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"The panel's Miracle *decision… does much to clarify past law on the scope to be given to the IBC Form 2100 pollution liability exclusion."*

RESTORING THE POLLUTION LIABILITY EXCLUSION'S INTENT
ING v Miracle 2011 ONCA 321

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It appears the Court of Appeal has given new life to its earlier reasoning in *Ontario v. Kansa* by its decision in the just released *ING v Miracle* case. The trial level ruling, some would say, took a conventionally worded pollution liability exclusion out of play in a factual context where one would normally expect it to be applied non-controversially. If ever there was a case for the exclusion to apply – a leak of fuel at a petroleum gas bar causing significant pollution clean-up costs for the adjacent owner – this was it. However, the trial level court refused the insurer's request for a declaratory ruling.

The panel's *Miracle* decision, apart from overturning the policyholder-side victory at the trial level, does much to clarify past law on the scope to be given to the IBC Form 2100 pollution liability exclusion. At the same time, the Court took the opportunity to restore some certainty in the debate over whether or not the distinction between a "passive" and "active" polluter is relevant in this context.

The Underlying Case:

In the underlying claim, the Federal Government of Canada sued Andrew Miracle o/a Mohawk Imperial Sales and Mohawk Liquidate. Miracle operated a convenience store and gas bar. The Government alleged gasoline escaped from an underground storage tank on Miracle's property and migrated on to the Government's adjacent lands. The Government's claim was for $1,850,000 in damages. The claim alleged strict liability, nuisance and negligence resulting in a loss in property value, environmental assessment costs and remediation costs. The Government relied on both provincial and federal environmental legislation in support. In short, it was a typical leaky Underground Storage Tank claim.

Miracle had coverage under a CGL policy issued by ING, which covered the relevant location at the relevant time. The policy included a form of pollution liability exclusion similar if not identical to the pre-2005 IBC Form 2100 wording. ING denied coverage based on the exclusion and brought a declaratory application seeking a ruling that it owed no defence. Although Miracle itself did not contest the case, the Government and another interested party intervened to do so.

The Trial Level Ruling:

As the panel put it,

> The application judge dismissed the application on the ground that, as Miracle was not an "active industrial polluter" and as the claim was based on Miracle's alleged negligence, the pollution exclusion clause did not apply.

The trial court judge did so relying on another Court of Appeal case, *Zurich Insurance Co. v. 686234 Ontario Ltd.* which had concluded a similarly worded exclusion did not apply to tenants' carbon monoxide gas poisoning claims brought

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"…the trial court judge in Miracle *concluded the policyholder was not an active industrial polluter, and that the leak from the UST was a result of the alleged negligence."*

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against Zurich's policyholder, a residential apartment building landlord.

In the *Zurich* case, the "gas" which caused the alleged injuries, leaked from a furnace which had allegedly not been properly serviced. The *Zurich* panel concluded, in that context, the exclusion was ambiguous since the insurer was attempting to apply it in a non-conventional circumstance, beyond the expectations of the parties. Significantly, the panel had ruled that nothing in the landlord policyholder's regular business activities "place[d] it in the category of an active industrial polluter of the natural environment". The alleged "pollution" was "a result of the negligence alleged in the underlying claims" – that is, the faulty servicing and maintenance of the furnace.

Relying on this reasoning, the trial court judge in *Miracle* concluded the policyholder was not an active industrial polluter, and that the leak from the UST was a result of the alleged negligence.

The Ruling on Appeal:

On appeal, the panel confined the *Zurich* case to its particular factual context in the following passage:

> … *Zurich* must be read in the context of the specific issue the court was addressing. Borins J.A. rejected what he quite appropriately described as a "hyperliteral" argument that the claim was excluded because it arose from the "escape" of "gas". The court refused to accept the insurer's strictly literal interpretation of the clause in favour of one that determined the meaning and reach of the exclusion, given its historical purpose and a common sense assessment of the insured's business activity. The exclusion's ordinary meaning in those circumstances was found to be ambiguous and contrary to the insured's reasonable expectations.

Writing for the unanimous court, Justice Sharpe continued:

> Unlike *Zurich*, in this case, the insured was engaged in an activity that carries an obvious and well-known risk of pollution and environmental damage: running a gas station. Indeed, the statement of claim is framed as a claim for damage to the natural environment caused by a form of pollution. While the respondent Canada now attempts to characterize its claim as if it primarily, if not exclusively, sounds in negligence, that ignores the fact that the statement of claim asserts the causes of action commonly associated with pollution-based claims for environmental damage: strict liability … and nuisance as well as negligence. The negligence claim is based in part upon alleged breaches of both provincial and federal environmental legislation and regulation. The damages claimed are for harm to the environment: the loss of property value due to contamination of the soil, the cost of investigating, testing and monitoring the contamination caused by the migration of a hazardous product from the lands of the insured, and the cost of rectifying the contamination and remediating the plaintiff's property. Such a claim fits entirely within the historical purpose of the pollution exclusion, which was "to preclude coverage for the cost of government-mandated environmental cleanup under existing and emerging legislation making polluters responsible for damage to the natural environment" [citing to a passage in the *Zurich* case].

In confining the *Zurich* decision to its particular factual context and explaining the limited application in other factually similar situations, the Court of Appeal has brought some much-needed clarity to the landscape for CGL coverage analysis. The result for insurers, brokers, policyholders and their respective counsel is more certainty about the scope of the pollution exclusion which can, absent further appeal, be applied

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non-controversially at least in conventional UST environmental pollution clean-up cases.

Justice Sharpe went further, however, and restored the Court's previous authority holding that the distinction between an "active" and "passive" polluter is not relevant to the coverage analysis.

> I do not accept the argument that the phrase "active industrial polluter of the natural environment" used in *Zurich* should be read as restricting the reach of the pollution exclusion clause to situations where the insured is engaged in an activity that necessarily results in pollution. Liability insurance is purchased to cover risks, not outcomes that are certain or inevitable. There is a general principle of insurance law that only fortuitous or contingent losses are covered by liability policies… Accepting the argument that the pollution liability exclusion only applies to "active" industrial polluters – those who are already excluded from ordinary liability insurance coverage by virtue of the fortuity principle – would effectively denude the clause of any meaning. In my view, the exclusion clearly extends to activities, such as storing gasoline in the ground for resale at a gas bar, that carry a known risk of pollution and environmental harm.

This distinction had previously been rejected in the Court of Appeal's 1994 decision, *Ontario v. Kansa General Insurance Company* but a subsequent brief endorsement in *Uniroyal* had cast doubt on whether the distinction could be discarded. This uncertainty has now been put to rest. Although involving a differently worded pollution liability exclusion, the factual circumstances in *Kansa* were close to the *Miracle* case.

As Justice Sharpe noted, the Court in *Kansa* faced a case which:

> involved a claim against the Crown for negligently failing to properly monitor a third party's storage and handling of hazardous materials. Writing for the court, Labrosse J.A. held, at p. 41, that the motion judge had erred by holding "that the exclusion clause for claims arising out of the discharge of pollutants applied only to exclude coverage to an insured who actively engaged in polluting activities". Referring to s. 14(1) of the *Environmental Protection Act* (a provision pleaded in the statement of claim in this case) Labrosse J.A. held, at p. 44, that "the passive polluter who permits pollution to take place is just as much a polluter as the active polluter who discharges or causes the discharge of pollution." I do not read the brief endorsement of this court in *Uniroyal Chemical Ltd. v. Kansa General Insurance Company Ltd.* (1996), 89 O.A.C. 311 (C.A.) as having overruled Labrosse J.A.'s judgment.

With this, the Court has restored a uniformity of approach to pollution liability exclusion coverage analysis for environmental pollution cases in the CGL context.

Impact on Future Cases:

Absent a further appeal, the *Miracle* case appears to bring back some certainty. Justice Sharpe's reasoning does so by narrowing the applicability of the Court of Appeal's previous *Zurich* decision and clarifying when and how the clause is to be construed in context. Justice Sharpe's reasoning has also restored the precedent of the Court's earlier decision in *Kansa* by doing away (again) with the distinction between "active" and "passive" polluter. This permits all parties to the CGL policy to focus analysis of pollution-related claims more directly on the words in the contract and their intended purpose in conjunction with the risk presented and the commercial activity itself.

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Future cases will no doubt canvas whether or not this analysis applies, for example, in Above Ground Storage tank cases. Justice Sharpe appears to have imported, by citing with approval, the B.C. Supreme Court's recent ruling in a first party AST case. His favourable mention of the analysis of that Court in the following passage and excerpt should inform an Ontario court's analysis of AST cases in future:

> In *Corbould v. BCAA Insurance Corp.* …, the court held that a claim for damages resulting from a spill of approximately 950 litres of heating oil from a tank on the insured's property was excluded. The insured's "all risks" policy excluded coverage for "loss or damage caused by contamination or pollution, or the release, discharge or dispersal of contaminants or pollutants". Sigurdson J. considered *Zurich* at some length but concluded, at para. 84, that the claim was excluded from coverage:
>
> > I understand that the words of the exclusion should not be read hyperliterally to include things that might be said to be contamination or pollution but objectively could not be considered by the parties to be intended to exclude coverage. I do not consider interpreting contamination or pollution to include a large spill of fuel oil that directly damaged the plaintiff's land and house to be a hyperliteral interpretation of the clause.

There are, of course, other factual contexts which may or may not present activities that "carry a known risk of pollution and environmental harm". Time will tell how far the Pollution Liability Exclusion can be restored to what insurers had originally thought would protect this form of coverage from such specialty risks.

For now, however, liability insurers, policyholders and brokers can look with more confidence at both their current and future risks. Specialized on site and off site environmental clean-up cost and liability coverage is certainly available in the marketplace. It comes at a price, commensurate with the risk. As the amount claimed in the *Miracle* case alone indicates, the costs for such exposures is anything but conventional.

Assuming the garden variety CGL policy responds in a particular environmental pollution scenario will be more dangerous now. Underwriters, on the other hand, will not face the pressure of absorbing such specialty risks within the conventional premium pool. In the end, this should benefit policyholders in the CGL market as a whole by putting the cost of the specialty risk where it rightly belongs. ■

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