

W—T

Debris Removal: When Should ICBC Pay?

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When a motor vehicle accident occurs involving a tractor trailer transporting cargo and cargo is spilled, a dispute often arises as to which insurer is responsible for cleaning up the debris: the cargo insurer or the third party liability insurer (i.e. ICBC).

This dispute does not arise in every case because where the spilled cargo has salvage value, the cargo insurer typically pays for cleanup of the cargo debris in the course of recovery. Similarly, in cases where toxic substances have been spilled, it has been for the third party liability insurer to pay.

The purpose of this paper is to provide a general overview of this long-standing issue between cargo insurers and third party liability insurers and to highlight the key issues that cargo insurers should consider to determine whether ICBC should pay for debris removal.

THE LEGISLATION

Section 64 of the *Insurance (Vehicle) Regulation*¹ provides that ICBC must indemnify an insured for the cost of cleanup and removal of debris if certain conditions are met. The section provides as follows:

64 Subject to section 67, the corporation shall indemnify an insured for liability imposed on the insured by law for injury or death of another or loss or damage to property of another that

(a) arises out of the use or operation by the insured of a vehicle described in an owner's certificate, and

(b) occurs in Canada or the United States of America or on a vessel travelling between Canada and the United States of America.

Provided the damage arose out of the use or operation in Canada or the United States by the insured of a vehicle described in owner's certificate, whether or not liability for the cost of cleanup will rest with ICBC, will largely depend on whether the following two conditions are met:

1. liability to remove the debris is imposed on the insured by law; and
2. the presence of the debris constitutes damage to property of another (usually the Crown).

The first condition will be satisfied if there is an act or law that imposes liability on the insured to remove the debris caused by the cargo spill. A demand or order to the insured

¹ *Insurance (Vehicle) Regulation*, B.C. Reg. 447/83.

to remove the cargo debris under the *Environmental Management Act*² will satisfy the first condition. As the case law discussed below illustrates, an actual demand or order for the cleanup of the cargo debris under the *EMA* is not necessary for a finding of legal liability imposed on the insured so long as it can be shown that the legal liability could have been imposed on the insured under the *EMA*.

With respect to the second condition, cargo debris that causes pollution to the environment will constitute damage to the property of another. Most often it is the provincial Crown's property that is damaged when cargo is spilled into lakes, rivers or on land adjacent to highways. Furthermore, the cases discussed below leave open the possibility that debris that falls short of pollution may also constitute damage to property of another; for example, where debris constitutes an obstruction to a river or a lake or an interference with navigation, fishing or swimming.

To date, the courts in BC have considered the issue of whether the cargo insurer or ICBC is obliged to pay for the cleanup when cargo is spilled in a motor vehicle accident in two key decisions, which were rendered concurrently: *Protrux Systems Inc. v. Insurance Corporation of British Columbia*³ and *Westside Transport Inc. v. Continental Insurance Co.*⁴ Interestingly, the BC Supreme Court held in the first case that the cargo insurer was liable for the cost of the debris removal but in the second case ICBC was held liable. The decision in each case ultimately turned on the particular facts of the case, which will be addressed in further detail below.⁵

APPLICATION OF THE LEGISLATION

Protrux Systems Inc. v. Insurance Corporation of British Columbia

In *Protrux Systems*, a tractor trailer under lease to the Plaintiff, Protrux, was involved in a motor vehicle accident in BC when the driver lost control of the tractor trailer, went off the road and came to rest in a river. The cargo in this case was a load of plastic coated chipboard insured under a cargo policy issued to Protrux by AXA Pacific Insurance Company. That policy contained a debris removal clause, which included coverage for "expenses necessarily incurred by the Insured, in the removal of the debris of the property occasioned by loss or damage not otherwise excluded hereunder."

During the process of removing the trailers, the towing company cut the straps holding the chipboard cargo on the trailers thus allowing the chipboard to escape into the river. The cargo was not salvageable and was recovered from the river some time after the tractor and trailers. The towing company billed ICBC for towing the tractor trailer from the river and billed Protrux for removal and disposal of the cargo. AXA eventually paid

² *Environmental Management Act*, S.B.C. 2003, c. 53 [*EMA*]

³ 2004 BCSC 1194 [*Protrux Systems*]

⁴ 2004 BCSC 1195 [*Westside Transport*]

⁵ Both cases dealt with section 64 of the *Insurance (Motor Vehicle) Regulation*, R.S.B.C. 1996, c. 231, which has since been repealed and replaced by the *Insurance (Vehicle) Regulation*, *supra*; section 64, however, remains the same. It should also be noted that each case dealt with the provisions of the *Waste Management Act*, R.S.B.C. 1996, c. 482, which has since been repealed and replaced by the *EMA*.

for the removal and then sought recovery for the cleanup costs from ICBC by way of a subrogated action. AXA took the position that ICBC was liable to indemnify Protrux under section 64 of the Regulations.

The primary issues for determination by the Court were as follows:

1. whether liability was imposed on Protrux by law to remove the cargo from the river; and
2. if so, whether the presence of the chipboard cargo in the river caused damage to the river and, thus, to the property of the provincial Crown.

AXA, in Protrux's name, argued that Protrux was liable under the *WMA* to remove the chipboard from the river and that its presence in the river caused damage to the river, by obstruction or pollution. ICBC, on the other hand, argued that there was no liability imposed on Protrux by law to remove the chipboard, nor was there damage to property of another. In the alternative, ICBC argued, *inter alia*, that Protrux vitiated its coverage by failing to comply with s. 73 of the Regulations.

The Court found that the evidence failed to establish that legal liability could have, or would have, been imposed on Protrux to remove the cargo debris from the river. There was no demand made on Protrux under the *WMA* to remove the cargo debris. Further, there was no evidence that the chipboard was abandoned and causing pollution of the river. The chipboard had been removed by the towing company and could not be said to have been abandoned by Protrux.⁶

Of note, the Court commented that it was not necessary that a demand or order must have been made against Protrux under the *WMA* before it could be said that there was liability imposed by law on Protrux to remove that chipboard from the river. Evidence that established that legal liability could have, or would have, been imposed on Protrux under the *WMA* would have been sufficient.⁷

Despite having answered the first question in the negative, the Court went on to consider the second issue of whether the chipboard caused damage to the river. There was no evidence of pollution and of physical damage caused to the riverbed or to the water. Nonetheless, the Court concluded that there was damage to the Crown's property on the basis that the two loads of chipboard constituted an obstruction to the river, regardless of whether it interfered with navigation or fishing, and that there was a considerable cost of clean up so as to return the river to its original condition.⁸

The Court also addressed ICBC's alternative argument that Protrux vitiated its coverage by failing to comply with s. 73 of the Regulations.⁹ Section 73(1)(a) provides that the insured shall give prompt written notice to ICBC of (i) any accident involving death,

⁶ *Supra* note 3 at para. 39

⁷ *Ibid.* at para. 38

⁸ *Ibid.* at para. 41

⁹ Section 73 remains unchanged under the *Insurance (Vehicle) Regulation*

injury, damage or loss in which he or a vehicle owned or operated by him has been involved; (ii) of any claim made in respect of the accident, and (iii) any other insurance held by him providing coverage for the accident; and (d) the insured shall not, except at its own cost, assume no liability and settle the claim. Further, section 73(2) provides that ICBC is not liable to an insured who, to the prejudice of ICBC, fails to comply with section 73.

The Court found that, although ICBC was notified the day following the accident, there was no evidence that Protrux made any claim for indemnification from ICBC for the cost of removal of the cargo debris before the towing company removed it. Further, Protrux paid the towing company's invoice. As such, ICBC was denied "the opportunity to decide who would remove the chipboard from the river, how it would be removed, and whether the charges for the cost of removal were reasonable." The Court held that ICBC was prejudiced by Protrux's failure to comply with section 73(1), which vitiated the coverage.¹⁰

Westside Transport Inc. v. Continental Insurance Co.

In *Westside Transport*, a truck owned by the Plaintiff, Westside Transport, overturned while carrying a load of eight large paper rolls weighing 48,000 pounds. The rolls broke loose and rolled into a lake in BC and paper debris was scattered down the hillside. The Ministry of Environment made a demand on Westside that it take immediate steps to clean up the debris less than two weeks following the accident. Further, a pollution abatement order was eventually issued against Westside. The debris removal and cleanup process did not begin until some 20 days after the accident and was not completed until almost one month later. Litigation ensued and the parties applied to the Court for a determination of which insurance coverage applied.

The questions for determination by the Court in this case were as follows:

1. whether the liability coverage provided by ICBC applied to the spilling of the rolls of paper; and
2. whether the coverage afforded by the debris removal clause in the cargo insurer's policy was excess insurance.

The cargo policy issued by Continental included coverage for debris removal expenses "necessarily incurred by the Insured, including clean up, fire department charges, pollution or environmental clean up, occasioned by loss or damage not otherwise excluded..." and was subject to a \$10,000 limit. The debris removal clause was subject to an "other insurance" clause in the Continental policy.

ICBC, who insured the truck, took the position that its third party liability coverage did not apply because there had not been "damage to property of another" to trigger coverage under section 64 of the Regulations. ICBC also took the position that the rolls of paper were benign and inert and that there was no impact to the environment resulting directly

¹⁰ *Supra* note 3 at para. 46

from the motor vehicle accident. Finally, ICBC took the position that any potential risk of environmental damage would only arise out of an unreasonable delay in recovering the paper rolls.

The Court concluded there was liability imposed by law on Westside to recover and clean up the cargo debris. The evidence established that the Ministry of Environment could have and would have demanded that Westside remove the paper rolls and clean up the debris immediately following the accident. Thus, the first condition for the application of section 64 of the Regulations was met.

In answering the question of whether the debris constituted damage to the Crown's property, the Court considered whether the damage to property was an immediate consequence of the accident, or whether it did not develop until several days after the accident. The Court held that the rolls of paper did not cause "pollution", and did not constitute "waste", as those terms were defined in the *WMA*, immediately upon being deposited in the lake and the surrounding land. Nevertheless, there was immediate damage caused to the Crown's property as a result of the accident as "[t]he rolls of paper in the lake constituted an immediate obstruction to persons using the lake for boating, fishing or swimming."¹¹ The Court inferred that the character of the lake and area adjacent to the lake was changed by the cargo debris and that considerable money and effort would be necessary to restore the lake and the land to its original condition.¹²

Accordingly, the Court concluded that the ICBC liability coverage applied immediately following the incident such that ICBC had an obligation to indemnify Westside for the costs of rectifying the damage to property.

Lastly, the Court addressed the second question of whether the coverage afforded by the debris removal clause in Continental's policy was excess insurance. As aforementioned, the debris removal clause in Continental's cargo policy was subject to an "other insurance" clause. That clause stated that the debris removal coverage would apply only as excess insurance in circumstances where, at the time of loss or damage, there was available "any other insurance which would apply in the absence of this insurance."

The Court found that the coverage provided by ICBC constituted "other insurance" available to Westside and, therefore, Continental's obligation under the debris removal clause applied only as excess insurance. To that end, Halfyard J. commented as follows: "I see no ambiguity in the wording of the Continental policy, and my interpretation is based on the plain and ordinary meaning of the words used, considered in the context of the policy as a whole."¹³

CONCLUSION

As the analysis of the above cases demonstrates, whether the cargo insurer or ICBC will be held liable for the cost of debris removal will largely depend on the facts of each case.

¹¹ *Supra* note 4 at para. 56

¹² *Ibid.*

¹³ *Ibid.* at para. 63

To determine whether ICBC should pay, cargo insurers should consider the following key issues:

1. whether there is liability to remove the debris imposed on the insured by law;
2. if not, whether the debris needs to be cleaned up or if it can instead be left;
3. whether there has been damage to property of another, either by way of pollution or obstruction;
4. whether sufficient notice has been provided to ICBC;
5. the impact of any “other insurance” clauses in relevant policies; and
6. the impact of any debris removal policy limit issues.

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