

# THE straight line

TEN MINUTES WELL SPENT | ISSUE 8 | AUGUST 2019

## Welcome to *The Straight Line*

This is the eighth issue of *The Straight Line*, a newsletter that appears several times throughout the year. Articles cover a broad range of topics that engage Ontario architects insured by Pro-Demnity, other OAA members – whether in practice or engaged in other businesses – and anyone with an interest in the profession.

We encourage readers to suggest topics. Please send any suggestions to: [editor@pd-straightline.com](mailto:editor@pd-straightline.com)

## IN THIS ISSUE:

*New CEO at Pro-Demnity:  
Bruce H. Palmer*



Left: Retiring CEO Byron Treves.  
Right: Incoming CEO Bruce Palmer.

The Board of Directors of Pro-Demnity Insurance Company is pleased to announce that Bruce H. Palmer has joined the Company as President & CEO.

## *Ontario First Nations Land*

Our news media provide us with unsettling daily reminders that, in First Nations communities, there is a backlog of necessary infrastructure investment. For Ontario architects who may be considering work in this sector, it is important to bear in mind that the circumstances are unique, and that different rules and regulations apply.

## *Fire: The Discussion Still Rages*

Another newsworthy item, whose prevalence and destructive powers seem to be increasing, fires are creating both physical devastation, and growing professional concerns.

— *The Editor*

## New CEO at Pro-Demnity: Bruce H. Palmer

The Board of Directors of Pro-Demnity Insurance Company is pleased to announce that Bruce H. Palmer has joined the Company as President & CEO

Former President & CEO Byron Treves has retired after 33 years of dedicated service, but continues as Executive Advisor until July 2020.

Bruce is a senior insurance executive, who brings a wealth of experience in the insurance industry in sales/distribution, business development, general management leadership and client services. Prior to joining Pro-Demnity on May 13 of this year, he was Chief, Member Services for the Ontario Medical Association, as well as CEO of OMA Insurance Inc. In these capacities, Bruce has stressed the importance of creating membership value through the provision of unique services

and programs. Bruce's previous positions also include: President, Ontario Physicians Services, Inc.; and Vice President, Professionals Division, Insurance Institute of Ontario.

Bruce holds an MBA from Queens University and a BA (Sci), Engineering Science from the University of Western Ontario. Within the insurance profession, he holds degrees from the Global Risk Management Institute (CRM) and the Insurance Brokers Association of Canada (CAIB). Bruce is a Fellow Chartered Insurance Professional (FCIP) granted by the Insurance Institute of Canada.

## Applicable Building Codes for Construction of First Nations Land in Ontario

### Introduction

According to a UN Report of the Special Rapporteur on the rights of indigenous peoples,<sup>1</sup> government investment into First Nations communities across Canada has not kept pace with the demand for adequate housing and need for major renovations to existing units. In fact, a report commissioned by The Canadian

Council for Public-Private Partnerships ("P3s") estimates the infrastructure deficit across First Nations in Canada to be between \$25 billion and \$30 billion.<sup>2</sup> In order to tackle that deficit, the Government of Canada will need to seriously consider the increased use of P3s in infrastructure development. With the inevitability of increases to infrastructure investment, design professionals must ensure they

have a clear understanding of the often confusing area of building code requirements on First Nations lands.

In a post published this past October, Miller Thomson partner, Karen L. Weslowski discussed the applicability of national and provincial building codes on First Nations lands in British Columbia.<sup>3</sup>

*There is a “regulatory gap” on First Nations land because federal laws are not designed to cover development or construction on federal land. When a lease is issued to a third party developer (which is the greatest interest a third party can have in First Nations land), the lease often addresses this regulatory gap by setting out a contractual development approval process and adopting a specific building code. Most reserve land leases issued by Canada on behalf of First Nations require the tenant to comply with the building code of the province in which the land is located.*

Unfortunately, determining the applicable building standards on First Nations land in Ontario remains just as unclear as in Western Canada. The lack of consistency when determining the appropriate building standards to apply means that consultants, architects, engineers and other design professionals in Ontario must remain cognizant of this issue in their decision-making and designs to avoid professional liability.

## Summary of Federal and Provincial Building Codes

First Nations lands<sup>4</sup> are regulated pursuant to the Indian Act, R.S.C. 1985, c. I-5 (the “Indian Act”) which acts as the main source of authority governing First Nations land use. At a national level, the National Building Code of Canada acts as a model building code meant to create the foundation of building codes at the provincial level; however, as mentioned in Ms Weslowski’s article, it has no legal status unless expressly adopted by the provinces. Provincial building codes, such as the Ontario Building Code, a regulation created under the Ontario Building Code Act, 1992, S.O. 1992, c.23, are enforceable across the province but generally do not apply to on-reserve construction projects.<sup>5</sup> This creates uncertainty when determining which building standards to adhere to

when developing infrastructure projects on First Nations lands.

## First Nations Building Codes in Ontario

First Nations have the authority granted to them by section 81(1)(h) of the Indian Act, to make by-laws that regulate the construction, repair, and use of buildings on First Nations territory. Currently many First Nations in Ontario create by-laws pursuant to this power. However, as in British Columbia, several First Nations have also entered into agreements with the Canadian government to manage their lands and resources, pursuant to Canada’s First Nations Land Management Act S.C. 1999, c.24 (“FNLMA”). We will refer to these First Nations as “Land Code First Nations.”

An example of such an arrangement is the Mississauga First Nation Land Code, enacted on June 2, 2009. With their own land code, the Mississauga First Nation is able to manage their land as necessary. In 2018 they formed a cannabis committee to explore the economic development of the industry within their land.<sup>6</sup> The mandate of this cannabis committee is to ensure that cannabis projects are in strict adherence to their Land Code. New projects such as a cannabis production facility would have to be designed in accordance with the Housing Policy,<sup>7</sup> created by the Mississauga First Nation. The Housing Policy mandates that new construction projects adhere to, at a minimum, both the National and Ontario Building Codes. The Mississauga First Nation Housing Policy is just one of the policies created through the power granted by the FNLMA.

On May 1, 2018, the Chippewas of Rama First Nation Land Code came into effect, which transferred administration for the land just east of Orillia from the Government of Canada to Rama (First) Nation pursuant to the FNLMA. The main parcel of the Casino Rama Resort land is subject to a lease between Casino Rama Inc., an affiliate of Rama (First) Nation, and the Government of Canada pursuant to a commercial ground lease. Section 10.3 of the Rama First Nation Land Use and Development By-Law No. 06-01 requires that all Casino Rama buildings be built in accordance with the National Building

Code or Provincial Building Code, whichever is more stringent.

Determining the applicable building code has been made easier due to the fact that many Land Code First Nations have enacted building code by-laws. However, as less than 20 of the over 140 First Nations in Ontario operate under the FNLMA and have their own land code, the issue is far from clear and predictable.

## Government Funded Infrastructure

The Government of Canada provides monetary support as part of their commitment to supporting First Nations in the planning, acquisition, design, and construction of infrastructure. Created to provide guidance on applicable standards, the Protocol for INAC-Funded Infrastructure (the “Protocol”), makes it clear that a Council of a First Nation must adhere to the National Building Code along with other national codes such as the Canadian Electrical Code and the National Plumbing Code of Canada, as a condition of receiving funding from the Canadian government.

The Protocol also serves as a reference for qualified and experienced third parties who are engaged by First Nations to provide planning, design, construction, operation and maintenance services, or goods or other services on First Nations lands.

The Council of a First Nation receiving funding, and all qualified professionals hired by First Nations, such as architects and engineers, are responsible for familiarizing themselves with all applicable statutes, regulations policies, codes, directives, standards, protocols, specifications, guidelines, and procedures referred to in the Protocol.<sup>8</sup>

## Required Steps Prior to Working on First Nations Land

As recommend in Ms Weslowski’s article, architects and engineers should take special care when completing designs for a First Nations construction project. Differences between federal and provincial legislation, and among each First Nation in their regulatory approach to construction, means that a case-by-case assessment is necessary.

Prior to commencing design work for an on-reserve First Nations construction project, an architect or engineer should perform due diligence that includes identifying which federal statutes and First Nations laws apply to land use matters on that particular First Nation's reserve. They should also request and become familiar with the First Nation's laws or by-laws relevant to development and construction. Lastly, they should also examine the applicable lease(s) to determine any contractual requirements. The applicable laws or leases may also set out certification requirements to be followed by an architect or engineer in order to support a request for a building permit or an occupancy permit. Failing to correctly ascertain the appropriate building code could result in serious

liability for the architect or engineer should the construction not meet the applicable requirements.

— *Jaspal Sangha, April 3, 2019*

This essay is slightly modified from a version, under the same heading, published in *Lloyd's Brief: Canadian Legal Perspectives*, by Miller Thomson LLP, April 3, 2019.

#### Notes

1. United Nations Human Rights Council, "Report of the Special Rapporteur on the rights of indigenous peoples," James Anaya (2014 Advance Unedited Version) at page 10, paragraph 26.
2. The Canadian Council for Public-Private Partnerships, "P3's: Bridging the First Nations Infrastructure Gap" Toronto, 2016 at page 3.
3. Karen Weslowski, "Construction on First Nations Land: Determining the Applicable Building Code," in *Lloyd's Brief: Canadian Legal Perspectives*. Toronto: Miller Thomson LLP, October 3, 2018.

4. First Nations lands governed by the Indian Act, R.S.C. 1985, c. I-5 are distinct from unceded First Nations territories which are not governed by the federal government.
5. The regulation of on-reserve construction projects falls under federal jurisdiction through the powers granted by the Indian Act, R.S.C. 1985, c. I-5.
6. James Hopkin, "Mississauga First Nation wants to open cannabis stores this spring," *SooToday* [Sault Ste. Marie] (December 22, 2018).
7. Mississauga First Nation, Mississauga First Nation Housing Policy, Section 12.1 – FNMHF – New Construction (Amended June 15, 2016).
8. Indigenous and Northern Affairs Canada, Protocol for INAC-Funded Infrastructure (August 19, 2016) at section 1.1.

*This essay is provided as an information service and may include items reported from other sources. We do not warrant its accuracy. This information is not meant as legal opinion or advice.*

## Fire

### Introduction

The Persian philosopher Zarathustra held that four "elements" – earth, air, water and fire – are sacred, being essential to life. But as essential as they are, daily news headlines remind us of their increasingly destructive power.

Of these four elements, fire, is particularly worrisome. Global warming effects are "turning many of our forests into kindling during wildfire season,"<sup>1</sup> causing increased frequency and duration of wildfires, worldwide. In the built environment, fires are also causing global concern, not due to natural circumstances, but to human error.

The Grenfell Tower fire in London continues to cause concern among professionals, regulators and insurers, internationally. Two years after the event, the effects of the fire and the subsequent inquiries are being felt profoundly.

### Fire and Insurance

If you doubt that an urban fire can have long-term international consequences, consider The Great Fire of London, which burned from September 2 to September 5, 1666. This was no ordinary building fire, since:

*Fire was a frequent hazard in the cramped, crowded streets packed with wooden buildings, all heated with open fires and lit with candles. People responded quickly and most fires were extinguished almost as quickly as they started.<sup>2</sup>*

By the time The Great Fire was finally extinguished, thousands of buildings had been destroyed, and 20% of Londoners were homeless. Fifteen years later, the city having been rebuilt, the first fire insurance company was founded and, shortly afterwards, the first "fire brigade."

### The Grenfell Tower Effect

On June 14, 2017, a rapidly spreading fire engulfed the Grenfell Tower in London's Kensington district,<sup>3</sup> claiming 72 lives and leaving hundreds homeless. The fire immediately became not just a local tragedy, but an international source of concern. In a modern city, how could a building be erected that seemingly broke every rule of fire prevention and control?

Of special concern was the exterior cladding, which had been poorly installed and, furthermore, had never been properly tested. In subsequent tests, it showed tendencies to encourage, rather than prevent, the spread of fire and, even more worrying, this material, or its variants, had been used in buildings all over the world.

Were they all now in imminent danger and/or uninsurable?

### The Lacrosse Apartments

As a case in point, a rapidly spreading fire in November, 2014, resulted in substantial damage to the exterior cladding of the Lacrosse apartment building in Melbourne Australia's Docklands. Fortunately, no lives were lost. The event had predated the Grenfell fire by two-and-a-half years, but the subsequent enquiry didn't wrap up until February 28 of this year. In his judgment, the Australian judge found the building's architects liable for 25% of the A\$5.7 million award.<sup>4</sup>

Clearly, the spectre of the Grenfell Tower fire hung over not just the Melbourne tribunal, but also the entire Australian architectural profession. It was all too familiar. The cladding material used in the Lacrosse building was an aluminum composite panel (ACP) with a combustible polyethylene core that had been substituted for the originally selected panel with a non-combustible mineral core.

Failing to note the critical difference between the original and the substitution, the architects had approved the substitution based on "visual characteristics only." In the judge's opinion, they had missed the opportunity to "ensure that its design

*(Continues on next page)*

## Fire (continued)

intent [...] was fulfilled.” He noted, furthermore, that the architects were also guilty of failing to act on their initial misgivings about the substitution, thereby abandoning “the position that an architect might otherwise occupy in the hierarchy of responsibility.”<sup>5</sup>

Another Australian news item, headlined “Lacrosse fire ruling sends shudders through building industry consultants and governments,” reported that the tribunal findings were “So shocking [...] that the national president of the Australian Institute of Architects suggested in an email to members [...] that they might need to seek counselling.”<sup>6</sup> The reporter estimated that there are 1,000 buildings in Australia covered with combustible

ACPs which, if litigated, could result in legal fees exceeding A\$1 billion – a conservative figure of A\$1 million (Can\$920,000) per building.

Multiply that figure by the number of buildings in the world similarly clad in panels with combustible cores, in countries more populous than Australia. This may give some indication of why architects the world over “might need to seek counselling.”

Not to mention their insurers.

### Notes

1. “Is Global Warming Fueling Increased Wildfire Risks?” Union of Concerned Scientists, July 24, 2018. <https://www.ucsusa.org/global-warming/science-and-impacts/impacts/global-warming-and-wildfire.html>.
2. “London Burning” David Worsfold, Insurance Post, Sept., 2016, quoting Prof. David Bland [https://www.academia.edu/37624996/Londons\\_Burning\\_Fire\\_insurance\\_after\\_the\\_Great\\_Fire\\_of\\_1666](https://www.academia.edu/37624996/Londons_Burning_Fire_insurance_after_the_Great_Fire_of_1666).
3. See *The Straight Line*, Issue 6.
4. <https://architectureau.com/articles/judge-finds-architect-proportionately-liable-for-lacrosse-fire-damages/> 2019-03-05.
5. *Ibid.*
6. <http://theconversation.com/lacrosse-fire-ruling-sends-shudders-through-building-industry-consultants-and-governments-112777> 2019-03-04.

## Our Contributors



**Jaspal Sangha** is an Associate at Miller Thomson. His broad practice encompasses insurance litigation and commercial litigation. Within his insurance litigation practice, Jaspal has a focus on professional negligence and commercial general liability. Jaspal can be reached at:

Miller Thomson LLP  
Scotia Plaza, 40 King Street West, Suite 5800  
P.O. Box 1011  
Toronto, Ontario M5H 3S1  
Direct Line: +1 416-595-8627 Fax: +1 416-595-8695  
[jsangha@millerthomson.com](mailto:jsangha@millerthomson.com)  
[millerthomson.com](http://millerthomson.com)



**Karen L. Weslowski** is a Partner at Miller Thomson. She practices insurance defence litigation, and construction and commercial litigation. Karen has represented clients at all levels of court, including the British Columbia Supreme Court, the British Columbia Court of Appeal, the Federal Court of Canada, and the Supreme Court of Canada. Karen can be reached at:

Miller Thomson LLP  
Pacific Centre, 400 – 725 Granville Street  
Vancouver, British Columbia V7Y 1G5  
Direct Line: +1 604-643-1290 Fax: +1 604-643-1200  
[kweslowski@millerthomson.com](mailto:kweslowski@millerthomson.com)  
[millerthomson.com](http://millerthomson.com)

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c/o Pro-Demnity Insurance Company  
200 Yorkland Boulevard, Suite 1200  
Toronto, ON M2J 5C1  
**Contact:** [editor@pd-straightline.com](mailto:editor@pd-straightline.com)

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Questions related to the professional liability insurance program for Ontario architects may be directed to Pro-Demnity Insurance Company. Contact information for the various aspects of the program can be found on the Pro-Demnity website:

### [www.prodemnity.com](http://www.prodemnity.com)

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