# Focus INSURANCE

## The dangers of voluntary compliance

### Ontario case takes narrow approach on duty to defend in environmental regulatory context




**Nina Bombier**
**Rory Gillis**

Case law regarding the duty to defend in civil litigation is well developed in Canada. There is relatively little judicial guidance, however, on the duty to defend in the environmental regulatory context, which differs from civil litigation in two ways. First, in lieu of pleadings and formal orders, regulators typically issue letters to landowners requesting information and/or remediation. Secondly, rather than object to these requests, landowners often comply and co-operate with the regulator so that they can avoid formal orders being made against them under applicable legislation, such as the *Environmental Protection Act* in Ontario.

This regulatory dialogue raises the question of whether and when an insurer's duty to defend is triggered. A 2012 decision of the Court of Appeal for Ontario provides some guidance, but ultimately only begins to answer this question.

In *General Electric Canada Co. v. Aviva Canada, Inc.* [2012] O.J. No. 3642, the Court of Appeal considered whether letters sent to the applicant General Electric by the Ontario Ministry of Environment triggered the duty to defend under two comprehensive general liability policies issued to the company.

Between 1903 and 1980, the applicant owned and operated a manufacturing facility on a property in Toronto. In February 2004, the Ministry wrote to existing and former owners of the property to advise that it was reviewing potential groundwater contamination at and near the property. The letter requested co-operation and assistance with the review.

In April 2004, the Ministry sent a second letter, this time only to the applicant, requesting that it "take action in delineating the source area [of contamination] on your former property." The Ministry advised it was willing to enter into a voluntary agreement, but that it would issue a Director's Order if it determined the response and progress of the investigation to be unsatisfactory.

The applicant and former landowner complied with the request for delineation. By April 2009, it had spent $2.1 million investigating the pollution, $1.86 million in remediating the property, and $750,000 in legal costs. It later applied to have these costs covered as defence costs under its comprehensive general liability policies.

Justice Michael Penny of the Superior Court dismissed the application on the grounds that the former landowner had voluntarily complied with the Ministry's request.

On appeal, the Court of Appeal affirmed the Superior Court's decision.

Writing for a unanimous court, Justice Robert Armstrong held that the costs incurred by the applicant were compliance, not defence costs. Since it had voluntarily complied with the Ministry's request rather than defend, there was no

**Trigger, Page 15**

**Focus** INSURANCE

# Do car rental companies have statutory exemption?

**Tara Argent**

GECE33 / ISTOCKPHOTO.COM

A frequent issue for insurers is consideration of whether s. 23 of the *Workers' Compensation Act of Alberta* bars a lawsuit against a car rental or leasing company. The act itself is directed towards injuries in the course of employment and removes the tort action against the employer and co-workers. Section 23 of the Act extends protection to other employers and their workers for conduct in the latter's course of employment.

In *Lepine v. Fraser* [1985] A.J. No. 1092, the plaintiff was injured in a motor vehicle accident when his truck collided with a vehicle owned by Budget Rent A Car ("Budget"), who had leased the vehicle to its operator, Fraser.

The plaintiff was operating his truck in the course of his employment for an employer to whom the act applied. Fraser was also an employee to whom the Act applied. It was accepted that there was no action against Fraser by reason of the operation of s. 15 of the act (now section 23). The claim against Budget was based on its ownership of the vehicle, and the operation of s. 181 of the *Highway Traffic Act of Alberta*.

The Court determined that section 15 only protected an employer from claims if those claims arose out of the activities of the employer or his worker. In this respect, the Court held that:

"To hold that s. 15 protects an employer simply because he has a status under the Act, without relating that status to either the conduct of himself or his workers in the course of employment in the industry would produce untoward results."

The Court held that while Budget was an employer under the act, there was no conduct of it or its worker which caused or contributed to the plaintiff's injury, and therefor the action was not barred against Budget by virtue of section 15 (now s.23) of the *Workers' Compensation Act of Alberta*.

The Alberta Court of Appeal refused to reconsider its decision in *Lepine*. In *Barker v. Budget-Rent-A-Car Edmonton Ltd.* [2011] A.J. No. 1553, the Court concluded that Budget had failed to establish that *Lepine* was incorrect in law, unsupported by legal principle, inconsistent with subsequent decisions, or overruled by statute. Therefore, *Lepine* remains good law in Alberta.

*Barker* came before the Court again in 2012, when Budget appealed from a decision refusing to grant summary judgment for dismissal of the action. The plaintiff leased a vehicle with himself and another person, Rayment, named as additional drivers. While the vehicle was being driven by Rayment during the course of his employment, it was involved in a single vehicle accident. Barker was a passenger in the vehicle and sustained injuries.

Barker received workers' compensation benefits and the WCB commenced a subrogated claim against Budget. The claim only raised allegations of negligence against Budget. Barker later amended the claim to include allegations of negligence against Rayment and allegations that Budget was vicariously liable.

The Court allowed the appeal and held that the conduct of Rayment was never placed in issue by the original pleadings. As there was no evidence to support the proposed amendments, the application to amend should have been dismissed.

Without the amendments, the original claim alleged negligent conduct on the part of Budget alone. On the basis of those deficient pleadings, the Court held that the claim could not succeed as it was statutorily barred pursuant to s. 23 of the act. While the ultimate result in *Barker* was a successful summary dismissal of the claim for Budget, it is noteworthy that such a result was obtained due to deficient pleadings of negligence against the driver of the vehicle and not a reversal of Lepine.

To determine whether section 23 of the act bars a plaintiff from recovering against a car rental or leasing company, the following questions should be considered:

- Was the plaintiff a worker within the meaning of the act?
- If so, was the injury sustained in the course of his or her employment?
- Is the defendant an employer within the meaning of the act?
- If the defendant is an employer within the meaning of the act, does the claim arise out of acts or defaults of the employer or the employer's employees while engaged in, about or in connection with the industry or employment in which the employer or worker of such employer causing the injury is engaged?

The continued recognition of *Lepine* dictates that as long as the conduct of the rental/lease company or its employee in the course of his employment did not cause or contribute to the injury arising from the accident, s.23 of the act will not provide a statutory exemption from suit.

***Tara Argent is an associate in the Edmonton office of McLennan Ross, a member of ARC Group of Canada network of law firms. They practise in commercial litigation and insurance.***

# **Trigger:** Language of regulator's letter determines scope of the claim

**Continued from page 14**

"defence" to speak of. The court rejected American case law that the receipt of a regulator's letter marks the beginning of adversarial administrative proceedings that triggers the duty to defend.

The Court of Appeal did not resolve the question of whether the Ministry's April 2004 letter constituted a "claim." The court held, however, that even if the letter did constitute a claim, the claim was merely for delineation of the source area of the contamination, not for remediation itself.

There are important implications to this decision.

First, an insured that voluntarily complies with a regulator's request may have difficulty triggering the duty to defend. While it may ultimately be in an insured's long-term interest to cooperate with a regulator, the decision establishes a disincentive to voluntary compliance and cooperation. This reality also works against the Ministry's objective of voluntary compliance in enforcement of statutory obligations under the *Environmental Protection Act*.

Secondly, the Court of Appeal has adopted a narrow approach to defining the scope of a "claim" in the environmental regulatory context. The scope of a claim will be determined by the plain language used in the regulator's letter, not the larger regulatory context. An initial letter from a regulator requesting information was held to merely be a claim for information, not remediation, even though such a letter may signal the beginning of an administrative process that will lead to a remediation order. Importantly, a party that undertakes subsequent investigation and remediation of contamination before receiving a formal request or demand to do, may have responded to a claim that does not yet exist at law and sidestepped any trigger of an insurer's duty to defend.

Third, the Superior Court endorsed the possibility that compliance costs may be covered under the indemnity provisions in a comprehensive general liability policy, rather than the defence provisions. The Court of Appeal did not address this issue, and the availability of indemnity coverage will ultimately be determined by the specific language in the policy. However, there are relevant differences between coverage under defence or indemnity provisions that are worth noting. Most significantly, indemnity coverage is always subject to a limit of liability, whereas defence costs often are not. There may also be differences in the breadth of coverage under defence and indemnity provisions. The details of the policy will ultimately determine which form of coverage is most beneficial to the insurer or insured.

***Nina Bombier is a partner at Lenczner Slaght whose litigation practice focuses on commercial, insurance, professional negligence and regulatory matters. Rory Gillis is an associate whose litigation practice includes commercial litigation, professional liability, and public and administrative law. The firm was counsel for the appellant.***