

Legal Bulletin

ENVIRONMENTAL & POLLUTION LIABILITY

Pollution Exclusion: Court holds that CGL policy does not cover escape of chemicals caused by fire

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The Supreme Court of Canada reaffirmed the broad reach of the pollution exclusion found in most commercial general liability (CGL) policies in Canada.

In dismissing the application for leave to appeal from the judgment of the British Columbia Court of Appeal in *Precision Plating Ltd. v. Axa Pacific Insurance Company et al.*, 2015 BCCA 277, the nation's highest court rejected an insured's attempt to get around this significant restriction on coverage. The case illustrates the importance of specialized pollution liability insurance—even for businesses that are not considered "active industrial polluters."

The facts of the case are as follows: the insured, Precision Plating Ltd. ("Precision"), operated an electroplating business out of a multi-tenant commercial building. As part of its operations, it stored toxic chemical solutions in vats.

A fire broke out in Precision's premises and set off the sprinkler system. The water released from the sprinklers caused the vats to overflow and the toxic chemicals ended up contaminating the property of neighbouring businesses. Four tenants sued Precision, which in turn filed a Motion seeking a declaration that its CGL insurer was obliged to defend it. Its insurer invoked the pollution exclusion and denied coverage.

The trial judge held that the proper interpretive approach to the pollution exclusion was the one adopted in *Zurich Insurance Co. v. 686234 Ontario Ltd.*, (2002) 62 O.R. (3rd) 447 (the "Zurich decision") where the Ontario Court of Appeal analyzed the history of the exclusion and found that it was intended to target active industrial polluters of the environment.

The judge concluded that the pollution exclusion was ambiguous as it appeared to exclude coverage for any kind of fire damage (given that "pollutants" as defined in the policy included "smoke" and "soot").



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This was not the intent, however, as the insurer had conceded that fire damage was covered. Consequently and in accordance with the reasonable expectations of the parties, the trial judge held that the pollution exclusion did not apply to exclude coverage for the escape of pollutants caused by a fire.

The British Columbia Court of Appeal reversed this decision, holding that the trial judge erred in framing his analysis as a search for the **cause** of the alleged damages as opposed to the **source** of the liability. It explained that the pollution exclusion when read together with the coverage grant makes it clear that liability for the release of pollutants was not covered. Thus, the trial judge was required to determine whether the pleadings alleged that the escape of pollutants was the source of Precision's liability. They did in fact allege such liability.

One lawsuit also asserted negligence as a concurrent source of liability. That said, the wording of the pollution exclusion excluded liability associated with the discharge of pollutants—even if the discharge resulted in part from other concurrent causes that were not otherwise excluded. Indeed, the pollution exclusion precluded from coverage "Property Damage caused by, contributed to by or arising out of the [. . .] escape at any time of Pollutants."

The British Columbia Court of Appeal held that the Zurich decision relied upon by the trial judge, as well as another case relied upon by the insurer, namely *ING Insurance Co of Canada v. Miracle*, 2011 ONCA 321 (the "Miracle decision"), were distinguishable. Both decisions focused on whether the pollution exclusion unambiguously applied to the type of pollution at issue



(i.e., carbon monoxide in the Zurich decision and gasoline in the Miracle decision). This was not the case here. The chemicals on the premises of Precision clearly fell within the definition of "pollutants."

Moreover, both a literal interpretation and a contextual examination of the policy (i.e., taking into account the reasonable expectations of Precision) led the British Columbia Court of Appeal to the same conclusion: the policy excluded coverage for the insured's liability for the escape of chemicals from its vats.

In summary, the trial judge had asked the wrong question: it was not the cause of the damage that was relevant, but rather the source of

the liability. Precision could have had no reasonable expectation of coverage for the alleged liability as the policy excluded coverage for claims where such liability was associated with the release of pollutants.

Lesson Learned

It's clear that most CGL policies are not designed to cover environmental exposures and cannot be relied upon if an escape of pollutants results in damage. A business faced with these risks is well advised to obtain specialized pollution liability insurance as part of a prudent risk management strategy.

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