

Manitoba Court of Appeal Considers Builder's Risk Insurance in 'Sher-Bett Construction'

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Builder's risk insurance (also known as course of construction insurance) provides first-party (i.e. property) coverage for losses that occur during the course of a construction project. Even though they are common on large projects, the coverage provided under these policies is often misunderstood.



The recent decision of the Manitoba Court of Appeal in *Sher-Bett Construction (Manitoba) Inc. v The Co-operators General Insurance Company*, 2021 MBCA 10 (*Sher-Bett*) provides a useful example of coverage issues that can arise under a builder's risk policy.

In *Sher-Bett*, the builder's risk policy insured against "all risks of direct physical loss of or damage to the Insured Property" but excluded loss or damage "caused directly or indirectly...by frost or freezing...unless caused directly by a peril not otherwise excluded in this Form" (the "Freezing Exclusion").

Sher-Bett involved damage to a freshly poured concrete floor. In late December 2016, the general contractor noticed that the new concrete floor was becoming icy. The contractor applied a chemical de-icer to prevent slipping. Unfortunately, the contractor did not notice a warning which stipulated that the product was not to be used on concrete floors less than one year old.

A few days later, the contractor noticed surface damage where the de-icer was spread. Although the contractor tried to remove the product using snow and windshield washer fluid, these efforts were unsuccessful. The floor was seriously damaged and needed to be replaced. A claim was made to the insurer for the damage to the concrete floor.

The insurer denied the claim and argued that the damage was caused "directly or indirectly...by freezing".

The insurer's argument was successful at trial. The trial judge concluded that the damage was caused by "freeze/thaw cycles" and that the loss was therefore excluded by the Freezing Exclusion.

The contractor appealed this decision to the Manitoba Court of Appeal.

The Court of Appeal found there were actually two “concurrent, interdependent causes of the damage to the floor: freezing[] and the application of the de-icer”. These causes “came together to cause the loss where each on its own would not have done so”.

Applying a legal doctrine known as proximate cause, the Court of Appeal concluded that the damage was “caused directly” by the application of the de-icer. In other words, the application of the de-icer was “an effective or dominant cause” of the damage.

Note that the Freezing Exclusion contains an exception for loss or damage “caused directly by a peril not otherwise excluded”. Since the policy did not contain a specific exclusion for the application of a de-icer, the exception to the Freezing Exclusion was engaged.

In the end, the Court of Appeal overturned the trial judge’s decision and found that there was coverage under the policy for the removal and replacement of the damaged concrete floor.

The *Sher-Bett* case provides an interesting illustration of the coverage disputes that can arise from property losses during construction. Complex losses often require a detailed causation analysis in order to determine whether coverage applies.

It is noteworthy that in *Sher-Bett*, the insurer conceded that a common policy exclusion that excludes the cost of making good “faulty or improper workmanship” but covers “resulting damage” did not apply. This decision therefore does not touch on this frequently litigated issue.

If you are an owner, contractor or subcontractor who has questions or concerns about construction insurance coverage, do not hesitate to contact **the TDS Construction Law Group**.

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