To the Editor:
This is an article form a series of monthly columns by Environmental Law Specialist Dianne Saxe, one of the top 25 environmental lawyers in the world, and Ms. Jackie Campbell. These articles are available for publishing at no charge, provided Dr. Saxe and Ms. Campbell are cited as the authors. Dr. Saxe can be contacted at (416) 962-5882 or admin@envirolaw.com. For more information, visit http://envirolaw.com.

What's the scope of the pollution exclusion clause in your home insurance policy?

Insurance policies often include pollution exclusion clauses, which specify that the insurer will not pay for certain pollution-related property damage. A recent decision by the Supreme Court of British Columbia, *Corbould v. BCAA Insurance Corporation,* reminds us that the scope of such clauses may be difficult to interpret.

Pollution exclusion clauses once applied mainly to damages from pollution in the industrial setting, but are now often included in residential policies. One of the reasons for such clauses is to make sure that a polluter actually to pay for pollution it causes. Clearly, insurance companies should not have to pay for breaches of environmental laws by their clients under general insurance policies.

In the BC case, Mr. Corbould's above-ground home heating oil storage tank leaked. His 2 year old tank suddenly sprung a leak and around 950 litres of fuel escaped into the soil and under his home. He reported the spill, hired an environmental consultant and cleaned up the property, at a cost of $200,000.

He sought indemnity from his insurer, BCAA Insurance Corporation ("BCAA"), under the "all risks" policy he held with them, which indemnified him against loss or damage to land and premises. He had advised BCAA that he would be using an oil furnace to heat the property. BCAA denied coverage.

The policy provided as follows: "*Perils Insured - You are insured against ALL RISKS OF DIRECT PHYSICAL LOSS OR DAMAGE subject to the exclusions and conditions in this policy."*

The policy's exclusion clause read as follows: "*We do not insure: … loss or damage caused by contamination or pollution, or the release, discharge or dispersal of contaminants or pollutants."* Of note, the term "pollutants" as it appears in the exclusion clause is defined in another clause of the policy; however, the terms "contamination," "pollution," "release, discharge or dispersal," and "contaminants" were not defined in the policy. Nor did the policy specifically exclude "oil".

BCAA argued that the exclusion clause is clear and unambiguous, and that escape of heating fuel from the oil tank is clearly contamination/pollution as contemplated by the policy.

Mr. Corbould argued that as he is a non-commercial, residential homeowner who was not involved in business activities (e.g., generating contaminants) that could lead to polluting the environment, the exclusion does not apply. Further, he argued that he had a reasonable expectation that the policy did not exclude liability for the unintended results of the normal operation of the heating system. He argued that interpreting "pollution" to include something that was an unintended consequence of the normal operation of his home heating system fails the common sense test for determining what constitutes "pollution".

The Court considered the principles of interpretation of insurance contracts:

- that the court should not create ambiguities where none exist;
- the *contra proferentem* rule (where an ambiguous clause will be interpreted against the interests of party that included in a contract);
- that general insurance coverage provisions should be interpreted broadly, and exclusion clauses narrowly; and
- that where a policy is ambiguous, the court should consider the reasonable expectations of the parties (the reasonable expectations doctrine).

In reaching his decision, the judge read the insurance contract as a whole, and found that even on a narrow reading of the exclusion clause, its plain and ordinary meaning would be that an oil leak of this size would be considered property damage caused by "contamination or pollution" or would be a "release, discharge or dispersal" of contaminants or pollution on the property, even though the terms are not defined in the policy.

As there were no Canadian cases that had considered residential heating oil as a pollutant, the judge also reviewed several commercial cases in which oil or gasoline had been determined to be contaminants or pollutants under insurance clauses. He also reviewed recent US cases that had found residential heating oil to be a pollutant within the meaning of the exclusion clause.

As well, the judge agreed with BCAA, which had argued that the exclusion clause had to have meaning. If the clause were interpreted not to cover a fuel spill or leak of a tank on the property of the insured, BCAA asked "*what is it intended to cover*"?

As there was no ambiguity in the policy language, the judge found that the reasonable expectations doctrine did not apply. Even if it did, he reasoned, application of the exclusion clause did not nullify Mr. Courbould's insurance coverage under the policy. As well, the doctrine applies to the expectations of both parties – a heating oil spill is precisely the type of event the insurer would have expected the clause to apply.

Clearly, "all risks" insurance policies, while they may provide broad coverage against property damage, don't cover all perils. Homeowners should review their policies to determine what is covered. Pay close attention to the language used in policy exclusions. For example, an exclusion clause may not apply where there is a "sudden and accidental" release of contaminants: does a leak in a pipe happen "suddenly" or not? If you are worried about whether a particular peril is covered, ask (in writing). The bottom line? *Those who use oil for heating must buy specific insurance against spills*.

(access the fulltext of *Corbould v. BCAA Insurance Corporation* at http://www.canlii.org/en/bc/bcsc/doc/2010/2010bcsc1536/2010bcsc1536.html)

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December 17 2010