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WHAT IS "SURFACE WATER"?

In the context of recent flood-related claims, the phrase "surface water" is coming under increased scrutiny. Property insurance policies often contain exclusions for loss or damage caused by "surface water". Flood insurance endorsements and policies in turn may provide coverage for flood caused by the accumulation or runoff of "surface water". The phrase is, in some instances, specially defined. However, particularly for older or industry standard form wordings, underwriters leave it undefined.

While Canadian courts have not often addressed the issue, U.S. courts have done so with more frequency. A Canadian court asked to look at the issue will, after reviewing any Canadian authorities on point, most likely first consider the common dictionary definitions. To the extent Canadian provincial health and environmental legislation has defined the phrase "surface water", a Canadian court may turn to such definitions as an aid in interpreting policy language. Finally, to the extent U.S. cases are of assistance, a Canadian court will look to these, particularly if they are in the insurance context. We briefly review each category below but caution readers this is not meant as legal advice for a particular form of policy wording or fact context. As the review discloses different wordings and different facts in different contexts will often give rise to different results.

Canadian Cases

Canadian courts have defined surface water as that which is produced by rainfall, melting snow, or springs and diffuses itself over the surface of the ground, following no defined course or channel, and not gathering into or forming any definite body of water. A court's treatment of the phrase "surface water"will depend on the context in which it is used in the policy. However, absent express language providing otherwise, Canadian courts will accept that "surface water" does not include water from non-natural or artificially created water sources, such as water-mains or sewage systems.

In *Re Partners Investments Ltd. and Borough of Etobicoke et al.*[1] the Ontario High Court found that water which escaped from a ruptured water-main, traveled to the surface of the ground and accumulated in the basement of the policyholder's property did not fall within an all-risk policy's exclusion for "flood, surface water, waves…" Following U.S. jurisprudence, and interpreting the exclusionary language in its context, Justice Cory (as he then was) concluded the exclusion was either (a) limited to flooding by natural causes or (b) ambiguous requiring it to be construed narrowly against the insurer, stating:

> The word "flood" refers to flooding from natural causes. The words "surface water" located as they are in the clause between the words "flood" and "waves" can only be a reference to surface water arising from flooding by natural causes. This is indicated by a

[1] [1981] O.J. No. 3025 (HCJ).

> reading of the clause as a whole. "Surface water" cannot be deemed to cover water escaping from a burst main.

In *T & T Realty Ltd. v. Allstate Insurance Co. of Canada*,[2] the city sewer system was inundated with surface water generated by a storm and rain water levels. The water runoff flowed into the policyholder's underground parkade filling it with 15 feet of water, silt, dirt, and other debris. At issue was whether or not the loss fell within coverage under a commercial property policy. The policy excluded:

> loss or damage caused directly or indirectly…
>
> [1] by flood, and the word "flood" includes waves, tides, tidal waves, and the rising of, the breaking out or the overflow of, any body of water, whether natural or man made…"
>
> [2] by seepage, leakage or influx of water derived from natural sources through basement walls, doors, windows, or other openings therein,

The Ontario High Court's Justice Anderson concluded both clauses operated to exclude the loss. The flow of surface water was a flood within the meaning of the first exclusion clause. The policyholder argued for but Justice Anderson refused to follow a line of U.S. cases differentiating flood waters from surface waters. These cases were distinguished because the policy language at issue in them drew a distinction between flood waters and surface waters. Justice Anderson also concluded the first exclusion clause's specified categories of flood were not exhaustive. Turning to the second exclusion clause, Justice Anderson concluded the flow of surface water also involved an "influx of water derived from natural sources". The result might have been different had the wording at issue been closer to the type considered in the U.S. cases.

In *Kass v. State Farm Fire and Casualty Co.*[3] Justice Matheson of the Alberta Court of Queen's Bench concluded that rain water and hail which, after falling to the ground, filled the policyholder's basement to a depth of several feet was caught by an exclusion for damage caused by "surface waters". Justice Matheson cited with approval the Supreme Court of South Dakota's reasoning in *Poole v. Sun Underwriters Insurance Co. of New York*[4] where, after examining a number of other U.S. authorities the panel concluded:

> Surface waters are those which are produced by rainfall, melting snow, or springs... such waters are not divested of their character as surface waters by reason of their flowing from the land on which they first make their appearance onto lower land in obedience to the laws of gravity. […]
>
> To us it is quite clear that the heavy rain which fell, after it reached the ground, was no longer rain, but became water and falls within that classification of waters which is known as surface water…

[2] [1986] O.J. No. 532 (SC).
[3] [1989] A.J. No. 202 (QB).
[4] (1973) 274 North Western Reporter 658 (Supreme Court of South Dakota).

This definition of "surface water" was also adopted in *Borer v. Dominion of Canada General Insurance Co.*[5] In that case, an Ontario small claims court judge concluded heavy rainfall into a sewer which accumulated in an enclosed area beside the exterior door of the policyholder's home and then flowed into the basement was surface water. Although the policy provided coverage for the escape of water from the sewer, it excluded the escape where it entered the dwelling as surface water.

Finally, and anticipating the next category of analysis, the Manitoba Court of Appeal in *Goodman v. Royal Insurance Co. of Canada*[6] turned to Black's Law Dictionary (6th ed., 1990) to construe "surface water" in an homeowners' policy exclusion clause, quoting from the dictionary as follows:

> As distinguished from the waters of a natural stream, lake, or pond, surface waters are such as diffuse themselves over the surface of the ground, following no defined course or channel, and not gathering into or forming any more definite body of water than a mere bog or marsh. They generally originate in rains and melting snows, but the flood waters of a river may also be considered as surface waters if they become separated from the main current, or leave it never to return, and spread out over lower ground. Water derived from rains and melting snows that is diffused over surface of the ground, and it continues to be such and may be impounded by the owner of the land until it reaches some well-defined channel in which it is accustomed to, and does, flow with other waters, or until it reaches some permanent lake or pond, whereupon it ceases to be "surface water" and becomes a "water course" or a "lake" or "pond," as the case may be.

The panel also cited to the *Poole v. Sun Underwriters Insurance Co. of New York* case discussed above The panel concluded the pooling of water in the policyholder's yard from snow and rain, the overflow of a drainage ditch and the resulting flow of water into the basement were within the meaning of "surface water" as used in an exclusion. In doing so, the Court of Appeal noted in this context that "surface water" did not change its character just because it ran into and then overflowed from a ditch.

Dictionary Definitions

In one older edition of a concise English dictionary, the phrase "surface-water" is defined as water "that collects on and runs off from surface of ground, etc."[7]

A more current regularly consulted law dictionary provides the following sub-definition under the term "water":

> ***Surface Water***

[5] [2003] O.J. No. 4567 (Sm Cl Ct).
[6] [1997] M.J. No. 268 (CA) leave to appeal dismissed [1997] S.C.C.A. No. 396.
[7] *The Concise Oxford Dictionary* (6th ed. 1976) at p. 1162.

> Water lying on the surface of the earth but not forming part of a watercourse or lake. Surface water most commonly derives from rain, springs or melting snow.[8]

From the Canadian cases reviewed, however, it appears our courts will not be confined solely to dictionary usage. As the *Goodman* case reviewed above makes clear, for example, water which makes its way into a watercourse, even if an artificial one, does not necessarily alter the character of the water as surface water. Similarly the *T&T Realty* case suggests a conduit such as an overflowing sewer, if incidental to the source, may be insufficient to convert surface water into sewer water.

Statutory or Regulatory Definitions

Canadian courts could also look to provincial legislation to see how the phrase "surface water" has been defined.

Provincial legislation uses qualifying language defining the phrase "surface water" as water which may be 1) in liquid or solid state; 2) flowing or standing; 3) from a naturally or artificially created body of water.[9] The legislation lists surface water sources, including for example (a) a lake, river, creek, spring, ravine, stream, lagoon, swamp, marsh, gulch and brook, marine water; and (b) a canal, ditch, reservoir, pond, sinkhole or other artificial surface feature made by humans into which a natural watercourse or source of fresh water has been diverted.[10] The legislation also carves out certain sources from the definition of "surface water", including for example a) ground water or water in a culvert that is constructed to prevent the contamination of a watercourse by domestic sewage or effluent;[11] and b) a dugout or reservoir on the property of an agricultural operation.[12]

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[8] *Black's Law Dictionary*, (8th ed. 2004) at p. 1622.

[9] Alberta *Water Act*, Water (Ministerial) Regulation, Alta. Reg. 205/98, s. 1.; Manitoba *The Environmental Act*, Livestock Manure and Mortalities Management Regulation, Man. Reg. 42/98, s. 1; New Brunswick *Clean Water Act*, S.N.B. 1989, c. C-6.1, s. 1; Ontario *Nutrient Management Act, 2002*, General Regulations, O. Reg. 267/03, s. 2.

[10] Alberta *Environmental Protection and Enhancement Act*, RSA 2000, c. E-12, s.1; British Columbia *Drinking Water Protection Act*, Drinking Water Protection Regulation, B.C. Reg. 200/2003, s. 5(1).; British Columbia *Environmental Management Act*, Code of Practice for Industrial Non-Hazardous Waste Landfills Incidental to the Wood Processing Indudstry, B.C. Reg. 263/2010, s. 1; British Columbia *Public Health Act*, Sewerage System Regulations, B.C. Reg. 326, s. 1; Manitoba *The Environmental Act*, Livestock Manure and Mortalities Management Regulation, Man. Reg. 42/98, s. 1; Ontario *Health Protection and Promotion Act*, Small Drinking Water Systems, O. Reg. 319/08, s. 2; Ontario *Nutrient Management Act, 2002*, General Regulations, O. Reg. 267/03, s. 2. See also Ontario *Nutrient Management Act, 2002*, Disposal of Dead Farm Animals, O. Reg. 106/09, s. 1.

[11] British Columbia *Public Health Act*, Sewerage System Regulations, B.C. Reg. 326, s. 1;

[12] Manitoba *The Environmental Act*, Livestock Manure and Mortalities Management Regulation, Man. Reg. 42/98, s. 1.

U.S. Cases

Authors in a recent law journal article note that U.S. courts also tend to define surface water as that which does not have a permanent existence, has no banks, and follows no defined course or channel.[13]

The same authors go on to point out, however, that U.S. jurisprudence discloses differences in the way claims are treated for this purpose, depending on how the water accumulated and how it caused the property damage complained of. The authors identify three categories as follows:

1. Rainwater run-off;
2. Rainwater collected on a rooftop; and
3. Rainwater after it has reached the ground and been channeled or contained.

Rainwater run-off

The U.S. authors' review of cases suggests that their courts have uniformly held surface water is not limited to rain falling directly on the ground. Surface water can also include rain falling on paved surfaces and water that may travel some distance across the ground before entering a structure.[14] This analysis meets a certain level of common sense in that, as the court in *American Family Mutual Insurance Co. v. Schmitz* noted, if rainwater lost its character as "surface water" upon encountering something artificially made, this would render the surface water exclusion virtually useless.[15] As noted above, similar reasoning was adopted by the Manitoba Court of Appeal in the *Goodman* case above.[16]

Rainfall on a Roof or Deck

This seemingly common sense approach does not always meet with favour in the context of rainfall that accumulates on a roof, deck or patio. The journal authors note there is a split in U.S. courts on this issue with some finding that rainwater collecting on

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[13] See Taylor, W.D., Park, A.J. and O'Brien, S., "*Unique Coverage Issues in Flood Losses*", 48 Tort Trial & Ins. Prac. L.J. 619 (2013) at p. 631, footnote omitted ("*Unique Coverage*").

[14] See *Intrepid Ins. Co. v. Prestige Imps. Inc.*, 78 So. 3d 583 (Fla Ct App, 2011) (Falling rain pooling in areas adjacent to the insured's property and flowing into insured's property constitutes damage caused by surface water.); *Rizzo v. State Farm Ins. Co.*, (Ida Sup Ctm 2013) (Rain water which accumulated in a house window well causing pressure and damage to a home was "surface water".); *Surabian Realty Co. v. NGM Ins. Co.*, 462 Mass. 715 (Sup Ct Mass, 2012) at 718.

[15] 793 N.W. 2d 111 (Wis. Ct. App. 2010) at pp. 117-118 ("*Schmitz*") citing to *Smith v. Union Auto Indem Co.*, 752 N.E. 2d 1261 (Ill. App. Ct. 2001). All case descriptions for U.S. authorities are from *Unique Coverage* and should be reviewed with care. In *Schmitz*, the court concluded that rain water entering the policyholder's home was surface water once it touched the ground, and did not lose this character when it flowed into a trench on the property. *Unique Coverage* addresses a number of other cases and issues and so is a recommended source for those interested in reviewing this subject in more depth.

[16] [1997] M.J. No. 268 (CA) leave to appeal dismissed [1997] S.C.C.A. No. 396.

a roof (or deck) is “surface water” while others distinguish between water collecting on the ground and water collecting on a roof (or deck), the latter not falling within the exclusion.

An example of the former approach cited by the authors is *Bringhurst v. O’Donnell*[17], an early case out of the Delaware chancery court which concluded that a roof is no more than an “artificial elevation” of the earth’s surface and that rain collecting there was within the meaning of the phrase “surface water” appearing in an easement.[18]

In *Fidelity Co-operative Bank v. Nova Cas. Co.*,[19] the court concluded that ponded water on the roof of the policyholder’s property was “surface water” within the meaning of an endorsement providing coverage for flooding caused by "[t]he unusual or rapid accumulation or runoff of surface waters from any source." Perhaps informing the court’s conclusion was the last phrase in the grant of coverage: “from any source”. To the same effect, although in the context of an exclusion clause, is *Boazova v. Safety Ins. Co.*,[20] where the court found migration of water from an elevated patio into the wooden sill, floor joists, and wall studs of the policyholder’s house was "surface water".

Courts taking the narrower view appear to have construed the wording strictly as it applies to water which has made it to the ground in the ordinary course and is not otherwise contained. The *Cochrane v. Travelers Ins. Co*.[21] decision out of Louisiana is an example. The court held that rainwater collecting on a roof and overflowing so that it seeped into a building was not caught by the surface water exclusion.[22] To the same effect, *Flamingo South Beach I Condo. Ass’n v. Selective Ins. Co.*[23] involved water which pooled on the surface of the policyholder’s condominium building deck and damaged the lobby. Since the water pooled on an elevated deck several feet above the ground, the court concluded the water was not “surface water” under a flood insurance policy.

Stopping here for a moment, then, U.S. courts are split on whether or not the rainfall must first come into contact with the natural ground (as compared with an “artificial

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[17] 124 A. 795 (Del. Ch. 1924).

[18] The *Unique Coverage* authors cite to the following additional decisions suggesting that to construe “surface water” narrowly to fall outside of roof accumulations would be a “strange” interpretation defying “common sense”: *Brandywine Smyrna Inc. v. Millenium Builders LLC*, 2010 WL 1380252 (Dal. Super. Ct. Apr. 8, 2010); *Sherwood Real Estate Inv. Co. v. Old Colony Ins. Co*., 234 So. 2d 445 (La. Ct. App. 1970); and *Nathason v. Wagner*, 179 A 466 (N.J. Ch. 1935).

[19] 726 F.3d 31 (U.S. Ct. App. 1st Cir, 2013).

[20] 462 Mass. 346 (Mass Sup Ct, 2012).

[21] 606 So. 2d 22 (La. Ct. App. 1992).

[22] The *Unique Coverage* authors cite to the following additional U.S. cases taking a similar view: *Delta Theatres Inc. v. Alliance Gen. Ins*. Co., 1997 W.L. 313413 (E.B. La. June 9, 1997); *McCorkle v. Penn Mut. Fire Ins. Co*., 213 So. 2d 272 Fla. Dist. Ct. App 1968); and *Am. Ins. Co. v. Guest Printing Co*. 152 S.E. 2d 794 Ga. Ct. App. 1966). More recently, see *Union St. Furniture & Carpet, Inc. v. Peerless Ind. Ins. Co.*, 2012 Conn. Super. LEXIS 2635 (The term "surface water" in a property policy exclusion did not include water collected on a roof.)

[23] 492 Fed. Appx. 16 (U.S. Ct App, 11th Cir, 2012).

elevation") to qualify as surface water in the context of rainfall on rooftops, decks or patios.

Diversion or Containment:

There is also a split in U.S. authority on whether or not rainwater loses its character as surface water after being diverted into a channel or otherwise artificially contained. A majority of U.S. courts have concluded that once water becomes contained or collected after it falls on the ground, it loses its character as "surface water". Typical of the cases holding the exclusion does not apply in this context is *Aetna Fire Underwriters Ins. Co. v. Crawley.*[24] There, the court concluded that when water entered the house through a sewer line and appliances, it was not "surface water" since the water was not flowing on the surface of the ground at the time of entry into the house.[25]

Similar reasoning was applied in *Surabian Realty Co. v. NGM Ins. Co.*[26] involving a commercial building damaged when a drain in an adjacent parking lot backed up during heavy rain flooded the policyholder's building. The court held that the water lost its character as surface water on entering the drain or sewer system. The court nevertheless found in favour of the insurer because the damages to the building resulted both from water that had backed up after entering the drain and water that never entered the drain and remained surface water. The policy's anti-concurrent cause language permitted the exclusion to apply regardless of any other cause.

Some U.S. courts, however, are prepared to distinguish between (a) water diversion or containment where intended for the purpose and (b) diversion or containment which is happenstance or merely temporary. The U.S. authors cite to the *Schmitz* decision, above, where rainwater had fallen into an excavation adjacent to a foundation for a house. The build-up of water subsequently washed away soil under the foundation, causing the house's collapse. In this instance, the court concluded the exclusion applied because the rainwater kept its character as surface water when it arrived at the trench. Since the trench was not created for the purpose of diverting water, the case could be

[24] 207 S.E. 2d 666 (Ga. Ct. App. 1974).

[25] Similar cases cited in *Unique Coverage* include *Heller v. Fire Ins. Exch*. 800 P. 2d 1006 (Colo. 1990); *Selective Weigh-Ins Co. v. Litig. Tech. Inc*., 606 S.E. 2d 68 (Ga. Ct. App. 2004); *M & M Corp. of S.C. v. Auto-Owners Ins. Co*., 701 S.E. 2d 33 (S.C. 2010); *Gross v. Conn. Mut. Life Ins. Co*., 361 N.W. 2d, 259 S.D. 1985); and *Georgetowne Square v. U.S. Fid. & Guar. Co*., 523 M.W. 2d 380 (Neb. Ct. App. 1994). See also *Herrington, Inc. v. City of Geneva*, 2012 IL App (2d) 120131-U (Ill App Ct) (Surface water that becomes part of a defined channel or waterway, such as a sewer system, is no longer surface water.); *Intrepid Ins. Co. v. Prestige Imps. Inc.*, 78 So. 3d 583 (Fla Ct App, 2011) (Water flowing from the storm drainage system is arguably not "surface water" under the exclusion.)

[26] 462 Mass. 715 (Sup Ct Mass, 2012).

distinguished from those other decisions where a defined channel or other conduit was responsible for containing the water.[27]

Discussion

As is often the case with U.S. coverage jurisprudence, there are divided lines of authority on seemingly similar facts. Canadian courts asked to consider the issue will in the end need to decide which side of a particular line of authority works best in the Canadian context or to perhaps go a different route to suit our legal environment.

The review above suggests Canadian courts will look not only to dictionary and statutory usage but also U.S. case law for assistance, but only where relevant. Factual context will always be a concern as it is in coverage analysis generally. Likewise, specific policy wording will drive a given result. Readers are therefore reminded that Canadian and U.S. cases must be examined with some care not only for the particular factual context but also for the particular wording at issue to be sure the authority relied upon supports the coverage analysis contended for.

As was made clear in the December 2013 business press, insurers and their reinsurers are well aware of the suspected connection between increased heavy weather and "global warming" events on the one hand and human activity on the other. Statistics and careful review of historic events suggest, therefore, that the frequency of such events and associated insured or uninsured losses will likely increase over time.[28]

An increase in claims frequency can and likely will sharpen the judiciary's focus on risk management and underwriters' wordings used in this context. Insurers wishing to avoid the risk will increasingly be required to be more precise. To the extent the phrase "surface water" in a policy wording is not defined, underwriters should be alert to the possibility this wording could be construed as ambiguous and interpreted against the drafter – in almost all cases the insurer.[29] Commercial and personal lines policyholders seeking coverage for the risk will need to be alert to the trends in U.S. and Canadian case law as they develop as well as the industry wordings crafted in response. At some point, if weather trends persist, the exposure may become uninsurable at any economic level.

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[27] The authors also cite to *State v. North Dakota State University*, 694 N.W. 2d 225 (N.D. 2005) amongst several other decisions coming to a similar conclusion where the alleged water was not intended for the purpose. See the *Unique Coverage* article at foonote 61 for further cases.

[28] See E. Reguly, "The Smartest Guys on the Planet" in The Globe & Mail's December 2013 *Report on Business* magazine at p. 66 detailing reinsurers' efforts to study and account for global warming type losses as early as 1973. Canada's largest P&C insurer recently took an underwriting loss for the first time in a decade and warned of personal lines premium hikes due to extreme weather events. The insurer reported over 50% of insured losses were for "[w]ater damage, wind and hail": see The Globe & Mail, January 6th, 2014 at pp. B-1,B-7.

[29] *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, [2010] 2 S.C.R. 245 at para 23.

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