



**Thomas G. Heintzman, O.C., Q.C.,  
McCarthy Tétrault  
Toronto, Ontario  
[www.mccarthy.ca](http://www.mccarthy.ca)  
[theintzm@mccarthy.ca](mailto:theintzm@mccarthy.ca)**

## **Builder's Risk Insurance: the Dangers of Misunderstanding the Covered Risks**

Covering risks by appropriate insurance is an essential element in planning a construction project. But what happens when the insured owner, its insurance agent and the insurance company have a different understanding of the risk? The British Columbia Court of Appeal recently addressed this issue in *Concord Pacific Group Inc. v. Temple Insurance Company*.

The owner took out Builder's Risk Insurance through an insurance agent. The insurance agent dealt with an insurance representative acting for the insurance company. The owner understood that the insurance for delay became effective on one date. The insurance agent and the insurance representative understood that the insurance for delay was effective on a later date, but the later date was not recorded in the policy that was issued.

The insurer sought to rectify the policy and insert the later date into the policy on the ground that the omission of that date had occurred by mutual mistake. The question was: whose intention was relevant in determining whether a mistake had occurred?

The Court of Appeal held that the intention of the owner's insurance agent and the insurance company's representative was the relevant intention. That was because the insurance agent and insurer's representative each had authority to bind their respective principals. Accordingly, rectification of the insurance policy was granted.

The Court of Appeal also considered section 12 of the B.C. Insurance Act. That section precludes an insurer from relying on a term or condition which is not set out in writing in the policy when issued. On its face, section 12 precluded a claim by the insurer to rectify an

insurance policy to include a term not found in the written policy when issued, or to amend that policy. However, the B.C. Court of Appeal effectively held that section 12 did not apply to the rectification of the policy to make it accord with the parties' intention, but rather to attempted changes to the agreed upon policy.

The decision in *Concord Pacific* shows how important it is for those involved in construction projects to carefully instruct their insurance agents and review the insurance policies which they obtain. Realistically, they will not be able to understand the technical jargon of the policy. But they can record in writing their basic questions: What is the insurance coverage that I am buying? What triggers that coverage, and when? And they can send an email to their insurance agent insisting upon written coverage that conforms to the answers to those questions.

**Builders' Risk Insurance** - *Concord Pacific Group Inc. v. Temple Insurance Company, 2010 BCCA 275 (CanLII)*

Tom Heintzman is a litigation lawyer at McCarthy Tétrault in the firm's Toronto, Ontario office. He specializes in commercial litigation, focusing on corporate, shareholder securities, telecommunications, environmental and class actions. Tom Heintzman has been counsel in many important cases and appears before all levels of courts including the Supreme Court of Canada. <http://www.constructionlawcanada.com>