

CASE ANNOTATION: R. V KANSA GENERAL INSURANCE COMPANY

Michael P. Taylor

Insurance – Environmental exclusion clause – Whether exclusion applying to insured who did not actually discharge pollutant – Claim against insured Crown for loss arising from contamination of soil and groundwater allegedly caused by regulatory negligence of Ministry of the Environment.

An action for damages against the applicant alleged that its regulatory negligence had resulted in the contamination of the plaintiff's property and a neighbouring property. The respondent insurer denied any duty to defend that action based on the environmental exclusion clause in its comprehensive general liability policy, which excludes coverage for "claims arising out of the discharge ...of ... pollutants." An application was brought for a declaration that the respondent was obliged to defend the action on behalf of the applicant.

Held – The application was allowed.

An insurer has a duty to defend an insured where the claim alleges acts or omissions falling within the policy coverage, while the duty to indemnify arises only where such allegations are proven at trial.

The pollution exclusion clause applied to both persons who discharge pollutants and persons who have a connection to the pollution such that their intentional and/or irresponsible acts or conduct must disentitle them to coverage on the basis that it would be contrary to responsible environmental behaviour to permit them to pass off financial responsibility for their actions or conduct to an insurer.

The respondent failed to establish that the alleged conduct of the applicant came within the scope of the pollution exclusion cause.

CASE ANNOTATION

This case represents an important development in Canadian law dealing with the interpretation of the "pollution exclusion" clause in commercial general liability ("CGL") policies.

It may and certainly will be argued that the judgment should be interpreted narrowly. Zelinski J. held that, in the circumstances, Kansa owed the insured Crown a duty to defend because the allegations made as against the Crown in the statement of claim might give rise to coverage. At the same time, he held that the defence was without prejudice to

Kansa's right to ultimately deny indemnity based upon the pollution exclusion clause. However, even if this is ultimately held to be the narrow ration of the case, this case is noteworthy for the arguments put forward by the parties, the Judge's reasoning, and the approach ultimately adopted by the Court.

Kansa argued that the pollution exclusion clause should be given broad application. They argued that the clause applied in all circumstances where the discharge of pollutant was the "proximate cause" of the damages claimed.

The Crown urged a narrower interpretation of the clause. Its position was that the allegations as against it were based in "regulatory negligence," and that the exclusion clause was meant to apply to actual polluters only. The exclusion clause states that the policy would not apply to "claims arising out of" the discharge of a pollutant. It argued that, by definition, the claims against it did not "arise out of" the discharge of a pollutant because there was not a continuous chain of causation between the damages claimed and the negligence alleged against the Crown.

In reasoning sure to cause consternation among insurers, the Judge rejected the proximate cause argument. At the same time, he did not narrow the application of the exclusion to merely the actual polluter. He felt that in order for the exclusion to apply, the insurer would have to establish that either the insured was the actual polluter or, alternatively, *that the insured's intentional or irresponsible acts connected with the actual pollution disentitled it to coverage.*

In his consideration of the American authorities, the Judge was of the opinion that a common theme was the activity or conduct of the insured.

In the author's opinion, the Judge failed to give adequate consideration to the policy interpretation argument put forward by the Crown. The meaning of the words "arising out of" in the context of an exclusion clause in a standard automobile insurance policy was considered by the Supreme Court of Canada in the case of *Law, Union & Rock Insurance Co. v. Moore's Taxi Ltd.*, [1960] S.C.R. 80, 22 D.L.R. (2d) 264. At pp. 84 and 85 of the judgment, the Court held that the words "claims arising out of ... as used in this exclusion can only be construed as referring to claims based upon circumstances in which it is possible to trace a continuous chain of causation unbroken by the interposition of a new act of negligence and stretching between a negligent use and operation of a motor vehicle on the one hand and the injuries sustained by the claimant on the other."

It would not have required a leap of faith to apply the Court's reasoning in *Law, Union & Rock* to the facts of this case and to hold that the "regulatory negligence" alleged as against the Crown did not arise out of the alleged discharge of a pollutant, given that not only was there no continuous chain of causation, but in fact new and separate acts of negligence were being alleged.

Further, if Zelinski J. felt that the meaning of the exclusion was unclear, it was open to him to resolve the ambiguity in favour of the Crown based upon the doctrine of contra proferentem (to which he alluded as much in his judgment).

However, Zelinski J. chose to paint the interpretation of the exclusion clause with a public policy brush. Although it is allegations with respect to the insured's conduct which may or may not give rise to the duty to defend, it is the actual conduct which will ultimately give rise to the duty to indemnify and/or application of the exclusion.

In having the Court make a determination of whether or not an insured's act is or is not "responsible" enough to attract coverage, the Judge placed the Court in the impossible position of having to value from a "responsibility" perspective each and every act of an insured. Surely when some sort of behavioural modification or control is desired this is a legislative matter or, at the very least, a matter for private contract between insurer and insured.

Given his decision, Zelinski J. did not have to decide whether or not the Crown qualified as a "polluter", given the breadth of the definition of same in s. 13(1) of the *Environmental Protection Act*.

At the same time, by rejecting the narrower arguments put forward, his reasoning has application not only to those insured against whom regulatory negligence is alleged, but to all those insured who were not actual polluters, such as subsequent purchasers. In circumstances where the insured is not the actual polluter per se, it appears as if the insurer will have to establish both knowledge and negligence on the part of the insured for the exclusion to apply.