of coverage letters of December 12, 2017. The evidence amply demonstrates these requirements were met.

[327] Paramount bears the onus to prove that the property damage was caused by a "pollution incident". This requires Paramount to prove several matters.

[328] The requirements that the incident be an "unexpected and unintentional emission, discharge, release or escape of pollutants into or upon land, the atmosphere or any watercourse or water body" that resulted in "environmental damage" are not in serious issue.

[329] The insurers acknowledged that the commencement of the release was accidental.

[330] The insurers submitted in their written brief that indemnifying Paramount for the loss would be contrary to public policy. I do not agree. The parties are free to contract for indemnification arising from a pollution incident.

[331] The insurers further submitted that indemnifying Paramount would be contrary to the purposes of the policies. This submission is premised on the assumption that Conoco actually knew of the release by late April or early May, 2016, therefore it was no longer unexpected or unintentional. Further, Conoco acted as Paramount's agent. In earlier parts of my reasons I have not found that either of these occurred.

(a) Conoco knew of evidence by April 30 that was sufficient to constitute detection under the policies. However, it was not actually or subjectively aware that the release was occurring.

(b) The insurers have not demonstrated that Conoco acted as Paramount's agent.

[332] Conoco's negligence in responding to the data anomalies does not change the fact that the release was unexpected and accidental. I have found that Paramount did not "abrogate" (insurers' brief, para 302) its duties under the CO&O and reasonably relied on Conoco (Part IV above). There is no basis to deny Paramount indemnification in these circumstances.

[333] The requirement that the insurers be notified within 2160 hours of notification to the non-operator (Paramount) is not in issue. Paramount notified them on June 15, 2016, well within the applicable time limit.

[334] The requirement that the emission, discharge etc., does not occur in a quantity or with a quality that is routine or usual to the insured's operation is not in issue and is amply supported by the evidence and the Agreed Statement of Facts.

[335] Consequently, Paramount has proved all the requirements for coverage, breach of contract and damages.

XI Decision

[336] Paramount is entitled to judgment against each insurer for the coverage afforded under its respective policy, subject to applicable pollution incident limits, aggregate limits, and any applicable deductibles or self-insured retentions, to the collective limit of $11,000,000.

[337] The parties may speak to prejudgment interest, costs, or other necessary issues if unable to agree.

Heard on the 9th day of May, 2023
Dated at Calgary, Alberta this 8th day of November, 2023

JT Eamon , JCKBA

Appearances:

John Legge and Nathania Ng
For the Plaintiff

Keith Marlowe KC and Carly Williams
For the Defendants