
POLLUTION RELATED LOSSES V. POLLUTION RELATED CLAIMS

Reported case: Boliden Limited v. Liberty Mutual Insurance Company

Citation: 2008 ONCA 288

At Issue: Does a pollution exclusion clause in a D&O policy apply to pollution-related losses or pollution-related claims? If the exclusion applies to some losses but not others, does the defence cost allocation endorsement apply?

The Court: Court of Appeal for Ontario

Judgment Rendered: April 17, 2008

Factual Summary: Liberty issued a D&O policy insuring the directors and officers of Boliden in respect of certain specified losses arising from claims made in the policy period, including damages and defence costs. Boliden shareholders brought a class action against Boliden in the wake of an environmental disaster. The class action was settled and Boliden indemnified its directors and officers for the defence costs associated with the class action. Boliden sought to recover these costs from Liberty. Liberty denied coverage for the defence costs associated with the action based on a pollution exclusion clause in the D&O policy. Liberty asked the court to consider the class action as a single claim for failing to disclose information in the prospectus about dam deficiencies, which deficiencies involved the threat of the escape of pollutants. Liberty's position was that the exclusion clause should be read as excluding all losses arising from a claim that related to or involved a pollution loss. This also resulted in a denial of the defence costs associated with the action.

Disposition by Lower Court: The motions judge determined the exclusion clause excluded pollution-related losses, not pollution-related claims. He applied the exclusion clause by considering whether the allegations of wrongful acts on the part of the directors and officers in the statement of claim gave rise to both pollution loss and loss other than pollution loss.

With respect to the defence costs, Liberty argued that the claims did not involve both covered and uncovered losses, and there was therefore no reason to apply the allocation endorsement in the policy. The trial judge disagreed and allowed Boliden 80% of the defence costs, in accordance with the defence costs allocation endorsement.

Appellate Decision: Appeal by Liberty dismissed. The Court of Appeal agreed with the lower court judge's reasoning regarding the application of the pollution exclusion as applying to losses and not claims. With respect to the defence costs, the court pointed out that the trial judge intended to treat each allegation in the statement of claim as a separate claim, and it made no commercial sense to analyze each allegation in a statement of claim to determine if it gives rise to a covered and uncovered loss as a precondition for applying the allocation endorsement. The Court of Appeal concluded that the proper approach was to consider whether the statement of claim exposed the directors and officers to both covered and uncovered losses, and if so, 80% of the defence costs would be advanced by Liberty. The action in this case involved both pollution-related losses and non-pollution-related losses, therefore the directors and officers were exposed to both covered and uncovered losses.