All of a Sudden, it was not Excluded: a Recent Ruling on the Qualified Pollution Exclusion

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The outcome of the decision of *Aviva Insurance Co. of Canada v. Intact Insurance Company*[1] should remind insurers that even though the insurance industry has taken steps to ensure that contemporary CGL policies contain wording that is characterized as the "absolute pollution exclusion," old wording, generally described as the "qualified pollution exclusion," can still come back to haunt them.

The outcome in *Aviva v. Intact* was well-reasoned, though perhaps frustrating for those who continue to wait patiently for a clear line of authority on the issue of whether the phrase "sudden and accidental" has a temporal component. Although Justice Cavanagh, who presided over the *Aviva* case, declined to address this issue, he did provide some clear directives in the event insurers are faced with a coverage application which calls for an interpretation of the qualified pollution exclusion, and namely the word "sudden."

In *Aviva v. Intact*, Aviva and Intact had insured Avondale, the operator of a gas station business adjacent to the plaintiff's property (Intact from 1983-1991, and Aviva from 1993-1999). The plaintiff alleged that contaminants from the property from where Avondale operated ("Source Property") had migrated onto the plaintiff's property, causing damage.

Aviva brought an application for a declaration that Intact had a duty to defend Avondale with respect to the allegations made by the plaintiff.

Aviva denied coverage under its CGL policies on the basis of the wording of the absolute pollution exclusion, however, it also insured Avondale under several umbrella policies (from 1993-1997), in which the pollution exclusion contained the words "sudden and accidental". As such, and based on the pleadings (discussed below), Aviva acknowledged the duty to defend for these specified policy periods.

Similarly, Intact's CGL policies (1983-1986) contained the following qualified pollution-exclusion language:

It is agreed that this policy does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water of any description no matter where located or how contained, or into any watercourse, drainage or sewerage system, **but this exclusion does not apply if such discharge, dispersal or escape is sudden and accidental.** [emphasis added]

Despite this language, Intact maintained that the wording in the Statement of Claim led to the conclusion that the contaminants had not escaped in a "sudden" or "accidental" fashion. Specifically, the word "migrate" had been used throughout the Statement of Claim, and, on a plain reading, "migrate" is not synonymous with "sudden." Accordingly, Intact argued that the exception to the exclusion (immediately above, in bold) did not apply.

Decision of the Court

Justice Cavanagh turned to case law that addressed the "sudden" aspect of the qualified pollution exclusion, including the decisions in *Murphy Oil Co*.[2], *Zatko*[3], and *BP Canada Inc*[4]. After reviewing the particular facts of each case, he reasoned that it was *how* the contaminants escaped that mattered, not the manner in which alleged property damage occurred. He was then able to dismiss Intact's reliance on the allegations in the Statement of Claim - that the contaminants had migrated from the Source Property onto the plaintiff's property. In doing so, he reasoned (at paragraph 33):

…While the damage to the Contaminated Property may have been slow and gradual because of migration of contaminants from the Source Property over a period of months or years, the exception may still apply, in my view, if the discharge, dispersal, release or escape of Contaminants onto the Source Property was accidental or happened over a brief period of time. Such a determination is possible whether or not the word "sudden" as used in the exception, properly interpreted, has a temporal component.

Accordingly, the Court held that the Intact policies from 1983-1986 had been triggered by the allegations against Avondale, and consequently, Intact was obliged to provide a defence.

Other Notable Aspects of the Case

Justice Cavanagh also made an interesting ruling on the apportionment of defence costs.

Recently, courts have appeared reluctant to make such a ruling so early in the game. Rather, they have concluded that the apportionment of defence costs is something to be agreed upon by the parties, and/or to be determined at the end of the proceedings. This often resulted in further speculation and delay - an unenviable position for insurers to be in.

Aviva submitted that it had incurred over $100,000 in defence costs. As evidence, it submitted invoices which were almost entirely redacted save for counsel's name and the billable time spent. Intact responded that it would not make a contribution without being able to examine the un-redacted invoices. Though Justice Cavanagh had "no reason to question the reasonableness of the charges", he agreed that Intact should be provided with further information before having to pay 50 percent of past expenses.

With respect to ongoing defence costs, Justice Cavanagh reasoned that such a determination should be governed by "equity and good conscience", and that since both the Intact and Aviva policies were engaged for approximately four years, Intact should share defence costs equally with Aviva going forward. Interestingly, there was no indication that either insurer would be able to seek a re-apportionment of those defence costs at the conclusion of the underlying litigation. This certainly breaks from tradition, wherein insurers are able to seek re-apportionment of defence costs at the conclusion of the matter, based on the facts determined at trial.

What Does This Mean for Insurers?

The *Aviva* decision ought to be a warning to insurers who may be asked to provide coverage under exclusions that contain the word "sudden." The qualified pollution exclusion has gone the way of the dodo, and for good reason. Insurers should take comfort, however, in the fact that the *Aviva* case provides certainty and clear guidance to insurers on the qualified pollution exclusion: when faced with situations where old policies with old wording are at issue, insurers should focus on the source of liability, not the cause of the damage.

This decision also provides an example of defence costs being apportioned before the facts of the case are decided. This may be helpful in providing certainty to insurers, but on the other hand, the decision to apportion defence costs on a 50/50 basis going forward may prove to be inequitable once further facts are discovered. It will be interesting to see if courts follow this aspect of the ruling in future cases.

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[1] 2017 ONSC 509.

[2] *Murphy Oil Co. Ltd. et al. v. Continental Insurance Co.,* 1981 CanLII 1895 (ON SC).

[3] *Zatko v. Paterson Spring Services Ltd.,* 1985 CarswellOnt 796 (Ont. S.C.).

[4] *BP Canada Inc. v. Comco Service Station,* 1990 CarswellOnt 637 (Ont. S.C.).