Court of Appeal for Saskatchewan
Docket: CACV4100

Citation: ***Kelly Panteluk Construction Ltd. v Lloyd's Underwriters*, 2024 SKCA 42**
Date: 2024-04-18

2024 SKCA 42 (CanLII)

Between:

Kelly Panteluk Construction Ltd.

Appellant
(Plaintiff)

And

Lloyd's Underwriters, collectively representing Lloyd's Underwriter Syndicate No. 0510 KLN, London, Lloyd's Underwriter Syndicates Nos. 1919 CVS, No. 1274 AUL, and No. 5151 MRE, London, and Lloyd's Underwriter Syndicate No. 1225 AES, London

Respondents
(Defendants)

Before:	Caldwell, Kalmakoff and Drennan JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Mr. Justice Caldwell
In concurrence:	The Honourable Mr. Justice Kalmakoff The Honourable Madam Justice Drennan
On appeal from:	2022 SKKB 227, Regina
Appeal heard:	June 8, 2023
Counsel:	James Ehmann, K.C., and David Miachika for the Appellant Jeff Grubb, K.C., and Mark Frederick for the Respondents

2024 SKCA 42 (CanLII)

Caldwell J.A.

I. OVERVIEW

[1] Kelly Panteluk Construction Ltd. [KPCL] appeals against the summary dismissal of its application for a declaration that the respondent insurance-underwriter syndicates [Insurer] had a duty to defend it under a course-of-construction, wrap-up, liability insurance policy [Policy] (see: *Kelly Panteluk Construction Ltd. v Lloyd's Underwriters*, 2022 SKKB 227 [*Decision*]).

[2] In the *Decision*, the judge held that the Insurer was not subject to a duty to defend under the Policy in the circumstances of this matter. In this appeal, KPCL alleges that the judge erred in law, misapprehended the germane pleadings, and failed to consider relevant case authorities. KPCL also argues that the judge erroneously placed the onus on it to take itself out of Policy exclusions and to establish coverage under the Policy and, thereby, failed to require the Insurer to prove that the exclusions applied in the circumstances of this case.

[3] For the reasons that follow, I conclude that the appeal must be dismissed.

II. BACKGROUND

[4] KPCL, which provides earth-moving and excavation services, entered into a contract with Canadian Pacific Railway Company [CP Rail] to construct an earthen embankment for a railway line located in southern Saskatchewan. The Insurer issued the Policy to KPCL in respect of KPCL's work on the embankment project, which consisted of placing a series of what are called *lifts* of earthen fill on CP Rail's property [Land] to build up its elevation. Other persons performed consulting and monitoring services in respect of the project, including Clifton Associates Ltd. [Clifton]. When the project was nearing completion, the embankment collapsed causing damage to it and to the Land for which CP Rail sued KPCL, Clifton and others, seeking $41 million in damages [CP Action].

[5] KPCL's insurance broker notified the Insurer of the CP Action and sought coverage under the Policy. The Insurer agreed that CP Rail's claims against KPCL in the CP Action were within the scope of the Policy, but it declined to provide coverage, citing a "Project Damage Exclusion" and an "Operations Exclusion" under the Policy. Those exclusions are worded as follows:

> **EXCLUSIONS**
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> This Policy does not apply to:
>
> …
>
> 8. damage to or destruction including loss of use of:
>
> …
>
> (c) that particular part of any property:
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> (i) upon which operations are being performed by or on behalf of the Insured at the time of the damage thereto or destruction thereof, arising out of such operation, or
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> (ii) out of which any damage or destruction arises, or
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> (iii) the restoration, repair or replacement of which has been made or is made necessary by reason of faulty workmanship thereon by or on behalf of the Insured;
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> the "**Operations Exclusion**"
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> …
>
> 11. property either forming part of or to form part of the Project Insured. However, this Exclusion shall not apply with respect to such coverage as is afforded under the Completed Operations Hazard and the Products Hazard as defined;
>
> the "**Project Damage Exclusion**"
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> …
>
> **SCHEDULE "A"**
>
> **ENDORSEMENT NO. 22**
>
> **Property Damage to Existing Property**
>
> This Policy is amended in that Exclusion 8 shall not apply to Property Damage to the principal[']s existing surrounding property, not forming part of the project works, but no coverage shall be provided for Property Damage to that part of property being worked upon when such Property Damage arises out of such work that is or would normally be considered as being covered by a Builders Risk/Course of Construction Insurance Policy.

[6] Having been denied coverage, KPCL issued a statement of claim against the Insurer and then brought a summary judgment application in the Court of King's Bench seeking a declaration that the Insurer owed it a duty to defend in the CP Action.

2024 SKCA 42 (CanLII)

[7] In the *Decision*, the judge held that the Insurer did not owe KPCL a duty to defend in the CP Action under the Policy. To reach that holding, he made findings about the substance of the claims against KPCL in the CP Action and interpreted the Project Damage and Operations Exclusions as well as Endorsement 22. The judge's interpretation of the claims in the CP Action and the Policy led him to reach four conclusions about coverage under the Policy:

(a) KPCL had not established that the pleadings in the CP Action could be read in a way that allowed the court to separate damaged property (i.e., the embankment and foundation soils of the Land) and KPCL's work thereon "into component parts" to thereby avoid the exclusion for damage to or destruction of "that particular part of any property" under the Operations Exclusion.

(b) The Operations Exclusion excluded the losses claimed against KPCL, which included claims for damage to the foundation soils, because it excluded losses from operations performed by or on behalf of KPCL and KPCL was responsible for all aspects of the construction of the embankment.

(c) Endorsement 22, although an exception to the Operations Exclusion, did not apply because the foundation soils formed part of the "project works".

(d) Lastly, the Project Damage Exclusion applied to exclude coverage for damage to the foundation soils because they formed part of the embankment project in accordance with the definition of *Project Insured* under the Policy.

[8] In summary, the judge determined that initial coverage for loss or damage under the Policy was excluded by the Operations Exclusion (and was not brought back into coverage by Endorsement 22) and by the Project Damage Exclusion. The Operations Exclusion applied because CP Rail had claimed for losses from operations that were claimed to have been performed by or on behalf of KPCL in the construction of the embankment and for damages to the foundation soils, which it claimed formed part of the embankment construction project. The Project Damage Exclusion applied for much the same reason—because the foundation soils formed part of the project under the definition of *Project Insured* in the Policy.

2024 SKCA 42 (CanLII)

2024 SKCA 42 (CanLII)

III. ISSUES AND ANALYSIS

[9] In *Progressive Homes Ltd. v Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 SCR 245 [*Progressive Homes*], Rothstein J. for the Supreme Court stated that "The issue of the duty to defend requires the consideration of the pleadings in the actions against [the insured] to determine if there is a possibility of the claims falling within the insurance coverage" (at para 6). The parties to this appeal agree that, when the language of an exclusion clause is ambiguous, it is to be interpreted in the manner most favourable to the insured. They further agree that, when an action falls outside policy coverage by reason of an exclusion clause, the duty to defend is not triggered.

[10] KPCL has pursued six related grounds of appeal in its factum, but, at root, it argues that there was at least a *possibility* of CP Rail's claims against it falling within the Policy coverage and that the judge erred in law and in fact when he found otherwise. As noted, the judge's conclusion rested principally on two findings: (a) that CP Rail had claimed that the foundation soils were part of the construction project; and (b) that CP Rail had claimed that KPCL was responsible for monitoring the foundation soils or for supervising the contractor who did that work. KPCL challenges these findings under its six issues, which I address below in the order they arise under its factum.

A. Did the judge err in law by making findings of fact to determine the Insurers' duty to defend KPCL in the CP Action, rather than assuming the facts as alleged in the pleadings were accepted as true as mandated by the Supreme Court of Canada?

[11] In its arguments under this heading, KPCL points to CP Rail's claim in the CP Action that "the foundation soils in the areas were weakened significantly by the Embankment Failure and CP was required to redesign the Embankment so that it could be safely constructed on the newly weakened soils". KPCL asserts that the judge erred by not accepting as true what CP Rail had claimed or what those claims stated for the purpose of determining whether the Insurer had a duty to defend. It says that, as a matter of law, the judge was not permitted to find as *fact* that the "foundation soils were part of the construction of the embankment".

[12] I start by observing, as did the judge, that it was the Insurer who had argued that "the foundation soils were an integral part of *the construction of* the embankment" (at para 91, emphasis added). While the judge agreed with the Insurer's position, he stated his finding a bit differently, writing "Not only were the foundation soils an integral *part of the embankment*…" and later referring to the "integral nature of the foundation soils *to the Project*" and describing this as "an often-repeated theme in the claim" (at para 92, emphasis added).

[13] Notwithstanding the discrepancy between what the judge found and what KPCL argues he found, it asserts that the judge erred in law by making findings of fact rather than assuming that the facts alleged in CP Rail's pleadings were true. It framed this issue with implicit reference to *Progressive Homes*, where Rothstein J. stated:

> [19] An insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim (*Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801, at pp. 810-11; *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49, [2001] 2 S.C.R. 699, at para. 28; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at paras. 54-55). It is irrelevant whether the allegations in the pleadings can be proven in evidence. That is to say, the duty to defend is not dependent on the insured actually being liable and the insurer actually being required to indemnify. What is required is the mere possibility that a claim falls within the insurance policy. Where it is clear that the claim falls outside the policy, either because it does not come within the initial grant of coverage or is excluded by an exclusion clause, there will be no duty to defend (see *Nichols*, at p. 810; *Monenco*, at para. 29).
>
> [20] In examining the pleadings to determine whether the claims fall within the scope of coverage, the parties to the insurance contract are not bound by the labels selected by the plaintiff (*Non-Marine Underwriters, Lloyd's of London v. Scalera*, 2000 SCC 24, [2000] 1 S.C.R. 551, at paras. 79 and 81). The use or absence of a particular term will not determine whether the duty to defend arises. What is determinative is the true nature or the substance of the claim (*Scalera*, at para. 79; *Monenco*, at para. 35; *Nichols*, at p. 810).

[14] I agree that a court tasked with determining whether there exists a duty to defend should not make specific findings of fact, but the proscription is not as absolute as KPCL suggests. In *Monenco Ltd. v Commonwealth Insurance Co.*, 2001 SCC 49, [2001] 2 SCR 699 [*Monenco*], a unanimous decision of the Supreme Court, Iacobucci J. summarised the jurisprudence on this issue, writing:

> [35] Based on this line of authority, it follows that the proper basis for determining whether a duty to defend exists in any given situation requires an assessment of the pleadings to ascertain the "substance" and "true nature" of the claims. More specifically, the factual allegations set out therein must be considered in their entirety to determine whether they could possibly support the plaintiff's legal claims.

2024 SKCA 42 (CanLII)

> [36] While these principles are instructive for the purposes of the present case, one important question arising in this appeal has been left open by the jurisprudence to date. That is, whether, in seeking to determine the "substance" and "true nature" of a claim, a court is entitled to go beyond the pleadings and consider extrinsic evidence. Without wishing to decide the extent to which extrinsic evidence can be considered, *I am of the view that extrinsic evidence that has been explicitly referred to within the pleadings may be considered to determine the substance and true nature of the allegations, and thus, to appreciate the nature and scope of an insurer's duty to defend.* I now turn to that question.
>
> [37] It should be recalled that the question whether an insurer is bound to provide defence coverage in an action taken against the insured arises as a preliminary matter. Of course, after trial, it may turn out that there is no liability on the insurer, and thus, no indemnity triggered. But that is not the issue when deciding the duty to defend. Consequently, we cannot advocate an approach that will cause the duty to defend application to become "a trial within a trial". In that connection, *a court considering such an application may not look to "premature" evidence, that is, evidence which, if considered, would require findings to be made before trial that would affect the underlying litigation*.
>
> (Emphasis added)

[15] Later in his reasons, Iacobucci J. reinforced the idea that the examination of extrinsic evidence should not stray into fact finding about contentious points at issue in the litigation between the third party and the insured. Rather, the reviewing court should seek merely to "[illuminate] the substance of the pleadings" (*Monenco* at para 39).

[16] Given the dicta in *Monenco*, I conclude that the judge was required to make findings about CP Rail's pleadings to determine the substance and nature of its allegations against KPCL. He had to determine what CP Rail's claims against KPCL were about not whether the facts alleged therein were provable or proven. As such, I reject KPCL's contention that the judge erred in law "by making findings of fact to determine the Insurers' duty to defend [it] in the CP Action" because that is what was required by the application that KPCL had put before him.

B. Did the judge misapprehend the pleadings in support of his conclusion that the foundation soils were an "integral part" of the Embankment construction because KPCL did the monitoring?

[17] KPCL submits that, as a matter of fact, CP Rail's pleadings do not support the judge's finding that the foundation soils were an "integral part" of the "construction" of the embankment, as that allegation is not set out in CP Rail's statement of claim. Although he agreed with the Insurer's position on that point, I reiterate that the judge stated in the *Decision* that the foundation soils were "an integral part *of the embankment*" and "integral…*to the Project*" (at para 92,

2024 SKCA 42 (CanLII)

emphasis added), not that they were an integral part of the *construction* of the embankment. Nevertheless, KPCL says that, had the judge not so erred, he would have concluded that there was a *possibility* of coverage under the Policy and, therefore, that the Insurer had a duty to defend it.

[18] In *Monenco*, when discussing when an insurer's duty to defend is triggered based on the allegations made in the pleadings, Iacobucci J. referred to that Court's earlier decision in *Nichols v American Home Assurance Co.*, [1990] 1 SCR 801 at 810, for the proposition that the "mere possibility that a claim falling within the policy may succeed will suffice" (*Monenco* at para 29; see also *Progressive Homes* at para 19). Justice Iacobucci explained this by saying that the insurer's duty to defend is broader than the duty to indemnify. Later in *Monenco*, he remarked:

> [31] Where pleadings are not framed with sufficient precision to determine whether the claims are covered by a policy, the insurer's obligation to defend will be triggered where, on a reasonable reading of the pleadings, a claim within coverage can be inferred. This principle is congruent with the broader tenets underlying the construction of insurance contracts, namely the *contra proferentem* rule, and the principle that coverage provisions should be construed broadly, while exclusion clauses should receive a narrow interpretation. In *Opron Maritimes*, *supra*, the New Brunswick Court of Appeal conveyed these principles by stating at para. 15 that, "[a]ny doubt as to whether the pleadings bring the incident within the coverage of the policy ought to be resolved in favour of the insured". Moreover, in *Nichols*, McLachlin J. stated at p. 812:
>
>> I conclude that considerations related to insurance law and practice, as well as the authorities, overwhelmingly support the view that the duty to defend should, unless the contract of insurance indicates otherwise, be confined to the defence of claims which may be argued to fall under the policy. That said, the widest latitude should be given to the allegations in the pleadings in determining whether they raise a claim within the policy.
>
> [32] As G. Hilliker writes in *Liability Insurance Law in Canada* (3rd ed. 2001), at p. 72, some courts have interpreted the foregoing passage as saying that if there is any possibility that the claim falls within liability coverage, the insurer must defend. However, Hilliker also maintains that courts must not engage in "a fanciful reading of the statement of claim merely for the purpose of requiring the insurer to defend". He notes that it is only where there is genuine ambiguity or doubt that the duty to defend must be resolved in favour of the insured party. This principle is articulated in a broader fashion by Andal and Donnelly, who state that "the widest latitude should be given to the allegations in the pleadings in determining whether they raise a claim within the policy". (See R. V. Andal and T. Donnelly, "Liability Insurance" in C. Brown, *Insurance Law in Canada* (loose-leaf ed.), vol. 2, at p. 18-13.)

[19] Justice Iacobucci recognised that the bare assertions advanced in a statement of claim are not necessarily determinative of the issue and that what really matters is the "true nature of the claim" (*Monenco* at para 34, quoting from *Non-Marine Underwriters, Lloyd's of London v Scalera*, 2000 SCC 24 at para 79, [2000] 1 SCR 551). Again, the key question is not whether the

2024 SKCA 42 (CanLII)

third-party claims are meritorious but "whether, assuming the verity of all of the plaintiff's factual allegations, the pleadings could possibly support the plaintiff's legal allegations" (*Scalera* at para 84).

2024 SKCA 42 (CanLII)

[20] Here, KPCL points out that CP Rail's pleadings refer to the "foundation soils" and the "embankment" as separate objects. It says that it performed no construction operations in relation to the foundation soils themselves. KPCL asserts that this error of fact disturbs the judge's conclusion that the CP Action was excluded from coverage under the Project Damage Exclusion. Absent that error, KPCL submits that the judge would have concluded that there was at least a possibility of coverage under the Policy and, therefore, that the Insurer had a duty to defend it.

[21] Consideration of this ground of appeal requires a more complete understanding of the terms of the Policy as well as the allegations made in the CP Action. As noted, the Project Damage Exclusion excludes claims of damage to "property either forming part of or to form part of the Project Insured". In the "Insuring Agreements" page of the Policy, the following reference is found to the *Project*:

> IN CONSIDERATION of the payment of the premium and subject to the Declarations, Insuring Agreements, Exclusions, Limits of Liability, Conditions and other terms of this Policy, THE INSURER HEREBY AGREES TO INSURE THE INSURED in the manner and to the extent herein set forth.
>
> INSURING AGREEMENTS
>
> The Insurer agrees to pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages, *but only with respect to the Project stated on the Declarations Page*
>
> (Emphasis added)

[22] On the "Declarations" page of the Policy, the term *Project Insured* is described as "As set forth in the Risk Details". The term *Project Insured* is defined in the "Risk Details" part of the Policy as:

> PROJECT INSURED: Civil and Bridge Construction requirements for the new Belle Plaine Railway Spur from the existing Kalium Spur to the proposed K+S Potash mine near Findlater, Saskatchewan. Project located at approximately 30.3 km railway grade from Belle Plaine SK to 11/1/P Road 194.

[23] Notably, the definition of the term *Project Insured* does not refer to an "embankment" or "foundation soils"; it does, however, identify the land where "the new Belle Plaine Railway Spur" would be located.

[24] The judge also said that CP Rail's claim of damage to the foundation soils was in nature and substance a claim for damage for work done by KPCL and that it was, therefore, excluded from coverage under the Operations Exclusion. That provision excludes "damage to or destruction including loss of use of…that particular part of any property":

> (i) upon which operations are being performed by or on behalf of the Insured at the time of the damage thereto or destruction thereof, arising out of such operation,
>
> …, or
>
> (iii) the restoration, repair or replacement of which has been made or is made necessary by reason of faulty workmanship thereon by or on behalf of the Insured.

2024 SKCA 42 (CanLII)

[25] As mentioned earlier, the Operations Exclusion was amended by Endorsement 22, which states:

> **ENDORSEMENT NO. 22**
>
> **Property Damage to Existing Property**
>
> This Policy is amended in that *Exclusion 8 shall not apply to Property Damage to the principal[']s existing surrounding property*, *not forming part of the project works*, but no coverage shall be provided for Property Damage to that part of property being worked upon when such Property Damage arises out of such work that is or would normally be considered as being covered by a Builders Risk/Course of Construction Insurance Policy.
>
> (Emphasis added)

[26] On the other side of the analysis, CP Rail describes the embankment project in the CP Action pleadings in the following terms:

(a) "a 31 kilometre rail spur near Moose Jaw, Saskatchewan" (at para 1);

(b) "a new section of track connecting the K+S Bethune mine to CP's existing rail line" (at para 13);

(c) "a crossing of the Qu'Appelle River Valley approximately 3.7 kilometers long" including "a multi-span bridge connecting the east and west banks of the Qu'Appelle River Valley that required high grade earth embankments as part of its design" (at para 14);

(d) "The Qu'Appelle River crossing was at approximately 25+000, with the embankments on either side of the river extending approximately two kilometers in each direction" (at para 15);

(e) "Construction of an embankment using the observational method involves building up height by adding controlled, specified amounts of fill where and when such placement is safe as determined by analysis of observed conditions. The fill and foundation soils are monitored and the stresses within the foundation soils and existing fill created by the newly placed fill are measured and analyzed to determine the rate at which further fill can be safely added to the embankment structure" (at para 22);

(f) "Although the Embankment was stabilized after the Embankment Failure, the foundational soils in the area were weakened significantly by the Embankment Failure, with the result that CP was required to redesign the Embankment so that it could be safely constructed on the newly weakened soils" (at para 56); and

(g) "After carefully evaluating the options available for reconstruction, and after taking into account the weakened foundation soils caused by the Embankment Failure, CP elected to proceed with a design aligned further to the west and with an elevation 3 meters lower than the original plan, with berms extending further outwards in both directions from the main Embankment" (at para 57).

[27] As the *Decision* records, the judge found that an oft-repeated theme of the CP Action was claims made on the basis that the foundation soils were part of the embankment that was to be constructed by KPCL and others for CP Rail. He quoted examples from those pleadings in support of that assessment, including some of the above-cited references.

[28] While not necessarily findings of fact, the judge's interpretation of the substance of the pleadings in the CP Action remains, in my respectful view, subject to the palpable and overriding error standard of review on appeal (*Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235; *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633; *Mosten Investments LP v The Manufacturers Life Insurance Company (Manulife Financial)*, 2021 SKCA 36, [2021] 9 WWR 1). Without attempting to explain the absence of support for KPCL's allegation of error of

2024 SKCA 42 (CanLII)

fact in this regard, I will simply state my conclusion, based on the foregoing, that the judge's finding that CP Rail claims in the CP Action that the foundation soils form part of the embankment is rational and not palpably in error based on those pleadings.

2024 SKCA 42 (CanLII)

C. Did the judge misapprehend the pleadings in support of his conclusion that the foundation soils were part of KPCL's work because KPCL was responsible for supervising the work of the consultant Clifton who did the monitoring?

[29] Similar to the previous point in issue, KPCL challenges the judge's finding that the CP Action alleges that it was responsible for monitoring the foundation soils during construction and for supervising Clifton in that regard. KPCL says, correctly, that the pleadings state that Clifton was responsible for monitoring the foundation soils during construction. It further says that Clifton was responsible for supervising the embankment work performed by KPCL.

[30] Nonetheless, I do not agree that the judge erred when he interpreted the CP Action as alleging that KPCL was responsible for construction of the embankment and for monitoring the foundation soils. That interpretation of the CP Action against KPCL is well supported by CP Rail's statement of claim, including by passages that describe KPCL's work on the project in these terms:

(a) "the primary earthworks and construction contractor for the Belle Plaine Project" (CP Rail statement of claim at para 9);

(b) "construction, grading and earthworks for the Belle Plaine Project" and "the general contractor for the Belle Plaine Project, <u>with responsibility for all aspects of construction and project management</u>" (at para 26, underlining added);

(c) "construction of the Belle Plaine Project earthworks, <u>including the embankments</u>, as well as <u>for overseeing the work of other construction contractors working on the Belle Plaine Project</u>" (at para 33, underlining added);

(d) "construction work on the embankment" (at para 34);

(e) "<u>KPCL constructed the Embankment</u> by placing a series of layers or lifts of earth, referred to as fill, increasing the height of the Embankment with the addition of each lift. As additional layers were placed, the existing fill and foundational soils

were compacted by pressure from the newly added fill, and by mechanical compaction of the fill after it was placed" (at para 35, underlining added);

(f) "KPCL was selected the primary construction contractor for the Belle Plaine Project and was responsible construction of the Embankment" (at para 99);

(g) "The scope of KPCL's work under the KPCL Agreement encompassed all services necessary for the construction of the Belle Plaine Project, including the construction of approximately 31 kilometers of railway grade with an estimated 7.2 million cubic meters of earth excavation and an estimated 6.7 million cubic meters of embankment construction (the 'KPCL Work')" (at para 100, underlining added);

(h) "KPCL's Work included all aspects of construction, project management and safety, as well as supervision of the construction contractors on Belle Plaine Project. KPCL was also responsible for providing a quality management system to control construction quality and for daily tracking and reporting regarding the construction work that had been performed." (at para 101, underlining added);

(i) "KPCL was responsible for providing the services necessary to complete the KPCL Work to the satisfaction of CP. KPCL was also required to protect the KPCL Work from damage and was responsible for damage arising as a result of its operations." (at para 102);

(j) "At all times, KPCL controlled the KPCL Work and was responsible for determining the most effective and appropriate construction methods for the KPCL work, including for the construction of the Embankment." (at para 103); and

(k) "KPCL was responsible for the means, method, technique and procedures used in the construction of the Embankment, as well as for the implementation of the construction method it selected. KPCL was also responsible for coordination of the services to fulfill the KPCL Agreement, including ensuring that it and its subcontractors obtained and complied with directions from Clifton as to the availability for construction of zones within the construction site." (at para 104, underlining added).

2024 SKCA 42 (CanLII)

[31] In view of the foregoing, there is no palpable error in the judge's interpretation of CP Rail's claims in the CP Action as alleging that KPCL was responsible for construction of the embankment and for monitoring the foundation soils.

[32] In its arguments before the judge and on appeal, KPCL submitted that the Insurer's obligations to defend it should be considered as if the Policy was only issued to KPCL. It explained this as meaning that the obligations and work of other defendants, such as Clifton, "are irrelevant to determining the Insurer's duty to defend KPCL in the CP Action". This submission may be why the judge did not refer to the pleadings in the CP Action that are inconsistent with or contradict the allegation that KPCL was responsible for or supervised Clifton in the monitoring of the foundation soils. For example, in its statement of claim, CP Rail described Clifton's work on the project in these terms:

(a) "CP selected Clifton to provide professional geotechnical and environmental engineering services and construction supervision services for the Belle Plaine Project" (CP Rail statement of claim at para 28, underlining added);

(b) "Clifton became the geotechnical engineer of record" and "was to provide the ongoing geotechnical engineering services needed to implement the observational design methodology during construction of the project", and "Clifton was to supervise and manage the construction of the Belle Plaine Project, including providing direction and supervision to KPCL, the construction contractor, to ensure the safe and appropriate implementation of the observational method during the construction" (at para 29, underlining added);

(c) "The observational method was to be implemented under Clifton's supervision and direction" and "Clifton monitored the soil conditions during construction… with a variety of devices including vibrating wire piezometers, settlement plates, borros anchors, slope inclinometers and alignment pins (collectively, the 'Monitoring Equipment')" (at para 37, underlining added);

(d) "Clifton and Altus used the Monitoring Equipment to monitor the stability of the Embankment and the underlying foundation soils during the course of constructing the Embankment. Using that information, Clifton determined where additional

2024 SKCA 42 (CanLII)

work on the Embankment could and could not take place. Clifton was responsible for communicating that information to both Altus and KPCL so that available construction locations could be marked by Altus and then utilized by KPCL to continue construction of the Embankment" (at para 38, underlining added);

(e) "Clifton was responsible for installing the Monitoring Equipment as well as for collecting and analyzing data from the Monitoring Equipment. KPCL and Altus provided assistance to Clifton in the placement and installation of the Monitoring Equipment" (at para 40, underlining added);

(f) "Based on the data collected from the Monitoring Equipment, and its professional analysis and interpretation of that data, Clifton designated specific zones in the Belle Plaine Project area according to their availability for construction work by KPCL and its sub-contractors. The designations indicated areas in which: (a) No fill placement was permitted; (b) Limited or restricted fill placement was permitted; and (c) Fill placement was permitted. …Clifton provided direction to KPCL regarding these designations, which signified the zones available to KPCL for grading and construction, both directly and through Altus" (at paras 41 and 42, underlining added);

(g) "Based on its analysis of the information from the Monitoring Equipment, Clifton designated various points along the Embankment as areas in which no fill was permitted in the period between October 26, 2015 and November 24, 2015. Subsequently, although pore water pressures in the Embankment did not decrease as much as expected during the period in which no fill placement was permitted, Clifton permitted KPCL to place an additional meter of fill in the Embankment area beginning after November 24, 2015" (at para 43, underlining added);

(h) "Throughout this period, Clifton was aware that certain instruments in the Monitoring Equipment had not been operating properly since at least September 29, 2015. Defects in, and failures of, the Monitoring Equipment continued through October and November 2015. In the week prior to December 5, 2015, Clifton was aware that critical Monitoring Equipment in the Embankment area was not

2024 SKCA 42 (CanLII)

performing properly. Clifton nonetheless provided KPCL with directions to continue with construction in the area of the Embankment" (at para 46, underlining added);

(i) "For example, despite being aware of the potential for instability due to a weak clay layer of soil in the foundational soils beneath the Embankment, on November 24, 2015, Clifton directed KPCL to place additional fill between 24+800 and 24+925. Similarly, although Clifton was aware that the pore water pressures in this area of the Embankment were still high and that the estimated FOS was just 1.1, on November 27, 2015, Clifton directed KPCL to place further fill between 24+700 and 24+950" (at para 47, underlining added);

(j) "On March 31, 2015, Clifton provided CP with a proposal for engineering, geotechnical and environmental services in relation to the Belle Plaine Project. As set out in this proposal, Clifton was to provide an instrumentation design and monitoring program, a geotechnical response plan, a baseline survey and environmental screening" (at para 79);

(k) "With respect to geotechnical support, Clifton's proposal included provision of an instrumentation program designed to monitor pore-water pressures, slope stability and settlements, a monitoring program designed to capture measurements during key construction activities and the development of a geotechnical response plan" (at para 81); and

(l) "In April 2015, CP and Clifton entered into a Supply of Services Agreement that was effective April 8, 2015 (the 'Clifton Agreement'). …Under the Clifton Agreement, Clifton agreed to provide the following services, amongst others, for the Belle Plaine Project: (a) geotechnical support and grade construction supervision; (b) environmental monitoring; (c) quality control testing; (d) daily reporting to CP; and (e) such other work as CP directed Clifton to perform. …In addition, Clifton was to provide construction supervision as required to direct the construction of the Embankment, including the appropriate timing for placement of

2024 SKCA 42 (CanLII)

> fill in particular areas, in accordance with the observational method (collectively…, the 'Clifton Work')" (at paras 81–83, underlining added).

[33] Ignoring KPCL's submission about disregarding the foregoing claims, I do not consider this to be a case of pleadings not having been framed "with sufficient precision to determine whether the claims are covered by a policy" (*Monenco* at para 31). CP Rail's claims against KPCL and the other defendants are precise and some of its detailed allegations of liability ostensibly and understandably overlap among the named defendants — such as its claims about who was responsible for monitoring the foundation soils or for supervising the monitor. On a reasonable reading of the whole of CP Rail's pleadings, it is genuinely possible to conclude that the "true nature of the claim" is that Clifton was primarily responsible for monitoring the foundation soils and that both Clifton and KPCL were liable to CP Rail in respect thereof (*Monenco* at para 34; *Scalera* at para 79). This is not, however, an ambiguity in the pleadings such that the judge should have resolved the duty to defend in favour of KPCL (*Monenco* at paras 31–32).

[34] Even though the CP Action can be read as claiming that Clifton is primarily liable to CP Rail for the monitoring of the foundation soils, the pleadings also identify KPCL as being responsible for that activity and for its supervision. Therefore, it cannot be said that the judge erred when he interpreted CP Rail's claims in the CP Action *as alleging* that KPCL was responsible for monitoring the foundation soils and for supervising Clifton in that regard.

[35] In short, I do not accede to KPCL's argument that the judge erred when he interpreted the CP Action as claiming that KPCL was responsible for construction of the embankment as well as for monitoring the foundation soils and for supervising Clifton in that regard. Of course, the judge's conclusion does not answer whether the Insurer might still be found to have a duty to indemnify KPCL following the fact-finding in a trial of the CP Action.

D. Did the judge impermissibly place the onus on KPCL to establish that a policy exclusion did not apply, instead of requiring the Insurers to establish that they did apply to all pleaded claims?

2024 SKCA 42 (CanLII)

[36] As noted, the Insurer accepts that CP Rail’s claims against KPCL fall within the initial grant of coverage under the Policy. With initial coverage having been conceded, the law placed the onus on the Insurer to establish before the judge that the claims pled against KPCL were excluded from coverage, in this case, by the Operations Exclusion and the Project Damage Exclusion. In this appeal, KPCL asserts that the judge erred by reversing this onus and requiring it to establish that the Policy exclusions did not apply to CP Rail’s claims against it.

2024 SKCA 42 (CanLII)

[37] KPCL’s argues that the judge’s interpretation of CP Rail’s claims — as alleging that the foundation soils were an integral part of the embankment construction — improperly placed the onus on it to prove the contrary so as to avoid the application of the Policy exclusions. In particular, KPCL criticises the judge for rejecting its submissions about the substance of the claims in the CP Action and about the applicability of the Policy exclusions thereto in the following paragraphs of the *Decision*:

> [75] KPCL suggests that although the [Project Damage Exclusion] would not allow it coverage for the last lift – that particular part of its work – it would allow coverage for the failed embankment.
>
> [76] The court must determine whether CP’s pleading make such a specific allegation. Do the pleadings possibly contemplate that KPCL’s work was separable into component parts so that each lift was a “particular part” of its work? In its brief of law, KPCL makes a strong assertion that the last lift initiated the failure but does not reference a clause in CP’s statement of claim to support its assertion.
>
> …
>
> [86] Not only do the pleadings fail to support KPCL’s claim that other persons’ work, not its own, were the cause of the embankment failure, the [Operations Exclusion] quite plainly includes the work of such other persons. Clause 8(c)(i) excludes from coverage “operations…performed by or on behalf of the Insured.”
>
> …
>
> [96] In conclusion, I cannot accept, as KPCL suggests, that the foundation soils did not form part of the Project. The pleadings emphatically state otherwise. CP claims damages for loss of the use of the foundation soils and alleges that KPCL was responsible for the monitoring of the foundation soils.

[38] Rather than revealing an improper reversal of the onus, the fullness of the judge’s analysis shows that he found that the Insurer had discharged its evidential and persuasive burdens by establishing that the claims against KPCL in the CP Action were excluded from coverage under the Policy. As I read the *Decision*, the judge knew that the Insurer bore that onus, but he also understood that both parties were entitled to argue whether the Insurer had discharged it. The paragraphs in question, when not taken out of their context in the *Decision*, simply show that he

considered KPCL's submissions as to what CP Rail's pleadings established or did not establish. They do not suggest that he reversed the onus.

[39] There is no merit to this ground.

E. Did the judge err by failing to interpret the relevant exclusions in the Policy in accordance with the accepted rules of policy interpretation?

[40] Under this ground, KPCL argues that the judge's finding that the foundation soils were a part of the embankment and were part of KPCL's work led him to erroneously interpret the Operations Exclusion and the Project Damage Exclusion to apply more broadly than was intended, thereby denying it coverage (or negating the Insurer's duty to defend it) for damage to, or that it had allegedly caused to, the foundation soils.

[41] Although they are set out in full earlier in this judgment, it is useful to have the text of the exclusions front of mind when considering this ground of appeal. The ones at issue state that "The Policy does not apply to":

(a) damage to "that particular part of any property…upon which operations are being performed by or on behalf of the Insured at the time of the damage thereto or destruction thereof, arising out of such operation";

(b) damage to "that particular part of any property…out of which any damage or destruction arises";

(c) damage to "that particular part of any property…the restoration, repair or replacement of which has been made or is made necessary by reason of faulty workmanship thereon by or on behalf of the Insured"; and

(d) "property either forming part of or to form part of the Project Insured".

[42] The first three comprise the Operations Exclusion and the fourth is the Project Damage Exclusion.

2024 SKCA 42 (CanLII)

[43] I recognise that the term *Project Insured* grounds the scope of the Project Damage Exclusion. As KPCL correctly observes, the definition of *Project Insured* does not refer to the foundations of the embankment. Returning to its position that the judge erroneously interpreted that term, KPCL argues that his finding that it includes the foundation soils shows that he erred by *broadly* interpreting the Policy exclusions to exclude more than what was intended. It submits that, if the Insurer had wanted to exclude property like the foundation soils from coverage, it would have and, indeed, should have done so in clear terms in the Policy.

2024 SKCA 42 (CanLII)

[44] To set some background, in the *Decision* the judge first interpreted the Operations Exclusion (sometimes called Exclusion 8), focussing initially on the meaning of “that particular part of any property” (at para 57) and finding that he could not, for the purposes of interpreting the exclusion, divide the embankment construction into separate components because KPCL’s work involved “indistinguishable, identical repetitive works” (at para 80). He then considered the meaning of “at the time of damage” under Exclusion 8(c)(i), because the embankment had collapsed at 7:00 a.m. when KPCL had no personnel on site, and concluded that “construing the exclusion so narrowly that it applies only at the instant an insured is intentionally touching the property would read the exclusion out of the policy” (at para 83). As discussed above, the judge next found that the Operations Exclusion was not limited to excluding operations “performed only by the Insured”, as had been the case in *Progressive Homes*, because it “excludes from coverage ‘operations…performed by or on behalf of the Insured’” (at para 86). This latter interpretation meant that, “because the pleadings clearly state that KPCL was responsible for the completion of the entire project, including the operations of others, and because the exclusion clearly covers the operations done on behalf of KPCL”, the judge could not accept “KPCL’s position that it has coverage under the Policy” (at para 88).

[45] At this point in the interpretive exercise, the judge examined Endorsement 22, which exempts CP Rail’s property “not forming part of the project works” from the application of the Operations Exclusion. With regard to KPCL’s submissions under this ground of appeal, this means that, when he came to determine whether the Operations Exclusion excluded the foundation soils from coverage, the judge was interpreting an *exemption* to an exclusion. In those circumstances, the onus was on KPCL to show that the Policy applied and that a narrow interpretation was no longer called for. The judge well understood his task:

[89] In the tiered analysis of interpreting an insurance policy, the court must determine if initial coverage for loss or damage, although excluded by an exclusion, is re-incorporated into the initial coverage by an exemption to the exclusion. KPCL asserts that Endorsement 22 has this effect because it expressly states that the policy "is amended in that Exclusion 8 shall not apply to Property Damage to the principals [*sic*] existing surrounding property, not forming part of the project works." KPCL states at para. 83 of its brief of law that any damage to the "pre-existing foundation soils underneath KPCL's Work" was "surrounding property" that belonged to CP. Accordingly, to the extent that the CP Action seeks damages for having to repair the pre-existing foundation soils, KPCL asserts Endorsement 22 restricts the application of Exclusion 8 and brings the claim for the damage to the foundation soils into coverage.

[90] The pleadings allege damage to the foundation soils. At para. 55 of the statement of claim, CP states "the foundational soils in the areas were weakened significantly by the Embankment Failure [and] CP was required to redesign the Embankment so that it could be safely constructed on the newly weakened soils."

[91] Lloyd's does not disagree that the foundation soils were and remain the property of CP. However, Lloyd's states that damage to the foundation soils is not part of the exemption in Endorsement 22 because, far from "not forming part of the project works" (as the endorsement requires), the foundation soils were an integral part of the construction of the embankment.

[92] Again, I agree with Lloyd's position. Not only were the foundation soils an integral part of the embankment, CP's claim states that KPCL was responsible "for all aspects of construction, project management and safety, as well as supervision of the construction contractors on Belle Plaine Project" (para. 101). Part of that responsibility was to "monitor the stability of the…underlying foundation soils" (para. 38) and to measure the "pore water pressure in the foundation soils and the Embankment fill" (para. 39). The integral nature of the foundation soils to the Project and the need to continually monitor the soil's response to additional layers of fill is an often repeated theme in the claim: "there was a clay layer in the foundation soils that was not adequately draining and which was contributing to the pore water pressure concern and that a weak layer such as this could cause instability." (para. 44)

[93] Furthermore, to suggest that the foundation soils were not part of the project works does not accord with the definition of "Project Insured" found in the Policy. The project was described as the construction "for the new Belle Plaine Railway Spur from the existing Kalium Spur to the proposed K+S Potash mine..." To suggest that the foundation soils under the embankment were not part of the Project does not accord with the definition of the "Project Insured."

[94] Lloyd's not only suggests that Endorsement 22 is much narrower than KPCL suggests, but that Exclusion 8 explicitly states that coverage is not extended to "loss of use of…property **upon** which operations are being performed…" [emphasis added]. Lloyd's takes a literal view of the preposition "upon," as in the embankment was built "on top of" the foundation soils. I am not convinced that "upon" as used in Exclusion 8 was meant to have such a literal interpretation.

(Emphasis in original)

2024 SKCA 42 (CanLII)

[46] As KPCL seems to recognise in its argument, the point at issue under this heading is not truly the judge's interpretation of the Policy exclusions; it is his interpretation of the claims in the CP Action. As the judge found, the Operations Exclusion and Endorsement 22, when read together in their ordinary and grammatical sense, unambiguously state that the Policy does not cover damage to "that particular part of any property … upon which operations are being performed by or on behalf of the Insured …arising out of such operation". The use of the term *project works* in Endorsement 22 instead of *Project Insured* is of little import in this regard. It will be recalled that KPCL's allegations of error in the judge's finding that the CP Action claims that the foundation soils were part of the embankment to be constructed by KPCL do not satisfy the benchmark for appellate intervention.

2024 SKCA 42 (CanLII)

[47] As I understand his reasons, the judge found that there was no cogent basis to conclude *other than* that the foundation of the embankment was part of the embankment itself. With that finding undisturbed, there is no rationale that would justify overturning his interpretation of the Operations Exclusion, after considering Endorsement 22, as excluding coverage for damage to the foundation soils.

F. Did the judge fail to consider relevant legal authority?

[48] KPCL pointed to two precedents that it says were overlooked by the judge. While it is not an error of law to fail to consider authorities, I have determined that neither of the cases were probative of the issues before the judge. Moreover, and determinant of this ground of appeal, the judge was plainly aware of and correctly applied the relevant insurance law principles, which he drew from the leading authorities, such as *Progressive Homes*.

[49] There is no merit to this ground of appeal.

IV. CONCLUSION

[50] I would dismiss the appeal and order that the Insurer have its costs.

"Caldwell J.A."
Caldwell J.A.

I concur. "Kalmakoff J.A."
Kalmakoff J.A.

I concur. "Drennan J.A."
Drennan J.A.

2024 SKCA 42 (CanLII)