AGENDA - ONTARIO MUTUAL INSURANCE ASSOCIATION
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CAMBRIDGE, ONTARIO

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ENVIRONMENTAL LAW ISSUES

1. Brief Overview of Basic Sources of Liability - overheads

2. Insurance issues in spills and emergencies - overheads

3. Risk evaluation - overheads

4. Recent changes to note:

- Environmental Claims Corporation discontinued
- Bill 146 - An Act to Protect Farming and Food Production, May, 1998
- A myriad of changes to Environmental Protection Act, Ontario Water Resources Act, Pesticides Act - e.g. Bill 82, 3rd reading December 1998
- Many approvals changes - e.g. "SAR's" (Standardized Approvals Regulations)

5. Environmental Concerns for the Insurance Industry:

- Possibility of some of the changes resulting in increased placement of contaminating substances on land, with future claims arising - e.g. dust suppressants; sludge application; many other examples
- Concerns with approval system, and possible failure to keep harmful substances out of the market place and out of use - e.g. apple fungicides suspected of harm to foetueses born with birth defects
- Newly understood effects of many materials and substances over time - e.g. PVC materials in buildings may become a future liability (as in fire risks); effects of mixtures and cumulative effects hardly yet understood - future liabilities are likely to follow additional research
- Decreased government role in environmental inspection, standard setting, & enforcement activities should be a concern to the insurance industry
- Increased reliance on "voluntary" compliance and "voluntary" improvement should be a concern to the insurance industry
- Many industries are now realizing importance of clear environmental rules and standards that are enforced, for competitive "level playing field" reasons; for reduced liabilities; and for greater clarity in planning future activities

6. If time permits, four cases to note:

BP Canada Inc. v. Comco Service Station (1990), Ontario High Court, Sutherland, J. 73 O.R. (2d) 317

This case continues to be cited as a leading case on the insurer's duty to defend under environmental damage claims. The Court held that the duty to defend only arises for claims which would fall within policy coverage. Where there is a clear exclusionary clause, the duty to defend does not arise. However, where there is any doubt as to whether the claim might fall within a claim, the duty to defend is triggered. That is the "mere possibility" of applicable coverage requires the insurer to defend the claim. The particular clause in issue in this case was the interpretation of the term, "sudden and accidental". The Court held that this term had a temporal element. That is, the fact of being unexpected or unintended does not itself make something sudden and accidental.

Pilot Insurance Co. v. Tyre King Tyre Recycling Ltd, (1992), Ont. Ct. Gen. Div. (Jarvis, J) 8 O.R. (3d) 236

The policy was described as a "limited pollution insurance" liability policy. "Pollution incident" was defined as "an unexpected or unintentional discharge of any 'pollutants' from or out of a structure or container". There were a number of exclusions, including 'property damage', and 'clean up costs' caused by a 'pollution incident' resulting from war, invasion, act of foreign enemy, hotilities, civil war, ...riot, civil commotion, sabotage or any other act of deliberate destruction of property or terrorism'. A fire was started by vandals in one of three piles of tires on the property. Extensive pollution occurred and substantial clean up costs were incurred. The Court held that the insurer was liable under the policy. Thhe arrangement of the tires were such that they constituted "structures" within the meaning of the policy. The acts of vandalism were not among those excluded by thw war risk exclusion.

R v. Kansa General Insurance (1994), Ont. C.A. (Robins, Griffiths, and Labrosse JJ.A.) 13 C.E.L.R. (N.S.) 59 (leave to appeal to S.C.C. denied 15 C.E.L.R. (N.S) 240 (S.C.C.)

This decision involved the interpretation of the policy's pollution exclusion clause. A claim of regulatory negligence was made against the Crown and it sought to have its insurer defend the claim. The Court of Appeal held that the U.S. cases interpreting the pollution exclusion clause were not applicable in Canada because the clauses there at issue were less absolute than the clause in question here. This clause excluded coverage even for sudden and accidental pollution. The Court found that the exclusion clause applied to claims "arising out of" pollution. As long as the insurer could show that the underlying claim was based on circumstances in which it was possible to trace a continuous chain of causation, without intervening negligence, between the pollution and the damages, then it would be possible to deny coverage. That is, the claim against the insured Crown was for regulatory negligence, and the Court found that the alleged regulatory negligence did not constitute an intervening act for which there would be coverage. The exclusion read:

> "<u>Exclusions:</u> This Policy shall not apply to claims arising out of:
>
> (i) the discharge, dispersal, release or escape of smoke, vapours, soot, fumes, acids, alkallis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water of any description no matter

where located or how contained, or into any water-course, drainage or sewage system."

Re St. Paul Fire & Marine Insurance v. Durabla Canada Ltd. (1996) Ont. C.A. (Houlden, Catzman and Rosenberg JJ.A.) 29 O.R. (3d) 736

The Court repeated the principle that the duty to defend arises from the mere possibility that a claim is within the policy. The duty to defend is broader than the duty to indemnify. The court should not assess competing theories of liability. Once there is a possibility that the claims asserted, according to the pleadings, fall within the policy, then there is a duty to defend. The fact that the policies in question were issued for time periods prior to the time period in which the claims arose was not material, so long as there was a possibility that the claims might fall within the policy.

7. Questions & Discussion