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CASE SUMMARY: INSURERS NOT REQUIRED TO DEFEND CLAIM FOR DAMAGES FOR OCCURRENCES BEFORE THE POLICY PERIODS AND WHICH FELL WITHIN A POLLUTION EXCLUSION

The commercial general liability policies only applied to property damage occurring during the policy period and the pollution exclusion excluded damage to adjacent property as a result of the migration of pollutants from the insured's property.

Insurance law – Commercial general liability insurance – Occurrence policy – Property damage – Pollution exclusions – Duty to defend – Rights and duties of insurer – Interpretation of policy – Costs

West Van Holdings Ltd. v. Economical Mutual Insurance Co., [2019] B.C.J. No. 550, 2019 BCCA 110, British Columbia Court of Appeal, April 5, 2019, R. Goepel, L.A. Fenton and G. Dickson J.J.A.

The insured sought a defence from its commercial general liability insurers for claims by its neighbour, for damage to the neighbour's property allegedly caused by the use of contaminants on the insured's land prior to and during the insured's ownership of its land. The policies were occurrence based policies providing coverage for claims alleging property damage which occurs during the policy period. The policies were not intended to provide coverage for events which took place long before the policies came into effect. Further, the wording of the exclusion for claims "arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants" was broad enough to include the migration of pollutants from the insured's property to the adjacent property. The insured failed to show the "mere possibility" that the claims fell within the grant of coverage.

In obiter, the Court held that there is no principled reason to award costs in a duty to defend case in a manner different than other litigation. If the insurer has breached its duty of good faith or conducts itself in a manner that is worthy of rebuke, it will be sanctioned. If not, an insurer facing a duty to defend claim should be treated no differently than any other litigant who may breach a contract with respect to costs.

This case was digested by [Dionne H. Liu](#), and first published in the LexisNexis® Harper Grey Insurance Law Netletter and the Harper Grey Insurance Law Newsletter. If you would like to discuss this case further, please contact Dionne H. Liu at dliu@harpergrey.com.