The case of the leaking gas tank: Why a CGL policy may not be enough to protect businesses from pollution liability

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A case brought before the Ontario Court of Appeal illustrates the importance of specialized pollution liability insurance for businesses where there is a clear risk of environmental contamination as a result of its operations. Steven Stieber[1], partner in the Toronto law firm Stieber Berlach LLP, has prepared this commentary and summary of the Ontario Court of Appeal decision in the case of *ING v. Miracle* (2011 ONCA 321) which involved ING Insurance Company of Canada and Miracle (Mohawk Imperial Sales and Mohawk Liquidate). The insured, Miracle, operated a convenience store and gas bar that was insured under a Commercial General Liability (CGL) policy with ING. After gasoline escaped from an underground storage tank on Miracle's property and contaminated adjacent lands owned by the federal government of Canada, Miracle was sued by the government for strict liability, nuisance and negligence in the amount of $1,850,000.

The insured turned to its CGL policy for coverage. ING denied the claim citing the policy's pollution liability exclusion and brought an application for a declaration that it had no duty to defend or indemnify the insured. The insured argued for coverage, relying on a previous 2002

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decision involving Zurich Insurance Company and the owner of an apartment complex. In the Zurich case, tenants of the apartment complex sued the owner for bodily injury from inhaling carbon monoxide that inadvertently escaped from the building's furnace system. The court held that the CGL's pollution liability exclusion was ambiguous and that "to exclude coverage would effectively nullify coverage, because carbon monoxide release wasn't really something you would expect to happen."[2]

At the core of both the Zurich and ING cases is the question of scope of the pollution exclusion. Should the CGL's pollution liability exclusion be applied only in cases where the insured is an active industrial polluter or should it also encompass situations where there is a known environmental contamination risk?

The application judge in the ING case agreed with Miracle's position, and dismissed ING's application on the grounds that the insured did not fall into the category of an "active industrial polluter" and therefore the pollution liability exclusion did not apply.

However, the Ontario Court of Appeal disagreed (following its previous 1994 decision in the *Ontario v. Kansa* case) and stated that, if the clause applied only to "active" industrial polluters, it would effectively "denude the clause of any meaning."[3] In its decision, the court found that the exclusion clearly extends to storage and resale of gasoline, which have a known risk of environmental contamination.

In other words, if the purpose of the CGL pollution liability exclusion is to exclude known risks of environmental contamination then a gas station must fall squarely into such a definition.

Mr. Stieber, counsel in the 1994 decision of the Court of Appeal in *Kansa v. HMQ*, had this to say: "The Court of Appeal in Miracle has in my view interpreted the pollution exclusion in a common sense manner and given it meaning where its application warrants. The insured was not deprived of coverage for traditional CGL risks. It was denied coverage where the policy was clearly designed to exclude environmental risks."

In contrast to a CGL policy, a pollution liability policy is specifically designed to include environmental risks. Businesses and other organizations with an evident potential for environmental contamination, such as gas stations, bulk fuel storage terminals, waste facilities and other entities that are involved with environmentally sensitive operations, should consider a stand-alone pollution liability policy as an important part of their risk management program.

2 "OCA clarifies scope of pollution liability exclusion clause" (2011), online: Advocate Daily.com
3 2011 ONCA 321

Summary of *ING Insurance Company of Canada v. Miracle (Mohawk Imperial Sales and Mohawk Liquidate)*, 2011 ONCA 321

BY STEVEN STIEBER
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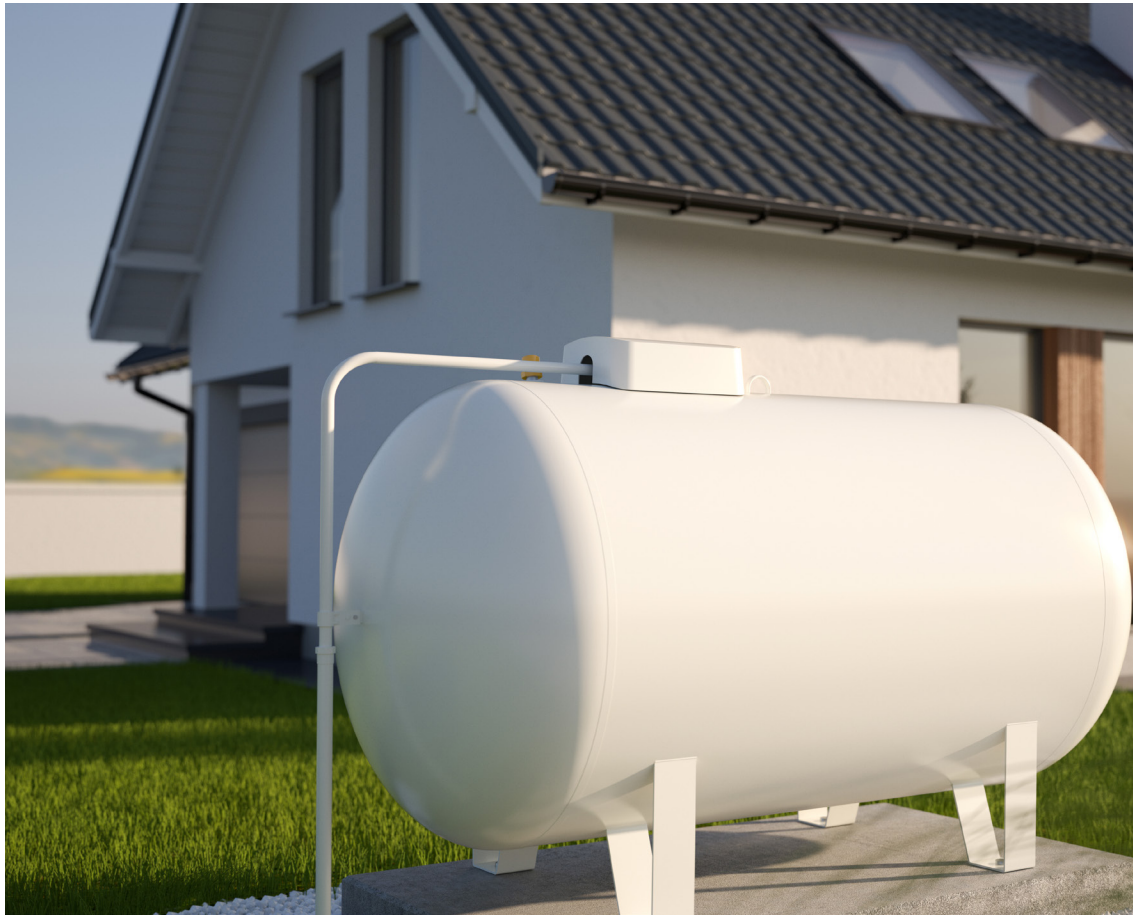
This case examines the application of a pollution liability exclusion clause in a Commercial General Liability (CGL) policy, and the interpretation of this clause by the Court. This case expands on and clarifies previous case law on this topic, such as *Zurich Insurance Co. v. 686234 Ontario Ltd.* (2002), 62 O.R. (3d) 447 (C.A.).

Facts

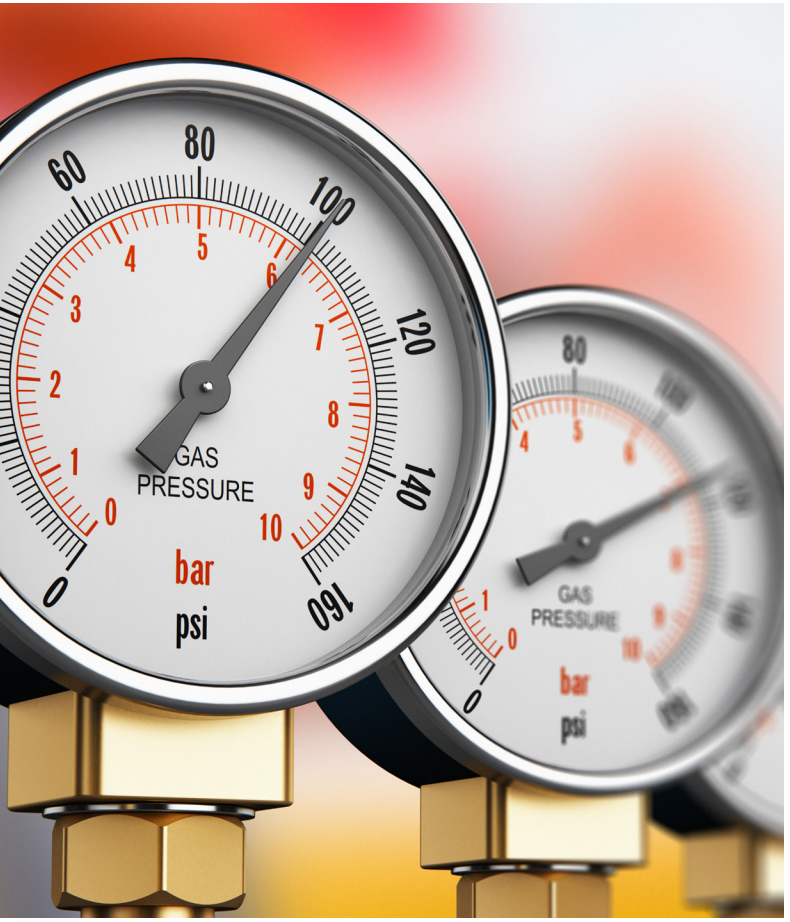
The insured, Miracle, ran a donut shop, convenience store, jewelry store, gift shop, apartments and a full-service gas bar at one location and a 24-hour gas station at another location, both insured under a CGL policy with ING.

Miracle was sued by the federal government for a gas tank leak that spread to federally owned land. Miracle turned to its insurer for defence coverage, which ING denied. "The insurer brought an application for a declaration that it had no duty to defend or indemnify the operator, saying it was excluded from coverage under the pollution liability exclusion."[4]

Miracle then sued ING for this denial of coverage and relied upon the Zurich case. The claim against Miracle was based upon causes of action for strict liability, nuisance and negligence. The damages claimed of $1,850,000 were for the losses and damages caused by the gasoline tank contamination and the costs associated with remediating the neighbouring property owned by the federal government.



4 "OCA clarifies scope of pollution liability exclusion clause" (2011), online: Advocate Daily.com



The pollution exclusion of the CGL policy provided that the insurance did not apply to:

"2. POLLUTION LIABILITY

a. "Bodily injury" or "property damage" or "personal injury" or "advertising liability" arising out of the actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of pollutants:

...

2. At, or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any Insured;

...

5. At or from any premises, site or location on which any Insured or any contractors or subcontractors working directly or indirectly on any Insured's behalf are performing operations:

a. If the pollutants are brought on to the premises, site or location in connection with such operations by such Insured, contractor, or subcontractor; or

b. If the operations are to test for, monitor, clean up, remove, contain, treat, detoxify, decontaminate, stabilize, remediate or neutralize, or in any way respond to, or assess the effect of the pollutants.

b. Any fines or penalties assessed against or imposed upon any Insured arising out of the actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of pollutants.

c. Any loss, cost or expense arising out of any request, demand or order that any Insured or others test for, monitor, clean up, remove, contain, treat, detoxify, decontaminate, stabilize, remediate or neutralize or in any way respond to, or assess the effect of pollutants unless such loss, cost or expense is consequent upon "bodily injury" or "property damage" covered by this policy.

d. "Pollutants" means 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."[5]

5 *ING Insurance Company of Canada v. Miracle (Mohawk Imperial Sales and Mohawk Liquidate)*, 2011 ONCA 321

The motions judge found that: "Since a reasonable insured would expect the exclusion to apply to industrial pollution and not to a gas leak, the plaintiff's claim was held not to fall within the pollution exclusion" and ruled in favour of the insured.[6]

ING appealed the decision on the basis that the exclusion clause did apply.

The causes of action against Miracle in this case were:

- "strict liability for bringing the petroleum hydrocarbon fuels onto the land occupied by the plaintiff and permitting the fuels to escape into the environment;
- nuisance; and
- negligence for, inter alia, causing or permitting inadequate petroleum hydrocarbon fuels handling facilities, contrary to required standards, laws and regulations; failing to conduct reasonable ongoing inspections; failing to maintain facilities in a safe operating condition; failing to take reasonable steps to stop the escape; failing to report the escape of fuels into the environment; and failing to take further steps following the escape to prevent further damage to the environment."[7]

Issue

The main issue in this case boils down to whether a CGL exclusion clause should only be applied to active polluters or should it also extend to known environmental contamination risks.[8]

Did the application judge make an error in holding that the gasoline leak was not to be excluded by the pollution exclusion clause?

6 2011 ONCA 321
7 2011 ONCA 321
8 "OCA clarifies scope of pollution liability exclusion clause" (2011), online: Advocate Daily.com

Rationale of the Court of Appeal

The Court found that the claim fell squarely within the language of the exclusion clause as a claim "arising out of the actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of pollutants." (The Court followed its previous 1994 decision in the *Ontario v. Kansa*.)

The clause was found to be "neither ambiguous nor contrary to the parties' reasonable expectations," as a convenience store and gas bar operator is confronted with many known risks of liability claims for bodily injury and damage to property that the CGL will cover. The Court's decision in Zurich was distinguished where the basis of the claim was a carbon monoxide leak from a faulty furnace in an apartment building, which is an act that is of an unpredictable nature and does not necessarily result in environmental pollution. In the present case, "the court referred to Zurich as the 'starting point for interpreting the pollution exclusion.' From there, it determined that the phrase 'active industrial polluter of the natural environment' as it appears in Zurich should not be given a 'hyperliteral' interpretation itself. Otherwise, the Court would fall into the very interpretational trap the Court in Zurich sought to avoid."[9]

By denying coverage for pollution liability, the Court does not deprive the policyholder of a substantial measure of protection for the other risks that the policy does cover. In addition, "this clause has a unique purpose: to preclude coverage for expensive government-mandated environmental cleanup required by legislation that makes polluters strictly liable."

Decision

Contrary to Zurich where the judge ruled that the exclusion clause was ambiguous and should be interpreted in favour of the insured; in the present case, the judge held that "a pollution liability exclusion clause in a Commercial General Liability (CGL) insurance policy will apply where the insured participated in an activity that posed a known risk of pollution and environmental damage." The appeal was allowed and the Court granted the declaration sought by ING that the claims in the action were excluded by the exclusionary clause and therefore, ING had no duty to defend.

9 Doug McInnis and Aleksandra Zivanovik, "Clarifying pollution exclusions in commercial insurance policies" (2011), online: McCague Borlack <http://www.mccagueborlack.com/emails/articles/pollution_exclusions.html>

Comments

From an insurer's perspective, the very purpose of the pollution exclusion is to "exclude coverage for known risks of contamination."[10] This case upholds this intention. Coverage concerns will continue to be decided on a case-by-case basis; however, this case is helpful in clarifying the role of the pollution exclusion clause. A CGL policy is not meant to respond to all damages. The insured should ensure that, if their business involves an exposure to hydrocarbons and the operation, supply, repair or maintenance of fuel tanks, appropriate coverage is secured to respond to these risks. The insured cannot rely upon its CGL policy because the escape was accidental and had never happened before. If the insured's business regularly involves fuel tanks, it will be treated as an active polluter and it will not be able to shelter behind a CGL policy.

> "The Court of Appeal in Miracle has in my view interpreted the pollution exclusion in a common sense manner and given it meaning where its application warrants. The insured was not deprived of coverage for traditional CGL risks. It was denied coverage where the policy was clearly designed to exclude environmental risks."
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> Steven Stieber, counsel in the 1994 decision of the Court of Appeal in *Kansa v. HMQ*.

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10 "OCA clarifies scope of pollution liability exclusion clause" (2011), online: Advocate Daily.com

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