Posted on: August 10, 2011

THE MORE "ABSOLUTE POLLUTION EXCLUSION"?

Richards Buell Sutton's Insurance Law Newsletter

By: C. Nicole Mangan

For the last decade the "absolute pollution exclusion" contained in commercial general liability policies has been largely "read down" by courts and decisions on the application of the exclusion have largely gone against insurers, particularly in Ontario. The foundation for these decisions was the Ontario Court of Appeal reasoning in *Zurich Insurance Co.* v. *686234 Ontario Ltd.* (2002), 62 O.R. (3d) 447. Adding confusion to the jurisprudence was the fact that British Columbia distinguished *Zurich* and, in some cases, applied the exclusion. Whether the exclusion applied seemed to be answered differently depending on where the loss occurred.

Nearly ten years after *Zurich* the Ontario Court of Appeal has revisited the absolute pollution exclusion in *ING Insurance Company of Canada* v. *Miracle (Mohawk Imperial Sales and Mohawk Liquidate)*, 2011 ONCA 321. *Miracle* provides greater clarity on the application of the exclusion and introduces greater consistency within the laws of Canada.

Background

The insured in *Miracle* operated a donut shop, convenience store, jewellery store, gift shop, furniture store, apartments above the retail stores, a large liquidation centre and two full service gas bars at its premises. The Government of Canada sued the insured, among others, when land it owned beside one of the gas bars was contaminated by gasoline. The gasoline had escaped from an underground storage tank on the insured's property. The insurer sought a declaration that it did not have a duty to defend or indemnify the insured.

The trial judge in *Miracle* considered the pleadings and the insured's business operations and determined that its regular business activities did not place it in the category of an active industrial polluter of the natural environment. Relying on *Zurich* and the plethora of Ontario cases following that decision the trial judge determined that the exclusion did not apply because the exclusion, properly construed, was meant to apply only to insured's whose regular business activities "place[d] it in the category of an active industrial polluter of the natural environment". Since the alleged pollution "was a result of the negligence alleged in

700 - 401 W GEORGIA ST.
VANCOUVER, BC V6B 5A1
CANADA
TELEPHONE 604 682 3664
FAX 604 688 3830
RBS.CA

the underlying claims" the exclusion had no application and a duty to defend was owed by the insurer.

The Ruling

In its ruling the Court of Appeal addressed both the proper interpretation of *Zurich* and the exclusion.

Reviewing *Zurich* the court noted that, in that case, a "connotative contextual construction" was applied instead of "dictionary literalism". The court also identified that the history of the pollution exclusion was analyzed in *Zurich* and that the historical analysis revealed the exclusion was created to address the development of mass toxic tort claims in the early 1970's. Relying on this analysis the court in *Zurich* concluded the exclusion was not intended to apply to a case where faulty equipment caused pollution. Accordingly, an improperly operating furnace that produced carbon monoxide in a residential building was deemed to fall outside the exclusion.

The court however went on to note that the insured in *Miracle* "was engaged in an activity that carries an obvious and well-known risk of pollution and environmental damage". The business of the insured, particularly the operation of the gas bars, fit precisely with the purpose of the exclusion which was designed to avoid insuring the cost of environmental clean up. Polluters were expected to be responsible for clean up of environmental damage absent specific insurance for that purpose. Furthermore, the court found that to apply the exclusion only where an activity "necessarily" resulted in pollution would violate a basic principle of insurance law – a loss is not fortuitous if it is fully anticipated or an inevitable result of an activity.

The decision in *Miracle* is consistent with *Pier Mac Petroleum Installation Ltd.* v. *Axa Pacific Insurance Co.* where the exclusion was applied to damage arising from a petroleum leak caused by negligent construction of an underground gas line and with *Corbould* v. *BCAA Insurance Corp.* where the exclusion was also applied for losses where heating oil spilled from a relatively new underground tank.

Practical Impact for Insurers

Greater harmony between the case law in British Columbia and Ontario will make determining whether the absolute pollution exclusion clause applies easier for insurers.

The concepts from *Zurich* on whether the exclusion applies have not changed but the standard required to establish the exclusion clause's application will now capture a broader range of cases. *Miracle* helps clarify that although the question of whether an insured is an "active industrial polluter of the natural environment" may still apply the standard no longer requires activity that "inevitably" results in pollution.

One item to review carefully when assessing pleadings where a pollution exclusion may apply is whether the

700 - 401 W GEORGIA ST.
VANCOUVER, BC V6B 5A1
CANADA
TELEPHONE 604 682 3664
FAX 604 688 3830
RBS.CA

claim is framed in negligence, strict liability for an environmental offence or nuisance and the length of time over which the loss is alleged to have occurred. Negligence is more likely to relate to an "accident" than nuisance or strict liability which often relate to claims for known effects of an intentional activity or a well known risk. As always, the pleadings and policy wording must be carefully considered in every case, however, the body of case law with respect to gas bar pollution is now seeing successful application of "absolute pollution exclusions" in Ontario, British Columbia and many of the United States.

700 - 401 W GEORGIA ST.
VANCOUVER, BC V6B 5A1
CANADA

TELEPHONE
604 682 3664

FAX
604 688 3830

RBS.CA