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CONSTRUCTION LAW—2007 UPDATE
PAPER 3.2

Liability Insurance Issues in Construction Practice

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LIABILITY INSURANCE ISSUES IN CONSTRUCTION PRACTICE

I. Are General Contractors Covered under Comprehensive General Liability Policies for Damage to the Building That They Contracted to Construct?

Comprehensive general liability policies ("CGL policies") provide certain coverage to general contractors and trades or subcontractors working on a project.

From the general contractor's perspective, CGL policies often include a duty upon the insurer to defend the insured general contractor in the event of a suit commenced against the insured to pay compensatory damages because of property damage caused by accident; and to indemnify the insured in the event of successful damages recovery by the plaintiff.[1]

However, it is important to consider the scope and extent of such insurance coverage in order to determine whether the general contractor ought to take additional measures to protect against potential liability.[2] This is of particular importance for a general contractor whose exposure may be joint and several with each trade and professional working on the project.

Of most importance, the current state of the law in BC suggest that insurance coverage under CGL policies typically does not extend to a general contactor in relation to defects in the very project that the general contractor builds. However, given the wide variance in policy wording, coupled with the nuances of the facts of any action commenced against the general contractor, it is necessary to carefully consider the wording of the particular insurance policy before determining whether coverage extends.

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1 This is, of course, a general CGL policy provision which will apply to any insured under such policies.

2 CMHC provides an excellent summary of the many types of insurance available for those involved in the construction industry in a Research Paper titled: "Variability in Construction Insurance and Alternative Insurance Solutions" (November 2004) (available at www.cmhc.ca).

In order to determine whether coverage extends, keep in mind the commercial reality of CGL policies or the general principle underlying such policies. This general underlying principle is expressed by the BC Supreme Court in *Privest Properties Ltd. v. Foundation Co. of Canada. Ltd.* (1991), 57 B.C.L.R. (2d) 88, 6 C.C.L.I. (2d), as follows:

> Comprehensive general liability policies ... are intended to protect the insured from liability for injury or damage to the persons or property of others; they are not intended to pay the costs associated with repairing or replacing the insured's defective work and products ...

From a layman's perspective, a general contractor's "work and products" would certainly consist of the very project that has been constructed.

The BC Supreme Court considered standard modern CGLpolicy terms in the recent BC Supreme Court decision in *Swagger Construction Ltd. v. ING Insurance Company of Canada*, 2005 BCSC 1269. In its decision, the Court provided well reasoned support for the notion that the general contractor was not covered by the CGL policies at issue in that case. The insured general contractor abandoned its appeal of the judgment. However, other general contractors in other cases are now suing seeking to undercut the decision in *Swagger*.

In *Swagger*, the general contractor of a project at UBC was engaged in litigation with the University concerning construction deficiencies and defects, and water ingress into the structure allegedly caused by those deficiencies and defects. The general contractor requested coverage under its CGL policies for defence of the underlying action. The insurers refused to provide coverage, and the general contractor sued to compel coverage.

The coverage clauses in each policy at issue differed slightly, but were found to be materially the same. For example, the policy issued by one of the insurers contained the following relevant clauses (all of which are often found in various incarnations of CGL policies):

- We will pay those sums that the insured becomes legally obligated to pay as compensatory damages because of "bodily injury" or "property damage";
- "Property damage" must be caused by an "occurrence";
- "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions;
- "Property damage" means:
    a. Physical injury to tangible property, including all resulting loss of use of that property, or
    b. Loss of use of tangible property that is not physically injured.

The Court in *Swagger* concluded that the underlying action against the insured general contractor did not allege "property damage" as that term was defined. While the building the insured had contracted to build allegedly contained defects that cascaded one to the other by allowing water to enter the structure, in and of itself this did not constitute "physical injury to tangible property."

In this regard, the Court divided the allegations in the underlying action into three compartments, none of which (the Court held) alleged "physical injury to tangible property":

(i) the costs of repairing particular work which was allegedly defective;

(ii) the costs of repairing work damaged by the other allegedly defective work; and

(iii) the costs associated with the loss of use of the project.

The insured did not put up a fight in relation to the first point, presumably because of well established law holding that the cost to repair the particular work allegedly defective is not covered by the terms

of even the most generously worded CGL policy. In this regard the BC Court of Appeal held in *Harbour Machine Ltd. v. Guardian Insurance Company of Canada*, [1985] B.C.J. No. 2876 (C.A.) that the mere presence of a defective product in an otherwise sound structure does not, in itself, constitute damage to the property.

The general contractor instead focused its energy on points (ii) and (iii). In order to argue that the costs of repairing work damaged by the other allegedly defective work constituted "property damage," the general contractor claimed that a building can be subdivided into its component parts. The general contractor then argued that some allegedly defective parts had allegedly damaged other non-defective parts, thus constituting "property damage" under the CGL policies.

The Court rejected this proposition. Citing *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, 121 D.L.R. (4th) 193, [1995] S.C.J. 13, the Court held that it is improper to artificially divide a single structure into its component parts. In *Winnipeg Condominium*, the Court labeled such an artificial division, the "complex structure theory." While *Winnipeg Condominium* was a tort case, in its companion insurance action, the Manitoba Court of Appeal held that such an artificial division is also improper in the insurance context (*Bird Construction Co. v. Allstate Insurance Co. of Canada*, [1996] 7 W.W.R. 609 (M.B.C.A.)). Of course, the terms of the Policy at issue must act as the guide as parties would be free to contract around such a proposition. However, in *Swagger*, the Court scrutinized the policy terms (which were typical CGL policies) and found that he could not avoid *Bird Construction* and *Winnipeg Condominium*.

Following the logic of *Winnipeg Condominium*, the Court then found that any "property damage" claim was really a claim for "pure economic loss," and not a claim for "physical injury to tangible property," which was a prerequisite to coverage under the CGL policies. The loss was a "pure economic loss" because it concerned remediation of a defective product or work, rather than physical injury to tangible property.

To support this proposition, the Court cited the following statement from *Privest Properties Ltd. v. Foundation Co. of Canada. Ltd.* (1991), 57 B.C.L.R. (2d) 88, which is the leading BC case on duty to defend:

> So far as Canadian law is concerned, it seems clear that unless there has actually been personal injury or damage to other property, the cost of repairing or replacing defective work is considered to be pure economic loss rather than damage to property: *Rivtow Marine Ltd. v. Washington Iron Works*, [1974] S.C.R. 1189.

The Court also noted that to trigger coverage there must be an "accident." However, in the underlying action the general contractor had been sued for breach of contract, and any claims for breach of duty of care were purely derivative of such breach of contract claim. In the circumstances, the Court concluded that there was no "accident," another prerequisite for a finding of coverage.

In this regard, the Court was bound by BC appellate precedent (*Harbour Machine Ltd. v. Guardian Insurance Company of Canada* (1985), 60 B.C.L.R. 360 (C.A.)). In *Harbour Machine*, the insured improperly installed engines in the defendant's boat. The substantial bulk of the claim related to remediation of the defective work. Additionally, severe vibrations resulting from the defective work caused one of the boat's propellers to fall off. The Court of Appeal held as follows:

> Essentially, the cost of remedying the defect arose out of the faulty planning and design of the installation and the poor workmanship in carrying it out. Apart from the minor matter of the propeller, there was nothing which could constitute a mishap or occurrence, the event of which must happen before there can be said to be either an accident or an occurrence.

After determining that the underlying action against Swagger failed to allege physical injury to tangible property, and that the pleadings did not disclose an "accident" or "occurrence," the Court considered the third grouping of allegations: the costs associated with the loss of use of the Project.

The Court found that this category added nothing to the analysis, and that it therefore stood or fell with the second category. The only allegation akin to loss of use was that the building was unfit for the intended purpose. Giving the pleadings their "broadest possible interpretation," the Court found that the pleadings included "[22(f)] a claim that as a result of the construction deficiencies, resultant damage and dangerous defects, UBC has suffered a loss of use of the property." The Court held as follows:

> In the context of these pleadings, the third category of damage referred to by Swagger, loss of use, adds nothing to the analysis. The only allegation against Swagger that can be interpreted as one for loss of use is the paragraph alleging the building was rendered unfit for its intended purpose. This relates to the Forest Science Centre itself, not to any different, undamaged property. Therefore, the relevant section of the policy is the portion that refers to loss of use of the property damaged. Accordingly, the third category of damages must stand or fall with the second.

In summary, as the law presently stands in BC, a general contractor is typically precluded from recovering from its insurer in relation to damage to the very building constructed by the general contractor. In *Swagger* the Court refused to find coverage because the defective building represented a pure economic loss, which does not constitute "physical injury to tangible property" (wording used in the CGL policies at issue in *Swagger*). The Court also found that the building did not become defective or damaged due to accident. The cost of remedying the defect arose out of the faulty planning, design, installation and poor workmanship and therefore did not constitute an accident.

While in our view the reasoning in *Swagger* is sound, a different approach has been taken by other courts. For example, the Court of Appeal in Ontario recently released a decision which in some ways may be at odds with *Swagger*: *Bridgewood v. Lombard*, [2006] O.J. No. 1288 (C.A.) (leave to appeal to the S.C.C. refused). Yet the *Bridgewood* decision is problematic. First, the Court failed to address the earlier *Swagger* decision. As well, it looked to an exception to certain exclusion clauses to read coverage into the Policy despite the fact that there was arguably no initial grant of coverage.

This area of the law is developing, and we do expect the courts of this Province to further expand and elaborate upon the issues. Similar developments are presently occurring rapidly in the US. Unfortunately, there is presently a lack of uniformity in the US. This has prompted at least one American commentator to encourage the US Supreme Court to consider the issue (L. Friedlander, "Construction Defect Litigation: Courts Fragmented Rationales Regarding Coverage for Contractors Faulty Workmanship," 11 Suffolk J. Trial & App. Adv. 119 (2006) at 136 to 137):

> Given the difference in courts' rationales throughout the country, it is time for the United States Supreme Court to consider this issue so that contractors will be able to better understand what their CGL policy covers.

The Supreme Court of Canada refused leave to appeal in *Bridegwood*. However, once the law of the various provinces develops further, and perhaps continues to diverge, such an appeal will may well be granted.

II. What Is a Non-Waiver Agreement, and Should I Sign One?

A. What Is a Non-Waiver Agreement?

Non-Waiver Agreements have a lengthy history in the Canadian insurance context. The first reference we discovered in Supreme Court of Canada jurisprudence is found in *National Benefit Life and Property Assurance Co. v. McCoy* (1918), 57 S.C.R. 29 (appeal from the BC Court of Appeal). That case concerned a first party property policy. In dismissing the appeal, Davies J. pointed out that:

> Immediately after the fire adjustment of the loss was placed by both companies in the hands of one McKenzie; but subsequently the adjustment was taken from him and placed in the hands of one Shallcross, another adjuster, *who took from respondent a 'non-waiver,' agreement* providing that any action taken by the company appellant in investigating the cause of the fire or the amount of the loss and damage to the property should not waive or invalidate any of the conditions of the policy.
>
> The trial judge found that the company was protected by the non-waiver agreement while Shallcross was acting as adjuster and settling the amount of the loss.

For its part, the BC Court of Appeal held that as to the adjuster's acts as an adjuster the defendant insurer was protected by the non-waiver agreement, but when the adjuster entered into negotiations outside his duties as an adjuster, that operated as a waiver of the eighth statutory condition and was not a protected act under the terms of the non-waiver agreement.

Non-Waiver Agreements have particular importance in the context of coverage under comprehensive general liability policies ("CGL policies"). Often it is difficult to determine whether insurance coverage extends under a CGL policy in any particular case. This problem arises because of subtle differences in wording from policy to policy; the undeveloped nature of the law on many key insurance issues, and divergent court decisions on the very same issue. The latter point is illustrated in the American context where either party can readily find an insurance decision supporting its position.

Despite the unpredictable insurance coverage environment, when a construction contractor or subcontractor is sued, and seeks a defence from its insurer under the liability provisions of its CGL Policy, the insurer is often forced to make a snap decision on coverage. This need arises because of the potential for default judgment or other steps in the litigation which may prejudice the insured contractor or the insurer.

From the contractor's perspective, litigation decisions may depend upon the insurer's denial or acceptance of coverage. If coverage is denied, the contractor will need to move quickly to retain counsel, investigate the claim, or otherwise take steps to protect its position in the litigation. If coverage is granted, these tasks will fall upon the insurer.

In order to avoid hasty decision making, many insurance companies request that the insured contractor enter into a Non-Waiver Agreement with the insurer. Such an agreement effectively puts off any potential coverage dispute to another day. Under the agreement, the insurer will typically agree to fund all or part of the defence without waiving any of the rights that it has under the insurance policies (such as a right to later deny coverage, and to refuse to indemnify the insured). We attach a sample Non-Waiver Agreement with this paper.

B. Should I Enter a Non-Waiver Agreement?

The short answer is "yes." The reasons relate to the potential costs which may flow from a refusal to enter into such agreement, and the fact that such agreements do not prejudice the insured—they simply set up a potential coverage battle for another day.

An insurer may be reluctant to accept defence obligations without a non-waiver agreement. This is because insureds sometimes argue, albeit often without success, that an insurer is estopped or otherwise barred from subsequently denying coverage after it took steps to investigate or defend the action brought against the insured.

One example of an unsuccessful attempt to raise this estoppel argument is found in *Alpine Florist & Food Market Ltd. v. Axa Pacific Insurance*, 2004 BCSC 1731. In that case, the insurer, Axa, did not enter into a non-waiver agreement with the insured or otherwise reserve its rights. However, the Court found that it was clear to the parties that Axa had questions about whether coverage applied. As well, the claim was one for breach of contract, and the Court found that the insured knew or ought to have known that a contract claim was not the subject of coverage. Therefore, Axa was not estopped from

denying coverage. It never represented to the insured that complete insurance coverage existed. As well, there was no evidence that the insured had acted to its detriment.

While the insurer may well avoid the estoppel trap without securing a Non-Waiver Agreement, there is a real risk that the trap door will open. As a result, without a Non-Waiver Agreement, and given the exigencies of time, some insurers may simply deny coverage rather than face allegations of estoppel further down the road.

If the insurer does deny coverage on this basis, the insured may find itself faced with the costs of retaining a lawyer until it can successfully convince the insurer to grant coverage, or succeed in a coverage suit against the insurer (albeit those costs may be recoverable in whole or part if the insured subsequently proves that coverage exists).

These costs can be avoided by entering into a Non-Waiver Agreement and putting the coverage dispute off for another day (if ever). With such an agreement in place the insurer will not run the risk of a waiver or estoppel argument, and the insured will obtain coverage unless and until the insurer seeks to exercise its rights to avoid coverage under the Non-Waiver Agreement. Additionally, the insured does not lose anything by entering the Non-Waiver Agreement given that it merely entitles the insurer to exercise all the rights that it has at law and under the insurance contract despite steps taken that might otherwise be construed as a waiver of those rights.

III. Am I Sufficiently Protected if I Am Covered by a Wrap-Up Policy of Insurance?

Contractors, subcontractors and even professionals working on a development project might wrongly believe that a wrap-up policy of insurance secured by the developer is sufficient to cover them for their potential liability.

Wrap-up policies often follow the wording typical of comprehensive general liability policies of insurance ("CGL policies"), expanded to include, as insureds, everyone working on a specific project for liability flowing from that project, and modified to limit coverage to this otherwise large group of individuals. The wrap-up policy may be an entirely distinct stand-alone policy, or it may be created by endorsement appended to a CGL policy already held by a developer.

A typical wrap-up endorsement appended to and therefore incorporating the terms of a CGL policy may read as follows:

> WRAP-UP ENDORSEMENT – PART I
>
> WHO IS AN INSURED (SECTION 1) IS AMENDED TO INCLUDE AS AN INSURED ALL CONTRACTORS, SUBCONTRACTORS, CONSULTING ARCHITECTS AND ENGINEERS BUT ONLY WITH RESPECT TO LIABILITY ARISING DIRECTLY OUT OF THE CONSTRUCTION OPERATIONS IN CONNECTION WITH THE INSURED PROJECT.
>
> THIS INSURANCE DOES NOT APPLY TO ANY SUPPLIERS OF MATERIALS OR PROPERTY WHO ARE NOT OBLIGED UNDER THEIR CONTRACT TO PERFORM CONSTRUCTION OR INSTALLATION OPERATIONS AT THE CONTRACT SITE.
>
> LIMITATION OF COVERAGE TO INSURED PROJECT
>
> THIS INSURANCE APPLIES ONLY TO THE CONSTRUCTION PROJECT AS DETAILED IN THE DECLARATIONS.

EXCLUSION – DAMAGE TO INSURED PROJECT

THIS INSURANCE DOES NOT APPLY TO "PROPERTY-DAMAGE" TO THE INSURED PROJECT REFERRED TO IN THE DECLARATIONS.

EXCLUSION – ERRORS & OMISSIONS

THIS INSURANCE DOES NOT APPLY TO "BODILY INJURY", "PROPERTY DAMAGE" OR "PERSONAL INJURY" ARISING OUT OF

1. (A) THE PREPARING, APPROVING, OR FAILING TO PREPARE OR APPROVE MAPS, DRAWINGS, OPINIONS, REPORTS, SURVEYS, CHANGE ORDERS, DESIGNS OR SPECIFICATIONS; AND

   (B) SUPERVISORY, INSPECTION, OR ENGINEERING SERVICES OF ENGINEERS, ARCHITECTS AND SURVEYORS.

POLICY PERIOD

24 MONTHS PRODUCTS/COMPLETED OPERATIONS

[OR 12 MONTHS PRODUCTS COMPLETED OPERATIONS]

IT IS HEREBY UNDERSTOOD AND AGREED THAT THE POLICY PERIOD IS DEFINED AS FOLLOWS:

INCEPTION DATE: AS STATED IN THE DECLARATIONS

THE TERMINATION DATE SHALL BE THE EARLIER OF: THE DATE SHOWN IN ITEM X OF THE DECLARATIONS OR THE DATE THE PROJECT IS PHYSICALLY COMPLETED AND ACCEPTED BY OR ON BEHALF OF THE OWNER BUT IN ANY EVENT NO LATER THAN THE DATE SHOWN ON ITEM NO. 2 OF THE DECLARATIONS.

AS RESPECTS THE "PRODUCTS-COMPLETED OPERATIONS HAZARD", THE POLICY SHALL CONTINUE TO APPLY FOR A PERIOD OF 24 MONTHS [OR 12 MONTHS] FOLLOWING THE TERMINATION DATE WHICH IS THE EARLIER OF: EXPIRY DATE SHOWN ON ITEM X OF THE DECLARATIONS OR THE DATE THE PROJECT IS PHYSICALLY COMPLETED AND ACCEPTED BY OR ON BEHALF OF THE OWNER BUT IN ANY EVENT NO LATER THAN THE DATE SHOWN ON ITEM NO. X OF THE DECLARATIONS.

A careful reading of the above wrap-up endorsement reveals many of the limitations and qualifications typical of most wrap-up policies.

The first limitation concerns the temporal period of wrap-up policy coverage. The wrap-up policy applies only to accidents which occur during the period which runs from a defined date to a point in time which is usually either 12 months or 24 months following the date of substantial completion. Accidents occurring after that date are not covered by the wrap-up endorsement.

This temporal limitation may have important repercussions for the scope of available coverage in cases of ongoing damage, such as the leaky condominiums. In such cases the "accident" or "occurrence" can run for many years. Usually "accident" or "occurrence" is defined in CGL Policies to include continuous or repeated exposure to substantially the same conditions, hence the notion of a long tail occurrence proceeding beyond the 12 or 24 month coverage period.

As a result, a party involved in a construction project may believe it is insured under a wrap-up and fail to secure its own CGL policy, particularly for the years beyond the 12 or 24 month completed

operations period. This may result in a large coverage gap where the occurrence proceeds beyond the covered one or two years.

For example, if water ingress into a project occurs for a period of 10 years, and the wrap-up contains a 12 month completed operations period, the insured will likely recover at most only 10% of any legal defence costs and indemnity payments from the wrap-up insurer (see, for example, *Surrey (District) v. General Accident*, [1996] B.C.J. No. 849 (C.A) in which the insurer was only responsible to indemnify the insured in relation damages occurring within the policy period).

A second issue concerns the interplay between the wrap-up policy and a subtrade or contractor's own CGL policy. The contractor or trade working on the project may believe that the wrap-up policy provides primary coverage, and fail to report a claim to their primary CGL carrier.

In fact, both the wrap-up policy and CGL policy often include language which purports to make the policy excess over other policies that apply to a given claim. As a result, the "excess" provisions cancel each other out, and both insurers are responsible to cover those years during which they both provided coverage (50% allocated to each insurer).

The wrap-up policy also appears, at least at first blush, to extend coverage to everyone who worked on a project: "all contractors, subcontractors, consulting architects and engineers." However, an important qualification appears in relation to consulting architects and engineers, and most other "professional" activities.

In particular, the wrap-up policy will usually contain the exclusion clauses set out in the example form above. As noted above, coverage is precluded in relation to liability arising from "the preparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications" and for "supervisory, inspection, or engineering services of engineers, architects and surveyors."

As a result of this important exclusion, architects and engineers should ensure that they have necessary professional liability insurance in place before providing professional services. The wrap-up policy will not afford coverage to these professionals in relation to their typical construction project functions.

Finally, the wrap-up policy will often simply extend certain CGL policy coverages to various parties involved in a construction project. As such, it is necessary to also consider the coverage and exclusion clauses in the CGL policy proper. Of importance, it is necessary to keep in mind the notion that generally CGL policies (and therefore wrap-up policies) are not "performance bonds" (subject, of course, to the terms of the particular CGL policy under consideration). Do not simply rely upon a CGL policy to afford such coverage.[3]

IV. How Has Liability Insurance Changed in Light of the "Leaky Condo" Crisis?

The liability insurance landscape has changed as a result of the "leaky condo" crisis. With the costly litigation flowing from litigation arising from these leaky condos, the insurance industry has responded. In particular, the wording of some policies has been modified to exclude coverage for water ingress claims. Other policies have simply increased premiums to cover the increased risk of such losses.

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3 CMHC provides an excellent summary of the many types of insurance available for those involved in the construction industry in a Research Paper titled: "Variability in Construction Insurance and Alternative Insurance Solutions" (November 2004) (available at www.cmhc.ca).

In the context of "occurrence" based policies, such as standard comprehensive general liability policies, the effects of certain industry policy amendments are just now beginning to be felt.[4] This is because most of the "occurrences" happened during a time when the policies did not yet contain relevant exclusion clauses, and, as a result, the earlier policies continue to respond.

Most professional liability policies contain similar water ingress exclusion clauses. However, their impact has been felt for a number of years given that the typical professional liability policy is written on a "claims made" basis (i.e., the policy that responds is the one in force at the time the claim is made).

The so-called "Water Ingress Exclusion" used by some insurance companies varies. Following, we set out one example:

> THE LIABILITY INSURANCE PROVIDED BY THIS POLICY DOES NOT APPLY TO BODILY INJURY OR PROPERTY DAMAGE DIRECTLY OR INDIRECTLY ARISING OUT OF "BUILDING ENVELOPE" FAILURE OR WATER INGRESS INTO BUILDINGS BUT THIS EXCLUSION DOES NOT APPLY IN RESPECT OF BUILDINGS WHICH HAVE HAD A "RAINSCREEN ASSEMBLY" INCORPORATED INTO THE CONSTRUCTION.
>
> "BUILDING ENVELOPE" INCLUDES ALL OR ANY COMPONENTS OF A BUILDING THAT SEPARATE THE INTERIOR SPACE FROM THE OUTSIDE ELEMENTS INCLUDING, BUT NOT LIMITED TO, EXTERIOR WALLS, WINDOWS, DOORS, ROOFS, DECKS, AND FOUNDATIONS.
>
> "RAINSCREEN ASSEMBLY" MEANS A CONSTRUCTION TECHNIQUE WHICH ELIMINATES WATER PENETRATION INTO A BUILDING BY DEFLECTING MOST OF THE WATER AT THE EXTERIOR CLADDING AND INCORPORATING A CAVITY BEHIND THE EXTERIOR WALLS WHICH, BY WAY OF GRAVITY AND WITH THE AID OF FLASHINGS ENSURES THE DRAINAGE TO THE EXTERIOR OF ANY INCIDENTAL WATER THAT PENETRATES PAST THE CLADDING.

It is important to consider whether the policy acquired by your client contains a water-ingress or similar exclusion. If so, depending upon the insured's area of business, it may be useful to shop for alternative insurance. However, such insurance is not always available, or may be too expensive for your client to purchase.

This leads to another issue, which flows from the high cost and availability of insurance. When the purchase of traditional insurance becomes uneconomic, non-traditional alternative program structures might be considered. Such non-traditional programs include various forms of captive insurance companies either controlled by one company of a group of companies engaged in a common purpose.

A detailed discussion of this topic is found in a research report prepared by Marsh for CMHC titled: "Variability in Construction Insurance and Alternative Insurance Solutions" (November 2004) (available at www.cmhc.ca). In the report, CMHC explains (at 15) that:

> Captives are often viewed as the privilege of the large organization, an option available and viable only for the largest Canadian corporations. This is a misconception. In fact, there are a variety of captive configurations. The single parent captive is best suited to larger organizations ($500,000 of insurance premiums or greater), but there are also group captives and rent-a-captives available to mid-size

4 Occurrence based policies respond to accidents which occurred during the period of coverage afforded by the policy, regardless of when lawsuit commenced against the insured. The accident is normally defined in the policy to include continuous and repeated exposure to conditions which result in property damage.

($250,000 of insurance premiums to $499,000 of insurance premiums) and small organizations (less than $250,000 of insurance premiums)

Continuing, the CMHC report stresses the need to "obtain legal and accounting advice, as well as undertake a proper feasibility study before determining the appropriateness of any non-traditional insurance program as costs vary by company, jurisdiction, purpose, insurance coverage, and other variable factors." This area falls well beyond the scope of this short paper. However, the CMHC report (which runs on for 228 pages) provides a very helpful overview of the costs and benefits of non-traditional insurance, and should be studied closely before advising clients on this growth area.

V. Appendix—Example Non-Waiver Agreement

WHEREAS:

A. The Insurer has issued a certain policy of insurance bearing policy number X to the Insured (the "Policy").

B. The Plaintiffs, ____ have commenced action number ___ in the Vancouver Registry of the Supreme Court of British Columbia (the "Action") alleging that certain damages, expenses, injuries, or losses (the "Claims") have been incurred at a condominium development known as "P" and located at _____.

C. The Insurer may have grounds to void the Policy or to deny defence coverage for the Action or any indemnity under the Policy for the Claims by reason of:

   (a) breaches of the terms and conditions of the Policy;

   (b) certain misrepresentations or failure to disclose material information;

   (c) a failure to provide notice of the Claims in a timely fashion;

   (d) some or all of the Claims being of a type either excluded from or not falling within the scope of coverage afforded by the Policy; or

   (e) such other grounds as may presently exist or as may be hereafter discovered; and

D. The Insurer, its employees, adjusters, lawyers and other agents have experience in investigating, evaluating, defending and settling claims and losses of the sort referred to above and the Insured wishes to take advantage of such experience while at the same time permitting the Insurer to reserve all rights it may have respecting the coverage matters referred to above;

NOW THEREFORE THIS DEED WITNESSES that in consideration of the Insurer postponing its decision to void the Policy, deny defence coverage, or deny indemnity, and also in consideration of the matters set forth in paragraph 1 hereof, the Insured agrees with the Insurer as follows:

MANAGEMENT OF CLAIMS AND LOSSES

1. The Insurer will or will continue to:

   (a) investigate the Claims;

   (b) defend the Action in the name of the Insured (or as otherwise required),

   (c) negotiate, settle, and pay the Claims or any settlements and judgments arising therefrom,

   all as the Insurer in its sole discretion deems necessary or appropriate.

2. If the Insurer appoints legal counsel (the "Defence Counsel") to represent the Insured in the Action, the Insured agrees that:

   (a) the retainer of Defence Counsel shall be limited to the representation of the Insured in the Action;

   (b) the Defence Counsel shall not advise either the Insurer or the Insured with respect to any coverage issues arising from the matters set forth in paragraph C of the Recital;

(c) all information received by Defence Counsel from either the Insurer or the Insured will not be treated as confidential from and will be available to both the Insurer and the Insured; and

(d) both the Insured and the Insurer shall be at liberty to retain their own separate legal counsel, at their own expense, to provide advice or representation as required with respect to any coverage issues.

3. The Insurer may at any time withdraw from any further involvement in any of the matters referred to in paragraph 1 hereof and in such event this Agreement shall nevertheless continue to be in full force and effect.

4. The Insurer may at any time seek a declaration that other insurers are responsible in whole or in part for the defence of the Action, or for payment of any amounts required to be paid in respect of the Claims.

5. The Insured will provide all reasonable cooperation and assistance to the Insurer and its representatives in carrying out the various matters contemplated in paragraphs 1 and 4 hereof, including the provision of all information, documents and policies necessary to allow the Insurer to seek a declaration under paragraph 4 hereof.

REIMBURSEMENT BY INSURED

1. In the event that the Insurer establishes that it was or is entitled to void the Policy or to deny all or part of the defence coverage or indemnity thereunder for the Claims by reason of the matters set forth in paragraph C of the Recital, then upon demand, the Insured will repay to the Insurer all reasonable amounts paid by the Insurer in connection with any of the matters set forth in paragraph 1 hereof.

NON-WAIVER

1. Neither the making of this Agreement nor anything done before or after the same by or on behalf of the Insurer shall:

(a) prevent or estop the Insurer from hereafter denying defence coverage or indemnity thereunder for the Claims in whole or in part, or from seeking reimbursement from the Insured; or

(b) constitute either

(i) an affirmation of the Policy or coverages thereunder, or

(ii) a waiver of any right by the Insurer to void the Policy or to deny coverage or indemnity thereunder or to seek reimbursement from the Insured,

and in the event of any action or other proceedings between the Insurer and the Insured, the Insured will,

(iii) neither plead nor claim such estoppel, affirmation or waiver;

(iv) admit that no such estoppel, affirmation or waiver has occurred.

EXECUTION OF AGREEMENT

1. The Insured also acknowledges that,
   (a) in making this agreement, has not been influenced to any extent whatsoever by any representations, statements or conduct of any description on the part of the Insurer or anyone on its behalf;
   (b) it has carefully read this Agreement and fully understands the terms and conditions; and
   (c) before executing this Agreement, either has obtained or has been given the opportunity to obtain independent legal counsel regarding this Agreement and all matters referred to herein or related thereto.

ENTIRE AGREEMENT

1. This Agreement and the Policy constitute the entire agreement between the Insured and the Insurer respecting the matters set forth herein and there are no oral statements, representations, warranties, undertakings or collateral agreements between the Insured and the Insurer modifying or affecting the terms hereof.

SIGNED -