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## Insurance & Reinsurance - Canada

### Court Considers Pollution Loss Exclusion in D&O Policy

Contributed by [Lang Michener LLP](#)

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The Ontario Court of Appeal recently dealt with the interaction between a pollution loss exclusion and the allocation provisions of a directors' and officers' (D&O) liability insurance policy in *Boliden Ltd v Liberty Mutual Insurance Co* ((2008), 90 OR (3d) 274).

In 1997 Boliden, a Canadian mining company with operations in Spain, issued shares in the Canadian market at an initial public offering price of C\$16. Less than a year later, a dam at the mine's tailings pond collapsed, releasing toxic materials into the Spanish countryside. Boliden's share values plunged to C\$5.35. Class actions on behalf of shareholders began immediately in Ontario and British Columbia, targeting the company, its directors and officers and its lead underwriter for alleged misrepresentation in its offering prospectus.

The statement of claim pleaded 10 particular examples of misrepresentation, the first four of which included such matters as:

- improper dam construction and maintenance;
- undisclosed knowledge of dam construction defects such that it could not support the projected mining activity;
- warnings about stability problems and structural defects with the dam; and
- a then recent study confirming design and construction problems with the dam.

Liberty, the D&O insurer, refused to provide a defence, citing its pollution loss exclusion. Boliden defended on behalf of its directors and officers, settled the claims and sued Liberty for defence costs of approximately C\$3 million.

The motions judge treated each of the 10 allegations as a separate claim and found that four of the 10 were not directly related to pollution and therefore did not fall within the pollution loss exclusion. As such, the allocation provisions for defence costs applied, making Liberty responsible for 80% of such costs.

The Ontario Court of Appeal agreed with Liberty that there was only one claim. However, it then distinguished between pollution-related losses and pollution-related claims. The court held that a single claim may involve both a covered and an uncovered loss, and that the loss arising from the alleged omissions in the four particularized paragraphs were covered losses. Therefore, they were not excluded by the pollution loss exclusion, which the court emphasized must be interpreted strictly and narrowly against the insurer; in the event of ambiguities, the reasonable expectations of the parties are to be given effect.

As is the case in the United States, pollution exclusions in Canadian policies - whether contained in commercial general liability policies or D&O policies - will be scrutinized carefully by the courts and may be interpreted in a manner that continues to surprise insurers.

For further information on this topic please contact [Frank Palmay](#) at Lang Michener LLP by telephone (+1 416 360 8600) or by fax (+1 416 365 1719) or by email ([fpalmay@langmichener.ca](mailto:fpalmay@langmichener.ca)).

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