

Does Project-Specific Wrap-Up Insurance Automatically Protect You as a Subcontractor?

Lessons Learned from the Court of Appeal's Decision in *Capital Sewer Servicing Inc. v. Crosslinx Transit Solutions*

Key Takeaway

Read your contract terms in their entirety and beware of the implications of priority provisions.

Where a contract contemplates that insurance will be carried by one party for a specific risk, it does not necessarily follow that the risk will be borne by the party carrying the insurance. The balance of the contract must be interpreted to determine the mutual intention of the parties with respect to the underlying risk.

In this case, a subcontractor was an insured under a wrap-up liability policy which provided coverage against the very risk which resulted in damage. However, the subcontractor's indemnification obligations were found to take priority over the insurance obligations – thereby requiring the subcontractor to defend and indemnify the contractor.

The Background

On January 12, 2021, the Ontario Court of Appeal released their decision regarding Capital Sewer Servicing Inc. v. Crosslinx Transit Solutions.¹

Capital Sewer Servicing Inc. ("**Capital**") was a subcontractor to the design-build joint venture known as Crosslinx Transit Solutions Constructors ("**Crosslinx**"), to perform sewer system work on the Eglinton Crosstown LRT project (the "**Project**").

The Project is being built by Crosslinx Transit Solutions General Partnership ("**Project Co**") through a public-private partnership, also known as a P3. Project Co's agreement with the Province of Ontario (the "**Project Agreement**") obligates Project Co to obtain and maintain a primary wrap-up commercial general liability policy which was required to be "*primary without right of contribution of any other insurance carried by any Named Insured*". Named Insureds includes all contractors and subcontractors.

Project Co's agreement with Crosslinx (the "**Construction Contract**") similarly provides that Project Co will carry such wrap-up insurance.

Capital's subcontract with Crosslinx (the "**Subcontract**") obligated Capital to carry commercial general liability insurance which was required to be primary "*except where the project specific insurance responds to the loss.*" Further, the Subcontract incorporated the Construction Contract which specifically contemplated the project specific wrap-up insurance.

The sewer system backed up and caused property damage. The property owners sued both Crosslinx and Capital. Crosslinx brought an application claiming that the Subcontract required Capital to defend, indemnify, and hold harmless Crosslinx in accordance with the indemnity provisions. Capital brought a cross-application claiming it had no such obligation because the Construction Contract, which was incorporated into the Subcontract, provided that the wrap-up insurance would cover such claims, and

¹ [2022 ONCA 10](#).

that by agreeing to insure against the risk, Crosslinx (and its client Project Co) had assumed that risk as a matter of law.

The Ontario Court of Appeal's Decision

The Court of Appeal upheld the lower court's decision that the indemnity provision of the Subcontract took priority, requiring Capital to defend and indemnify Crosslinx, and dismissed the appeal.

The Court of Appeal clarified that while in most cases a covenant to insure against a certain risk will result in the assumption of the risk of harm insured against. However, this is not a "legal rule", and the contract as a whole (including any incorporated agreements) must be read to assess the objective intention of the parties.

In this case, the contract was interpreted by the court such that indemnity provisions in the Subcontract ranked in priority to the Construction Contract and the Project Agreement. It was further found that the Subcontract articulated the objective intention of the parties that Capital, not Crosslinx, would be liable for issues arising out of Capital's work and that the effect of the insurance covenant was dependent on the objective intention of the parties.

This case is a great example of the importance of proper contract drafting and review, particularly focused on understanding the contract as a whole. It is also an example of a primacy provision possibly backfiring. Typically, a subcontractor will seek to have the subcontract primary over the prime contract.



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