

Newfoundland Court of
Appeal and Ontario
Superior of Justice Clarify
Scope of Builder's Risk
Insurance Policies

LUC #153 [2019]

Primary Topic:

XIII Insurance

Jurisdiction:

Newfoundland and Ontario

Author:

Jacob McClelland,
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CanLII References:

[2019 NLCA 13](#)

[2019 ONSC 1700](#)

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Newfoundland Court of Appeal and Ontario Superior of Justice Clarify Scope of Builder's Risk Insurance Policies

Overview

In *Pre-Eng v. Intact*, 2019 ONSC 1700 (“*Pre-Eng*”), the Ontario Superior Court recently confirmed the limited scope and purpose of builder's risk insurance by finding that such policies cover only damage occasioned to property being installed, renovated or constructed by the insured.

Coincidentally, around the same time as the hearing of *Pre-Eng*, the Court of Appeal of Newfoundland and Labrador released its decision in *Dominion of Canada General Insurance Company v. Viking Fire Protection Incorporated*, 2019 NLCA 13 (“*Viking Fire*”), in which it found that a limited scope was consistent with the parties' reasonable expectations, and produces a realistic result that the parties would have contemplated in the commercial atmosphere in which the insurance was obtained.

These decisions all but resolve the conflicting jurisprudence with respect to the interplay between builder's risk and general commercial liability insurance (at least for Ontario and Newfoundland).

Background

Pre-Eng v. Intact

In *Pre-Eng*, a contractor was hired to do a number of renovations to a school, which included repairing a roof over the school's gymnasium. As a result of the contractor's negligent work, water leaked through the roof and onto the floor of the gym causing \$250,000 in damages and losses.

The contractor had two types of insurance: builder's risk insurance from Northbridge and commercial and general liability insurance with Intact. The two policies were intended to be complementary: Northbridge would cover anything that fell within the builder's risk policy and Intact would cover everything else.

Both insurers took the position that the other's policy covered the damages and losses caused by the contractor's negligent work therefore leaving the court to decide whether the builder's risk insurance policy covered only the part of the school that the contractor was actually working on, or the entire school. The case was decided on dual motions for summary judgment.

Dominion of Canada General Insurance Company v. Viking Fire Protection Incorporated

The facts in *Viking Fire* were not that different. In *Viking Fire*, a contractor was responsible for work on a sprinkler system for hospital renovation project. During construction, when work was almost complete, water leaked

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from the sprinkler system, causing damage to not only the new property (which was directly used in and incorporated into the construction project), but also other areas of the hospital, or what the court referred to as the “pre-existing property”.

An application was brought in the Supreme Court of Newfoundland and Labrador to determine, as a questions of law, whether the builder's risk policy of the contractor covered the damage to the pre-existing property. The applications judge held that it did. The builder's risk insurer appealed.

Conflicting Case Law from Non-Appellate Courts

Prior to the issuance of these decisions, there was conflicting case law from non-appellate courts with respect to the scope and purpose of builder's risk insurance.

For example, in *Medicine Hat College v. Starks Plumbing & Heating Ltd.*, 2007 ABQB 691 (“*Medicine Hat*”), a case involving a similar builder's risk policy to those in *Pre-Eng* and *Viking Fire*, a contractor was hired to move a gas line for the construction of an entrance to a large building. Shortly after work was completed, a faulty connection between the new and existing gas lines caused an explosion in the penthouse of the building. Notwithstanding that the contractor had not been hired to do any work in the penthouse, the Alberta Court of Queen's Bench concluded that the phrase “property in the course of construction” included the building's penthouse and as a result the damage was covered under the builder's risk policy held by the contractor.

On the other hand, the Ontario Superior Court came to the opposite conclusion in *William Osler Health Centre v. Compass Construction Resources Ltd.*, 2015 ONSC 3959 (“*Osler Health*”). In that case, a contractor was hired to renovate a kitchen in a large hospital. As a result of negligence on the part of the contractor's plumbing subcontractor, flooding occurred in many areas of the hospital giving rise to significant damages. The Court concluded that the builder's risk insurance held by the subcontractor only covered damages to the kitchen itself, not to the other areas of the hospital which had been flooded.

The Ontario Superior Court Decision

In finding in favour of Northbridge, Bawden J. of the Ontario Superior Court followed the reasoning in *Osler Health*. In his view, a narrower scope of builder's risk insurance reflects the important distinction between it and general commercial liability insurance:

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[11] A contractor may be able to do a great deal of damage to a large structure through negligence but that does not require the builder to insure the entire structure before undertaking his small task. The object of Builder's Risk insurance is to ensure that the builder has sufficient insurance to complete his work in the event of an unforeseen failure. That is what the contract between the builder and the building owner required in this case and in every other case which has been brought to my attention by counsel.

[12] As Justice Firestone observed in paragraphs 27 to 29 of *Osler Health*, it would not be commercially viable to impose an obligation on the contractor to obtain Builder's Risk insurance to cover an entire building. If the builder was required to insure the entire structure while working on only one part, (even a part as potentially hazardous as gas lines), the cost of insurance for minor contractors would become prohibitively expensive.

Bawden J. went on to find that there was no ambiguity in this particular builder's risk policy and that the words "property in course of construction, installation, renovation, reconstruction or repair" were sufficiently clear to exclude the gym floor from coverage. He noted that the gym floor was not being installed, renovated or constructed and there was no evidence to suggest that it was.

Lastly, Bawden J. indicated that he was "fortified" in his conclusion by the above-noted recent decision of the Court of Appeal of Newfoundland and Labrador in *Viking Fire*.

The Newfoundland Court of Appeal Decision

In *Viking Fire*, the Newfoundland Court of Appeal applied a three-prong test from *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, and considered the competing decisions in *Medicine Hat* and *Osler Health*.

In overturning the lower court's decision, the Court concluded that the interpretation and analysis undertaken in *Osler Health* better aligns with the law respecting the function of builder's insurance:

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[193] Having considered the conflicting authorities, and the respective analysis and conclusion in *Medicine Hat* and in *William Osler*, I am of the view that the interpretation in *William Osler* accords more directly with the functions of Builders' Risk insurance. The Court in *William Osler* also adopts an interpretation of the policy language that is consistent with the parties' reasonable expectations, and produces a realistic result that the parties would have contemplated in the commercial atmosphere in which the insurance was obtained.

For these reasons, the Court found that the onus of establishing that damage to the pre-existing property at the hospital fell within the grant of coverage provided under the builder's risk policy had not been met.

Key Takeaways

It appears that the conflicting Canadian case law over the scope of builder's risk insurance policies is close to being resolved. We now have appellate authority from Newfoundland, as well as two decisions in Ontario which suggest that the scope of such policies is to be more narrowly construed than what has been interpreted in Alberta. This will undoubtedly provide greater certainty for insurers and their counsel when it comes to assessing coverage under such policies, at least in the provinces of Ontario and Newfoundland.

