

***MDS v Factory Mutual* case suggests courts might allow claims for COVID-19 business-interruption coverage under property insurance policies**

By Robert Martz and Paul Beke

A question frequently arises as to whether property insurance policies will cover business-interruption losses arising from COVID-19. Often those policies cover losses from *all risk* (not merely listed risks) of direct physical damage or loss to insured property. As such, the key question will be whether COVID-19 has caused *physical* damage.

Actual contamination of a building with the COVID-19 virus is likely to constitute physical contamination, so insurance will likely often cover the business interruption until your business has been able to clean up the contamination. Whether coverage will extend beyond that will depend on how broad your policy is. In order to determine that, it is important to preserve your rights by getting timely legal advice, and making an insurance claim by the applicable deadline.

Early indications are that COVID-19 contamination qualifies as *physical* damage or loss

Courts have typically focussed on perceptible damage in their definition of "physical damage or loss". In doing so, courts have sometimes defined physical damage as "alteration in the appearance, shape, colour or other material dimension of the property insured."¹ But note that contamination through microscopic or subatomic changes is also a change of "material dimension". So if a person infected with COVID-19 had been in a building, then (until disinfected) the building would likely be (1) physically altered by the physical presence of a contaminant, and (2) thus, physically damaged.

Current Alberta (and Canadian) case law on contaminated buildings is sparse. However, analogous cases from other Canadian jurisdictions indicate that contamination by fumes² or radioactivity qualifies as *physical* damage or loss and should be applicable to COVID-19 contamination.

In the case of radioactive contamination, a 2020 decision of the Ontario Superior Court of Justice—*MDS Inc v Factory Mutual Insurance Company (FM Global) [MDS v Factory]*³—offers some comfort to businesses that contamination will qualify as physical damage. That case involved a leak of radioactive heavy water inside a nuclear reactor due to unanticipated corrosion. In turn, some radioactivity was venting into the air. The Canadian Nuclear Safety Committee shut down the reactor during a 15-month investigation and repair of the leak, along with more general unanticipated corrosion. According to the Court, the insurance policy didn't cover anticipated corrosion, but did cover physical damage resulting from corrosion.

MDS v Factory involved unique circumstances and a unique and complex insurance policy. Further, the decision turned on many specific interpretative issues including whether certain terms were ambiguous, and therefore, would favour the insured party. (Indeed, the Court held that that the corrosion exclusion didn't apply in the most literal way, because of ambiguity). Despite the particularities of the decision, it is important because of the way it treated the radioactive heavy water and radioactive air.

The Court considered the presence of radioactive heavy water and air where they didn't belong as constituting physical damage. The Court did so, even though the contamination ceased after the shut-down, and the investigation and repair process was lengthy. The Court focused on the commercial purpose of all-risks property insurance to provide broad coverage. The Court regarded not only the contamination, but also the unsafe and unusable state of the reactor as qualifying as physical damage.

Business interruption might extend beyond the period of actual contamination

The trial judge's decision suggests that courts may look for ways for insurance to cover a business interruption, even after the business has cleaned up the contamination, particularly if the contamination led to a closure order.

Mere risk or fear of contamination likely won't qualify as physical damage or loss

Physical damage or loss is not the same as loss of use of a building when no physical damage has yet happened. All-risk property insurance should cover a building that is uninhabitable, because of actual contamination. But a building that is uninhabitable only in the sense of being subject to the risk or fear of contamination will very likely not be covered. However, coverage could apply if the contamination has not yet happened, if it is inevitable and imminent.⁴

Beware that your insurance policy wording could exclude specific contaminants

Your insurance coverage will depend on your circumstances, and the language of your specific policy, including any exclusion clauses. For example, if your policy contains a pollution clause, it may exclude coverage of listed contaminants.

Aside from actual contamination, wording in your policy could also cover non-physical risks

Your business may have purchased extensions to the basic coverage of physical damage. For example, your policy may include extension clauses covering business-interruption losses caused by:

- orders of civil authorities; or
- business interruptions on the premises of suppliers or customers, due to physical damage or loss there—such an extension existed in *MDS v Factory*.

Make timely insurance claims after review of your specific policy, and keep careful records

With densely worded coverage clauses, exclusions and extensions, each property insurance policy requires careful and detailed legal interpretation, and consideration of the circumstances of business interruption. You shouldn't rule out insurance coverage for business interruption during this pandemic without thorough legal analysis. Your focus should be on the deadline for making insurance claims. You may have an arguable claim, and you need to preserve it. Also carefully keep records on your circumstances, and your efforts to reduce your business-interruption losses. You will need supporting records during the claims process and for any resulting litigation.

Conclusion

Insurers will be under pressure because of the pandemic. In response, they will often deny property claims on the ground that damage wasn't physical, or other technical grounds. You may need to promptly sue to get the coverage that courts may think you paid for.

This bulletin is general information only, not legal advice. If you have any questions please contact any member of our [Litigation Group](#).

¹ *Acciona Infrastructure Canada Inc v Allianz Global Risks US Insurance Company*, 2015 BCCA 347 (CanLII), <<http://canlii.ca/t/gkgm9>>.

² *Garden View Restaurant Ltd v Portage La Prairie Mutual Insurance Company*, 2014 NSSC 447 (CanLII) [**Garden View**], <<http://canlii.ca/t/gfr60>>.

³ *MDS Inc. v. Factory Mutual Insurance Company*, 2020 ONSC 1924 (CanLII), <<http://canlii.ca/t/j6dk0>>

⁴ *Garden View*.