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STATUTORY ENVIRONMENTAL LIABILITY AND THE CGL POLLUTION EXCLUSION

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A recent decision from the BC Supreme Court concerning the applicability of CGL pollution exclusions in the context of contaminated sites litigation should raise some concern for insurers. In *West Van Holdings Ltd. v. Economical Mutual Insurance Company*, 2017 BCSC 2397 the court found that liability for cost-recovery claims under the *Environmental Management Act* (the "*EMA*") was not ousted by the pollution exclusions contained in the CGL policies of two major insurers. The case should serve as a warning for underwriters and brokers to review the effect of policy wordings in the context of status rather than fault based liability such as that created by the *EMA*.

THE FACTS

The insured dry cleaning operator and its corporate parent holding company (the "Insureds") were sued by the owners of an adjacent property (the "Underlying Action"). The plaintiffs in the Underlying Action alleged that the Insureds' dry-cleaning business, in operation since 1987, and a previous automotive repair business which had operated on the Insureds' property (the "Property") since 1976, utilized chemicals and petroleum products in a manner that caused them to enter the groundwater and soil and migrate to the plaintiffs' lands causing them to become contaminated. The Underlying Action entailed causes of action in nuisance, negligence and a statutory cause of action under the *EMA* seeking recovery for costs of remediation.

The Insureds had CGL policies through the period 1998 – 2012 with two major insurers. The policies had similarly worded pollution exclusions for property damage "*arising out of the actual, alleged or threatened discharge, disposal, release or escape of pollutants … at or from premises owned, rented or occupied by an Insured.*"

The Insureds tendered their defence of the Underlying Action but the insurers declined on the basis of the pollution exclusions. The Insureds then commenced an action against the insurers seeking a declaration that the insurers owed a duty to defend them in the Underlying Action.

THE RULING

In ruling for the Insureds the court concluded that the plaintiffs' invocation of a cause of action under the

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EMA was determinative. The court noted that under the *EMA* current owners or operators of a site from which a contaminating substance migrated are "persons responsible for remediation", with absolute and retroactive liability. In this manner, the *EMA* necessarily reaches back and brings historical events into a current owner or operator's present-day risk of liability. The *EMA* thus creates a cause of action that is status based as opposed to fault based; a current owner may be liable by its status as such without any wrongdoing.

The court found the pollution exclusion clauses did not clearly oust coverage for this type of liability. In support of its conclusion the court found that the pollution exclusions do not "clearly and unambiguously" oust coverage for compensation arising from pollutants that may have been used *before* they owned the Property or operated their dry cleaning business. In other words, the pollution exclusions provided no clarity on whether they extend to concurrent, contributory or retroactive liability for property damage arising out of occurrences that may have been brought about by an independent third party such as the previous Property owner or the automotive repair company.

The court also considered the manner in which other exclusion clauses within the policies specific to contaminants (*e.g.* liability arising out of nuclear energy hazards, fungi, fungi derivatives and asbestos) showed that had they wanted to, the insurers could have easily worded the pollution exclusions in a way that made them clearly and unambiguously applicable to concurrent, contributory and retroactive liability of the type subject of the *EMA*.

Finally, the court distinguished the cases relied on by the insurers, in which similarly worded exclusions were found to apply, on the basis that the underlying claims by the plaintiffs in those actions were based only on alleged acts or omissions of the insureds and not statutorily deemed, retroactive liability based on a third party's actions and an insured's status as an owner or user of an allegedly contaminated property.

PRACTICAL CONSIDERATIONS

It is notable that the insurers have filed appeals so our Court of Appeal will likely have the final word as to whether the ruling in *West Van Holdings* will stand.

In the context of the appeal it may be argued that the court in *West Van Holdings* fell into the same error as the court in *Gill v. Ivanhoe Cambridge I Inc.,* reversed in *Economical Mutual Insurance Company v. Gill*, when it placed undue and unnecessary emphasis on the language used in other exclusion clauses contained in the policies and thereby moved away from the Continuity of Interpretation doctrine expressed by the Supreme Court of Canada in *Co-Operators Life v. Gibbens*. In this latter context we note cases such as *ING Insurance Company of Canada v. Miracle*, *Pier Mac Petroleum Installation v. Axa Pacific Insurance Co.* and *Corbould v.*

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BCAA Insurance Corp. which have found that insureds engaged in activities that carry an obvious and well-known risk of pollution and environmental damage fit precisely within the purpose of the pollution exclusion and therefore are not entitled to coverage. A dry cleaning operation would seem to be such an activity.

Irrespective of the arguments insurers may have on appeal, *West Van Holdings* is the first case of its kind to specifically address the effect of status based liability legislation in the context of the specific wording of pollution exclusions. As such it is advisable that underwriters and brokers review their policy wordings in light of such statutory claims to determine their and their clients' risks in what is likely to be a burgeoning area of insurance coverage contention.

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