WeirFoulds LLP

When is a Pollutant Not a Pollutant: Total Pollution Exclusions in Commercial General Liability Policies

June 30, 2022

By John Buhlman

On June 2, 2022, the SCC dismissed an application for leave to appeal from the Ontario Court of Appeal's decision in *Hemlow Estate* v. *Co-operators General Insurance Company*, 2021 ONCA 908. Mr. Hemlow carried on business as a mechanical contractor. He applied for and received a Commercial General Liability ("**CGL**") insurance policy with Co-operators. Like many CGL policies, the policy issued to Mr. Hemlow contained what is called a "Total Pollution Exclusion":

This insurance does not apply to:

- Pollution Liability
    1. "Bodily Injury" or "property damage" or "personal injury" arising out of the actual, alleged, potential or threatened spill, discharge, emission, dispersal, seepage, leakage, migration, release or escape of "pollutants".

"Pollutants" was defined elsewhere in the policy as:

"Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant including smoke, odours, vapour, soot, fumes, acids, alkalis, chemicals and waste.

This is indeed very broad wording that potentially covers any discharge, no matter the cause. However, in the *Hemlow Estate* case, the Court of Appeal narrowed the scope of the Total Pollution Exclusion by looking to the nature of the claim and what was the actual cause of the discharge.

Mr. Hemlow was hired to sample and analyze the mechanical and refrigeration systems at a client site. While doing his work, Mr. Hemlow opened a valve to a pipe containing pressurized ammonia. Mr. Hemlow was killed by the exposure to ammonia and the ammonia caused significant damage to the client's property.

The client sued Mr. Hemlow and others for negligence, nuisance and breach of contract. Co-operators refused to defend the claim against Mr. Hemlow's estate on the basis there was no coverage for the claim, relying on the Total Pollution Exclusion.

The Hemlow estate brought an application for a declaration that Co-operators has a duty to defend the action brought by the client. The application judge agreed Co-operators had a duty to defend finding that the word "Pollution" (as opposed to "Pollutants") was ambiguous because it was left undefined in the policy and could be interpreted as including only environmental pollution. In other words, the exclusion is worded "to protect the insurer from liability for environmental pollution and the improper disposal of contamination of hazardous waste."

The Court of Appeal dismissed the appeal. The Court cited *Nichols v. American Home Assurance Co.*, [1990] 1 S.C.R. 801 for the

proposition that a duty to defend arises only where the pleadings raise claims for which there may be an obligation to indemnify. The Court of Appeal held that the interpretation of the pollution exclusion must give proper consideration to the nature of the claims advanced against the Estate. Nothing in the statement of claim "involves, or asserts, a claim arising out of 'pollution' as that term is commonly understood." Instead, the claim is for damage to property. This does not change because what caused the damage happens to be something that can be labelled as a pollutant.

In essence the Court of Appeal looked to Mr. Hemlow's expectations and purpose in obtaining a CGL policy. Mr. Hemlow and other parties obtain CGL policies to cover claims for negligence. Negligence in opening the valve and allowing the ammonia to escape is the essence of the claim against the Hemlow Estate and the nature of the claim is not changed because the damage was caused by a pollutant. Since the nature of the claim is negligence, which is covered by the policy, Co-operators had a duty to defend.

The Court of Appeal drew a distinction between this case and the cases where the claim is for damage to the natural environment caused by a form of pollution, such as contamination arising from leaking underground storage tanks at a gas station.

One statement the Court of Appeal made, which is probably too narrow today, is that the historical purpose of the pollution exclusion was "to mitigate coverage for the cost of government-mandated environmental cleanup." While that may be what prompted insurers to include pollution exclusions in policies, they are not restricted to government-mandated cleanup. They surely exclude coverage for claims by neighbours for the escape and discharges of pollutants from one property to another even though there is no government mandated cleanup.

One can imagine many situations where negligence can lead to the "escape" of "pollutants" which causes property damage. After all, the definition of "pollutant" in the policy covers almost everything imaginable. If Co-operators was correct, there would be no coverage for damage caused by the escape of a "pollutant" in a fire, an explosion or, as in the *Hemlow Estate* case, negligence of any kind.

As the Court of Appeal stated, people buy a CGL policy to cover precisely this type of claim.

For more information or inquiries:

John Buhlman

Toronto
416.947.5070

Email:
jbuhlman@weirfoulds.com

John Buhlman is an experienced litigator who acts on complex environmental and commercial litigation. A key part of his practice involves advising clients on regulatory compliance with environmental laws.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035