

DOES YOUR BUSINESS INTERRUPTION INSURANCE COVER YOU FOR COVID-19?

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The COVID-19 pandemic is not yet contained and while governments struggle to respond, businesses are bracing for the inevitable economic downturn. Most companies have some form of insurance coverage and careful consideration ought to be given as to whether this encompasses business interruption coverage. This type of coverage is meant to cover losses incurred when an insured event causes a company's business (i.e., revenue) to be interrupted. For example, a particular government or governmental authority may have ordered the closure of specific businesses (e.g., bars, sit-down restaurants, nightclubs, gyms, fitness centres, athletic clubs, recreation facilities, sports arenas, theatres, casinos and other private entertainment facilities, conference centres, retail clothing outlets, etc.) or it may have ordered a general lock-down of a specific geographic area requiring all non-essential services to shutter within it. Since these businesses can no longer operate, or operate as contemplated, a business interruption claim may be triggered.

Although a policy of insurance is a specific type of contract, it is nevertheless a contract. As with any contract, the specific policy language of a business's insurance cover is critical to the analysis as to whether a claim for coverage of a business interruption loss will be successful. Generally, business interruption insurance is one aspect of a broader policy, such as a commercial property policy, and will have a defined limit to coverage.

The usual bars to a claim would be:

- a. a policy requirement to have direct physical loss or damage to the insured's property upon which to base the claim. (An issue is whether actual contamination of a premises can constitute direct physical loss to the premises under the wording of the policy. It may simply be that the property need only be rendered uninhabitable as a result of the virus.);
- b. a policy exclusion for pandemics, epidemics, disease or microbes of various sorts (including viruses); and
- c. a 'named perils' business interruption policy under which a pandemic, epidemic or government-ordered business closure is not one of the named perils. (The policyholder would best be served by an all-risks policy, but it might then need to contend in any event with items (a) and (b) above.).

This having been said, business interruption insurance can include the following coverages either in the body

of the policy itself or by way of endorsement or rider:

Interruption by Civil or Military Authority Coverage – This provides an indemnity for actual losses sustained for the period during which access to the insured's premises is prohibited by legal order of a civil or military authority. (We are now experiencing forced closures by civil authorities across Canada.) Again, the question will be whether the policy requires direct physical damage to the insured's property or even a neighboring or adjacent property. There may be a waiting period attached to such coverage (usually stated in hours) and there is usually a limited coverage period (for example, 30 consecutive days).

Leader Property Coverage – This coverage, if it applies to the policy, would usually be provided by way of endorsement. Such coverage normally provides an indemnity to the insured if there is direct physical loss or damage to property not owned by the insured, but within a stated distance from the insured's business or property and which attracts business to the insured's own business. The designated property may be a *lead* tenant in a shopping complex, conference centre, sports arena, or other 'magnet'. Again, there is generally a need to have direct physical loss or damage to the designated property before the indemnity might kick in.

Contingent Business Interruption Coverage – This endorsement or rider, if it applies, would protect against loss caused by the damage to the property of others, including direct suppliers of goods and services to the insured and/or direct purchasers or receivers of goods and services provided by the insured. It should be noted that unless the policy has been specifically amended to widen the coverage, there could be a gap in the coverage if the insured is within a multi-tied supply chain because of the general condition that there be a *direct* relationship between insured and supplier and/or purchaser/receiver. For example, if an insured party relies on a supplier in order to run its business, such as for parts or other materials or for seasonal labour, then this coverage could potentially be called upon.

Pandemic Disease Business Interruption Insurance – This type of endorsement might cover specific contemplated diseases, such as SARS, H1N1, MERS, or Ebola. However, if drafted generally, it could be called upon in response to COVID-19.

If a business has some sort of business interruption insurance, then it is important to carefully examine it for the indemnity period covered and for all of the conditions around that. The policy may provide coverage only for the period until the damage is repaired or the closure order is lifted even if the business has not recovered to its 'pre-event' level of net income (if that is the measure) (a so-called *limited indemnity or limited risk* policy). On the other hand, the policy may provide an indemnity until the business recovers to its 'pre-event' level of net income, subject, however, to the maximum indemnity period specified in the policy (a so-called *extended indemnity or extended risk* policy). Often a policy will cover the reduction in net income (i.e., the net income that would otherwise have been earned by the insured), together with continuing normal operating expenses,

including payroll amounts.

As is evident from the foregoing, it is also important to be concerned with what business expenses the policy will cover and, more particularly, whether the policy will cover so-called *extra expenses*, being expenses that the insured would not otherwise have incurred, but that were nevertheless necessary and were incurred as a direct result of the covered event or peril.

If a business interruption claim was accepted by an insurer, then it would be subject to rigorous analysis of the business's revenue in the months and years prior to the event. The insurer will look to all mitigation efforts made by the business, including what steps were taken to continue to bring in revenue despite the event. In the case of the current pandemic, we have seen gyms converting their services to online, virtual personal training. This type of mitigation effort may be expected by the insurer, and businesses would be wise to take all reasonable steps to convert their business to contact-free, or virtual services to recoup some portion of losses suffered.

If you wish to have a coverage review, or if you wish to discuss any other issue related to COVID-19, we are available.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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