DOLDEN WALLACE FOLICK LLP

JUNE 21, 2019

INSURE UPDATES

IN THIS ISSUE

18th FLOOR – 609 GRANVILLE ST
VANCOUVER, BC. V7Y 1G5
Tel: 604.689.3222
Fax: 604.689.3777
E-mail: info@dolden.com

Unit 302 – 590 KLO Road
KELOWNA, BC. V7Y 7S2
Tel: 1.855.980.5580
Fax: 604.689.3777
E-mail: info@dolden.com

850 – 355 4th AVE SW
CALGARY, AB. T2P 0H9
Tel: 1.587.480.4000
Fax: 1.587.475.2083
E-mail: info@dolden.com

14th FLOOR – 20 ADELAIDE ST E
TORONTO, ON. M5C 2T6
Tel: 1.416.360.8331
Fax: 1.416.360.0146
Toll Free:1.855.360.8331
E-mail: info@dolden.com

Wildfire Claims in British Columbia

By Steve Wallace, DWF Vancouver, Email: swallace@dolden.com and Dan Richardson, DWF Vancouver, Email: drichardson@dolden.com

Wildfires burn through forests – and budgets. Fighting wildfires is expensive, and the Province of British Columbia is increasingly seeking to recover those costs from forestry companies and others operating in the woods by means of contravention orders, administrative penalties and costs recovery orders. These claims can result in significant defence and indemnity costs for liability insurers.

Given that we are seeing an increasing number of these claims, and with "*wildfire season*" just around the corner, this is an opportune time to provide an overview of claims under BC's wildfire legislation, and some tips for handling these claims.

Money to Burn: Increasing Costs of Wildfires

2018 was British Columbia's worst year on record for wildfires, both by the number of fires and the area burned. It broke records set only the year before (the 2017 wildfire season had been the most destructive in the Province's recorded history, costing an estimated $562.7 million). When the final numbers are tallied, we expect to see similar numbers coming out of 2018. As a result, wildfire management funding has increased by 58%, to a total of $101 million annually.

Several years ago, in an effort to recoup some of these high costs, the Province enacted the *Wildfire Act*, SBC 2004, c. 31 (the "*Act*"),

and its regulations (the "*Regs*"), which allows the Province to seek recovery of its fire-fighting costs from individuals (including homeowners) or commercial enterprises (such as logging companies) whose contraventions or breaches of the *Act* caused or contributed to the wildfire.

Given the costs involved in fighting wildfires, and the destruction they can cause, these claims can be significant. Further, the nature of claims under the *Act*, and the process under which the claims are decided, are relatively unusual and generally not well understood.

The Wildfire Act

The *Act* requires anyone carrying out industrial activities near forests or grasslands to conduct fire hazard assessments and abatement activities, and to immediately control any fire that might start. If a person contravenes the *Act*, the Province may obtain various orders against the person, including administrative penalties (up to $100,000), recovery of fire fighting costs (plus a 20% overhead), and remediation orders requiring the person to repair or restore the land disturbed by the fire.

Section 25 of the *Act* also provides a cost recovery power that imposes strict liability on certain persons (including occupiers of private land) who cause or contribute to the fire or the spread of fire. It is important to note that in order to seek recovery under section 25, the Province does not need to establish a contravention of the *Act*, nor does it have to establish that the person was negligent or reckless; it is enough that the person "*caused or contributed to the fire or the spread of the fire*". These claims should concern insurers of rural properties where bonfires or debris burn fires are permitted. In a recent example, the B.C. Forest Appeals Commission ordered the homeowner to pay $500,162.04 for fire control costs incurred in fighting a 2012 fire (approximately half of the initial demand for the full amount of the costs incurred to fight the fire).

Section 29 of the *Act* provides defences in relation to contraventions of the *Act*, including due diligence, mistake of fact, and officially induced error. However, it is important to note that the due diligence defence set out in s.29 is only available as a defence against administrative penalties and contravention orders. The due diligence defence in s.29 does not apply to cost

recovery claims under s.25. For example, even if a person took every possible precaution to ensure their bonfire did not cause a wildfire, the person will not be able to rely on such due diligence in response to a cost recovery claim made solely under s.25.

Despite the significant sums of money that may be involved, the Province does not have to pursue contravention orders or cost recovery through the courts. The *Act* provides that a person is entitled to an "*opportunity to be heard*" (often shorthanded as "OTBH"), following which a decision maker designated by the Province will make a determination regarding the contravention order(s) and cost recovery sought.

Recent Outcome

Recently, our firm successfully defended a logging company against a significant claim for contravention orders, administrative penalties and costs recovery orders.

Our client was logging in an area at risk of wildfires. To meet its obligations under the *Act* and *Regs*, our client assessed the risk of fire by relying in part on weather data from a nearby weather station. After a fire occurred, the Province contented that our client should have used data from a differently located weather station, which would have generated a higher fire danger class rating, which in turn would have required our client to take further fire prevention measures.

The primary issue in this case was whether the weather station used by our client was "*representative*" of the weather for the area where our client's logging operations were taking place.

Ultimately, the decision turned on expert evidence regarding the "*representativeness*" of the two weather stations in question. The Province's decision maker ultimately preferred our expert's evidence over the evidence of the Province's expert, and found that our client had not contravened the *Act*.

Take Away

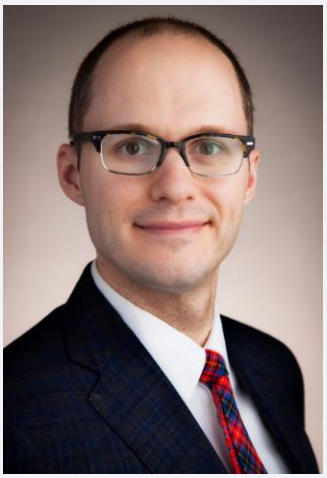
With climate change, the number and severity of wildfires in British Columbia will likely increase. Just recently, the U.S. National Interagency Fire Center released a weather outlook for May – August 2019, which suggests the Pacific Northwest will

experience unusually dry conditions. As the Province continues incurring hundreds of millions of dollars fighting those fires, insurers can expect to deal with an increasing number of claims under the *Act*. Given the cost of fighting wildfires, and the fines available under the *Act*, such claims can easily amount to over $1 million.

In order to successfully defend these claims, insurers should obtain legal advice at an early stage, to ensure a good understanding of the *Act*, including the nature of the alleged contraventions, claims, and any available defences.

Insurers may also wish to speak to counsel to discuss the evidence required to respond to the claim (including expert evidence where necessary), in order to be well prepared for the OTBH. A failure to obtain expert evidence at an early stage may deprive an insured of a potential defence. For example, if the cause of the fire is not clear, a fire investigation undertaken several months or years after the fire will be less persuasive than a prompt investigation.

From an underwriting perspective, insurers should review their policies to ensure that the policy wordings correctly reflect the extent of the risk they intend to insure. For example, some insurers may be content to cover fire control costs, but not administrative penalties or fines. Insurers may also wish to exclude coverage for losses arising from particularly risky operations, or include warranties with respect to an insured's compliance with wildfire legislation during their operations. Finally, insurers who provide homeowners insurance (particularly to homeowners in rural areas) should consider whether their policies provide coverage for claims arising from wildfires, and adjust their premiums, or consider excluding wildfire claims, as desired.



Ontario Bill 118 Update

By Robert Smith, DWF Toronto, Email: rsmith@dolden.com

The Ontario Legislative Assembly is considering the passage of Bill 118, which, if passed, will be called "*An Act to Amend the Occupiers' Liability Act*" and will change the landscape with respect to liability that can be imposed on landlords, commercial tenants and winter maintenance contractors in Ontario.

Bill 118 intends to amend section 6 of the *Occupiers' Liability Act*, to state that no action for personal injury caused by snow or ice can be commenced against a landowner or a winter maintenance contractor unless "*within 10 days after the occurrence of the injury, written notice of the claim, including the date, time and location of the occurrence, has been served on one or more of the persons listed in subsection (2)*". This means that an injured party must provide written notice within ten days to the occupier of the premises, a winter maintenance contractor, or a landlord.

The proposed subsection 6.1(3) states that the notice period will not apply in instances where the injured party died as a result of the injury.

The proposed subsection 6.1(4) contains a saving provision that will allow courts to relieve a party from the consequences of this notice period "*if a judge finds that there is reasonable excuse for the want or the insufficiency of the notice and that the defendant is not prejudiced in its defence*".

If passed, the effect of Bill 118 will expand the notice requirements and protections already afforded to Ontario's municipalities by subsection 44(10) of the *Municipal Act*, to occupiers, landlords, and winter maintenance contractors.

We can anticipate how the proposed saving provision contained in subsection 6.1(4) will be interpreted by looking at precedents laid down in the context of claims against municipalities. For instance, in *Seif v. Toronto (City)*, the Ontario Court of Appeal held that the test to be applied to determine whether an excuse is "*reasonable*" is whether, in all of the circumstances of the case, it was reasonable for the appellant not to give notice until he or she did. The Court noted that lack of awareness of the notice requirement does not, on its own, constitute a reasonable excuse.

However, ignorance of the notice requirement can add to another extenuating circumstance (such as a lack of knowledge about the severity of the injury suffered) to create a reasonable excuse that warrants the waiver of the notice period, provided that the delay has not prejudiced the municipality's ability to conduct its defence.

It will be reasonable to assume that a similar standard will be imposed on the proposed subsection 6.1(4).

Bill 118 has received two readings before the Legislative Assembly and is currently being considered by the Standing Committee on Regulations and Private Bills. Assuming it clears committee, it will need to be passed in a third reading and receive Royal Assent to become law. We will be watching the progress of Bill 118 closely.

British Columbia *Insurance Act Limitation* Period

By Jill Shore, DWF Vancouver, Email: jshore@dolden.com and Graham Hallson, DWF Vancouver, Email: ghallson@dolden.com

In 2012, a new BC *Insurance Act* (the "*Act*") came into effect that brought significant changes to insurance law in British Columbia One such reform was the implementation of uniform limitation periods for most actions against insurers in relation to insurance contracts and certainty as to when these limitation periods commence (similar changes have been made to the Manitoba and Alberta Insurance Acts). *Section 23* of the *Act,* states that:

> *(1) An action or proceeding against an insurer in relation to a contract must be commenced,*
>
> *(a) in the case of loss or damage to insured property, not later than 2 years after the date the insured knew or ought to have known the loss or damage occurred, and*
>
> *(b) in any other case, not later than 2 years after the date the cause of action against the insurer arose.*

We recently relied on the certainty that the new limitation provisions bring in successfully arguing for summary dismissal of an action that was brought beyond the applicable limitation period set out in *s. 23(1)(a)* of the *Act.* To date, this section has received little judicial attention; (only a recent, non-binding Civil Resolution Tribunal decision, *Lowe v Beacon Underwriting*, 2019 BCCRT 649).

Under the previous *Act*, the general limitation provisions provided that a similar action must be brought within "*one year after the furnishing of reasonably sufficient proof of a loss or claim under the contract*." The timing of when "*reasonably sufficient proof of loss*" had been provided was a topic of ambiguity leading courts to conclude that the limitation period did not commence until an insurer had accepted or rejected losses claimed. Separate limitation provisions that applied only to certain types of insurance (*e.g.* fire or automobile insurance) created further uncertainty.

Our matter involved claims sought from the insurer for losses stemming from a fire at the insured's business premises. The insurer had previously accepted and paid out various losses to the insured pursuant to a business risk policy. After over a year had passed, the insurer wrote to the insured's counsel several times inquiring whether the matter could be closed. He received no response until well beyond two years after the fire, when the insured sought recovery of further losses. The insurer took the position that the two-year limitation period had lapsed and that there was no obligation to pay further losses.

The insured had argued that even though the claims had been advanced more than two years after the loss and damage occurred, that the relevant limitation period commenced only upon a clear denial of coverage. Mr. Justice Weatherill rejected this argument given the clear language of the new limitation provisions. He also rejected the insured's argument that the limitation period within *s. 23(1)(b)* of the *Act* was applicable to the matter because this was a case of loss or damage to property, and *s. 23(1)(b)* only applies "*in any other case*".

In his oral reasons delivered on June 13, 2019, Mr. Justice Weatherill stated that the language within *s. 23(1)(a)* of the *Act* was clear and unequivocal. It was abundantly clear to him that

this was an action against an insurer, was in relation to an insurance contract, was for loss or damage to property and was brought more than two years after the insured knew or ought to have known that the loss or damage had occurred. Accordingly, the action was summarily dismissed because the limitation period within *s. 23(1)(a)* of the *Act* had lapsed.

Take Away:

Section 23(1)(a) of the *Insurance Act* brings certainty as to the applicable limitation "*start date*" for bringing an action for contractual claims against an insurer involving property loss or damage: two years after the insured knew or ought to have known the loss or damage occurred. Insurers should take note of when an insured first became aware (or ought to have been aware) of property damage or loss giving rise to a potential claim.

Director Liability Reaffirmed by the Alberta Court of Appeal; *Hall v. Stewart*

By David Girard, DWF Calgary, Email: dgirard@dolden.com

A director can be held personally liable for his/her tortious conduct committed in his capacity as a director of a corporation. In *Hall v. Stewart*[1], the defendant, Stewart, was a director of DWS Construction Ltd. ("DWS") which was retained as a sub-contractor to perform work on the construction of a new home. As part of its work, DWS installed a temporary staircase into the basement of the new home for workers to use. The plaintiffs were employees of another sub-contractor that were injured when they were on the staircase and it collapsed.

Both DWS and the plaintiffs' employer were "*employers*" under the *Workers' Compensation Act* and, therefore, the plaintiffs could not sue DWS. They were compensated by the Workers' Compensation Board, which brought this subrogated claim against Stewart personally.

Stewart sought to dismiss the action on the basis that there can be no personal liability upon him as he was acting as a director

[1] 2019 ABCA 98

of DWS. The Alberta Court of Appeal concluded that Stewart, who had been personally involved in the installation of the staircase, could be held personally liable. The court also found that both DWS and Stewart personally owed a duty of care to others to ensure that the staircase installed by them did not create a danger for others present at the construction site.

After noting that the law on when personal liability will attach to corporate torts is not clear, the court noted that the factors identified as relevant by the case law are:

a. Whether the negligent act was committed while engaged in the business of the corporation, and whether the negligence of the employee was contemporaneous with that of the corporation;

b. Whether the individual was pursuing any personal interest beyond the corporate interest;

c. Whether the director owed a separate and distinct duty of care towards the injured party;

d. That the conduct was in the best interests of the company;

e. Whether the plaintiff voluntarily dealt with the limited liability corporation, or had the relationship imposed on it;

f. The expectations of the parties;

g. Whether the tort was independent;

h. The exception in *Said v. Butt* [directors may terminate the contracts of the corporation without fear of being held personally liable];

i. The nature of the tort, and particularly whether it was an intentional tort; and

j. Whether the damage was physical or economic.

The Court further commented that the corporation could have purchased "*directors' insurance*" that would provide coverage for its directors. By not purchasing D&O insurance, the court commented that Stewart "*must have elected to assume the underlying risk himself.*"

Take Away

The key takeaways for insurers writing risk in Alberta and Canada are:

(i) this decision is likely to cause renewed interest in D&O policies;
(ii) if a director is personally involved in work that causes personal injury, he/she may be held liable for such injury; and
(iii) if a director is involved only in a managerial role, or in work that causes a pure economic loss, the risk of liability to the director will be lower.

EDITOR

Chris Stribopoulos

Tel: 647.798.0605 Email: cstribopoulos@dolden.com

Please contact the editor if you would like others in your organization to receive this publication.

CONTRIBUTING AUTHORS

Steve Wallace
Tel: 604.891.0353 Email: swallace@dolden.com

Dan Richardson
Tel: 604.891.5251 Email: drichardson@dolden.com

Robert Smith
Tel: 647.798.0609 Email: rsmith@dolden.com

Jill Shore
Tel: 604.891.0390 Email: jshore@dolden.com

Graham Hallson
Tel: 604.891.0365 Email: ghallson@dolden.com

David Girard
Tel: 587.480.4002 Email: dgirard@dolden.com