

## Insurer off-the-hook for Release of Pollutants Caused by Fire

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On January 14, 2016, the Supreme Court of Canada denied *Precision Plating Ltd.*'s ("Precision Plating") application for leave to appeal the British Columbia Court of Appeal's ("BCCA") decision in *Precision Plating Ltd. v. Axa Pacific Insurance Co.*,<sup>1</sup> ("Precision Plating v Axa").

*Precision Plating v Axa* focused on the interpretation and application of pollution exclusion clauses in commercial general liability policies. The decision upheld a pollution exclusion clause in a commercial general liability insurance policy, shielding an insurer from the duty to defend third party claims.<sup>2</sup> *Precision Plating v Axa* suggests that the Courts are moving towards a more liberal interpretation of pollution exclusion clauses, including where there are concurrent causes of liability, such as fire and the release of pollutants.

### Background

Precision Plating operated an electroplating business in a multi-tenanted commercial complex. Precision Plating's operations required the use of chemicals stored in vats. In April 2011, there was a fire at Precision Plating's premises that activated the sprinkler system. The water from the sprinkler system caused the chemicals in vats to overflow. These chemicals then allegedly impacted neighbouring businesses within the commercial complex.

As a result, neighbours within the complex commenced four separate actions against Precision Plating. Precision Plating sought a declaration that its insurers (collectively, "Precision's Insurer") had a duty to defend and indemnify Precision Plating under its commercial general liability insurance policy (the "Policy").

Both the British Columbia Supreme Court ("BCSC") at trial<sup>3</sup>, and the BCCA on appeal<sup>4</sup>, focussed on the interpretation and application of the pollution exclusion clause in the Policy. The pollution exclusion clause stated in part:<sup>5</sup>

<sup>1</sup> 2015 BCCA 277 [*Precision Plating* BCCA].

<sup>2</sup> See *ING Insurance Co. of Canada v. Miracle*, 2011 ONCA 321 and *Breton Petroleum Ltd. v. Aviva Insurance Co. of Canada*, [2014] N.S.J. No. 298.

<sup>3</sup> *Precision Plating Ltd. v. Axa Pacific Insurance Co.*, 2014 BCSC 602 [*Precision Plating* BCSC].

<sup>4</sup> *Precision Plating* BCCA *supra* note 1.

<sup>5</sup> *Ibid* at para 10.

This insurance does not apply to:

- (b) (i) Bodily Injury, Personal Injury or Property Damage caused by, contributed to by or arising out of the actual, alleged or threatened discharge, emission, dispersal, seepage, leakage, migration, release or escape at any time of Pollutants:

(1) at or from any premises, site or location owned, rented or occupied at any time by an Insured

### **Trial Court’s Decision – Pollution Exclusion Does Not Apply to Bar Coverage**

At trial, the BCSC held that the pollution exclusion clause was ambiguous and therefore Precision Plating’s Insurer had a duty to defend and indemnify Precision Plating.<sup>6</sup>

The BCSC found that

- ♦ pollution caused by a fire does not fall within the ordinary meaning of “pollution”, and the pollution exclusion clause is instead intended to exclude coverage arising from environmental pollution, not the escape of substances caused by a fire<sup>7</sup>
- ♦ the third party claimants pleaded in their claims that the fire caused, and was not separate from, the damage alleged<sup>8</sup>
- ♦ the third parties’ claims related, at least in part, to damage caused by fire, and damage caused by fire is covered under the Policy and is not excluded by the pollution exclusion.<sup>9</sup>

### **BCCA’s Decision – Pollution Exclusion Applies – No Coverage**

The BCCA reversed the BCSC’s decision.

The BCCA found that

- ♦ the Policy covers “*potential liability* because of property damage due to an accident or occurrence, *not the potential damage itself*.”<sup>10</sup>
- ♦ the trial Court’s analysis was focussed on the original cause of the damage, the fire, rather than the cause of the alleged liability, the pollution, and concluded that “it is not the ‘true cause’ of the damage that is relevant, but the true cause of the liability.”<sup>11</sup>
- ♦ the third parties’ claims “do not, in substance, allege liability for fire or smoke damage” but instead “allege liability for the accidental release of pollutants and the contamination caused by leaking toxic chemicals.”<sup>12</sup>

The BCCA also noted that one of the four third party claimants alleged in its claim against Precision Plating that the fire and the release of pollutants were concurrent sources of liability. As Precision Plating’s Insurer admitted that liability arising from a fire would be covered under the Policy, the BCCA considered whether coverage could exist where multiple sources of liability are alleged (i.e., fire and the release of pollutants). The BCCA examined the pollution exclusion clause and held that the words “caused by, contributing to, arising out of” in that clause are sufficient to exclude coverage. The BCCA concluded that the Policy “does not cover a claim

<sup>6</sup> *Precision Plating* BCSC *supra* note 3 at paras 67 (referred to as para 68 in the BCCA decision) and 73.

<sup>7</sup> *Ibid* at para 67 (referred to as para 68 in the BCCA decision).

<sup>8</sup> *Ibid* at para 49.

<sup>9</sup> *Ibid* at para 67 (referred to as para 68 in the BCCA decision).

<sup>10</sup> *Precision Plating* BCCA *supra* note 1 at para 36.

<sup>11</sup> *Ibid* at para 57.

<sup>12</sup> *Ibid* at para 67.

where liability associated with the release of pollutants is alleged, whether as a sole or concurrent cause.”<sup>13</sup>

The Supreme Court of Canada dismissed Precision Plating’s application for leave to appeal the BCCA’s decision with costs.<sup>14</sup>

### **Implications of *Precision Plating v Axa***

Given the recent trend in Canadian case law, it is critical to examine and understand the application and implications of pollution exclusion clauses when purchasing commercial general liability insurance. The Courts are moving away from interpreting pollution exclusion clauses narrowly, in favour of a broader approach. Such pollution exclusion clauses can apply where there are concurrent causes of liability, such as fire and the release of pollutants.

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<sup>13</sup> *Ibid* at para 47.

<sup>14</sup> Supreme Court of Canada, Case No. 36579.