

COVID-19: Impacts on Construction Projects in BC

Presented by members of our Infrastructure, Construction & Procurement Group

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COVID-19:

Impacts on Construction Projects in BC

All sectors of our society - individuals, communities, industries and government, have joined in a concerted effort to combat COVID-19 and the health emergency and economic disruption it has caused. The construction industry in B.C. is doing its part by adapting its practices to minimize the risk of COVID-19, while providing much needed economic support for the province.

Construction projects in B.C. have no doubt been impacted and we will discuss the following key issues arising from COVID-19:

1. Guidelines and Best Practices for the Operation of Construction Sites
2. Delay Claims and COVID-19 in Construction Contracts
3. Insurance Considerations
4. Builders Lien Claims

Guidelines and Best Practices for the Operation of Construction Sites



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Notable Events

March 12: Gatherings of more than 250 were prohibited

March 13: Physical distancing measures implemented in communities

March 16: Gatherings of more than 50 were prohibited

March 18: Announcement that above does not apply to construction sites

March 22: Guidance to construction sites operating during COVID-19 were issued

March 26: Construction work, firms and trades declared essential services

PHO Guidelines For Construction Sites

On March 22, 2020, the Provincial Health Officer ("PHO"), issued an Information Bulletin with guidelines for employers and employees working at construction sites during COVID-19. The guidelines focus on the following key safety precautions:

- Self-isolation
- Physical Distancing
- Sanitation

Self-isolation

- Contacts of a confirmed case (persons have been or could have been exposed to the virus but do not have symptoms) should self-isolate for 14 days.
- With or without a history of travel, person exhibiting respiratory symptoms and/or a temperature should self-isolate at home for at least 10 days after onset of symptoms.
- After 10 days, if health improves and temperature is normal, person can return to work.
- Employers should maintain a list of employees that are currently working on sites and update this list daily.

Physical Distancing

- No more than 50 people in the same space in any circumstances.
- Where possible, employees should maintain a distance of two metres.
- Number of occupants in any elevator/hoist limited to 4.
- Reduce in-person meetings.
- Hold site meetings in open spaces/outside.

Sanitation

- Increase handwashing stations and signage to identify their location.
- Where plumbed facilities are impracticable, provide access to portable hand-washing facilities.
- Clean all common areas and surfaces each day.

PHO Order for Industrial Camps

On April 23, 2020, the Provincial Health Officer, issued an order for the operation of Industrial Camps.

Order sets out the obligations of employers and employees at industrial camps and also creates the role of a coordinator to act as a liaison between the employer and public health.

Industrial Camps: Employer Obligations

- Develop and post a COVID-19 infection prevention and control protocol.
- Maintain high levels of accommodation, worksite and worker hygiene.
- Provide rapid response if a worker develops symptoms of COVID-19 (isolate the worker, provide access to a health professional, notify a health officer).
- Not allow a worker who has symptoms to work.
- Appoint a coordinator.
- Arrange for a health officer to inspect the camp accommodations, worksite, and vehicles.

Industrial Camps: Coordinator Obligations

- Act as a liaison between the employer and the health officer.
- Oversee implementation of the protocol.
- Monitor the health of workers daily, keep records and inform the health officer if any worker exhibits symptoms.
- Ensure risk of transmission is limited while workers are transported between accommodations and worksite.
- Monitor worker compliance.
- Inform the health officer if employer fails to implement the protocol or if a worker fails to comply with the requirements.

Industrial Camps: Worker Obligations

- Follow the protocol.
- Follow infection prevention and control practices including diligent hand hygiene.
- To the extent practical, reduce close contact with other persons (i.e. maintain a two metre separation, avoid shared spaces).
- To the extent practical, limit the risk of transmission when travelling to and from work and between shifts.
- Remain in accommodations on days when not required at the worksite.

Industrial Camps: Worker Obligations (cont'd)

- Avoid any unnecessary visits to public establishments and only leave accommodations if approved by the coordinator.
- If must leave accommodations maintain physical distance, carry a mask or tissues.
- If develop symptoms while away, put on mask or cover nose and mouth with tissues, return immediately to accommodations and phone a health professional for advice.
- Self-monitor daily for signs and symptoms of illness.
- If exhibit symptoms, inform the coordinator and self-isolate for 10 days, unless instructed otherwise by a health professional.

Worksafe BC Protocols

- Every employer is required to have a COVID-19 safety plan that outlines the policies, guidelines, and procedures they have put in place to reduce the risk of COVID-19 transmission.
- Six-step COVID-19 safety plan template:
 - Assess the risks at the workplace
 - Implement protocols to reduce the risks (elimination, engineering controls, administrative controls, PPE)
 - Develop policies and plans
 - Monitor the workplace and update the plans as necessary
 - Assess and address risks from resuming operations

Enforcement Monitoring

Worksafe BC

- Carries out workplace inspections.
- Acts on requests/inquiries to Worksafe's prevention line.
- Focus on consultation and education activities to ensure all obligations are fulfilled.
- Has broad powers to make orders to carry out health and safety regulations (stop work, impose penalties)
- Non-compliance can attract criminal sanctions including fines and imprisonment.

Other Resources for Best Practices

- B.C. Centre for Disease Control
- ICBA
- BC Construction Association
- BC Construction Safety Alliance
- Canadian Construction Association COVID-19 (see Standardized Protocols for All Canadian Construction Sites)

Confirmed Case Onsite

- PHO guidelines do not address.
- Best Practices:
 - Contact and take directions from public health.
 - Subject to instructions from public health, advise employees if they may have come in contact with the confirmed case (even if asymptomatic) to self-isolate for 14 days.
 - Enforce self-isolation.
 - Report the matter to insurers.

NOTE: Public health and Worksafe have wide powers to issue orders and directives including shutdown of site.

Limitation of Liability

Order Protecting Essential Service Providers

- Order issued April 2, 2020 pursuant to the *Emergency Program Act*, protects those providing essential services from liability for damages relating directly or indirectly to exposure to COVID-19 while continuing to operate, as long as the essential service provider complies with the applicable emergency and public health guidelines.
- Exclusions apply for gross negligence (acts or omissions that represent a marked departure from the expected standard of care).

Delay Claims and COVID-19 in Construction Contracts



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Common Law Mechanisms to Address Delays

- Not every contract includes provisions that deal with delays outside the parties control or the process to follow when unforeseen circumstances make performance impossible.
- Frustration has been developed in the common law to deal with situations where the contract is silent regarding delays or unforeseen circumstances.

Frustration

- Frustration applies where there is an intervening event that the parties did not foresee, and made no provision for in their contract, and that makes performance of the contract “radically different from that which was undertaken by the contract” (*Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58).
- Frustration may occur where:
 - there has been a radical change in circumstances; and/or
 - the object of the contract is no longer possible

Frustration

- The test for frustration asks whether there has been a *radical change* in the contractual obligation.
- The *radical change* will make performance of the contract fundamentally different than what was originally contracted for.
- High bar to meet in the construction context.

(*Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58 and *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, [1960] SCR 361)

Frustration

- *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, [1960] SCR 361

(page 368): "How can a dispute over a question whether a certain item of work is an extra bring about frustration of the whole contract when the question of extras is covered in elaborate detail by the contract itself? The principle to be applied is not in doubt. It was examined again as recently as 1956 in *Davis Contractors Ltd. v. Fareham Urban District Council*, where *Bush v. Whitehaven Port and Town Trustees* (1888), *Hudson on Building Contracts*, 4th ed., vol. 2, p. 122, a case often appealed to in this type of dispute, was finally overruled. I take the statement of the principle from p. 729 of the *Fareham* case:

*Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do. ****

It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

On any view of the facts of this case, there cannot be frustration. The performance of extra work will not justify it, even if such work was done. Extra work of the kind said to have been performed in this case is a contingency covered by the express contract and does not afford a ground for its dissolution. If there was to be extra pile driving, the character and extent of the obligation to pay were fully covered in the contract. Even on the plaintiff's own view of the case, its performance was not radically different from that called for by the contract. The facts of the case do not justify an inference of frustration"

Frustration

- *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58

[53] Frustration occurs when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes "a thing radically different from that which was undertaken by the contract": *Peter Kiewit Sons' Co. v. Eakins Construction Ltd.*, [1960] S.C.R. 361, per Judson J., at p. 368, quoting *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 (H.L.), at p. 729.

...

[55] More recent case law, including *Peter Kiewit*, adopts a more candid approach. The court is asked to intervene, not to enforce some fictional intention imputed to the parties, but to relieve the parties of their bargain because a supervening event (the OLRB decision) has occurred without the fault of either party. For instance, in the present case, the supervening event would have had to alter the nature of the appellant's obligation to contract with the respondent to such an extent that to compel performance despite the new and changed circumstances would be to order the appellant to do something radically different from what the parties agreed to under the tendering contract: *Hydro-Québec v. Churchill Falls (Labrador) Corp.*, [1988] 1 S.C.R. 1087; *McDermid v. Food-Vale Stores (1972) Ltd.* (1980), 14 Alta. L.R. (2d) 300 (Q.B.); *O'Connell v. Harkema Express Lines Ltd.* (1982), 141 D.L.R. (3d) 291 (Ont. Co. Ct.), at p. 304; *Petrogas Processing Ltd. v. Westcoast Transmission Co.* (1988), 59 Alta. L.R. (2d) 118 (Q.B.); *Victoria Wood Development Corp. v. Ondrey* (1978), 92 D.L.R. (3d) 229 (Ont. C.A.), at p. 242; and G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at pp. 677-78.

Force Majeure

- *Force Majeure* clauses are contractual clauses that suspend the parties contractual obligations when a certain event, beyond the control of either party, prevents a party from fulfilling the terms of the contract.
- *Force Majeure* clause will have an inclusive list of events and may include a general definition of the type of delay.
 - **Review your clause to determine if it applies to a COVID-19 related delay.**

Force Majeure

- Typically provides:
 - extension of time, but no additional costs (with exceptions); and
 - termination rights where the *force majeure* event continues.
- Typically requires:
 - notice of the *force majeure* event

CCDC Contracts – Delay Claims

- CCDC contracts include standard clauses that deal with situations of delay in the construction project.
- Little case law discussing interpretation and application of delay claims.
- Be aware that the standard provisions in CCDC contracts are often revised by supplementary conditions.
- **Always read the terms of your contract carefully.**

CCDC Contracts – Delay Claims

- Delay claims dealt with at GC 6.5 – Delays
- GC 6.5.1 - delays caused by the Owner
 - Contractor gets time and money for the delay

"If the *Contractor* is delayed in the performance of the *Work* by an action or omission of the *Owner*, *Consultant* or anyone employed or engaged by them directly or indirectly, contrary to the provisions of the *Contract Documents*, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The *Contractor* shall be reimbursed by the *Owner* for reasonable costs incurred by the *Contractor* as the result of such delay."

CCDC Contracts – Delay Claims

- GC 6.5.2 – delays caused by a stop work order

- Contractor gets time and money for the delay

"If the Contractor is delayed in the performance of the Work by a stop work order issued by a court or other public authority and providing that such order was not issued as the result of an act or fault of the Contractor or any person employed or engaged by the Contractor directly or indirectly, then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as the result of such delay."

CCDC Contracts – Delay Claims

- GC 6.5.3 – Delays caused by a reason beyond the control of the Contractor
 - Contractor gets time, not money, for the delay (unless the delay is caused by the Owner or Consultant, then the Contractor gets time and money)

“If the *Contractor* is delayed in the performance of the *Work* by:

- .1 labour disputes, strikes, lock-outs (including lock-outs decreed or recommended for its members by a recognized contractors’ association, of which the *Contractor* is a member or to which the *Contractor* is otherwise bound),
- .2 fire, unusual delay by common carriers or unavoidable casualties,
- .3 abnormally adverse weather conditions, or
- .4 any cause beyond the *Contractor’s* control other than one resulting from a default or breach of *Contract* by the *Contractor*,

then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The extension of time shall not be less than the time lost as the result of the event causing the delay, unless the *Contractor* agrees to a shorter extension. The *Contractor* shall not be entitled to payment for costs incurred by such delays unless such delays result from actions by the *Owner, Consultant* or anyone employed or engaged by them directly or indirectly.”

CCDC Contracts – Delay Claims

- GC 6.5.4 – Notice requirements for delay
- Be aware that extensions for time sought under GC 6.5 Delays must follow the notice provision in GC 6.5.4.
- If notice is not given, no extension of time shall be made.

“No extension shall be made for delay unless *Notice in Writing* of the cause of delay is given to the *Consultant* not later than 10 Working Days after the commencement of the delay. In the case of a continuing cause of delay, only one *Notice in Writing* shall be necessary.”

CCDC Contracts – Delay Claims

- What is a stop work order?
 - CCDC does not define “stop work order”.
 - Order issued by the Public Health Officer providing guidance and instructions with respect to health and safety measures to be followed during the COVID-19 pandemic are likely not stop work orders as considered by 6.5.2.
 - Government has issued statements that construction should continue.
 - So far, construction sites have not been shut down as in Ontario or Quebec.

CCDC Contracts – Delay Claims

- GC 10.2 – Laws, Notices, Permits, And Fees
 - GC 10.2.7 – relates to circumstances where changes are made to applicable laws or regulations prior to bid closing.
 - If a change to applicable laws or regulations is made, GC10.2.7 may permit either party to submit a claim for contract price.
- “If, subsequent to the time of bid closing, changes are made to applicable laws, ordinances, rules, regulations, or codes of authorities having jurisdiction which affect the cost of the Work, either party may submit a claim in accordance with the requirements of GC 6.6 – CLAIMS FOR A CHANGE IN CONTRACT PRICE.”

CCDC Contracts – Delay Claims

- Consider who will bear cost of changes relating to health and safety legislation.
 - GC 9.4 – Construction Safety
 - Sets out who will have obligation to ensure compliance with applicable health and safety legislation and for initiating and maintaining all safety precautions and programs in connection with the performance of the work at the project site.
 - CCDC 2: Contractor responsible for health and safety at the Place of the Work;
 - CCDC 17: Trade Contractor is responsible for health and safety relating to the work, Owner is responsible for health and safety at the Place of the Work.

CCDC Contracts – Delay Claims

- If COVID-19 issues arise for ongoing project:
 - Important to have clear communication around expectations for health and safety;
 - Recommended that have clear communication around:
 - anticipated delays;
 - nature of delays (supply chain? labour?);
 - anticipated length of delays; and
 - issues that may arise from any public health order.

CCDC Contracts – Delay Claims

- In addition to delay provisions, consider:
 - who has responsibility to ensure compliance with health and safety?
 - has there been a change in law?
 - what do the suspension and termination provisions say?
 - obligations for site security during suspension of work?
 - what must each party do to mitigate loss?
 - alternative work to be performed to assist meeting construction schedule?
 - costs of demobilization/remobilization?

CCDC Contracts – Delay Claims

- Pay attention to Public Health Officer Orders and WorkSafeBC Orders.
- BC has not made orders shutting down construction sites – Ontario and Quebec have.
- Ontario:
 - only specific projects permitted to continue
 - increased monitoring of construction sites by enforcement officers
 - fines issued if non-compliant

CCDC Contracts – Delay Claims

- A number of options to consider for construction contracts going forward to address COVID-19 risks.
- Consider circumstances of each project – one option may be preferred given different circumstances.

CCDC Contracts – New Projects

- Option 1 – Status Quo
 - leave the standard provisions “as is”.
- Option 2 – Time not Money
 - amend provisions so Contractor will receive extensions of time, but no extra cost for COVID-19 delays or extras.
- Option 3 – Money not Time
 - amend provisions so Contractor will receive extra cost, but no extension of time for COVID-19 delays and extras.

CCDC Contracts – New Projects

- Option 4 - Money and Time
 - amend provisions so Contractor will receive extra cost and extension of time for COVID-19 delays extras.
 - consider approach where money and time only available for certain COVID-19 delays or risks but not all:
 - stop work orders;
 - supply chain disruption; or
 - prolonged delays.

Insurance Considerations



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INSURANCE CONSIDERATIONS

BUILDER'S RISK INSURANCE / COURSE OF CONSTRUCTION ("COC")

Intended to provide broad coverage for "all risks" that may arise during the course of construction for direct physical loss or damage to property.

INSUREDS

- Named Insureds: Owner / Developer & Contractor
- Unnamed insureds: Subcontractors & Bank (mortgagee)

INSURANCE CONSIDERATIONS

BUILDER'S RISK INSURANCE – WHAT DOES IT COVER?

- Coverage for buildings under construction
- Project property, including materials, equipment and supplies to complete the project
- Extra work fees for architects & engineers
- Cost of barricades & additional site structures (temporary buildings)
- Soft costs (legal fees)
- Delayed start-up
- Civil Authority coverage – government shutdown of site

INSURANCE CONSIDERATIONS

WHAT IS EXCLUDED FROM COVERAGE?

- Inherent vice (faulty work or design or material, wear & tear)
- Motor vehicles at the project site
- Pollution / certain contamination
- Equipment and tools used by contractor

INSURANCE CONSIDERATIONS

STEPS TO COVERAGE UNDER BUILDER'S RISK POLICY

1. Insureds and covered project
2. Insuring Agreement – is the loss covered?
3. Exclusions – is the loss excluded in whole or in part?
4. Exceptions to exclusions – is part of excluded loss covered because of exception?

INSURANCE CONSIDERATIONS

**DO BUILDER'S RISK POLICIES COVER COVID-19 RELATED
SUSPENSION & DELAY?**

- Delayed Start-Up
- Civil Authority - Prevention of Access

INSURANCE CONSIDERATIONS

COVERAGE UNDER BUILDER'S RISK & COVID-19

- COVID-19 has caused project suspension in whole or in part
- Crews have been cut down to ensure social distancing
- Significant delay on project schedule
- Is COVID-19 caused delay covered by DSU coverage in COC policies?

INSURANCE CONSIDERATIONS

DELAYED START-UP (“DSU”) COVERAGE UNDER BUILDERS RISK POLICY

- Loss of the anticipated or potential income due to delayed project completion
- Loss must be covered by insuring agreement
- Project suffers physical loss or damage during construction
- Akin to business interruption insurance for construction projects

INSURANCE CONSIDERATIONS

DELAYED START-UP ("DSU") COVERAGE UNDER BUILDERS RISK POLICY

Insuring Clause

Subject to all its' stipulations, limitations and conditions, this Policy covers against the loss directly resulting from delay in the commencement of the commercial operation of the project described in the Declarations caused by loss, destruction or damage by the perils insured against by Section 1 of the Policy occurring during the Policy Period to the Property insured herein.

INSURANCE CONSIDERATIONS

CIVIL AUTHORITY COVERAGE UNDER BUILDERS RISK POLICY

Interruption by Civil Authority

Cover under this Section is extended to include the actual loss as covered hereunder for up to a maximum period stated in the declarations with respect to Interruption by Civil Authority when, as a result of the perils insured against, access to the premises described is prohibited by order of civil authority.

INSURANCE CONSIDERATIONS

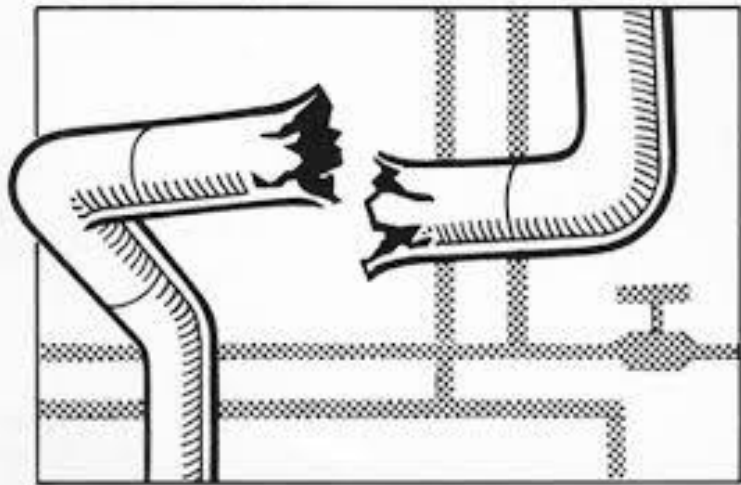
GETTING PAST THE INSURING AGREEMENT (Section 1)

In order for coverage to be triggered, there must first be “direct physical loss of or damage to the property insured”

- **“direct physical loss”** of the property insured; OR
- **“damage”** to the property insured.

INSURANCE CONSIDERATIONS

DAMAGE TO PROPERTY



INSURANCE CONSIDERATIONS

DIRECT PHYSICAL LOSS



INSURANCE CONSIDERATIONS

D.P. Murphy, Inc. v. Laurentian Casualty Co. of Canada, [1992] P.E.I.J. No. 70 (PEISC)

DECISION

- The presence of gas fumes in a building adjacent to a Tim Hortons restaurant prompted a fire inspector to close the Tim Hortons due to an explosion risk. Tim Hortons suffered business losses and claimed coverage under its commercial property policy.
- The court held that this constituted **direct physical loss** where the insured sought to recover business interruption losses.
- However, the loss was excluded by contamination exclusion.

INSURANCE CONSIDERATIONS

MDS Inc. v. Factory Mutual Insurance Company (FM Global),
2020 ONSC 1924

FACTS

- A leak of heavy water containing radioactive particles caused shutdown of nuclear facility for 15 months.
- Canadian Nuclear Safety Commission established safety protocol to be followed before the facility could be reopened and required a report that the facility was fit for its purpose.
- Insurer denied coverage for \$121 million for loss of profits during shutdown period under an all-risk property policy.

INSURANCE CONSIDERATIONS

MDS Inc. v. Factory Mutual Insurance Company (FM Global),
2020 ONSC 1924

- Court found coverage – it wanted to find coverage
- Focused on the policy as a whole and expectations of the parties
- “Property damage” has been defined in Supreme Court of Canada as requiring change in the physical state
- Judge in ***MDS*** made statement that “property damage” in this policy includes loss of use

INSURANCE CONSIDERATIONS

MDS Inc. v. Factory Mutual Insurance Company (FM Global),
2020 ONSC 1924

462 When the resulting physical damage exception is considered in light of other provisions in the Policy, including Period of Liability for the Time Element Coverage, it appears clear that the meaning of resulting physical damage contemplates loss of use of the NRU. Therefore the Policy is not ambiguous. This would end the analysis on the applicability of the resulting physical damage exemption. The Plaintiffs' loss flowing from the disruption of the normal supply of isotopes would be covered under the Policy.

INSURANCE CONSIDERATIONS

MDS Inc. v. Factory Mutual Insurance Company (FM Global),
2020 ONSC 1924

- Many all-risk policies or commercial property policies require finding of “property damage” to get past the insuring agreement
- Many have been quick to conclude that **MDS** stands for the proposition that loss of use = property damage
- Therefore, the argument is that closure of construction site as a result of COVID-19 = loss of use = property damage = coverage

INSURANCE CONSIDERATIONS

APPLICATION OF *MDS* WILL BE LIMITED TO ITS FACTS (*in Sam's respectful opinion*)

- Concluding loss of use = “property damage” is overly simplified view. Coverage analysis is nuanced
- In ***MDS*** the judge considered policy as a whole
- Coverage was under a policy section called Time Element Coverage which provided coverage for “physical loss or damage”
- There was no definition of “property coverage”, so judge was at liberty to determine a definition for the policy
- Judge made the broad statement in the interpretation of an exception to the contamination exclusion, which she first said did not apply

INSURANCE CONSIDERATIONS

ARE COVID-19 RELATED ISSUES IN CONSTRUCTION COVERED UNDER BUILDERS RISK?

- It can be, particularly if the policy defines “property damage” to include “physical loss”, but you must prove “physical loss”
- Depends on reading of the policy as a whole.
- If the claim gets past insuring agreement, it must not be excluded under contamination, pollution or microorganism exclusion
- If covered, the insured is afforded coverage for delayed start-up and civil authority interruption coverage.

INSURANCE CONSIDERATIONS

IS THERE PHYSICAL LOSS FROM COVID-RELATED CLOSURE OF CONSTRUCTION SITE?

- Shut down with no government order – prophylactic measure – no cover b/c cannot prove direct physical loss because cannot prove uninhabitable when preemptive
- Shut down due to government order – easier to gain coverage if can prove presence of virus on site or uninhabitable – still difficult
- Critical to prove actual presence of COVID-19 on site
- If outbreak with positive testing and shut down *because* then perhaps site is uninhabitable as a result of COVID-19
 - Even then the shut down is only as long as it takes to clean site – but coverage can be triggered

Builders Liens in Covid-19 Times



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COVID-19 Context to Builders Liens

- In today's COVID times:
 - Trades are claiming for extras/delays
 - Owners are paying more than anticipated, or preparing (and putting funds aside) to deal with disputes later on
 - There are/will continue to be more disputes regarding payments and contract obligations
- Important to understand how builders liens work to ensure payment/resolve lien issues

What is a Builder's Lien?

- Secures a claim for payment for work or materials supplied to a property or an improvement (eg building)
- Creates an “in-rem” (latin: “in the thing itself”) claim against land and improvement
 - vs. “in personam” claim in contract
- Created by filling out a simple form and registering it in the Land Title Office
- Governed by the *BC Builders Lien Act* (the Act)

What is a Builder's Lien?

(cont'd)

- Effect of a claim of lien:
 - Registered against title to land/property
 - Date of registration determines priority vs. other charges registered against same title
 - Can restrict the owner from dealing with property
 - Development
 - Financing – new or existing
 - Sales/transfers

Filing Liens in COVID-19 Times

- Fill out form, file on BC Online system
- Can sign electronically/PDF – no COVID restrictions
- April 8, 2020 - Ministerial Order M098 clarified that the suspension of limitation periods and mandatory time limits does not apply to limitation periods/time limits in the *Builders Lien Act*
 - Filing of the claim of lien
 - S. 21 notice, Notice of Civil Claim, etc.

Builders Liens

Strict Compliance Required

- As claim of lien is created by a statute, must strictly comply with requirements of the Act
 - Timing requirements
 - Information required on the lien form
 - Enforcement of claims of lien
- Courts have no discretion to correct the parties' non-compliance with requirements of the Act
 - Eg. if a lien filed 1 day late, courts cannot extend deadline

Builders Liens – Case Comments

- ***Yongfeng Holdings Inc v Zheng*, 2019 BCSC 1534**
 - Y Holdings built a house for Mr. Zheng
 - Y Holdings filed a lien, mistakenly inserted Mr. Zheng's (owner's) address instead of its own (lien claimant's) address
 - Court found the mistake extinguished the lien
- ***581582 B.C. Ltd. v. Habib*, 2013 BCSC 378**
 - 581582 B.C. Ltd. doing business as ANE Consulting contracted to build a house
 - Lien filed by "ANE Consulting Ltd."
 - Claimant not a proper legal entity, lien extinguished

Timeline for Filing a Lien Against Land

A lien must be filed (s. 20 of the Act):

1. If a Certificate of Completion was issued, 45 days after issuance; or
2. If there is no Certificate of Completion, 45 days after the head contract has been completed, abandoned or terminated; or
3. If there is no head contract, 45 days after the improvement has been completed or abandoned.

Timeline for Filing a Lien

Case Comment

Persepolis Contracting Inc. v. 0887678 B.C. Ltd., 2014 BCSC 2016

- Contractor says it was retained by Owner to perform renovations on the Hotel – budget 2.5M, no written contract
- Contractor says it performed renos ending in March 2013 and didn't get paid – filed a builders lien in March 2013 for 600K
- Court finds:
 - Contractor only performed odd jobs around the Hotel until October 2012. Any “agreement” for work was terminated in October 2012.
 - Invoices show a “cheeky and transparently dishonest attempt” to show that the 45 day limitation to file a lien has not expired
 - Lien out of time. Special costs awarded against Contractor.

What Can One Lien For?

- 2 (1) Subject to this Act, a contractor, subcontractor or worker who, in relation to an improvement, performs or provides work, supplies material, or does any combination of these things, has a lien for the price of the work and material, to the extent that the price remains unpaid, on all of the following:
 - the interest of the owner in the improvement;
 - the improvement itself;
 - the land in, on or under which the improvement is located;
 - the material delivered to or placed on the land.
- **Cannot lien for:**
 - Interest, lost profit, work not yet performed
 - Damages/delay claims – except components including actual work

What Can One Lien For?

Case Comment

JVD Installations Inc. v Skookum Creek Power Partnership **2020 BCSC 374**

Parties constructed hydroelectric facility near Squamish. JVD subcontracted the work to IDL (wholly owned subsidiary). Most work performed on unalienable Crown land, except for 2 private lots. Neither JVD nor IDL themselves performed the work on private lots. JVD/IDL filed liens against 2 private lots, claiming about \$3.5M in unpaid fees. The Court found:

- JVD (who subcontracted work to IDL) is entitled to file a lien against the lands on which improvement was constructed
- JVD/IDL can lien any lands the improvement touches if that improvement is a single integrated improvement
- JVD/IDL can file a lien over any lands occupied by (a portion of) an improvement if they provided work “in relation to” that improvement, and the work was an integral and necessary to the improvement

Removing Liens/Clearing Title

- Liens are removed to:
 - Proceed with development/financing
 - Affect a transfer/sale
 - Clear title for other reasons
- Usually done by court application, but can be done by security agreement with lien claimant's lawyer if posting full lien amount under s. 24 of the Act
- Despite restricted court operations (no in-person hearings), applications to remove liens can be heard
- Urgent applications are common and can be easily accommodated

How To Remove Liens Against Land?

Disputed Liens – Section 24 of the Act (most common)

- Party can discharge a lien by paying into court OR lawyer's trust account the amount of lien claim
- In order to get the money from court/ lawyer's trust account, lien claimant must prove claim
- **Pros:** quick resolution, usually unopposed, can dispute the validity of lien later, can pay money into lawyer's trust account under agreement (without court application), can post a lien bond instead of cash
- **Cons:** money posted can be "locked up" for the duration of the dispute/litigation

How To Remove Liens Against Land? (cont'd)

Undisputed Liens – Section 23 of the Act

- Owner/GC can discharge a lien by paying into court the lesser of:
 - the total amount of lien claims, or
 - the amount owing by owner/GC to the person hired by them, provided that amount is at least equal to the statutory builders lien holdback (usually 10% of payments made)
- **Pros:** final resolution of claim of lien
- **Cons:** amount of holdback to be paid in may be disputed

How To Remove Liens Against Land? (cont'd)

Improper/invalid Liens – Section 25 of the Act

- Apply to the court to remove a lien on the basis that:
 - Lien was filed out of time; or
 - Lien is vexatious, frivolous or an abuse of process (filed against wrong land, for amounts not lienable, etc.)
- **Pros:** final resolution of claim of lien
- **Cons:** often opposed – turns into a substantive hearing – must have a strong case that lien is invalid to succeed

How To Enforce A Lien Against The Land?

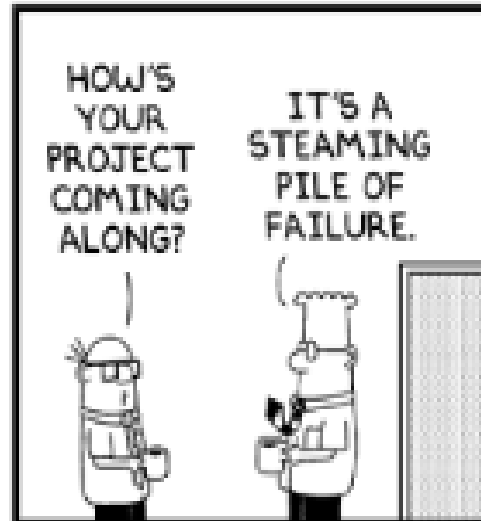
- Within 1 year from filing of a claim of lien:
 - File a Notice of Civil Claim in the BC Supreme Court (even if claim under \$35K)
 - File a Certificate of Pending Litigation (CPL) in the Land Title Office
- Unless both done, the claim of lien is extinguished
- Notice of Civil Claim and CPL can both be filed electronically online
- **No extensions of time due to COVID-19**

How To Enforce A Lien Against The Land?

- Above process can be sped up from 1 year to 21 days by delivering a “21 Days Notice”
 - If Notice of Civil Claim and CPL not filed within 21 days, lien will be extinguished
 - Useful when: small claim, questionable merits

Preliminary Advice

- Have a lawyer prepare/review your agreement – consider including COVID-related provisions if relevant
- Document extras/changes in writing, keep good records
- Negotiate, compromise and settle disputes if possible
- If payment not received, act quickly and file your lien
- Diarize deadlines to enforce a lien (1 year after filing)
- **Liens are complicated – seek legal advice to ensure your interests are fully protected**



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