

Homeowners Denied Environmental Coverage for Contamination – Doctrine of Imminent Peril

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Coverage for losses due to environmental contamination in residential homeowner insurance policies is rare. Where a homeowner discovers contamination at his or her property due to an unknown source or, worse, contamination at adjacent properties emanating from the home, the homeowner may not have any insurance coverage to cover the cost of remediation. Can a homeowner undertake the remediation and then claim that he or she has coverage under the doctrine of imminent peril?

This question was recently considered by the Nova Scotia Court of Appeal in *Garden View Restaurant Ltd v Portage La Prairie Mutual Insurance*.¹

The plaintiff owned a residential home. The plaintiff discovered that a copper pipe connecting the fuel oil tank to the furnace had been vandalized and had caused fuel oil to discharge on the property.²

The plaintiff retained an environmental consultant to remediate the contamination. The remediation involved excavation of impacted soil, groundwater testing and sub-slab air sampling.³

The plaintiff claimed the cost of remediation under its homeowner's policy. The defendant insurer acknowledged coverage for \$10,000 and denied the rest of the claim.⁴

The plaintiff applied to the Nova Scotia Supreme Court and then to the Nova Scotia Court of Appeal for a declaration that the insurer was liable to pay for the entire cost of remediation.

In both proceedings, there were two primary issues:

1. Was there damage to insured property so as to invoke coverage under the policy?
2. Did the doctrine of imminent peril apply?

On the first issue, both Courts held that the specific policy wording did not include the soil and groundwater underneath the building as "insured property". The policy was clear that the "insured property" included the building only.⁵ For this reason, there was no coverage under the policy for the remediation costs.

¹ 2016 NSCA 8.

² *Ibid* at para 3.

³ *Ibid* at para 5.

⁴ *Ibid* at paras 6 and 7.

⁵ *Ibid* at paras 19 and 20.

More interestingly, on the second issue, the Courts reviewed the seldomly applied doctrine of imminent peril. The Court of Appeal described the doctrine as follows:

The doctrine of imminent peril is a common law principle that permits an insured to recover damages resulting from preventative action taken to stop what would otherwise be an imminent peril (for which coverage is provided under the policy) from occurring.

...

The doctrine of imminent peril therefore requires the following:

- (a) There must be an operating peril of the type or category described in the insurance contract; and
- (b) The danger must be present in the sense that unless something is done, damage will ensue; i.e., it is inevitable.⁶

The plaintiff submitted that it had coverage under the policy for losses due to vapours from the contamination entering adjacent properties. The plaintiff submitted that these vapours would have occurred if the plaintiff had not undertaken the remediation.⁷ For these reasons, the plaintiff believed that it had coverage under the doctrine of imminent peril.

Both Courts disagreed. The Court of Appeal held that there was no coverage under the policy for losses due to these vapours.⁸ Further, the plaintiff's theory that there were pathways by which vapours could have entered the properties was unsupported by the evidence.⁹ The vapours were not imminent or likely to occur at any moment.¹⁰ There was no evidence that the remediation work was motivated by the intention to stop vapours from entering the adjacent properties.¹¹

While the plaintiff was unsuccessful in this case, insureds should note the Court of Appeal's following comments on the doctrine of imminent peril:

By requiring the peril and damage to be inevitable and imminent, insurers will not be obliged to pay and insureds will not be paid - other than in cases in which damages are a virtual certainty to occur at any moment, unless averting action is taken. The burden is on the insured to establish facts that trigger the doctrine.¹²

Despite the requirement for inevitability in the doctrine, the burden of proof remains unchanged. An insured must show on a balance of probabilities that the damage was inevitable.¹³

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⁶ *Ibid* at paras 29 and 30.

⁷ *Ibid* at paras 38-40.

⁸ *Ibid* at para 67.

⁹ *Ibid* at para 49.

¹⁰ *Ibid* at para 42.

¹¹ *Ibid* at para 60.

¹² *Ibid* at para 34.

¹³ *Ibid* at para 36.