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CGL Coverage and Long-Tail Pollution Claims: Several Triggering Issues Considered

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CGL COVERAGE AND LONG-TAIL POLLUTION CLAIMS: SEVERAL TRIGGERING ISSUES CONSIDERED

Environmental claims against long term industrial polluters often concern occurrences of property damage spanning many decades. If the polluting industry held standard Commercial General Liability ("CGL") insurance policies over the course of many years, a diverse array of CGL policies may be called upon. This is because CGL policies typically provide coverage for the insured's liability to pay compensatory damages for injuries to third parties' property damage occurring during the policy period.[1]

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* This paper represents the views of the author, and not necessarily those of the author's clients.

1 This paper focuses upon standard CGL policies, which are "occurrence" policies, providing coverage for occurrences falling within the coverage period even if the insured is sued long after the policy ends. Compare this to "claims made" policies which provide coverage if a claim is made against the insured during the policy period. Note also that CGL policies usually cover both property damage and bodily injury. This paper focuses upon property damage issues.

For the insurance practitioner, this makes for an interesting area of the law. We need to consider manuscript and old form insurance policies, the impact of amendments on defining policy obligations, and old case law discussing phrases which may have fallen into disuse.[2] As well, there is the scientific and regulatory overlay: the need to consider environmental impact assessments and reports, determine steps taken by insureds to remediate or quell the spread of pollutants, and consider the nature of regulatory clean-up demands.

From the insurers' perspective, it is necessary to attempt to determine risks associated with environmental claims. However, many CGL policies were issued before such risks were contemplated. As one American author comments[3]:

> Because cleanup costs for contaminated sites are claimed and enforced retroactively for pollution incidents which occurred or recurred in the past, insurers and insureds together have new and expanded obligations which can go back 40 years or more for risk exposures and damages never contemplated, assessed, or identified, and certainly not made part of the premiums or risk selection process.

Politicization of the process has brought about statutes imposing potentially immense liabilities upon offenders. In turn, the true targets of such legislation—the environmental offenders—often seek to burden insurers with liabilities for their own wrongs.

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2 The history of liability policies is beyond the scope of this paper. However, in brief, the standard comprehensive general liability insurance policy was developed in 1940 (see historical discussion in *Certain Underwriters at Lloyd's of London v. Powerine Oil Company*, 24 Cal. 4th 945 (Cal. S.C. 2001)). For early Canadian liability policies (not commercial general liability), see *Anderson v. Caledonia Insurance Co.*, [1938] 4 D.L.R. 126 (B.C.C.A.) (auto liability policy); *Western Canada Accident & Guarantee Insurance Co. v. Parrott* (1921), 61 S.C.R. 595 (appeal from Sask. C.A.) (workplace liability policy—predating WCB); *Winter et al. v. Trans-Canada Insurance Co.*, [1934] O.R. 87 (Ont. H.C.J.) (auto liability). A very early occurrence-based general liability policy is discussed in *Reliance Petroleum Ltd. v. Stevenson*, [1953] O.R. 807 (H.C.J.). In that case, Canadian General Insurance Company issued a policy with the following insuring agreement: "*To pay on behalf of the Insured all sums which the Insured shall become obligated to pay for reason of the liability imposed upon the Insured by law, or assumed by the Insured under contract as set forth hereinafter, for damages because of injury to or destruction of property caused by accident occurring within the Policy Period and while this Endorsement is in force*."

The Court in *Reliance* cited a rare US Supreme Court insurance decision, *St. Louis Dressed Beef and Provision Company v. Maryland Casualty Company* (1906), 201 U.S. 173, which considered the following insuring agreement: "*In consideration of the application for this policy, a copy of which is hereto attached and which is made part of this contract, and of one hundred sixty-eight dollars ($ 168) premium, Maryland Casualty Company, of Baltimore, Maryland (hereinafter called "the company"), does hereby agree to indemnify St. Louis Dressed Beef & Provision Co. of St. Louis, county of , State of Missouri, hereinafter called "the assured" for the term of one year beginning on the fifth day of July, 1900, at noon, and [***3] ending on the fifth day of July, 1901, at noon, standard time, at the place where this policy has been countersigned, against loss from common law or statutory liability for damages on account of bodily injuries, fatal or nonfatal, accidentally suffered by any person or persons, and caused through the negligence of the assured, by means of the horses or vehicles in his services, and the use thereof, as described in the application and while in the charge of the assured or his employes*." Despite lacking a clause compelling the insurer to defend the insured, the USSC found the insurer liable to indemnify the insured for costs that he had incurred in defending himself.

3 C.A. Zagaski, *Environmental Risk and Insurance* (Lewis Publishers, Boca Rotan: 1991) at 52. As an example of the great risk to insurers resulting from environmental claims, consider the example of Lloyd's Equitas—a runoff vehicle set up in 1992 for the sole purpose of handling Lloyd's Underwriters' asbestos and environmental claims.

On the one hand, this is an underwriting issue: the development of policy language necessary to appropriately cap the risk.[4] But in relation to the CGL policy, the process is backward-looking: consideration of old policies created before such immense exposures were "contemplated, assessed, or identified."[5] To create order, fairness and predictability for insurers and insureds alike, it is essential to work towards a predictable approach to determining coverage. But with such disparate policy language spanning many years, this goal is elusive.

In this paper, I consider two triggering issues fairly unique to the environmental insurance context.[6] By "triggering" I mean events necessary to trigger coverage under the insuring agreement in the CGL policy: a legal obligation to pay "damages" because of "property damage" caused by an "occurrence" or "accident."

I first consider whether pollution of the environment arising from an insured's long term industrial activities constitutes "property damage" caused by "accident." I then consider whether government cleanup or remediation orders, demands, or suits constitute legal obligations to pay "damage." Under the latter head, I consider associated issues including coverage for steps taken to avoid government remediation orders or to prevent future occurrences of property damage. I conclude that many factors militate against triggering standard CGL policies and requiring insurers to indemnify long-term industrial polluters in relation to their costs incurred to cleanup the environment.

I. The Insuring Agreement

While many old form CGL policies may be brought into play in relation to long-tail pollution claims (i.e., pollution releases spanning many years), certain key elements are typically present in all such policies. In essence, there must be (i) an "accident" or an "occurrence," (ii) which causes "property damage" during the policy period, and (iii) a legal obligation upon the insured to pay damages in relation to the property damage. In other words, a third party must sue the insured for damages alleging that the insured is responsible for property damage which occurred during the policy period.

Examples of insuring agreements include the following:

> *"We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of 'property damage' to which this insurance applies. The 'property damage' must be caused by an 'occurrence.'"*

And, an older form policy:

> *"To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of property damage caused by accident."*

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4 There are a number of insurance policies now available to cover certain insurance risks, including Pollution Legal Liability Insurance; Commercial Pollution Legal Liability Insurance; Commercial Real Estate Pollution Legal Liability Insurance: Cleanup Cost Cap Insurance; Contaminated Property Development Insurance; Secured Creditor Impaired Property Insurance; Contractor's Pollution Liability and E&O Insurance; Finite Risk Coverage; etc. For a detailed discussion of these and other pollution coverages see A. Waeger, "Current Insurance Policies for Insuring Against Environmental Risks" in *Environmental Insurance, Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery*, ALI ABA (May 8-9, 2008) at 339.

5 Zagaski, *supra*.

6 This paper does not examine the many exclusion clauses which may apply to coverage claims, most notably, the pollution exclusion clause. If the insuring agreement has not been triggered, there is no need to consider exclusions: *Progressive v. Lombard*, 2007 BCSC 439 (appeal reasons pending).

In addition to the indemnity obligations, standard CGL policies generally impose defence obligations upon the insurer. For example:

> *"We will have the right and duty to defend any "action" seeking those compensatory damages."*

And, another example from an older CGL policy:

> *"To defend in the name and on behalf of the Insured and at the cost of the Insurer any civil action which may at any time be brought against the Insured on account of such property damage."*

II. Is Environmental Damage Caused by Industrial Pollution an "Accident"?

As noted in the insuring agreement provisions set out above, in order to trigger coverage under the CGL policy, any alleged "property damage" must be caused by an "accident" or by an "occurrence." This issue is of particular importance in the context of the long-tail industrial polluter: the insured which has emitted pollutants into the environment as a byproduct of its long-term industrial operations.

Often, the industrial polluter discharged its waste byproducts directly into the environment for a variety of reasons: it was entitled to do so pursuant to government permit; the cost of treating waste prior to release would be too costly; lack of control equipment at the time of release; or belief by the industry that the release would not cause the sort of harm subsequently revealed by progress in environmental science. Regardless of the industry's rationalization for discharging pollutants into the environment, the discharge is generally intentional and not an "accident." The costs arising from this intentional act are essentially costs of doing business. As explained below, there are good reasons to prohibit such industrial polluters from accessing their CGL policies to obtain indemnity for their industrial activities.

From a public policy perspective, allowing insurance coverage to extend to the long-tail industrial polluter defeats a primary goal of our Canadian environmental legislation. This goal seeks to dissuade industry from engaging in polluting activities by imposing upon polluters the direct and immediate costs of pollution. In so doing, Canadian legislation compels industries to pay more attention to the need to protect ecosystems in the course of their economic activities. This goal has been called the "polluter pays" principle.

The Supreme Court of Canada recently drew attention to this feature of Canadian legislation in *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*[7]:

> The Quebec legislation reflects the growing concern on the part of legislatures and of society about the safeguarding of the environment. That concern does not reflect only the collective desire to protect it in the interests of the people who live and work in it, and exploit its resources, today. It may also be evidence of an emerging sense of inter-generational solidarity and acknowledgement of an environmental debt to humanity and to the world of tomorrow (*114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Ville)*, [2001] 2 S.C.R. 241, 2001 SCC 40, at para. 1, per L'Heureux-Dube J.).
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> > ... To encourage sustainable development, that principle assigns polluters the responsibility for remedying contamination for which they are responsible and imposes on them the direct and immediate costs of pollution. At the same time, polluters are asked to pay more attention to the need to protect ecosystems in the course of their economic activities.

7 2003 SCC 58 per LeBel J.

If an insurer shoulders environmental cleanup cost, the polluter deflects those costs to someone else, and avoids repercussions associated with its failure to "pay more attention to the need to protect ecosystems." (*per* L'Heureux-Dube J. in *Spraytech*). The insured industry learns nothing, except that it can gain economically by avoiding the expenses incurred in treating its pollutants or minimizing discharge. Its insurers will simply shoulder the burden should it be required to clean its pollutants from the environment.

Despite the force of this argument, it has been rejected in at least one American decision: *AIU Insurance Co. v. Superior Court (FMC Corp).*[8] However, the Court's reason for rejecting the public policy argument do not apply in BC as they related to an express American legislative mandate allowing insurance coverage for polluting activities. In this regard, the California Supreme Court held as follows:

> Although one can readily conceive of arguments for and against permitting insurance against the costs of rectifying pollution, at the outset we note that such arguments are not pertinent to either of our inquiries in this case. Both *CERCLA* and the *Hazardous Substance Account Act* expressly permit responsible parties to insure against the costs of relief available under the legislation ... Thus, because *Congress and the Legislature already have made the relevant public policy determinations*, the issue before this court is not whether CGL policies may provide the coverage sought, but whether they do provide it according to their terms. The answer is to be found solely in the language of the policies, not in public policy considerations.

Unlike the US Congress and state legislatures, the BC legislature has not expressly permitted insurance against the costs of rectifying pollution.[9] There is nothing new about prohibiting insurance coverage on public policy grounds, and Canadian courts have refused to allow insurance coverage to extend to insureds for public policy reasons.[10]

Of particular interest and applicability is the public policy rationale relied upon to avoid coverage for punitive damage claims. This rationale was outlined in *Fiske v. Hartford Insurance Co. of Canada*.[11] The Court refused to allow coverage for a punitive damages claim, holding as follows:

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8 799 P.2d 1253 (Cal. S.C. 1990).

9 This discussion is confined to public policy issues regarding pollution coverage under standard CGL policies. Pollution insurance *per se* is not a problem. Consider, for example, the various classes of pollution insurance noted at footnote 4 above, including clean up cost cap insurance. The clean up cost cap insurance provides coverage for environmental remediation costs exceeding a pre-determined capped amount. For example, a developer will estimate the clean up cost on polluted property that it has purchased, and will obtain insurance to cover costs in excess of that amount which additional costs might arise through the discovery of unanticipated additional pollutants found on site. In such a case, the public policy prohibitions to coverage are clearly inapplicable.

10 See, for example, *Oldfield v. Transamerica Life Insurance Co*., 2002 SCC 22, [2002] 1 S.C.R. 742: "[14] Canadian courts have recognized the public policy rule. In *Demeter v. Dominion Life Assurance Co.* (1982), 35 O.R. (2d) 560 (C.A.), MacKinnon A.C.J.O. held that '[t]he basic rule of public policy which is not disputed is that the courts will not recognize a benefit accruing to a criminal from his crime' (at 562). In *Brissette Estate v. Westbury Life Insurance Co.*, [1992] 3 S.C.R. 87, Sopinka J. held that 'a person should not be allowed to insure against his or her own criminal act irrespective of the ultimate payee of the proceeds' (at 94)."

See also *Kentville (Town) v. Gestas Inc*. (1989), 40 CCLI 41, aff'd 96 N.S.R. (2d) 338 (C.A.): "...it would be contrary to public policy as alien to the peaceful and orderly resolution of disputes in a timely manner, which is essential to good industrial relations, to hold that insurance companies could step in and represent the employer in labour arbitrations."

11 [1993] O.J. No. 3127 (QL) (Ont. Ct (Gen. Div.)), varied, [1993] O.J. No. 3127 (QL), 56 A.C.W.S. (3d) 895 (Ont. C.A.) on unrelated issue.

> I have concerns that allowing insurance coverage to extend to awards of punitive or exemplary damage may reduce the intended effectiveness of such awards. I have concerns that interpreting insuring agreements in such a way is contrary to important principles of public policy.

To summarize, drawing from Canadian environmental legislation, the Supreme Court of Canada has expressed an important public policy principle: assigning to polluters the responsibility for remedying pollution in order to encourage polluters to pay more attention to the need to protect the environment. Canadian courts have shown a willingness to disallow insurance coverage to support "important principles of public policy" (*Fiske*). Hence, courts may validly prohibit polluters from accessing CGL insurance coverage.

Even if the "polluter pays" principle is not relied upon to avoid coverage without further inquiry, the principle should at least inform consideration of coverage under CGL policies. In particular, the principle comes into play when we consider the initial coverage trigger. The CGL insuring agreement requires that property damage be caused by "accident", otherwise there is no coverage: "*To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of property damage caused by accident*."[12]

An "accident" is a fortuitous event: something unlooked for, unintended and unexpected. In *Canadian Indemnity Co. v. Walkem Machinery and Equip. Ltd.*,[13] Pigeon J. held that "no dictionary need to be cited to show that in everyday use, the word is applied as Halsbury says in the passage above quoted, to any unlooked for mishap or occurrence." And, *per* Robertson J.:

> The word 'accident' is not a technical legal term with a clearly defined meaning, and in the policy here it is to be read in its proper and ordinary sense. That sense is expressed in these definitions: 'Any unintended and unexpected occurrence that produces hurt or loss' and 'an undesigned, sudden and unexpected event.' Injuries are accidental or the opposite, for the purpose of indemnity, according to the quality of the results rather than the quality of the causes.

The issue was discussed earlier by the Ontario Court of Appeal in *Crisp v. Delta Tile & Terrazzo Co*, [1961] O.W.N. 278 (Ont. C.A.). In that case, dust from terrazzo grinding in a basement permeated the rest of the house, causing damage. The Court of Appeal, per Aylesworth J.A. held as follows (at 279):

> In our view, on the particular facts of this case, there was no accident within the meaning of that word as it appears in coverage B of the policy. That which happened, in our opinion, was *the natural, foreseeable and probable consequence of the defendant's acts*. The defendant should have foreseen that such natural and probable consequences would ensue because the defendant and the defendant's workmen, on the evidence, had actual knowledge of what would happen if the precautions, which they failed to take, were not taken. There was, in this sense, a deliberate courting of the risk with knowledge of the risk, there was an element of reckless conduct in the sense that they could not have cared whether or not the dust damage would ensue when they proceeded with the work in the way they did with the knowledge which they had. As I have said, the facts being such as I have described, we are all of the view that the defendant has failed to bring itself within the insuring clause to which I have referred.

The converse of an accident is a deliberate act. In *Sansalone v. Wawanesa Mutual Insurance Co.* (1997), 185 D.L.R. (4th) 57 (S.C.C.), the Supreme Court used language similar to that relied upon by the Ontario Court of Appeal in *Crisp* and held as follows:

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12 Later policies changed the word "accident" to "occurrence," but the defined "occurrence" as an "accident or repeated exposure to conditions resulting in property damage."

13 [1976] 1 S.C.R. 309.

> ... when the risk of injury is inherent in the insured's deliberate act so that the injury is the *natural and probable consequence of the act*, the intention to commit the act is the intention to cause the injury, and the claim is therefore excluded from coverage.

In *Sansalone*, the Supreme Court was discussing the intentional act exclusion. But the exclusion clarifies the requirement that property damage be caused by accident.[14] Therefore, the Supreme Court's reasoning applies to the insuring agreement. Thus, in Canada under CGL policies, property damage is not caused by "accident" if the property damage was the natural and probable consequence of the insured's act.

While there will be exceptions, it is probably fair to say that most industrial polluters will have an extremely difficult time convincing a court that they did not deliberately release pollutants into the environment; and that at the time of the release they did not appreciate that the natural and probable consequence of that act would be to pollute the environment (for example, a smelting company's deliberate release of mine waste directly into a river). If the release was permitted, the industry might not have expected a cleanup demand by the very government that permitted the release. The industry might not have appreciated the enormous impact its pollution release was having upon the environment. But the focus of the inquiry is the intent of the insured's actions, not the precise scope of the harm that actually manifests.

If the public policy rationale holding polluters responsible for their own activities is kept in mind, Canadian courts may well conclude that an industry's discharge of pollutants into the environment fails to qualify as an "accident" under standard CGL policies. At minimum, a presumption ought to apply against an industrial polluter, a presumption that the environmental impact or "property damage" arising from its long-term industrial operations was not caused by accident but is the natural and probable result of the industrial activities. Adopting this approach accords with the insuring agreement's requirement that property damage be caused by "accident"[15]; and it furthers public policy objectives seeking to modify polluting activities by holding polluters responsible for their own acts.

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14 Most CGL policies include an intentional act exclusion, such as "[no coverage for] any act or omission committed with intent to cause injury to persons or property unless for the purpose of protecting persons or property." Such exclusions merely clarify the insuring agreement. Intentional acts are not accidents, and cannot be covered; but the intentional act exclusion clarifies that defensive acts are not intentional in the sense that coverage would be avoided for such acts.

Note Domtar v. Niagara Fire Insurance Company, 552 N.W.2d 738 (Minn. App.), in which the Court held that "In the insurance context, 'intent' requires that the insured intend the harm itself." The Court agreed with the proposition that "the presumption in tort and criminal law that a person intends the natural and probable consequences of his intentional acts has no application to the interpretation of terms used in insurance contracts." This proposition conflicts entirely with the Canadian approach enunciated by the Supreme Court of Canada in *Sansalone* and is therefore likely to be rejected by a Canadian court.

15 In *Morton Int'l, Inc. v. General Acc. Ins. Co. of Am.*, 629 A.2d 831 (NJ Supreme Court, 1983), the Supreme Court of New Jersey noted insurance industry representations to state insurance regulators in 1970 which stated that the "sudden and accidental" pollution exclusion merely clarified pre-existing insurance coverage. Indeed, while the New Jersey Supreme Court was surprised by these early statements, when considered in the context of the long-term industrial polluter intentionally releasing pollutants into the environment, the pollution exclusion really added nothing: coverage should never extend to such acts. The situation may differ in situations were there is a sudden and accidental release of pollutant, for example, from a secure storage facility. In that case there is an accident, not an intended release of pollution to the environment.

III. Environmental Regulators' Remediation Demands and Voluntary Clean-Up: "Legal Obligation to Pay Damages"?

A unique aspect of environmental coverage matters concerns the source of claims against the insured. Rather than suits commenced in court seeking "damages," the insured is often subjected to demands and orders of government agencies or regulators requiring the insured to cleanup pollutants or reimburse cleanup costs to government.16 One key question is whether cleanup costs constitute "damages" pursuant to the insuring agreement. A second issue is whether proceedings initiated by regulatory authorities fall within the insuring agreement coverage for the insured's "*legal obligation* to pay as damages." A third issue is whether voluntary measures taken by an insured to avoid a future occurrence or government action fall within the insuring agreement.

A. Do Environmental Cleanup Costs Constitute "Damages" Under CGL Policies?

The broad question asks whether an environmental regulator's cleanup claims against an insured qualify as covered claims under standard CGL policies. Given lack of any substantial Canadian consideration of the issues, I begin by looking at American law.

In a leading American decision, *AIU Insurance Co. v. Superior Court (FMC Corp.)*,[17] the California Supreme Court accepted that government claims against insured seeking recovery of cleanup costs do constitute a legal obligation to pay "damages." As explained below, Canadian courts may not follow this approach.

In *AIU*, the Court considered whether certain claims of government environmental agencies' against an insured charged with contaminating various property sites constituted claims for "damages" sufficient to trigger the insured's coverage. In brief, acting pursuant to statute, state and federal environmental regulatory agencies demanded the insured clean property or reimburse the agencies for remediation costs. The agencies then sued the insured in court seeking to recover the costs to remediate or to force the insured to remediate (positive injunction).

The insured's CGL policies provided coverage for all sums the insured became legally obligated to pay as "damages" as a result of "property damage" within the meaning of the policies.

An issue arose as to whether the agencies' suit for reimbursement of cleanup costs was an action for "damages" within the meaning of CGL policies. The Court held that the suit claimed "damages" because such reimbursement was analogous to a judgment awarding damages for injury to property, measured by the cost of restoring the property to its original condition. Under the applicable statutes, the agencies could have proceeded against the insured either by requiring the insured to take remedial action, or by taking remedial action themselves and suing for reimbursement. The agencies chose the latter. As the Court explained:

> ... the mere fact that the governments may seek reimbursement of response costs or injunctive relief without themselves having suffered any intangible harm to a proprietary interest does not exclude the recovery of cleanup costs from coverage under the 'damages' provision of CGL policies.

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16 For example, see the *Environmental Management Act*, S.B.C. 2003, c. 53, ss. 58 and 59, which allows the Minister to issue a certificate showing an amount of money spent by the government to remediate contaminated property, and to recover the cost of remediation by selling any property comprising all or part of the site, etc. The certificate constitutes a deemed debt.

17 799 P.2d 1253 (Cal. S.C. 1990).

The Court observed that the claim constituted "damages" because

> ... [the] agencies suffer 'loss' or 'detriment' in two separate ways when they incur response costs under CERCLA and similar statutes. First, release of hazardous waste into groundwater and surface water constitutes actual harm to property in which the state and federal governments have an ownership interest; this harm is 'detriment' in statutory terms. ... Second, the agencies' out-of-pocket expenses of investigating and removing the waste as required by statute is 'loss' incurred as a direct result of harm allegedly created through the unlawful act or omission of [the insured].

As well, the Court noted that "[the insured's] reimbursement of government response costs is monetary 'compensation' for the loss suffered by the agencies when they proceed with environmental cleanups."

On the injunctive relief issue, the Court accepted that such relief did not "readily" fall within the meaning of "damages":

> The costs of injunctive relief ... do not readily satisfy the statutory or dictionary definitions of 'damages.' Because such costs are paid to employees or independent contractors rather than aggrieved parties, they do not directly 'compensate' aggrieved persons for 'loss' or 'detriment.'

Despite this finding, the court stretched the insuring agreement beyond its plain words to include injunctive relief, finding that it was unlikely "that the parties to CGL policies intended to cover reimbursement of response costs but not the costs of injunctive relief, at least where the latter costs are incurred—generally at a lower total cost—for exactly the same purposes addressed through governmental expenditure of response costs."

The *AIU* approach does not represent the universal American view. A notable exception is the Eighth Circuit decision in *Continental Ins. Cos. v. Northeast Pharmaceutical Chem. Co.*,[18] which found that cleanup costs are not "damages" under a standard CGL policy. In reaching this conclusion, the Eighth Circuit relied upon CERCLA's distinction between cleanup costs incurred by the insured and "natural resource" damages, which are mandated by that statute.

In *Continental Ins.*, the federal government commenced an action against the insured seeking abatement costs, injunctive relief and reimbursement of its response costs (all of which the Court defined as "cleanup costs") pursuant to US federal statute. The Court found the insured jointly and severally liable to the federal government for the cleanup costs. In the subsequent insurance coverage action, the Court construed the word "damages" according to their legal and technical definition. The Court explained that cleanup costs did not constitute claims for "damages" under the policies at issue. In relevant part:

> ... we hold that the term 'damages' is not ambiguous in the insurance context and that the plain meaning of the term 'damages' used in the CGL policies refers to legal damages and does not cover cleanup costs.
>
> ...
>
> In the insurance context, however, the term 'damages' is not ambiguous, and the plain meaning of the term 'damages' as used in the insurance context refers to legal damages and does not include equitable monetary relief. ...
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> This limited construction of the term 'damages' is consistent with the provision defining the insurer's obligation as a whole. Continental did not agree to pay '*all sums* which the insured shall become legally obligated to pay.' Continental agreed to pay 'all sums which the insured shall become legally obligated to pay *as damages*.'

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18 842 F.2d 977 (8th Cir. 1987).

> The expansive reading of the term 'damages' urged by the state would render the term 'all sums' virtually meaningless. 'If the term 'damages' is given the broad, boundless connotations sought by the [insured], then the term 'damages' in the contract ... would become mere surplusage, because any obligation to pay would be covered. The limitation implied by employment of the phrase 'to pay as damages' would be obliterated.' *Maryland Casualty Co. v. Armco, Inc.*, 822 F.2d at 1352.

In *obiter*, the Court indicated that its decision would have differed had the government asserted a claim against the insured for natural resource damages, which would have constituted a claim for equitable relief, i.e., "damages." The Court in *Continental* relied extensively upon *Maryland Casualty Co. v. Armco Inc.*[19] This is notable as the *Maryland* decision was expressly accepted and applied in Ontario in *Brockton (Municipality) v. Frank Cowan Co.*[20] (discussed below). Given this, and despite early indications to the contrary (*Hildon Hotel (1963) Ltd. v. Dominion Insurance Corp.*[21] and *Greenwood Forest Products Ltd. v. United Fire Insurance Co.*[22]), Canadian courts are likely to conclude that a government claim seeking to recover environmental cleanup costs fails to qualify as "damages" under standard CGL policies.[23] Following, I explain.

Two BC cases are often cited for the proposition that cleanup costs constitute "damages": *Hildon Hotel* and *Greenwood*. In both cases, government entities sued insureds seeking to recover pollutant remediation costs. The insureds sought coverage for these costs, and the insurers denied. In both cases, the courts found that the insurers were obligated to cover the insureds.

One Canadian commentator argues that "On the current state of affairs in Canada, it is likely a claim under [relevant legislation] for contribution would constitute a claim for damages."[24] However, this statement was made prior to certain key Ontario decisions: *Brockton (Municipality) v. Frank Cowan Co.*[25] and *Akey v. Encon Insurance Managers Inc.*[26] As well, the author did not distinguish *Greenwood* and *Hildon* based on the failure in those cases to consider the word "damages," and to instead simply focus on the meaning of the term "property damage." A detailed review of developments in the law suggests that a more nuanced approach is required.

In particular, *Greenwood* and *Hildon* ought to be applied with caution. They are not authority for the proposition that remediation costs constitute "damages." In *Hildon Hotel*, the question was whether oil in a harbour constituted property damage. The insuring agreement in that case provided coverage in relation to "injury to or destruction of property." The Court found that "injury" was not synonymous

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19 822 F. 2d 1348 (4th Cir. 1987).

20 [2000] O.J. No. 4455 (QL).

21 (1968), 1 D.L.R. (3d) 214 (B.C.S.C.).

22 (1982), 133 D.L.R. (3d) 486 (B.C.S.C.).

23 Note commentary pre-dating recent Ontario decision: J. Singleton, "Exposure of Liability Insurance to Claims Resulting From B.C.'s Contaminated Sites Legislation" (1997), 15 Can. J. Ins. L. 71 at 73: "Whether or not [liability to remediate a contaminated site] would constitute a claim for "damages," so as to trigger liability coverage, remains to be determined. The case law on the subject is far from being certain. Although an insurer would be expected to mount a strong arguable case that regulatory liability for the cost of cleaning up a contaminated site does not constitute liability for "damages" [*Maryland Casualty Co. v. Armco*, 822 F.2d 1348 (4th Cir. 1987)], an equally strong arguable case might be developed for demonstrating the opposite [*Hildon Hotel (1963) Ltd. v. Dominion Insurance Corp.* (1968), 1 D.L.R. (3d) 214 (B.C.S.C.) and *Greenwood Forest Products Ltd. v. United Fire Insurance Co.* (1982), 133 D.L.R. (3d) 486 (B.C.S.C.)]."

24 J. Singleton, "Exposure of Liability Insurance to Claims Resulting From B.C.'s Contaminated Sites Legislation" (1997), 15 Can. J. Ins. L. 71 at 74.

25 [2000] O.J. No. 4455 (QL).

26 [2001] O.J. No. 2184 (QL), aff'd [2002] O.J. No. 2605 (QL) (C.A.).

with "damage," and included an infringement to intangible rights. Oil in the water constituted an infringement, which was an "injury" sufficient to trigger coverage. The Court did not address the question of legal "damages."

In *Greenwood*, the focus was also upon whether there had been "property damage" and not whether the insured was liable to pay "damages." Certain of the insured's tanks leaked chemicals into soil, groundwater and a river. The policy's definition of "property" failed to distinguish between tangible and intangible property. The Court concluded that the incorporeal or intangible right to water free of pollutants had been damaged, thus constituting "property damage" under the policy.

Thus, Snowden and Lichty rightly conclude as follows[27]:

> ... the focus of both courts [in *Greenwood* and *Hildon Hotel*] was on the meaning of the term 'property damage' as defined in the respective policies; the courts were not asked to address or, in any event, did not consider the question of whether such response costs constituted damages. The issue of environmental response costs as damages has not been considered the appellate level in Canada.

Outside the pure pollution context, the issue of administrative response costs has been considered by Canadian courts. Application of principles from such case law ought to apply equally in the pollution context. In two fairly recent cases, the Ontario Superior Court of Justice considered the definition of "damages" and "compensatory damages" and adopted a legal and technical definition for these words which contrasts with the broad definition relied upon by the California Supreme Court in *AIU*.

In *Brockton (Municipality) v. Frank Cowan Co.*,[28] the Court considered an insurer's obligations arising in relation to the e-coli outbreak in Walkerton, Ontario. The Court considered the term "compensatory damages" in relation to certain response costs to regulatory and investigative authorities, costs associated with a public inquiry, and various engineering, public relations and remediation costs arising out of the contamination of the town's water system.

The Court noted *Greenwood* as possible authority for the proposition that an insurer might be held liable to pay investigation and abatement of pollution costs under the head of "damages."[29] Nonetheless, the Court found such costs were not covered in *Brockton*. In particular, the Court held that "expenses incurred by Brockton with respect to the MOE and O.P.P. investigations, the engineering reports, remediation work, the public relations expenses and the Public Inquiry are simply too remote and are not covered by the liability policy."[30]

The Court defined "damages" legally and technically, and found the word was unambiguous and confined in scope.[31] In relevant part the Court held as follows[32]:

> In *Maryland Casualty Co. v. ARMCO Inc.*, 822 F. 2d 1348 (4th C.I.R. 07/06/1987), the court strictly limited its interpretation of the term 'damages' when requested to extend indemnification to investigative and remedial costs incurred by the government with respect to potential environmental hazards. The United States

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27 M. Snowden and M. Lichty, *Annotated Commercial General Liability Policy* (April 2008 Release) (Aurora, Ontario: Canada Law Books) at 8-27.

28 [2000] O.J. No. 4455 (QL).

29 *Brockton* at para. 80, citing *Greenwood Forest Products* (see Snowden and Lichty at 8-27).

30 See para. 80.

31 As a side note, the Court also pointed out that the various costs had been incurred without the insurer's approval and authorization and that "it would be inequitable to require the Insurer to pay for the expenses and costs. ..."

32 See paras. 88 to 94.

government had brought a claim against the owner of a waste storage facility alleging that improper maintenance techniques were used in storing hazardous waste. There was a seepage of toxic chemicals into the soil and ground water surrounding the site. The court held:

> The best approach in construing the term 'damages' as contained in this insurance contract is to afford it the legal, technical meaning described in Hanna. The contract obligates Maryland Casualty to pay where its insured becomes obligated 'to pay as damages ...' If the term 'damages' is given the broad, boundless connotations sought by the appellant, then the term 'damages' in the contract between Maryland Casualty and Armco would become mere surplusage, because any obligation to pay would be covered. The limitation implied by employment of the phrase 'to pay as damages' would be obliterated.

I favour this approach because it accords with the relationship between the Insurer and the Insured which is based on the contract between them as set out in the terms and conditions of the insurance policy...

The plain wording in the Cowan policy sets out the extent of the damages and costs related thereto which are the responsibility of the Insurer to pay. The words are clear and unambiguous; the *contra proferentum* rule which would be applied against the Insurer has no application in these circumstances. ...

Legal fees associated with responses to regulatory and investigative authorities including the O.P.P., the Coroner, the MOE and the Public Inquiry, *engineering expenses and remediation expenses are all outside the limits of the contractual risks undertaken by the Insurers*. In my view, the definition of damages in these circumstances should not be expanded to include costs and other expenses for items that I consider are only indirectly related to the defence of the civil claims.

In addition, the Cowan policy (see Condition 10) clearly gives the Insurer the right to investigate the claims. The policy specifically requires that the Insurer approve any expenses incurred by the Insured ...

In this case there is the issue of fairness to the Insurer. First of all, it would be inequitable to require the Insurer to pay for the expenses and costs incurred by Brockton without its approval and authorization and there were none approved and authorized. Secondly, it was not within the contemplation of the Insurers, at any time, that the liability policy would cover the broad range of costs and expenses associated with responding to the catastrophe that befell the Town of Brockton.

There is no duty on [the insurer] to defend the civil action claims against Brockton nor to pay Brockton's legal costs or other expenses. ...

In a subsequent decision, *Akey v. Encon Insurance Managers Inc.*,[33] the Ontario Superior Court of Justice relied upon *Brockton*, and concluded that the word "damages" in an insurance contract should be construed in accordance with its legal and technical meaning. In that case, an insured private care facility sought coverage under its liability policy seeking a defence at a coroner's inquest. The Court held that a coroner's inquest does not constitute a "claim for compensatory damages"; and that legal fees associated with representation at such an inquest do not constitute "damages." The Ontario Superior Court of Justice held as follows[34]:

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33 [2001] O.J. No. 2184 (QL), aff'd [2002] O.J. No. 2605 (QL) (C.A.).

34 At para. 13.

> As I read it, the wording of the Policy only obligates the respondents to defend the applicant and pay expenses in any investigation, defence, arbitration, litigation, and settlement where there is a claim for compensatory damages. To the extent that the proceedings involving the applicant do not constitute civil actions claiming compensatory damages, the respondents are not required to indemnify the applicant for his expenses.

The Court noted the following definitions of the phrase "compensatory damages"[35]:

> *Black's Law Dictionary*, 6th ed. St. Paul, Minn: West Publishing Co. 1990 defines 'damages' as: 'A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property or rights, through the unlawful act or omission or negligence of another. A sum of money awarded to a person injured by the tort of another.'
>
> It further defines 'compensatory damages' as: 'Compensatory damages are such as will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury. Damages awarded to a person as compensation, indemnity or restitution for harm sustained by him. The rationale behind compensatory damages is to restore the injured party to the position he or she was in prior to the injury.'

Citing *Brockton* the Court in *Akey* concluded as follows: "In construing the term 'damages' in an insurance contract, it should be construed in accordance with its legal, technical meaning in law."[36] Affirming the Superior Court of Justice's decision, the Court of Appeal noted that the coroner's inquest did not constitute a claim against the insured; hence there was no coverage available to the insured. The Court of Appeal observed that the mere fact of a future "speculative" claim against the insured was insufficient to trigger present obligation under the insurance policy.

Given these developments, a Canadian court may well reject the *AIU* approach with its broad "damages" definition, in favour of a legal and technical meaning such as that expressed in *Maryland Casualty Co. v. ARMCO Inc.* and *Continental Ins*. Cleanup costs are not a "damages" claim, not equitable in nature, but simply costs incurred to clean pollution pursuant to statutory requirements.

B. Must the Insured be Subjected to a Lawsuit in Court Before the CGL Policy is Triggered?

Despite the broad interpretation of issues in *AIU*, the California Supreme Court has since revisited and refined the issues. This occurred first in *Foster-Gardener, Inc. v. National Union Fire Ins. Co.*[37] in which an environmental agency issued an order to the insured holding the insured responsible for pollution, and compelling remediation. The insured sought a defence to the regulatory proceedings from its insurer, National Union. National Union refused, and the insured sought declaratory relief concerning National Union's defence obligations and recovery of defence costs.

The policy included an insuring agreement which in relevant part provided as follows: the insurer must "*... defend any suit against the insured seeking damages on account of ... property damage ... and may make such investigation and settlement of any claim or suit. ...*"

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35 At paras. 15 and 16.

36 At para. 17. This strict interpretation of the phrase "compensatory damages" was most recently adopted by the Ontario Superior Court of Justice in *York Region Condominium Corp. No. 772 v. Lombard Canada Ltd.*, 51 C.C.L.I. (4th) 288 (Ont. S.C.J.) at paras. 54 to 57.

37 18 Cal. 4th 857 (Ca. S.C. 1998).

The Court held that the word "suit" in the policy meant a civil action commenced by filing a complaint in a court of law (i.e., Writ of Summons and Statement of Claim in BC). Anything short of that was a "claim." The insurer was granted discretion with respect to claims: it could choose to investigate and settle claims. It had no such discretion respecting "suits," which it was required to defend. Because the policies failed to treat the terms "suit" and "claim" interchangeably, the Court found that the insurer's differing rights and obligations were deliberately and intentionally articulated in the policies.

As such, National Union was not obliged to defend the insured in relation to the environmental agency's cleanup order. The Court accepted what it termed the "literal meaning approach" pursuant to which "the term 'suit' is deemed unambiguous, referring to actual court proceedings initiated by the filing of a complaint. When no complaint has been filed, there is no 'suit' the insurer has a duty to defend." Further, the Court observed that

> ... by specifying that only a 'suit,' and not a 'claim' triggers the duty to defend, insurers have drawn an unambiguous line to define and limit their contractual obligation. This delineation encourages stability and efficiency in the insurance system. In exchange for a higher premium, the policies might have obligated the insurer to defend any 'demand' against the insurer, or to provide a defense whenever the insured is subject to government compulsion or investigation. They did not.

Note, however, that the Court left open whether National Union might be obliged to indemnify the insured for the actual cleanup costs incurred as a result of any administrative clean up order. In this regard, the Court explained in *obiter* as follows:

> Thus, even if Foster-Gardner is correct that its insurers will ultimately be obligated to indemnify costs incurred as a result of the Order, this merely means that the insurers have an inherent incentive to participate in those proceedings where the costs are ascertained. Under the language of the policy, however, this is a judgment call left solely to the insurer ...

In 2001, the issue came before the California Supreme Court again: *Certain Underwriters at Lloyd's of London v. Powerine Oil Company*[38] (*Powerine I*). This time the California Supreme Court held that a standard CGL policy requiring that the insurer indemnify the insured for "*all sums that the insured becomes legally obligated to pay as damages*" was limited to money ordered by a court:

> Proceeding from *Foster-Gardner* to this case, we believe that the insurer's duty to indemnify the insured for 'all sums that the insured becomes legally obligated to pay as damages' under the standard comprehensive general liability insurance policy *is limited to money ordered by a court*.
>
> ...
>
> The duty to defend is broader than the duty to indemnify. The duty to defend is not broad enough to extend beyond a 'suit,' i.e., a civil action prosecuted in a court, but rather is limited thereto. *A fortiori*, the duty to indemnify is not broad enough to extend beyond 'damages,' i.e., money ordered by a court, but rather is limited thereto. 'It is ... well settled that because the duty to defend is broader than the duty to indemnify,' a determination that 'there is no duty to defend automatically means that there is no duty to indemnify.'

The California Supreme Court noted that the word "damages" in the insuring agreement "is clear in its limitation to money ordered by a court." The Court justified the distinction between administrative proceedings and court proceedings because administrative proceedings are "to the [administrative] agency's benefit and its subject's detriment, in order to give the subject an incentive toward compromise and a deterrent against litigation."

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38 24 Cal. 4th 945 (Cal. S.C. 2001).

In short, the California Supreme Court implicitly accepted that insurers may justifiably avoid the administrative realm with its harsh treatment of the "subject" to such proceedings, which would in turn fall upon the insurer. As the California Supreme Court explained in *Powerine I*, the standard comprehensive general liability policy is "surely comprehensive but hardly unlimited." This meshes well with the policy objectives articulated by the Supreme Court of Canada, which seek to hold polluters responsible for their own polluting activities. There are good reasons to find that the standard CGL policy does not respond to the harsh treatment of the "subject" of environmental administrative proceedings. Those proceedings aim at least in part to dissuade future polluting conduct, a goal undermined if the insurer pays.[39]

Will Canadian courts also require an actual lawsuit against the insured before accepting that coverage has been triggered? The likely answer is 'yes.' First, as discussed above, Canadian courts will likely conclude that cleanup costs are not "damages." If the court concludes that there is no possibility of indemnity obligations owed to the insured, then the court will also conclude that the insurer has no defence obligations.[40] Thus, if cleanup costs do not constitute "damages," the insurer is never obligated to defend the insured, including in the administrative context.

Even if the court concludes that cleanup costs may constitute "damages," Canadian courts may nonetheless refuse coverage for purely administrative proceedings. Standard CGL policies utilize the word "action." "Action" is usually defined in CGL policies as "a civil proceeding in which compensatory damages because of ... property damage ... to which this insurance applies are alleged."[41] Like the California Supreme Court, Canadian courts have defined the word "action" by its legal and technical definition. See, for example, *Kentville (Town) v. Gestas Inc.*,[42] in which the Court noted that the policy applied to "any civil action." The Court held that a labour arbitration proceeding was not a "civil action." The Court also noted that "an arbitration does not create a legal obligation to pay as contemplated by this policy." As well, as discussed above, in *Akey v. Encon Insurance Managers Inc.*, the Ontario Court of Appeal accepted that a coroner's inquest was not a claim against the insured seeking damages.

Given the foregoing, Canadian courts will likely agree with the California Supreme Court decision in *Powerine I* and conclude that a purely administrative order against the insured seeking to compel the insured to cleanup pollutants or pay the cleanup costs fails to constitute a claim for damages, and does not trigger defence obligations.

C. Costs Incurred to Prevent Potential Government Order or Future Harm

If insureds are not entitled to coverage in relation to purely administrative environmental proceedings, then they are unlikely to recover from their insurers the costs incurred to avert potential environmental proceedings or future harm.

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39 Brief mention must also be made of *Powerine Oil Company v. Central National Insurance*, 37 Cal. 4th 377 (Cal. S.C. 2005) (*Powerine II*). *Powerine II* arose in relation to the same underlying administrative proceedings as *Powerine I*, but in this case the Court considered certain excess and umbrella policies. The Court concluded that these policies were required to indemnify the insured because the insuring agreement at issue differed from the CGL policies discussed in *Powerine I* by using the word damages *and* expenses. The word "expenses" was sufficiently broad to include expenses required by an administrative agency pursuant to an environmental statute.

40 See *Nichols v. Ameican Home Assurance Co.*, [1990] 1 S.C.R. 801.

41 Some modern CGL policies expressly include arbitration.

42 (1989), 40 C.C.L.I. 41, aff'd 96 N.S.R. (2d) 338 (C.A.).

The issue was discussed in the Nova Scotia case *Stuart Estate v. Royal and Sun Alliance*,[43] in which the Court did not allow insureds to recover from their insurer costs incurred to remediate oil pollution damage. In *Stuart Estate*, homeowners incurred $143,000 to remediate damage caused by an oil leak. The homeowners were not subject to any suit by third parties. Nevertheless, they sought coverage through their homeowners' insurance policy pursuant (in relevant part) to the third party "personal liability" provisions of that policy.

Regarding the "personal liability" provisions, the homeowners argued that they were required by the Nova Scotia Department of Environment to remediate the property. As such, they argued that the leak represented a third party loss (to the Government). The insurer, in response, argued that the homeowners pro-actively fixed the problem in order to sell their property. Thus, they argued, while the Government may have eventually ordered a remedy, it made no official claim and filed no such action. In other words, the insurer argued that there was never a third party claim as envisioned by the policy.

The Nova Scotia Supreme Court phrased the issues as follows[44]:

> The 'personal liability' issue involves an analysis as to what constitutes a third party claim under the relevant policy. In other words to establish coverage, does there have to be an expressed third party loss and consequential demand, or can they be inferred? Can the facts of this case be considered a 'personal liability' peril covered under the policy?

The relevant provisions of the insurance policy in *Stuart Estate* provided that "Your Personal Liability protection covers you when you're responsible for unintentional physical injury or damage" (note the broad words "responsible for" which seem to go beyond a law suit imposing such responsibility).

The relevant Provincial legislation, Nova Scotia's *Environment Act*,[45] set out the alleged responsibility as follows: "Any person responsible for the release of a substance ... shall, at that person's own cost .... take all reasonable measures to (i) prevent, reduce and remedy the adverse effects of the substance ..." The Court refused to find that coverage extended under the personal liability provisions of the policy:

> [51] ... I find that this is not the type of risk covered by these policy provisions. ... When I consider this personal liability package, it is clear to me that its purpose is to protect insureds from third party lawsuits, either threatened or filed. In the case at Bar, the remediation work was completed to make the property marketable. *The fact that it may have been eventually ordered by the Government does not render it a covered peril*. The following reference in the policy should not be taken out of context: '[You are covered] when you're responsible for unintentional physical ... damage.' This clause falls under the heading 'Where you are Protected.'
>
> [52] This clause should not be seen to expand what is otherwise clear—this coverage is designed to protect against actual third party claims. While I know of no Canadian authorities on point, at least one U.S. State Supreme Court refused to extend similar provisions to include this type of loss. See: *City of Edgerton v. General Cas. Co*. 1994 Wisc. LEXIS 83.

This leads to somewhat distinct topic: claims for coverage for steps taken to prevent future harm. Most US state and federal courts do not allow coverage for costs incurred simply to prevent future harm as such costs do not constitute "damages." However, there are a number of US decisions which have

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43 2004 NSSC 58, (2004), 221 N.S.R. (2d) 331, aff'd 2005 NSCA 6, 17 C.C.L.I. (4th) 192.

44 At para. 9.

45 S.N.S. 1994-95, c. 1, s. 1. S. 71.

found coverage for such steps. Additionally, a number of advocates press for such coverage. A notable recent example[46]:

> In what might be viewed as a somewhat desperate attempt to avoid coverage, certain insurers have contended that environmental response costs incurred to comply with the *Resource Conservation and Recovery Act* (RCRA) are not covered by insurance, but rather are 'costs of doing business.' These 'excluded' costs include expenditures for capping a landfill or settling lagoon or open waste pit if, in the opinion of the insurer's expert witness, the cap was not necessary to remediate or protect groundwater (e.g., where the polluting materials have been removed or stabilized prior to capping). ...

Given this sort of rhetoric, the issue needs to be addressed. In Canada, such costs are unlikely to be covered. The issue has been considered in several recent Quebec cases, which refused to allow coverage for costs incurred to prevent future occurrences. The cases did not arise in the environmental context, but they are helpful. In *Grace Canada inc. v. Revêtements de réservoirs Lamy inc.*,[47] the Court held as follows [translation]:

> The purpose of a civil liability insurance policy is to indemnify the insured for the financial consequences of 'accidents' and not the financial consequences of decisions made with a view to avoiding an 'accident.' As long as the risk has not materialized, the insurance coverage cannot be claimed because it is *contingent on the occurrence of a risk and not its prevention*.

Grace Canada was cited with approval by the Quebec Court of Appeal in *Géodex inc. c. Zurich, compagnie d'assurance*.[48] BC courts have adopted a similar approach. For example, in *Gulf Plastics Ltd. v. Cornhill Insurance Co.*,[49] the BC Supreme Court held as follows:

> The recall of equipment or parts discovered to have a common fault involves expenses incurred to prevent accidents which have not occurred. While the insurance covers damages for bodily injuries and property damage caused by the product that failed, *it was never intended that the insurer would be saddled with the cost of preventing other failures*, any more than it was intended that the insurer would pay the cost of preventing the first failure if the product had been discovered to be in a dangerous condition before the occurrence.

The issue was also considered by the BC Court of Appeal (*per* Southin J.A.) in *MacMillan Bloedel v. Youell*.[50] Again, the Court rejected the notion that costs incurred to prevent future harm are covered.

The insured in *MacMillan Bloedel* was the time charterer of a vessel which was transporting coal. A danger of spontaneous combustion of the coal arose, and the coal had to be off-loaded, delaying the shipment. At trial, the insured was successful in seeking coverage for the costs involved in the off-loading. The doctrine of imminent peril was applied. The insurer successfully appealed. The Court of Appeal held that the policies covering the charter were liability policies and not insurance on the goods, merchandise and ship. The sue and labour clause could not be relied on to recover the expenses of avoiding liability. The purpose of a liability policy was to indemnify against amounts paid out for which the insured became liable. It did not cover sums paid to avoid liability.

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46 G. Rothschild, "The Resolution of Environmental Insurance Claims: Key Issues from the Policyholders Perspective" (ALI-ABA, Environmental Issues and Latest Developments on the New Coverage and Insurance Cost Recovery) (2008) at 335.

47 REJB 2002-39553 at para. 53.

48 2006 QCCA 558 at para. 69.

49 (1990), 46 C.C.L.I. 144, aff'd 61 B.C.L.R. (2d) 64 (C.A.) (product recall).

50 [1993] I.L. R. 1-2980.

Southin J.A. discussed an American case, *Leebov v. United States Fidelity*.[51] She suggested that *Leebov* stood for the proposition that an insured who incurs costs to limit its insurer's liability can recover those costs from the insurer. However, she found that in the case before her the insured had simply incurred costs to limit its own liability: "What the [insured] expended, whether they appreciated the fact or not, averted their own liability, albeit the underwriters benefited."

One American commentator notes that: "... an insured that acts to prevent imminent ... contamination to a third party's property may have coverage, while an insured that acts prophylactically to prevent damage at some future date may not."[52] There is nothing illogical with this approach. Steps taken by insureds to prevent future harm will not assist the insurer on risk when those steps are taken (unless, by happenstance, that insurer continues to issue policies into the future and to a point in time when, but for the insured's prophylactic measures, harm would have occurred). As such, there is no good reason to compel that insurer to incur costs. As the Ontario Court of Appeal noted in *Akey*, the future claim is speculative and does not trigger coverage.

Furthermore, insureds must always act prudently and with a view to mitigate future risks, and they cannot place such costs upon their insurers. In *Rhone-Poulenc Basic Chemicals Co. v. American Motorists Insurance Co.*,[53] the insured sought indemnification for the cost of upgrading equipment to limit emissions. In rejecting the claim for indemnity, the Court, among other things, noted that the policy holder had an independent duty to mitigate future release of pollutants. Costs incurred to prevent future harm did not constitute damages. Accordingly, the policy did not apply. This approach makes eminent sense, otherwise insurers would be compelled to fund all manner of devices installed to limit future liability: seatbelts in cars; mechanisms to reduce greenhouse gas emissions; holding tanks for pollutants; etc.

In summary, Canadian courts will likely conclude against coverage for steps taken to prevent some future environmental liability, whether at the hand of an environmental regulator or true tort claimant. There are numerous Canadian cases which support this proposition outside the environmental coverage realm: *Grace Canada inc. v. Revêtements de réservoirs Lamy inc.*,[54] *Géodex inc. c. Zurich, compagnie d'assurance*,[55] *Celestica Inc. v. Ace INA Insurance*,[56] *Gulf Plastics Ltd. v. Cornhill Insurance Co.*,[57] *MacMillan Bloedel v. Youell*.[58] Furthermore, the approach is sensible. If insurers are liable for capping a landfill or settling lagoon or open waste pit to prevent the future spread of some pollutant, then the insurer's liability is unlimited. Applying the same logic, the insurer should also be compelled to pay for seatbelts in cars, safety devices and security on aircraft, earthquake proofing of structures, and any other steps taken to reduce the insured's potential liability to third parties. All of these steps would be taken to reduce the chance of a future occurrence, which is unlikely to fall within the policy period of the insurer paying the costs incurred to limit liability. By definition the occurrences would occur in future, and does not constitute a present occurrence under the CGL policy.

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51 165 A.2d 82 (S.C. Penn. 1960).

52 *Environmental Law Practice Guide*, "Chapter 8: Environmental Insurance Coverage," Matthew Bender & Company, Inc., 2004 at §8.03[4].

53 616 A.2d 1192 (Del. Supr. 1992).

54 REJB 2002-39553 at para. 53.

55 2006 QCCA 558 at para. 69.

56 [2003] O.J. No. 2820.

57 (1990), 46 C.C.L.I. 144, aff'd 61 B.C.L.R. (2d) 64 (C.A.) (product recall).

58 [1993] I.L. R. 1-2980.

IV. Summary

To conclude, most long-tail pollution claims against industrial long-term polluters are unlikely to trigger coverage under standard CGL policies. Allowing CGL insurance coverage to extend to cover insureds for their industrial pollution activities may defeat environmental legislative policy, which seeks to modify polluting behaviours by holding industry responsible for pollution. As well, where an insured releases pollutants into the environment as a regular and normal part of its operations, that hardly constitutes an "accident" sufficient to trigger coverage under CGL policies.

Even if courts find that public policy reasons and the nature of the pollution discharge fail to prohibit coverage, we must consider the nature of claims against insureds. Often, the industrial polluter is subjected to government remediation orders. Canadian courts may conclude that such claims are not equitable in nature, and fail to qualify as "damages" as required to trigger insurance coverage. As well, such claims are often purely administrative in nature, which further distances cleanup costs from true claims for damages because of property damage. Insureds cleaning the environment of pollution in order to prevent a future government remediation order or taking precautionary steps to prevent future harm are even further removed from the insuring agreement. Such steps are taken absent any claim for damages, and therefore cannot trigger the insuring agreement. Where the steps were taken to simply prevent future harm, costs incurred relate to a speculative or potential occurrence that does not fall within the insuring agreement at issue.